



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: SICHALE, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. 34 OF 2013

BETWEEN

THUWEIBA MAKA

FATUMA MAKA

RUKIA MAKA

AZIZ MAKA APPLICANTS

AND

AISHA JUMA

MALIK ABU SHEE RESPONDENTS

(Being an application or extension of time to appeal from the judgment and decree of the High Court of Kenya at Mombasa (Ibrahim, J.) dated 16th August, 2012 and delivered on 20th September, 2012

in

H.C.C.A. No. 109 of 2007)

RULING

The applicants Thuweiba Maka, Fatuma Maka, Rukia Maka and Aziz Maka filed a Notice of Motion application dated 26th November, 2013. They sought the following orders *inter-alia*,

a) *Time required for the filing and service of the Notice of Appeal under Court of Appeal Rule (sic) be extended.*

(b) *The Notice of Appeal dated 23rd August 2013, lodged on 23rd August 2013 and filed on 23rd August 2013 be deemed to have been duly filed and served.”*

The application was supported by the affidavit of Thuweiba Maka who deponed on behalf of herself

and on behalf of the other applicants. In her affidavit she deponed that they were aggrieved by the judgment of Ibrahim, J. (as he then was) delivered on 20th September 2012; that they were mis-advised by their previous counsel as regards when to institute an appeal; that they sought the services of A. I Hayanga, advocate but could not move with haste due to lack of funds and due to the fact that Hayanga became indisposed soon thereafter; that they had wanted to appeal as paupers but the process is long and cumbersome and finally that they have an arguable appeal.

The 1st respondent Aisha Juma swore an affidavit on her behalf and on behalf of the 2nd respondent. She deponed that the applicant had not provided any proof of their intention to sue as paupers; that the applicants have all along been represented by counsel and it was incorrect for them to argue that they had no funds to pay for legal services; and finally that the applicants have filed a similar application in the High Court.

When the appeal came before me for hearing, Mr Hayanga contended that the applicants who are born of the same mother as the respondents, have an arguable appeal; that they had wanted to appeal as paupers were it not for the intricate nature of an application seeking leave to appeal as paupers; that no prejudice would be occasioned to the respondents and urged the court to exercise its discretion in favour of the applicants.

Mr Hamza, the learned counsel for the respondents vehemently opposed the application. He invited me to find that there was no proof of the applicant's intention to acquire the status of paupers; that the applicants do not have an arguable appeal and further that the applicants had filed a similar application in the High Court. He urged me to dismiss the application for want of merit. Mr Hayanga later clarified that the application in the High Court had been withdrawn.

I have carefully considered the submission of the respective counsels. It would appear that the applicants herein have had difficulties in raising legal fees as evidenced by a letter dated 24th August 2012 from M. A. Mwangi Advocate advising the applicants of a date for a ruling and also asking for balance of his fees. In the 1st applicant's affidavit, she depones that the said advocate returned their case file to them and that it was then their intention to file the appeal as paupers were it not for the intricate process. The 1st applicant further deponed that their new counsel became indisposed and he was in and out of hospital. I note that when Mr Hayanga appeared before me, he was still in crutches.

Given the above, it is my considered view that the delay has been sufficiently explained. As to whether the respondents shall suffer prejudice, I note that it is the applicants who are in occupation of a house in Guraya, which house they are to be evicted from, following the judgment of the Kadhi, the subject matter of the appeal before Ibrahim, J. I therefore do not see the prejudice to be suffered by the respondents. Additionally, the annexed "*proposed memorandum of appeal*" appears to raise issues of law apart from a contestation on the facts. The intended appeal is therefore not frivolous.

For the foregoing reasons, I allow the application. The applicant shall have 7 days from the date hereof to file and serve the Notice of Appeal. Thereafter the record of appeal is to be filed and served within 30 days from the date of filing the Notice of Appeal. The applicants shall however bear the costs of this application as they are the ones who occasioned the delay.

Dated and delivered at Mombasa this 14th day of February, 2014.

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

/saa