



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA
Civil Appeal 330 of 2003

HUSAMUDDIN GULAMHUSSEIN POTHIWALLA

**ADMINISTRATOR, TRUSTEE AND EXECUTOR OF THE ESTATE OF
 GULAMHUSSEIN EBRAHIMJI**

POTHIWALLA.....
..... APPELLANT

AND

**KIDOGO BASI HOUSING CORPORATIVE SOCIETY LIMITED AND 31
 OTHERS RESPONDENTS**

**(Appeal from the judgment and decree of (Lady justice Mary Ang’awa)of the High Court of
 Kenyaat Mombasa dated the 8th December 1997**

in

H.C.C.C. NO.112 OF 1995

RULING

The application that was argued before me was taken out by the appellant in the main appeal and it seeks two substantive orders; that is to say:

“1. **THAT** Hussein Husamudin Pothiwalla and Khuzeima Husamudin Pothwalla be granted leave to be substituted as the Applicants in place of the deceased Husamuddin Gulamhussein Pothiwalla in this Suit.

2. **THAT** this Honourable Court be pleased to extend the time within which this Application ought to have been filed”.

The Provisions of the law upon which the application is based are however carelessly invoked or not invoked at all and that formed one of the two prongs of the objection raised by learned counsel for the respondents Mr. Jiwaji. The rules cited as the basis for seeking the first prayer are **rules 51(2) and 83(1) and (2)** but it was readily conceded by Ms Kilonzo for the applicant that they are not relevant. They

relate, respectively, to substitution of deceased parties in applications and in intended appeals. It is common ground that the main appeal was filed on 29th December 2003, and has since come up for hearing severally but has been adjourned on account of interlocutory applications. In the intervening period the appellant died on 1st April, 2005. The application for substitution in such event may only lie under **rule 96(1)** of this Court's Rules. The second prayer may only be made under **rule 4** of the rules but there is no mention of it except at the hearing of the application when Ms. Kilonzo apologized for the oversight.

It is obviously a serious matter for advocates to submit records before this Court which are slovenly drawn. But, in my view, it is not in the interests of justice that a party be punished for such errors of counsel which do not go to the substance of the matter when appropriate orders as to costs may be made to address such transgression. The orders sought in this application are clear and the rules under which they can be sought or granted are also clear. I will deal with the substance of the application those defects notwithstanding.

The second prong in the objection raised by Mr. Jiwanji is that the application for extension of time does not lie, firstly, because the order is being sought after inordinate delay when it ought to have been made under certificate of urgency, and, secondly, because this Court ordered the appellant to file the application within 60 days and used the word "MUST" not "MAY" or "SHALL". In his view the word conveys finality and left no room for any further exercise of the Court's discretion in the matter.

The order alluded to by Mr. Jiwanji was made by this Court on 28th July 2005 when it was disclosed that the appellant had died three months earlier. Ms. Kilonzo was ordered to file the application for substitution within sixty days and there can be no doubt that that order was mandatory in tone. I do not, with respect, however accept the construction placed on the wording of the order that it left no option for seeking extension of time simply because the word "MUST" was used instead of "SHALL". It cannot be argued that a party would not be at liberty to apply where the word "Shall" is used and I do not see why it should make any difference where the word used is "MUST". Both convey a mandatory sense but do not take away the court's discretion which must always remain available if the ends of justice shall be met, and where the circumstances of each case so merit. It would have been another matter if the Court went further and imposed a default clause if the application was not filed within the period set. But it was left open and it seems to me, that it was an invitation to apply if the circumstances so required.

The application for substitution of the deceased appellant ought to have been filed by 27th September 2005 but it was not. The two sons of the deceased swear that they were not appointed as legal representatives of the deceased's estate until 7th October, 2005 when a limited grant **ad litem** was issued to them. There is a large family and they were wary of objections and other disputes being raised by other members of the family and therefore they waited for the advertised period of objection to expire before the final grant was issued on 13th January, 2006. One month later they filed the application now before me.

In issue in the main appeal is a dispute that goes back more than 30 years. It relates to a parcel of land on Mombasa Island measuring approx. 1.849 hectares (4.568 Acres). It was originally owned by the deceased appellants' father, also deceased, who asserted that the respondents were his tenants but had refused to pay rent, while the respondents asserted that they purchased the parcel of land in 1994 and were in effective occupation of it. They counterclaimed an order for specific performance of the purchase agreement. The superior court dismissed that suit and granted orders for specific performance under the counterclaim on 9th December 1997. That was when the deceased appellant came before this Court.

An appeal would only abate one year after the death of the appellant if no application is made for substitution. It follows that the appeal herein would have abated on 30th March 2006 if no application was made for substitution. The application was however made within that period but outside the period ordered by the Court. As stated earlier extension of time may be sought and granted if the circumstances so require. It is extension of a period set by the court as stated under rule 4 and there is no limit to the exercise of that discretion. This court in Leo Sila Mutiso v. Rose Hellen Mwangi (Civil Application No.

Nai.255 of 1997 (unreported) set out the factors that may be considered in a judicious exercise of the discretion as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted.”

The factors are not exhaustive and I have exercised my mind on the period of delay which is 4½ months. It would be inordinate if there was no explanation for it but I am satisfied with the explanation put forward by the applicants. I would excuse it particularly considering that this is land matter and the applicants have since inception of the dispute given no reason to show that they were not interested in pursuing it to its conclusion. I am also satisfied that there would be no prejudice to the respondents who continue to stay in occupation of the land without disturbance from the applicants.

Accordingly the time for filing the application is hereby extended with the result that the application now before me was timeously filed. Prayer 1 of the application seeks “leave”, as correctly pointed out by Mr. Jiwanji but there are no provisions under the rules for seeking leave. It is a superfluous word and I ignore it. I grant the order with the effect that the deceased appellant be and is hereby henceforth substituted with Hussein Husamdin Pothiwala, and Khuzeima Husamudin Pothiwala, the joint administrators/executors of his estate, as the appellants in the appeal.

The costs of the application shall be borne by the applicants in any event.

Dated and delivered at Mombasa this 21st day of July 2006

P.N. WAKI

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JUDGE OF APPEAL

I certify that this a true copy the original.

DEPUTY REGISTRAR