



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 5 OF 2018**

**MOHAMED BAISHE.....APPELLANT/RESPONDENT**

**VERSUS**

**TIMA HASSAN UREMA & OTHERS.....RESPONDENT/APPLICANT**

**TIMA MOHAMED KOMBO**

**BINA ABDALLA HASSAN.....INTERESTED PARTIES/RESPONDENTS**

**RULING**

1. By a Notice of Motion dated 3.4.19, the Applicants seek in the main that the memorandum of appeal filed by Appellant on 15.2.18 be struck out. The grounds are that since the appeal was filed, the Appellant has made no attempt to prosecute the same. As a result, the Applicants have been denied the fruits of their judgment delivered by the Kadhi's Court on 16.1.18.

2. In his affidavit sworn on 3.4.19 Edward Gichana, advocate for the Applicant avers that without furnishing any security and before the appeal was admitted, the Appellant was on 30.4.18, granted stay pending the hearing and determination of the appeal, by the Kadhi's Court. The Appellant has been in occupation of the estate of the deceased and enjoying the proceeds thereof to the exclusion of other beneficiaries some of whom have died. It is therefore fair, just and equitable that the appeal be dismissed.

3. The Appellant has opposed the Application. He states that the averments in the affidavit are inconsistent with the prayers sought as the Applicant is not seeking a review or appeal of the stay orders of the Kadhi's Court. The Appellant avers that justice cuts both ways and he has the right to a fair hearing as enshrined in Articles 50 and 159(2)(d) of the Constitution. He urged the Court not to punish him for matters beyond his control as he has not been able to get the typed proceedings from the Kadhi's Court to prepare record of appeal despite several requests in writing. Further, directions on the appeal have not been given. According to the Appellant, the appeal cannot be dismissed at this stage as the same has not been admitted and directions have not been taken. Further no sufficient reasons have been given to warrant the grant of the orders sought. The Appellant further states that he will suffer great harm and prejudice if the orders sought are granted.

4. I have given due consideration to the Application and the oral submissions by the Applicants' respective counsel. The Application is expressed to be brought under the provisions of Sections 1A, 1B, 3A and 79B of the Civil Procedure Act and Order 42 Rules 11, 13, 14, and 20 and 50 of the Civil Procedure Rules and all other enabling provisions of the law. The Application arises from a succession petition in the Kadhi's Court at Mombasa. Being a succession matter, the governing law is the Law of Succession Act. By dint of Rule 63 of the Probate and Administration Rules under the Act, the aforesaid provisions of the Civil Procedure Act and Rules are not applicable herein.

5. The appellate jurisdiction of this Court in respect of decisions of Kadhis Courts is stipulated in Section 50 of the Law of

Succession Act which provides:

**50. Appeals to High Court**

(1)

***(2) An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi's Court in respect of the estate of a deceased Muslim and, with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.***

6. The Act does not stipulate the time within which such an appeal ought to be filed or indeed when the record of appeal shall be filed. Section 58 of the Interpretation and General Provisions Act is however instructive:

***"Where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises".***

7. The judgment was delivered by the Kadhi's Court on 16.1.18 and the memorandum of appeal was filed timeously on 15.2.18. It is however to be noted that by the date the Application was filed on 8.4.19, a year and 2 months after, the Appellant was yet to file the record of appeal. The reason proffered by the Appellant for the delay is that he has not been able to get the typed proceedings from the Kadhi's Court. He exhibited several letters addressed to the Hon. Chief Kadhi asking for the typed proceedings. The first 2 letters are dated 29.1.18 and 19.4.18. No other letter was written until 7 months later on 21.11.18. In the said letter and the subsequent one dated 20.2.19, there is an indication that the lower Court file could not be traced for quite some time. It is trite that when a file is missing for a period of time, the reasonable thing for a party seeking the file to do, is to apply for reconstruction of the same. There is no evidence that such application was ever made by the Appellant. Rather, the Appellant appeared to be quite content with writing intermittent letters and sitting back.

8. Although the time for filing the record of appeal is not stipulated in the Act, such record must be filed without unreasonable delay. A delay of over 1 year is in my view inordinate. In the meantime, the Appellant is enjoying stay orders granted by the Kadhi's Court. As stated by the Appellant, justice cuts both ways. All parties to a suit are entitled to the a fair hearing as guaranteed by Article 50 of the Constitution which provides at Clause (1):

***Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***

9. The Court notes that none of the exhibited letters requesting proceedings was served upon the Applicants. They were thus not aware that such requests had been made. In order to uphold the constitutional guarantee of a fair trial, the Applicants ought to have been served with the said letters of request of proceedings. This was the holding of the Court of Appeal in Justus Aloo Ogeka & 6 others v Kenya Union of Commercial Food And Allied Workers & 2 others [2018] eKLR:

***As seen above, the respondent failed to serve the request for proceedings on the applicants. The effect of this failure was to preclude the respondent from applying the proviso to rule 82(1) to exclude the period of preparation when computing time to file the record. Without the ability to exclude the preparation period, it was imperative for the record to be filed within 60 days from the date the notice of appeal was filed. It is against this backdrop, that it then becomes apparent that the reason advanced by the respondent that it was unable to file the record because it had yet to be supplied with the proceedings by the registry, essentially falls by the wayside, and it mattered not that the registry had not supplied the proceedings.***

10. While there is no provision in the Act that an appellant should serve a respondent with requests for proceedings where there is a delay, by parity of reasoning, the Appellant's failure to serve the Applicants with letters requesting proceedings precludes from relying on delay in getting the proceedings as the reason for delay or failure to file the record of appeal.

11. The failure or inordinate delay in the filing of the record of appeal has resulted in the Applicants' being denied the fruit of their judgment since 16.1.18. This goes against the conventional principle that a decree holder should enjoy the fruits of his judgment. In this regard, I am in agreement with Majanja , J. who in Republic v Town Clerk Of Webuye County Council & another [2014] eKLR, stated:

*On the other hand, a decree holder’s right to enjoy fruits of his judgment must not be thwarted. When faced with such a scenario, the Court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of the Constitution particularised under Article 10, the obligation of the court to do justice to the parties and to do so without delay under Article 159(2)(a) and (b) and the applicant’s right of access to justice protected under Article 48 of the Constitution.*

12. To file an appeal on 15.2.19 and fail to file a record of appeal a year and 2 months later is tantamount to thwarting the Applicants’ right to enjoy the fruit of their judgment.

13. The upshot of the foregoing is that I allow the Application dated 3.4.19 and hereby strike out the Appellant’s appeal dated 15.2.18 with costs to the Applicants.

**DATED, SIGNED and DELIVERED in MOMBASA this 17<sup>th</sup> day of January 2020**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

.....for the Applicants

.....for the Appellant

.....for the Interested Parties

.....Court Assistant



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