

ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

F.A.O. No.117/2018
Tazarat Hussain
Versus
Zayabat Hussain and others

S. No. of order / proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	24.06.2019	Mr. Abdul Kamran Butt, Advocate for the appellant Qazi Rafi ud Din Babar, Advocate for respondents No.1 to 8

Through the instant appeal, the appellant, Tazarat Hussain, impugns the order dated 21.05.2018, passed by the Court of the learned Civil Judge, Islamabad, whereby his application under Order XXXIX, Rules 1 and 2, C.P.C. filed along with his suit for declaration, cancellation of mutation No.1589, dated 16.01.2013, was dismissed.

2. Learned counsel for the appellant submitted that vide mutation No.1589, dated 16.01.2013, the appellant's father, Qurban Hussain, is alleged to have sold 144 *kanals*, 05 *marlas* of land in *mouza* Arra, Tehsil and District Islamabad to respondents No.1 to 3 for a total sale consideration of Rs.5,00,000/- only; that Qurban Hussain was on his death bed when the said mutation is alleged to have been executed; that Qurban Hussain died on 28.05.2013; that the appellant came to know about mutation No.1589 when he went to have the inheritance mutation attested with respect to the said land; that Qurban Hussain was the father of the appellant and respondents No.1 to 3; that other than the appellant and respondents No.1 to 3, Qurban Hussain was also survived with three daughters and one widow; that four months after the

attestation of the said mutation No.1589, respondents No.1 to 3 sold the said land to Al-Hamra Society at the rate of Rs.2,50,000/- per *kanal*, vide agreements dated 22.05.2013 and 21.06.2013; and that the said sale took place six days prior to Qurban Hussain's demise.

3. Learned counsel for the appellant further submitted that mutation No.1589 was made fraudulently and the same was hit by the doctrine of *marz ul maut*, that Qurban Hussain's death was immanent when the said mutation was executed; that the appellant has a house where he is living with his family in the land which is the subject matter of the said mutation; and that the learned Trial Court erred by dismissing the application for interim injunction. Learned counsel for the appellant prayed for the instant appeal to be allowed and for the impugned order dated 21.05.2018 to be set-aside.

4. On the other hand, learned counsel for respondents No.1 to 8 submitted that the doctrine of *lis pendens* adequately protects the appellant; and that since the appellant is challenging mutation No.1589 on the basis of fraud and the principle of *marz ul maut*, he is under an obligation to prove the same during the trial.

5. Learned counsel for respondents No.1 to 8 further submitted that the instant appeal was grossly time barred; and that the instant appeal against the impugned order dated 21.05.2018 was filed before this Court on 18.10.2018. Learned counsel for respondents No.1 to 8 prayed for the appeal to be dismissed.

6. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

7. I propose, in the first instance, to decide the objection taken by the learned counsel for respondents No.1 to 8 to the maintainability of the instant appeal.

8. Vide impugned order dated 21.05.2018, the appellant's application for interim injunction was dismissed by the learned Civil Court. The said order was assailed by the appellant in an appeal before the Court of the learned Additional District Judge, Islamabad, which appeal was filed on 23.05.2018. Vide order dated 17.10.2018, the Court of the learned Additional District Judge returned the said appeal to the appellant on the ground that the said Court did not have the pecuniary jurisdiction to adjudicate upon the matter. Thereafter, the instant appeal was filed by the appellant before this Court on 18.10.2018.

9. In paragraph 10 of the appellant's suit, the value of the suit for the purposes of jurisdiction and court fee was clearly stated to be Rs.2,50,00,000/-. In this view of the matter, the Court of the learned Additional District Judge, Islamabad, was bereft of the pecuniary jurisdiction to adjudicate upon the appellant's appeal.

10. The appellant, in his application for condonation of delay in filing the instant appeal, has taken the position that the valuation entered in paragraph 10 of the suit was the result of a typographical mistake; and that the valuation was in fact Rs.5,00,000/-, which was the consideration alleged to have been paid by respondents No.1 to 3 for the suit land. This stance, in my view, is an afterthought. The appellant had consciously fixed the value of the suit for the purposes of jurisdiction and Court fee to be Rs.2,50,00,000/-.

11. Now as regards the question as to whether the time consumed by the appellant in prosecuting his appeal before the Court of the learned Additional District Judge, Islamabad, can be ignored or excluded from the thirty-day limitation period for filing of an appeal, the appellant has not advanced any plausible explanation as to why he had filed the appeal on 23.05.2018 before the Court of the learned Additional District Judge, Islamabad. The valuation in the suit was Rs.2,50,00,000/- and therefore, more than the pecuniary jurisdiction of the learned District Court. Ignorance of the law cannot be a valid defence. Therefore, the appellant cannot be said to have filed the appeal or to have prosecuted the same before the Court of the learned Additional District Judge for a period of almost five months with “*due diligence*” or “*in good faith.*” In the case of *Khushi Muhammad Vs. Mst. Fazal Bibi (PLD 2016 S.C. 892)*, it has *inter-alia* been held as follows:-

“38. Time spent pursuing an appeal before a wrong forum, in good faith and with due diligence ought in our view to constitute sufficient cause for condonation of delay. But the act of approaching a wrong forum must be accounted for: it should be established that due to some honest, bona fide and genuine ambiguity in the law or in fact, a party or his counsel was led astray in terms of approaching a wrong forum. Mere incompetence of the counsel, inadvertence, negligence or ignorance of law attributable to him and/or overlooking of the record by the counsel cannot constitute sufficient cause ipso facto, but the factor(s) which misled the legal counsel, including any ambiguity in the law, causing him to file the appeal before the wrong forum must be indicated. Mere wrong advice of counsel is not an adequate ground per se to constitute sufficient cause because if this rule is accepted, the centuries tested rule that ignorance of law is no excuse would stand violated. Besides, the above factors which caused ambiguity and misled the appellant (or his counsel as the case may be) have to be stated with clarity and precision in the”

application for condonation of delay and proved on the record.”
(Emphasis added)

12. Since the appellant's application for condonation of delay contains no pleadings with specificity as to what accounted for the appellant's *bonafide*, honest and genuine mistake or ambiguity in the law or in fact causing it to file the appeal before the wrong forum (i.e., the Court of the learned Additional District Judge), it falls short of the requirements for such an application set in the case of *Khushi Muhammad Vs. Mst. Fazal Bibi (supra)*.

13. In view of the above, I have no reason to allow the appellant's application for condonation of delay in filing the instant appeal. After holding so, it would not be appropriate to give any findings on the merits of the main appeal. The petitioner's application for the condonation of delay is dismissed and as a consequence of such dismissal, the instant appeal too stands dismissed. There shall be no order as to costs.

14. Before parting with this order, it may be noted that the learned counsel for respondents No.1 to 8 has taken a very fair stance that regardless of the dismissal of the appellant's application for interim injunction, the doctrine of *lis pendens* adequately protects the appellant.

(MIANGUL HASSAN AURANGZEB)
JUDGE

Ahtesham*