



REPUBLIC OF KENYA



**Gituku v Gathui & another (Miscellaneous Application E004 of 2021)
[2022] KEHC 14285 (KLR) (26 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14285 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MISCELLANEOUS APPLICATION E004 OF 2021**

JN NJAGI, J

OCTOBER 26, 2022

BETWEEN

JOHN NDUNGU GITUKU APPLICANT

AND

MARY WANJIRU GATHUI 1ST RESPONDENT

BEATRICE WANJA GITUKU 2ND RESPONDENT

RULING

1. The applicant has filed an application dated 5th May 2021 brought under Rules 49, 59 of the *Probate and Administration Rules* and Section 79G of the *Civil Procedure Act* seeking to enlarge the time within which to file an appeal against the ruling in Nyeri CMCC No. 619 of 2018 delivered on 24th July 2020.
2. The applicant has also filed a second application dated 18th October 2021 brought under Rules 49, 59 and 73 of the Probate and Administration Rules seeking that the status quo of the resultant sub-divisions of LR. Tetu/Muthuaini/3192, 3193, 3194, 3195, 3196, 3197, 3198 and 3199 be maintained pending the hearing and determination of the instant application and the application dated 5th May 2021. Both applications were opposed by the respondents vide the replying affidavits of the 1st respondent sworn on the 12th November 2021.

Applicant's Case -

3. It is the applicant's case that he came to learn of the delivery of the judgment on the 30/3/2021 when surveyors visited the subject parcel of land accompanied by police officers and proceeded to effect sub-division. He further states that his co-petitioner died in March 2021 and when he visited the court registry he found that judgment was delivered and subsequent orders made. The applicant contends that he made an application to have the sub-division effectuation stayed as it affected his developments on the land which would cause him to demolish them and reconstruct afresh.



4. The applicant states that the respondents are his sisters and they knew that his co-petitioner, their brother was unwell but to ensure that he was kept in the dark, they served his co-petitioner.
5. The applicant contends that his intended appeal is not frivolous as it raises serious issues concerning the distribution of the estate. Further that he does not know why the court proceeded to distribute the estate on an application for revocation of letters of administration by the respondents.
6. In the application dated 18th October 2021 the applicant states that the subject estate LR No. Tetu/Muthuaini/49 has been sub divided into eight parcels namely Tetu/Muthuaini/3192, 3193, 3194, 3195, 3196, 3197, 3198 and 3199. He urges the court to maintain the status quo of the subject property until his application and appeal is heard and determined. He states that he is apprehensive that if the status quo is not maintained and his appeal is successful it will serve no practical purpose. He further avers that no prejudice will be occasioned to any party by maintaining the status quo. He states that his apprehension is occasioned by the fact that the respondents and other beneficiaries intend to dispose the land.

The Respondents' Case -

7. The respondents submit that the applicant is not being candid when he states that he learnt of the ruling on 30/3/2021. That the impugned ruling was in respect of the respondents' application for revocation of grant dated 10th February 2020 to which the applicant had filed an affidavit of protest sworn on 3rd March 2020. Further the said application was canvassed by way of written submissions and the ruling delivered on 24/7/2020 where the court held that all the children of the deceased are entitled to the estate of the deceased in equal shares.
8. The respondents aver that the applicant declined to sign the transmission documents despite being requested to do so by the area chief. The respondents further state that they were constrained to file an application dated 16th October 2020, requesting the court to authorize its Executive Officer to sign RL7 and RL19 on behalf of the applicant and others who had declined to sign. That the applicant was served with the said application.
9. The respondents further state that the applicant filed an application dated 7/3/2021 seeking to re-survey LR No. Tetu/Muthuaini/49. They state that the relief sought by the applicant is discretionary and equitable and the applicant should not be granted any equitable rights as he has come to court with unclean hands. The respondents contend that there is evidence that the applicant declined to sign RL7 and RL19 before the Chief at Kamakwa and further that he failed to respond to the application seeking to have the Executive Officer sign RL7 and RL19 on his behalf. Moreover, the Assistant Chief has confirmed that the surveying was properly undertaken and that each beneficiary was considered.
10. The respondents further state that the applicant has not complained about the merit of the order of distribution of the estate of the deceased among all the children in equal shares. That the intended appeal has no likelihood of success as the estate of the deceased was distributed among his children in equal shares as opposed to the applicant's proposal that sought to exclude married daughters.
11. The respondents state that the application dated 18th October 2021 lacks the substratum to support it as the same is misconceived and an abuse of the court process for the reason that LR Tetu/Muthuaini/491 which formed the estate of the deceased was subsequently divided amongst all the children and the resultant numbers are Tetu/Muthuaini 3192-3199. That as registered owners of the sub-divisions the beneficiaries are free and at liberty to deal with their respective parcels of land as they wish. As such, the respondents state that the application lacks merit and ought to be dismissed with costs.



12. The applications were disposed of by way of written submissions.

The Applicant's Submissions -

13. The applicant relies on Rule 73 of the Probate and Administration Rules and urges the court to invoke its inherent powers to meet the ends of justice. The applicant contends that the appeal will serve no purpose if it succeeds and the resultant sub-divisions of the estate are disposed of. The applicant states that the respondents will not suffer any prejudice if they wait for the outcome of the application for leave to appeal out of time. The applicant submits that the subject matter is land and therefore that the parcels of land will still be available.

The Respondents' Submissions -

14. The respondents submit that the applicant has conceded to the fact that he has not filed an appeal against the decision in Nyeri Succession Cause No. 619 of 2018. Further that all the children of the deceased have been issued with their respective title deeds being LR Tetu/Muthuaini/3192-3199. They pray that the court dismisses the applications.

Analysis and determination -

15. The main issues for determination herein are:-
- a. Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time;
 - b. Whether status quo ought to be maintained in respect of LR Tetu/Muthuaini/3192-3199.

Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time -

16. Section 79G of the *Civil Procedure Act* states:-

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

17. It is clear from the wording of section 79G of the *Civil Procedure Act*, that before the court considers extension of time, the applicant must satisfy the court that that he has good and sufficient cause for filing the appeal out of time. This principle was stated in the case of *Diplack Kenya Limited vs William Muthama Kitonyi* [2018]eKLR where it was held that an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.

18. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others* (2014) eKLR set down the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-

“The underlying principles a court should consider in exercise of such discretion should include:-



- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
 - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
 - f. Whether the application has been brought without undue delay.
19. Similarly in the case of *Paul Musili Wambua vs Attorney General & 2 Others* [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-
- “.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”
20. The applicant has explained his delay was occasioned by the fact that his co-petitioner who was served never informed him and that his siblings were trying to keep him in the dark. He states that he came to know of the ruling on 30/3/2021. I have perused the court record and noted that the respondents wrote to the area chief Kamakwa Location on 16th September 2020, requesting for his assistance to have some of the beneficiaries, the applicant included, in signing RL7 and RL19. The area chief responded to the correspondence on 29th September 2020 stating that he summoned the beneficiaries as requested and they declined to sign the forms stating that they were not involved in the succession process. The respondents subsequently filed an application dated 16/10/2020 seeking the trial court to authorize its Executive Officer to sign all the transfer documents RL7, RL19, mutation forms and partition forms on behalf of the beneficiaries, the applicant included. The application was allowed on 30th November 2020. The respondents have filed an Affidavit of Service dated 29th October 2020 indicating that the applicant together with the other three beneficiaries were served with the application dated 16/10/2020 and they declined to sign to show that they were served with the said documents. In that regard, I find that the respondents have shown that the applicant was aware of the ruling delivered on 24/7/2020 all along and he did not come to know of it on 30/3/2021 as he alleges. To this end, I find that the applicant’s reasons for the delay are not satisfactory.
21. I have also perused the court record and noted that the ruling was delivered on 24/7/2020 and the applicant brought the instant application seeking leave on 5th May 2021. This is a duration of about 10 months since the ruling was delivered. I find that the applicant has not satisfactorily explained the reasons of his delay.
22. Further I do note that the grant was revoked and the estate of the deceased shared equally amongst all the children of the deceased. Notably, the applicant was of the view that the estate ought to be shared



to the exclusion of his married sisters. I do find that the intended appeal is not arguable as the trial court distributed the estate equally among the children of the deceased. In this regard, I am not convinced that the applicant is deserving of extension of time within which to file his appeal.

23. Since the court has declined to grant the orders to extend time to file the applicant's appeal, the application dated 18/10/2021 falls on the wayside.
24. The upshot is that there is no merit in the applications dated 5th May 2021 and 18th October 2021 and are hereby dismissed. As the matter involves members of the same family, it is ordered that each party bears its own costs.

SIGNED THIS 16TH SEPTEMBER 2022.

J. N. NJAGI

JUDGE

DELIVERED, DATED AND SIGNED AT NYERI THIS 26TH DAY OF OCTOBER, 2022.

By:

HON. JUSTICE M. MUYA

JUDGE

In the presence of:

Mr. Nderi: for Applicant

Mrs Mwangi hold brief for Mwai: for Respondents

Court Assistant : Kinyua

30 days **R/A.**

