



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
SUCCESSION CAUSE NO. 2171 OF 2001
IN THE MATTER OF THE ESTATE OF
WATHUKO CHONGO ALIAS WATHUKO CHONGO WATHUKO (DECEASED)

NDERI WATHUKO CHONGO.....1ST APPLICANT

PETER NDERI CHONGO.....2ND APPLICANT

VERSUS

SAMUEL NJOROGI WATHUKO.....1ST RESPONDENT

SERAPHINE WANJIKU WATHUKO.....2ND RESPONDENT

RULING

1. The deceased Wathuko Chongo alias Wathuko Chongo Wathuko died intestate on 30th May 2001. He was survived by three widows: Dorcas Waithera, Seraphine Wanjiku and Susan Nyambura. He had 22 children in all. His first wife Tabitha Wanjiku predeceased him. Maina Wathuko, James Nderi Wathuko, Nderi Wathuko Chongo (1st applicant) and Peter Nderi Chongo (2nd applicant) petitioned the court for the grant of letters of administration intestate in their capacity as sons of the deceased. The grant was issued to them on 10th November 2003, and confirmed on 6th May 2013. The confirmation was confirmed on the basis of a consent on the mode of distribution.

2. The applicants filed summons dated 9th February 2016 seeking the revocation of the certificate of confirmation. The application was opposed by the respondents Samuel Njoroge Wathuko and Seraphine Wanjiku Wathuko. Oral evidence was taken. The court on 7th September 2016 found that the consent entered into on 10th May 2013 was a valid basis for the distribution of the estate of the deceased as contained in the certificate of distribution. The application was dismissed with costs.

3. On 2nd February 2017 the applicants filed an application seeking to review the decision of 7th September 2016 and determined on 14th September 2016. Basically the applicants were challenging the distribution of the estate. In a ruling dated 16th March 2018 and delivered on 20th March 2018 the court found no merit in the application and dismissed it.

4. In an application dated 27th July 2018 and filed on 2nd August 2018 the applicants sought leave to appeal out of time. They sought that the notice of appeal filed on 2nd August 2018, about five months out of time, be deemed to be properly filed and served on the respondents. The grounds on which the application was based were that:-

- (a) there was no notice on the issuance of the ruling sought to be appealed against;
- (b) the ruling was delivered in the absence of the parties; and that
- (c) failure to appeal on time was due to circumstances beyond the control of the applicants or its parties.

5. The supporting affidavit by the 1st applicant went to the merits of dispute. In the affidavit he deposes as follows:-

“11. THAT on 20th March 2018, the Honourable Justice A.O. Muchelule dismissed the application holding that the court would not sit in appeal of its own decision. A copy of the ruling is annexed.

12. THAT immediately after the ruling the respondents begun harassing the applicants on the ground with the intention of executing the second court order pertaining to the deceased estate which order favours the said respondents.

13. THAT I am apprehensive that unless an extension of time to appeal out of time is granted the 1st and 2nd respondents will move to forcibly take up the land from the applicants.

14. THAT unless the court grants this application to enable filing of an appeal the appellants will suffer irreparable loss.”

6. There was no averment that the applicants had no notice of the date of ruling. The record shows they did not attend the ruling. But their own averment shows they immediately became aware of it. This is because they say the respondents begun harassing them to leave the land. The question therefore is, why did they not appeal on time?

7. According to the respondents the application is an abuse of the process of the court, lack merits and should be dismissed with costs. According to the affidavit in support sworn by applicants’ counsel Mary Wanjuhi Muigai, it was stated as follows:-

“6. THAT the said delay can be explained as herein aforesaid and the same was caused by the circumstances beyond the applicants’ or its Advocates control.”

Counsel did not depone to the circumstances. What were the circumstances that made the filing of the appeal within the prescribed time not possible? If for instance, the applicants were not aware of the date of the ruling, at what point did they become aware, and what steps did they take upon that knowledge to remedy the situation? Did they become aware before or after the prescribed time?

8. Under **rule 75(1) and (b) of the Court of Appeal Rules**, the applicants were under obligation to file their appeal within 14 days from the date of the ruling. They did not bring themselves within this prescribed time. In the application for extension of time to appeal the court will bear in mind the length of delay, the reasons for the delay, the conduct of parties, and the possible prejudice that the applicants will suffer if the application is not allowed (**Imperial Bank Ltd & Another – Vs Alnashir Popat & Others, Civil Appeal No. 395 of 2017 at Nairobi**). In the case of **Aviation Cargo Support Ltd –v- St. Mark Freight Services Ltd [2014] eKLR**, it was held that the applicant has to show that the delay is not inordinate and has to give plamisible explanation to the satisfaction of the court why it occurred. He has to show what steps he took to ensure he came to court as soon as it was reasonably practicable. Lastly, in **Monica Malel & Another –v- R. Civil application No. Nai 246 of 2008** it was observed that the reason for the delay has to be specific, and not based on guesswork. Where the applicants are not sure of why there was delay in filing the appeal within the prescribed time that amounts to saying that they had no reason for the delay.

9. The delay was for about 5 months. The applicants have not given a reason why there was delay in the appeal within the prescribed time, now that they acknowledge that following the ruling complained of the respondents begun to harass them. The discretion of the court cannot be exercised in favour of the applicants who have failed to explain the delay.

10. In conclusion, I find that the application for the extension of time to appeal lacks merits. It is dismissed with costs.

DATED and DELIVERED at NAIROBI this 29TH day of JANUARY 2019

A.O. MUCHELULE

JUDGE