



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

MISC SUCCESSION CAUSE NO. 21 OF 2016

IN THE MATTER OF THE ESTATE OF NJUE KAMUNDE alias NJUE WA KAMUNDI (DECEASED)

AND

MARYSTELLA GAKII MUTEGI....1ST PETITIONER/ADMINISTRATIX

MARCY KAGIGE KAMUNDE.....2ND PETITIONER./ADMINISTRITIX

R U L I N G

1. Mercy Kagige Kamunde, the applicant in the application dated 4th March 2017 has raised a Preliminary Objection to the further Supplementary Affidavit and authorities filed by Marystella Gakii Mutegi, the respondent herein which documents were filed on 9th June, 2017 stating that the same were filed out of time and in contravention of this court's directions/orders that the said documents be filed within specified period (which was 21 days from 11th May, 2017.)

2. The applicant has submitted that she complied with the said orders and filed all her documents and pleadings on 2nd June 2017 and faulted the Respondent for filing hers on 9th June 2017- seven days late according to her. Mr. Karanja counsel for the applicant has on that ground applied that the Supplementary Affidavit sworn on 6th June 2017 and filed on 9th June 2017 be struck out together with the list of authorities filed on the same date. The applicant has contended that the Respondent be allowed to rely on the Replying Affidavit filed on 13th March 2017 and Supplementary Affidavit filed on 20th April, 2017.

3. The Respondent through her learned counsel M/s Kaaria Advocate has opposed the Preliminary Objection. Her main ground of opposition is that a proper computation of time in her view shows that her documents were filed on time. In her view time does not run on public holidays and days falling on a weekend. She cited the provisions of **Order 50 Rule 3 of Civil Procedure Rules** and **Section 57 (b)** of the **Interpretation and General Provisions Act (Cap 2 Laws of Kenya)** to support this contention. She also cited the following authorities to buttress her position namely:-

(i) Kyule Makau -vs- Dominic Musei Ikombo [2015] eKLR.

(ii) Duncan Wainaina - vs- Samuel Mbugua [2011] eKLR.

(iii) Simba Colt Motors Ltd -vs- Registrar of Industrial Court & 2 others [2011] eKLR.

(iv) Nandi Tea Estate Ltd - vs- George Ochieng Oduogo [2015] eKLR.

(v) Peter Munga -vs- African Investment Fund LLC [2017] eKLR.

4. The Respondent further urged this court to invoke the provisions of **Article 159 (2) (d)** to extend time if it finds that the documents were filed out of time. She contended that **Section 95** of the **Civil Procedure Act**, **Order 50 Rule 6** in addition to the cited constitutional provision gives discretion to this court to extend time.

5. I have considered the preliminary point raised by the applicant and the response made by the Respondent. The record of proceedings in this cause shows that both parties were in court on 11th May 2017 when the court gave directions on the best way to deal with the applications dated 4th March 2017 for the interest of time and the overriding interests of justice. It was on that basis this court gave both parties 21 days from 11th May 2017 to file statements of accounts on how the income or any proceeds from the estate had so far been utilized.

6. The applicant herein filed her Supplementary Affidavit and written submissions on 1st June 2017 though the counsel clarified that the

documents were actually stamped on 2nd June 2017 (the 1st of June is normally a public holiday in Kenya usually known as Madaraka Day- or the date upon which Kenya attained its Independence). I have looked at receipt and it shows that the applicant actually paid for the filing fees of the said documents on 2nd June 2017 which means that the documents were filed on 2nd June 2017. On the other hand the respondent filed her documents on 9th June 2017 and not 8th June 2017 as submitted. Now let us look at the computation of time to determine if the applicant's assertion that the respondent filed her documents out of time is true. The legal position on the question of computation of time is not expressly stated in the Law of Succession Act. However the purposive Interpretation of the Provisions of **Rule 63 (1) P&A** Rules indicates that the provisions of **Rule 50 (2) and (3)** do apply when it comes to computation of time within which either the rules or an order of court limits time to do any act or thing. **Rule 63 (1)** of the **P&A** states that inter alia the provisions of **Order XLIX** (now amended) to **Rule 50** apply so far as it is relevant. **Order 50 Rule 2** of the **Civil Procedure Rule** provides as follows:-

"Where any limited time less than 6 days from or after any date or event is appointed or allowed for doing any act or taking any proceedings, Sunday, Christmas Day and Good Friday and any other day appointed as a public holding shall not be reckoned in the computation of such limited time."

The above provision means that if a party in a proceedings in court is given six days or less to do an act for example file a response or any other pleading, time will only run during official working days. The public holidays and weekends would be excluded in computation of time in such instances.

7. In the present case, the parties herein were given 21 days so the provisions of **Order 50 Rule 2** of the **Civil Procedure Rule** does not apply because in where a party is given more than 6 days like in this instance days falling on (weekends and public holidays) count in so far as the last day does not fall on such days. If it does the day is then excluded. **Order 50 Rule 3** provided as follows:-

"Where the time for doing any act or taking any proceedings expires on a Sunday or other day on which the offices are closed and by reasons thereof, such act or proceeding cannot be done or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open."

The above rule clearly show that the only days that are not be reckoned in computation of time, when the period given more than six days are where the last day of period given falls on those days that are outside official working days.

8. The Respondent's contention that non official working days like the weekends and public holidays are not severally reckoned with in the computation of time is certainly not correct. This is because besides the cited provisions of **Civil Procedure Rule** which as I have observed do apply in Probate matters, the other statutory provision regarding computation of time is found under **Section 57(b)** of the **Interpretation and General Provisions Act (Cap 2 Laws of Kenya)**. The Respondent cited the Section but gave a contrary interpretation. **Section 57** of the cited statute states as follows:-

"In computing time for the purpose of a written law, unless the contrary intention appears-

a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which that event happens or the act or thing is done,

b) if the last day of the period is Sunday, or a public holiday or all official non-working days (which days are in this Section referred to as excluded days), the period shall include the next following day not being an excluded day.

c) where an act or proceeding is directed or allowed to done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done on the next day afterwards, not being an excluded day.

d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of time."

The period of 21 days granted to the parties to file their respective Supplementary Affidavits and submissions was based on direction or orders of this court given for purposes of expediting the determination of this cause. The period I gave was not statutory or based on any expressed written law to bring into operation the provisions of the above cited (**Section 57** of **Interpretation and General Provisions Act**). That Section applies where time for doing any act in court proceedings is prescribed by a statute or the subsidiary legislation (rules/regulations). Nonetheless a look at the applicable rules in this instance (**Order 50 Civil Procedure Rule**) clearly shows that the said rules are anchored on **Section 57** of the **Interpretation and General Provisions Act**. The same can be said of the **Rule 3(b)** of the **Court of Appeal Rules** which was the basis upon which the decision in cited case of **Kyule Makau - vs-Dominic Musei Ikombo [2015] eKLR** was made. The Court of Appeal in that case found that because the last day fell on a public holiday (which was 1st May 2015) and the next two days 2nd and 3rd fell on a weekend, the next working day being 4th May 2015 the excluded days were 1st May 2015 (public holiday) 2nd May, 2015 and 3rd May, 2015 (non working days). The three days were therefore excluded in computation of time within which the appellant was required to file a notice of appeal and was consequently found to have filed his notice within time.

9. Now having stated the law regarding the computation of time, it is now clear that the 21 days I gave the parties herein on 11th May 2017 expired on 1st June 2017. The last day having fallen on a public holiday as observed above meant that going by the provisions of **Order 50 Rule 3 Civil Procedure Rule**, that 1st June 2017 was excluded in the computation of that 21 day period. The parties were required to have filed their papers by 2nd June, 2017. The record clearly show that only the applicant was within time when she filed her documents to wit Supplementary Affidavit and written submissions on 2nd June, 2017. On the other hand, the Respondent was seven days late when she filed her papers on 9th June, 2017. The authorities cited by the Respondent are all in tandem on the question of computation of time. The cited

decisions in my view are of the same view that the excluded days are only those days where either the first or the last day falls on a public holiday on non working day.

10. Having found that the Respondent filed her papers out of time, the next issue for determination is whether this court should on that account strike them out as urged by the applicant or exercise its discretion and extend time in order to deem the said documents duly filed and served as urged by the Respondent. The Respondent in urging me to extend time contended that that this court should invoke its powers under **Sections 57 and 95** of the **Civil Procedure Act** and the provisions of **Article 159** of the **Constitution**. She also cited the provisions of **Section 59 of the Interpretation and General Provisions Act**. To begin with the provisions of **Section 95** of the **Civil Procedure Act**, although that provision grants power or discretion to enlarge time, that Section of the statute does not apply to probate matters by a dint of the provisions for **Rule 63 of Probate and Administration Rules** which clearly sets the limits under which the provisions of Civil Procedure Rules apply. **Section 95** of the **Civil Procedure Act** only apply to civil proceedings carried out under **Civil Procedure Act and Rules**. Probate and Administration matters are special proceedings governed exclusively under **Law of Succession Act (Cap. 160 Laws of Kenya)** which has its own rules and regulations dictating the mode of procedure and requirements to be adhered to. The provisions of **Section 59 of Interpretation and General Provisions** in the same way does not apply because the power to extend time under that Section only relates to a time prescribed by a statute or a written law. The period of 21 days given to parties in this cause as I have already observed were not statutory in nature but were simply directions/orders given in the interest of time and justice to the parties herein.

11. Having said that, the power to enlarge time in this instance is donated by the provisions of **Order 50 Rule 7** of the **Civil Procedure Rule** which apply to Probate matters pursuant to the provisions of **Rule 63 of Probate and Administration Rules**. The other provision cited by the Respondent that is **Article 159 (2) (d)** can also constructively be interpreted to cover instances where a court is minded to make decisions on substance rather than on technicalities.

12. I have considered the reason why the Respondent delayed in filing her papers within the time period I gave. The counsel for the respondent stated that the valuation report and statement of accounts took time to be availed to her but were availed to her on time nonetheless. It is however apparent that the delay in filing the documents on time was based on the counsel's illusory on the computation of time given rather than getting the requisite documents late. This court finds that though the learned counsel should have certainly known better than her client, I find that it would amount to an injustice if a mistake by counsel can be visited upon a litigant particularly in the circumstances of this cause. This court finds that though the period of 21 days given was done with an overriding objective to facilitate just and expeditious resolution of the disputes in this cause, it would be drastic and unfair if I was to strike out the documents filed out of time. The Applicant's counsel at the hearing of this Preliminary Objection conceded that other than the issue of costs and time, his client was unlikely to suffer any prejudice if this court were to extend time. This court is minded to determine the summons dated 4th March 2017 on substance rather than on a technicality such as not considering the Supplementary Affidavit and authorities filed because they were filed out of time.

In the premises I find no merit in the Preliminary Objection raised. The same is overruled. For the above reasons I shall pursuant to the provisions of **Article 159(2) (d)** of the **Constitution** exercise my discretion under **Order 50 Rule 7** of the **Civil Procedure Rule** and **Rule 73 of Probate and Administration Rules** by extending time under which the Respondent was required to file her further Supplementary Affidavit, written submissions and authorities. The said documents are deemed duly filed and served. The respondent shall pay costs of this Preliminary Objection plus attendant costs incidental to the canvassing and determination of the same. I further direct pursuant to my earlier directions that this matter be accorded priority in view of the age of the applicant.

Dated and delivered at Chuka this 27th day of November, 2017.

R. K. LIMO

JUDGE

27/11/2017

Ruling signed, dated and delivered in open court in presence of Kaaria for Respondent and Karanja for applicant.

R. K. LIMO

JUDGE

27/11/2017