



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 823 OF 2012

IN THE MATTER OF THE ESTATE OF SOLOMON NDALO OBEDE (DECEASED)

CARREN OTIENO OBEDE.....1ST PETITIONER

DENNING OTIENO OBEDE.....2ND PETITIONER

VERSUS

JULIA KEMUNTOI ONGONDO.....1ST OBJECTOR

MARGARET MORAA MAINYA.....2ND OBJECTOR

RULING

By a consent of the parties recorded in court on the 27th October, 2015, directions were given that Juliah Kemunto Ongondo and Margaret Moraa Mainya do file objection proceedings to the Petition for letter of administration and to file and serve the objection, within 21 days and further that the *status quo* be maintained.

It is not until the 13th January, 2016 that the 1st Objector Juliah Kemunto Ongondo filed her objection, of course surpassing the time limit of 21days given by the court.

It is not until the 2nd February, 2016 that Margaret Moraa Mainya the 2nd Objector filed her objection again of course surpassing the timelines set in court.

When this matter came up for directions on the 29th February, 2016, the objectors through Mrs. Mukira and Ms. Kipruto respectively made pleas to the court to deem as regular the late filings.

On her part Mrs. Mukira indicated that her client exceeded the timelines by a week. The reason for this was that some documents were missing. These are the affidavit marked as annexure 1 in the supporting affidavit. It is urged that the 1st Objector had to travel to Kisii to procure the same and a photograph (Ex.9) annexed to the supporting affidavit that had made the objector travel to her rural home at Nyakach. Once these documents were obtained, counsel proceeded to file the objection soonest. It is the 1st objector's case that no prejudice will be suffered.

On her part, the 2nd objector through Ms. Kipruto indicated that the delay was occasioned by a missing certificate of title in respect of property No.LR. 36096 where she resides and which forms part of the estate of the deceased. It took time to locate the same.

Mr. Kobe for the petitioner opposed the application before court. It is urged that **Section 68** of the **Law of Succession Act** and **rule 17** of the **Probate and Administration rules** are clear that where parties seek leave to file objections, they must make formal applications. Counsel states that the objectors herein need to conform.

It is further argued that the reasons advanced from the bar are not sustainable and should be disregarded. Two (2) months on the part of the 2nd objector is inordinate. Counsel concedes that there may be no prejudice on their part but adherence to procedure is the main issue.

In reply, Mrs. Mukira submits that the objections have been filed following directions given in court. Ms. Kipruto on her part indicates that the objectors have raised weighty issues.

Two (2) issues arise for determination:

1. Whether the objectors ought to have filed formal applications for objections within the requirement of **Section 68** of the **Law of Succession Act** and **rule 17** of the **Probate and Administration rules**.
2. Whether the objections lodged out of the timelines (21 days) set by court should be regularized and be deemed to be properly filed.

On issue of No.1, **Section 68(1)** of the **Law of Succession Act** provides as follows:

“68. Objection to application

- 1. Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by such notice as aforesaid, or such longer period as the court may allow.**

Rule 17(1) of the **Probate and Administration rules** provides:

“17. Objection, answers and cross-application

- 1. Any person who has not applied for a grant to the estate of a deceased and wishes to object to the making of a grant which has been already applied for by another person may do so by lodging within the period specified in the notice of the application published under rule 7(4), or such longer period as the court may allow, either in the registry in which the pending application has been made or in the principal registry, an objection in Form 76 or 77 in triplicate stating his full name and address for service, his relationship (if any) to the deceased and the grounds of his objection.**

From the record, it is clear that by a consent recorded on the 27th October, 2015, the objectors were directed to file objection proceedings to the petition of letters of administration. The record goes on to show that the said objections were filed albeit out of time. Mr. Kobe raised the issue that the objectors have not complied with **Section 68** of the **Law of Succession Act** and **rule 17** of the **Probate and Administration rules**.

I have perused the objections filed herein and I find the same to have been filed in compliance with the Law and rules made thereunder and specifically in form 77 in the first schedule of the **Law of Succession Act**.

In regard to issue No.2, it is common ground that the objections were filed out of the time limit granted by court on the 27th October, 2015.

In addition to the inherent powers of the court donated by **rule 73** of the **Probate and Administration rules**, this court has powers to enlarge time to any period fixed or granted by the rules or by an order of

the court for the doing of any act or thing. **Section 68(1)** of the **Law of Succession Act** (Cap 160 Laws of Kenya) provides:

“68. Objection to application

(1) Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by such notice as aforesaid, or such longer period as the court may allow.

This court may upon request or on its own motion enlarge the time. This is a discretionary power. Like all discretionary powers, the same must be exercised judiciously. In my view, this ought to be within the circumstances of each case, Moreso, the reasons advanced for failure to meet the time set.

Both objectors indicate that they had difficulties obtaining necessary documents. These documents were necessary in support of their respective objections. I am persuaded that both have made out strong grounds for the exercise of discretion in their favour.

The question of enlargement of time arose before this court (Lenaola, J) in the case of **In the Matter of Estate of Mwirichia Kinga (Deceased) – Jane Kithiru Nyamu V. Misheck Kirai Mbwiria & 2 others**, [2007] eKLR where in allowing an application for enlargement of time, the Judge expressed himself thus:

“So far as I can see, what triggered the objection now before me is the failure by the protesters to abide by the orders of Sitati, J. made on 8/5/2006 to the effect that the Petitioners should “file and serve their affidavits within 21 days.” The Affidavit was in fact filed on 6/6/2006 by the Petitioner and she was therefore 7 days late in doing so. The question of days and dates is a matter of fact and not of law but Mr. Kioga argues that Order XLIX of the Civil Procedure Rules as read with Rule 63 of the Probate and Administration Rules is applicable. I agree but the power to strike out a document already on record is a drastic one and should be used sparingly.”

Of course, in allowing enlargement of time or regularising a document filed out of time, care must be taken to ensure that no prejudice is occasioned on either party.

In our instant case, I see no possibility of prejudice being visited on the petitioner. Consequently, I proceed to deem the objections filed herein as regularly filed. Both do form part of the record herein. The petitioner has leave to file further affidavit(s) if deemed necessary within 14 days hereof. The matter be set down for hearing thereafter.

Dated, Signed and Delivered at Nakuru this 23rd day of March, 2016.

A. K. NDUNGU

JUDGE