

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Misc Appli 212 of 2007

DUNCAN GATUNDU KIRUBI APPLICANT_

VERSUS

SAMUEL MWANGI KIRUBI RESPONDENT

RULING

Chamber Summons dated 10th December 2007 seeks leave to file an appeal out of time. That proposed appeal is in respect of the judgement of Kangema Principal Magistrate's Succession Cause No. 8 of 2000 which was delivered on 4th April 2001. The applicant in his affidavit stated that an appeal had previously been filed in respect of that judgement namely HCCA No. 45 of 2001. This appeal was later withdrawn. That it was withdrawn because after the court's investigation it was found that it had been filed six days out of time. The applicant argued that he had a good appeal. The application was opposed by their respondent. The respondent argued that the applicant was guilty of inordinate delay because it had delayed for two months before filing the present application since the withdrawal of the previous appeal. Further the respondent argued that the application was defective for having been brought by way of Chamber Summons rather than Summons as recognized by the rules under Cap 160. In this regard I perused Cap 160 with a view to finding out whether Summons was defined by that Act. I was unable to find a definition of Summons. The definition that I could find was in *Mozley & Whiteley's Law Dictionary 12th Edition*.

Summons is defined as; - ***A citation to appear before a Judge or magistrate. The word is used variously, as follows:-***

- 1. A citation summoning a person to appear before a stipendiary magistrate or bench of justice.***
- 2. An application to a judge at chambers, whether at law or in equity.***

That quotation shows that the purpose of summons is to cite someone to appear in court or an application before court. I find that the addition of the word 'chambers' is not fatal.

The respondent also argued that the application is incompetent for having relied on section 47 of Cap 60 and rule 73. In respect of section 47 the same provides that the court can entertain any application and determine any dispute under the act. That section contrary to what was argued by the respondent does not restrict itself to providing power to the court to arbitrate only in respect of disputes. It is clear in its reading that it also covers all applications. Similarly rule 73 of the Probate and Administration Rules affords the court the discretion to make such orders as may be necessary for the ends of justice. The applicant is by this application invoking that discretion. I reject the respondent's opposition to the application. The applicant could indeed have filed his application earlier but I find that the period of about two months was not inordinate and was excusable. The justice of the case will best be served by allowing the application. The respondent can adequately be compensated with costs. The court grants the following orders:-

- 1. That time be and is hereby extended for the applicant to file his appeal in respect of Kangema Principal Magistrate's Succession Cause No. 45 of 2001 out of time. The same should be filed and served within 14 days from this date hereof.***

2. *The costs of Chamber Summons dated 10th December 2007 are granted to the respondent in any event.*

Dated and delivered at Nyeri this 8th day of April 2008.

MARY KASANGO

JUDGE