



REPUBLIC OF KENYA



In re Estate of Pauline Njogu Mbiyu (Deceased) (Succession Cause E3043 of 2022) [2023] KEHC 21767 (KLR) (Family) (7 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21767 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE E3043 OF 2022
PM NYAUNDI, J
JULY 7, 2023**

BETWEEN

**JONATHAN MBIYU KOINANGE 1ST OBJECTOR
LUCY NJOKI KOINANGE 2ND OBJECTOR
ANGELINE PAULINE WANGUI KOINANGE 3RD OBJECTOR
DR. MOSES PIUS KANJA KOINANGE 4TH OBJECTOR**

AND

**LEONARD KARUGA KOINANGE 1ST PETITIONER
GRACE NJERI KARUGA 2ND PETITIONER**

RULING

1. By Summons presented under section 68(1) & 47 of the [Law of Succession Act](#) and rule 17(1) of the [Probate and Administration Rules](#) the Applicant seeks the following orders -
 1. Spent
 2. Spent
 3. That this honourable court be pleased to grant leave to the Applicants to file an objection out of time as per the draft objection annexed hereto.
 4. That pending the hearing and determination of the intended objection, the respondents jointly and severally be restrained from dealing and /or intermeddling with any property and/or assets belonging to the estate of the deceased.



2. The Application is supported by affidavit of the 1st Applicant Appellant sworn on the 21st February and further Affidavit sworn on 21st March 2023. The Application is opposed by the Respondents and the 1st Respondent has sworn an affidavit on 6th March 2023 in opposition.
3. The parties agreed to canvass the application by way of written submissions. The Applicants submissions are dated 4th April 2023 and those of the Respondent are dated 16th May 2023.

Background

4. The Applicants are daughter in law and grandchildren of the Deceased respectively. The Respondents are the appointed executors of the impugned will of the deceased dated 16th August 2019. Notice of the Petition for grant by the Respondents was published in the Kenyan Gazette on December 30, 2022 *vide* Gazette Notice No. 16105 in accordance with section 67 of the [Law of Succession Act](#) and rule 7(4) of the [Probate and Administration Rules](#).
5. On 2nd February 2023, no objection having been filed, Grant of Probate with written will was granted to the 1st and 2nd respondent.
6. Subsequent thereto the Applicants filed this Application, seeking enlargement of time within which to file an objection. The Applicant states that the failure to file the objection within the statutory time limit was not deliberate and that the delay was because the 1st Applicant was not in good health and therefore unable to deal with the matter appropriately.
7. The Respondent in response contends that the delay is not explained sufficiently in order for the Court to exercise its discretion in favour of the Applicant and counters the assertion that the intended objection is meritorious.

Analysis And Determination

8. Having considered the rival pleadings, affidavits filed, submissions presented and the relevant law, I discern the following as the issue for determination
 - a. Whether the Applicant has met the threshold for the grant of the orders sought?
9. The Principles to guide courts in considering applications of this nature (enlargement of time) were well articulated by the Supreme Court in the case of [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others](#) [2014] eKLR where the court stated as follows:
 - a. Extension of time is not a right of a 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 to 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 respondents if the extension is granted;
 - f. Whether the application has been brought without undue delay; and



- g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time
10. The delay in the presenting this application is not inordinate and the reasons given are plausible. My focus is on the viability of the intended objection proceedings and thus an answer to the submission by the Applicant, at paragraph 13 of the Supporting Affidavit, that the intended objection raises serious issues that touch on the validity and credibility of the purported Will upon which the petition is premised.
11. The Supreme Court in the Salat case guided that extension of time is not a right and is available to a deserving party. A deserving party in my view is one who is able to demonstrate that the next step, that the party will take upon time being enlarged, is not into sinking sand.
12. The Court in deciding to grant extension of time must also be alive to the fact that indeed judicial time is in short supply and the Court is duty bound not to clog the system with matters which on the face of it will be declared dead on arrival.
13. Section 68 provides;

Objections to Application

1. Notice of any objection to an application for a grant of representation shall be lodged with the Court, in such format as may be prescribed within the period specified by such notice as aforesaid, or such longer period as the court may allow
 2. Where notice of objection has been lodged under sub -section 1, the court shall give notice to the objector to file an answer to the application and a cross-petition application within a specified period (Emphasis Supplied)
14. Rule 17(1) of the *Probate and Administration Rules* provides
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 already been 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 in triplicate stating his full name and address for service, his relationship (if any) to the deceased and the grounds of his objection. (Emphasis supplied)
15. As noted in paragraph 5 above the grant herein issued on the 2nd February 2023. The question I pose is whether a person can file an objection after the Grant has issued as that will determine whether or not I should proceed to allow this application and enlarge time.
16. This same question was posed by Hon Justice J.A Makau *In re estate of Agnes Ogolas Akoth (Deceased)* [2016] eKLR, in which he observed
- (14) In the instant case the objection was filed when grant had already been made. The delay in filing of the objection of 4 years is inordinate and unexplainable. The objector is objecting to the making of the grant after it has already been made and I find that the objection has already been overtaken by events. The court cannot stop what has already passed. The law of Succession is crafted in such a manner that the obtaining of the grant is not an end to aggrieved party's



rights. One can challenge the grant by seeking its revocation or annulment or even file a protest to the mode of distribution.

17. I agree wholly with the finding of the Judge. A plain reading of the relevant provisions cited above reveals that an Objection is filed to challenge the Petition or Application for grant. The Court cannot consider an objection ‘to the making of a grant’ after the grant has been made.
18. As pointed out in the referenced decision the avenues available to the Applicants at this stage would be to apply for revocation or annulment of the grant.
19. The applicant has sought to avail himself of the provisions of article 159 (2) (d) of the [Constitution of Kenya](#) . The primacy of procedure is well settled, the Court of Appeal in the case of *Fcs Ltd v Odhiambo & 9 others* [1987] KLR 182 – 188. held *inter alia*:

“The rules of procedure carry into effect two objectives; first to translate into practice the rules of natural justice so that there are fair trials and the second, procedural arrangements whereby the steps of a trial are carried out in good order and within reasonable time. In my opinion where the rules are dealing with the precepts of natural justice, the court would be slow to conclude that they are mere technicalities, which may be swept under the carpet by the brush of section 3A of the [Civil Procedure Act](#) on inherent jurisdiction of the court to do justice.”

20. Rules of procedure cannot therefore be regarded as procedural technicalities provided for under article 159 (2) (d) of the [Constitution](#) . In the case of *Speaker of the National Assembly v Karume* [2008] KLR 425, the Court of Appeal held:

“Where there was a clear procedure for the redress of any particular grievance prescribed by the [Constitution](#) or an Act of Parliament; that procedure should have been strictly followed.”

12. Further in in the case of *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] eKLR;

“...the right of appeal goes to jurisdiction and is so fundamental that we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at article 159 (2) (d) of the [Constitution](#) .

We do not consider article 159 (2) (d) of the [Constitution](#) to be a panacea, nay, a general white-wash that cures and mends all ills, misdeeds and default of litigation”.

21. Having found that a grant having issued no objection can be filed, it follows that there is no utility in enlarging time to file an objection. Enlarging time to allow the Applicant to file an objection in the current circumstances would be tantamount to the Court offering a key to the Applicant when the door is bolted on the inside. It is a waste of the Applicants precious time and they should be nudged in the right direction at the earliest opportunity.
22. In the circumstances I dismiss the Summons dated February 21, 2023, each party will bear their own costs.

It is so ordered

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 7TH DAY OF JULY, 2023.

P M NYAUNDI

JUDGE



In the presence of:

Mr Towett h/b Peter Muchoki.....Advocates for the Appellant/ Applicant

Mwangi for the RespondentAdvocates for the Respondent

Karani Court Assistant

