



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

SUCCESSION CAUSE NO.139 OF 2017

IN THE MATTER OF THE ESTATE OF PAUL MWANGI KIMAMO (DECEASED)

ELIZABETH MWANGANGI alias ELIZABETH NJERI MWANGI.....PETITIONER/RESPONDENT

-VERSUS-

MIRIAM WATETU WATHAIGA.....PROPOSED OBJECTOR/APPLICANT

R U L I N G

The petitioner/respondent, **Elizabeth Mwangangi** has filed a notice of preliminary objection to the application dated 16/10/2018 to the effect that it is totally misconceived, bad in law, incompetent and an abuse of the process of the court; that the same having been filed long after a grant of Probate of written Will in respect of the estate of the deceased was made to the petitioner in this cause and that the application should be struck out with costs.

The application by way of summons, dated 16/10/2018 seeks an extension of time within which to file an objection to the petition herein. It is based on grounds that the petitioner/respondent failed to cite or seek the applicant's consent before filing the instant Succession proceedings despite being aware that she ranked in equal priority with the applicant in applying for grant; that the applicant disputes the validity of the purported Will of the deceased and there are good reasons why the applicant failed to file her objection in time.

Mr. Njogu, counsel for the petitioner submitted that the application under challenge was brought under Section 68(1) and (2) of the Law of Succession Act, Rule 17(1) & (2) of the Probate and Administration Rules; that an objection under Section 68 and Rule 17 of Probate and Administration Rules, is for all intents and purposes, an objection to the making of a grant of representation to a deceased's estate; that a grant of Probate of written Will has already been made on 14/4/2016 and hence the application dated 16/10/2018 is overtaken by events; that even if extension is granted, it will not serve any purpose.

Counsel relied on two authorities:

1. Estate of Paulo Kibet Cheroni P&A Cause No.335/2013; that the application was under Section 68 of the Law of Succession Act and the court observed that the applicants only recourse was to seek revocation of grant;

2. The Estate of Agnes Ogola Akoth; an application for extension of time was made after grant was issued and the court said that even if such an order were made after confirmation of grant, it would still be incompetent.

The court was urged to consider and uphold the two persuasive authorities.

The preliminary objection was opposed. Mr. Gakuhi Chege, counsel for the applicant submitted that the Preliminary Objection is a misconception of the law because Section 68 does not state that the exercise of the court's direction shall not apply where a grant has been issued; that the term making of grant of representation is not used in Section 68; that the decision in ***Paulo Kibet (Supra)*** is made per incuriam; that Rule 17 of the Probate and Administration Rules does not limit the exercise of the court's jurisdiction to extend time to the period before making of a grant.

Counsel observed that the decisions sought to be relied upon are not binding on this court. Counsel considered the case of ***Agnes Ogola Akoth (Supra)*** in which an objection was filed without the leave of the court, and the court appreciated that an objection would be incompetent if leave was not sought. Counsel argued that if the Parliament had intended that no objection could be filed before making a grant, it would have expressly provided for it in Section 68 of the Law of Succession Act and Rule 17 of the Probate and Administration Rules. Counsel further submitted that under Section 71(2)(b) Laws of Succession Act, a grant can be confirmed to some other person other than the petitioner and that was considered in ***Re: Estate of Gerald Waigwa Ndegwa, Succession Cause 46/2017***, where the objector was issued with a grant. He urged the court not to read Section 68 in isolation but read it with Section 71 Law of Succession Act.

It was further submitted that Rule 63 of the Probate & Administration Rules, saves the provisions of the Civil Procedure Rules, that is, Order 50 on enlargement of time and that in *Re: Estate of Mary Karugi*, J. Meoli dismissed a preliminary objection on account of an objection filed out of time citing Article 159(2)(d) of the Constitution. Counsel argued that the decision of *Paulo Kibet (Supra)* was made per in curiam and the preliminary objection should be dismissed.

In a rejoinder, Mr. Njogu submitted that there is no doubt that grant of probate was made and that in *Agnes Ogolla case (Supra)*, the objection was not struck out but the court said it was overtaken by events; that facts in the case of *Gerald Waigwa* are different from the instant case and Section 71 has not been cited by counsel; and lastly, that in *Re: Estate Mary Karugi's case*, no grant had been issued.

I have considered the preliminary objection and the response thereto. The application for extension of time was brought under Section 68(1) and (2) of the Law of Succession Act and Rule 17(1) and (2) of the Probate and Administration Rules.

Section 68 of the Law of Succession Act provides:

“Section 68(1) Notice of 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 the notice, or such longer period as the court may allow;

(2) Where Notice of Objection has been lodged under subsection (1), the court shall grant notice to the objector to file an answer to the application and a cross application within a specified period;

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

‘Rule 17 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.’

In considering the provisions of Rule 17(2) of the Probate and Administration Rules, I believe that the court has to take into account Rule 67 on enlargement of time in Succession matters. Rule 67 provides:

“Rule 67 Where any period is fixed or granted by these Rules or by an Order of the court for the doing of any act or thing, the court upon request or of its own motion may from time to time enlarge such period notwithstanding that the period originally fixed or granted may have expired.”

As properly captured in the *Re – Estate of Mary Kirugi Mwangi case*, Rule 63 of the Probate and Administration Rules allows the application of Order 50 Civil Procedure Rules that deals with enlargement of time. Order 50(6) Civil Procedure Rules provides:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of time appointed or allowed.”

From my understanding of the above provisions Section 68 Law Succession Act and Rule 17 of the Probate and Administration Rules, the court has discretion to order extension of time for filing of an objection and it does not specify whether the said discretion should be exercised before or after grant has been issued. In *Re: Estate of Mary Kirugi (Supra)*, a grant of representation had been issued and the court went ahead to grant extension of time to file objection.

I have also considered the decisions cited by both counsel. They are all decisions of the High Court and are persuasive in nature. In regard to the *Paulo Kibet case*, I do not think that an application for extension of time to file an objection can only be made before grant of letters of administration. I agree with the finding in *Re: Estate of Mary Kirugi*. A reading of Section 68 and the Rules on extension of time bear me witness that an application for extension of time can be made at any time and the court has to consider it on a case to case basis.

There is no doubt that a grant of representation has already been issued to the petitioner/respondent herein. The applicant claims to be a widow of the deceased just as the petitioner claims.

I have seen from the record that infact, the applicant had cited the respondent to take out letters of administration earlier on but it seems the applicant lost track of the case at one time and did nothing. It means that the applicant has shown keen interest in the deceased's estate from the onset and even the respondent is aware of it.

From a consideration of the above Rules, this court has wide powers to grant such orders of extension of time as are necessary to meet the ends of justice (R.73 P & A).

The discretion must be exercised judiciously with the court considering the special circumstances of each case, for example, the period for the delay, the reasons given for the delay in filing the objection and the prejudice that may result, if any.

As observed earlier, the applicant had shown interest in the deceased's estate claiming to be a widow and wants to contest the Will filed by

the petitioner. The court of course has to take into account the overriding object of the law as well as obligations of the parties towards assisting the court in expeditious and inexpensive resolution of disputes, In arriving at what the court should do, I also consider whether the prayers sought would prejudice the parties in any way. Grant of Probate of will was issued to the respondent on 14/04/2016. It is not until 16/04/2018, over 2 years, that the applicant came to this court to seek extension of time to file objection. The applicant has not explained the delay. The Law of Succession is grafted in such a manner that the obtaining of grant is not an end to an aggrieved party's rights. One can still challenge the issuance of grant by seeking revocation or annulment under Section 76 of the Probate and Administration Act and if the grant is not yet confirmed, one can file a protest to the mode of distribution. I do not think that the applicant would be prejudiced in any way if leave is not granted because the appellant has other avenues for pursuing her rights. On the other hand, if the court were to grant leave to file an objection, the court would be taking a step two years back.

The upshot is that I allow the preliminary objection and I strike out the application dated 16/10/2018. Costs will abide the determination of the petition.

Dated, Signed and Delivered at NYAHURURU this 7th day of **May**, 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. G. Chege for applicant

Eric – Court Assistant