



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA CHUKA

MISC. CIVIL APPLICATION NO. 4 OF 2020

RAPHAEL MURUNGI GEOFFREY.....1ST APPLICANT

ELIAS MUTEGI M'BURI.....2ND APPLICANT

VERSUS

KENNETH MICHENI M'BURI

(legal Representative of the Estate of GEOFFREY M'BUURI MAGIRI ALIAS BUURI MAGIRI

ALIAS MBURI MAGIRI – (DECEASED).....RESPONDENT

R U L I N G

1. The matter pending before this court is the summons dated 10th June 2020 which is brought under **Section 50 of the Law of Succession Act (Cap 160 Laws of Kenya)**, to be referred to as “**that Act**”, **Rules 49, 59 (1) & (6), 67 and 73 of the Probate and Administration Rules**. The gist of the application is that the court be pleased to order stay of implementation of the certificate of the confirmed grant dated 15th January 2020, stay of hearing of summons for rectification of grant and stay of further proceedings in ***Chuka Chief Magistrate’s Court Succession Cause No. 168/20*** pending the hearing and determination of the intended appeal.

It also seeks orders for extension of time to file appeal against the ruling of the Chief Magistrate delivered on 15th January 2020 in ***Chuka Chief Magistrate’s Court Succession Cause No. 168/2017***.

2. The application is supported by the affidavit of Raphael Murungi Geoffrey sworn on 10th June 2020. His contention is that the respondent had filed a summons for confirmation of grant dated 13th June 2019 in the lower court after which they (respondents) filed an affidavit of protest. The respondent filed a replying affidavit to the protest and filed it in court on 28th November 2019. The protest was on the mode of distribution proposed by the respondent.

The court delivered its ruling on 15th January 2020 and dismissed the protest. At the same time the court allowed the summons for confirmation of grant and a certificate of confirmed grant was issued.

3. The applicants state that they had instructed their advocate on record, Mr. I.C Mugo to file an appeal but he informed them that courts were not working owing to covid-19 locked down. They however found that the respondent had filed an application for rectification of grant dated 14th February 2020 and they decided to engage the advocate now on record, Mr. Nyamu Nyaga who applied for proceedings and ruling but by then the time for filing the appeal had lapsed. The applicants contends that the delay in filing the appeal was not of their own making and they ought not to be punished due to the laxity on the parts of their advocate.

4. The applicant avers that unless the application is allowed, he will suffer irreparably as he was denied his share of inheritance on land parcel No.Mwimbi/Murugi/520 where he has lived all his life and he has a permanent home. His co-applicant has also lived on this parcel of land all his life and has permanent home. He contends that the appeal has high chances of success and he prays that the application be allowed.

5. The applicants filed a Supplementary Supporting affidavit and avers that the application for rectification of the certificate of confirmed grant dated 14th February 2020 is pending before the Chief Magistrate’s Court and there is no order barring them from filing a replying affidavit. The applicants contend that they are seeking stay of further proceedings in the Chief Magistrate’s Court including the application for the rectification of grant. That the respondents will not suffer any prejudice.

The respondent deposes that the ruling of 15th January 2020 in the lower court was read in open court in the presence of the applicants. That their advocate was served with the application for rectification filed on 14th February 2020 and fixed for hearing on 1st April 2020 but it

could not proceed due to Covid- 19 pandemic crisis. He depones that the applicants did not oppose the application nor demonstrate a desire to appeal against the ruling. He contends that the application is an afterthought intended to delay the distribution of the estate. That the ruling of the trial magistrate was sound and proper and the applicants were not discriminated. That the distribution was in conformity with what the deceased had bequeathed. The application was disposed off by way of written submissions. The applicant submits that the court has discretion to allow the application and the applicants should not be punished for the mistakes of their former advocates.

The applicants submits that **Rule 67** of the **Probate and Administration Rules**, Cap 160 Laws of Kenya gives the court unfetter discretion to enlarge time notwithstanding that the period originally fixed or granted may have expired. It is submitted that such discretion is intended to avoid injustices and hardships resulting from accident, inadvertence, excusable mistake or error are. It is not intended to assist a litigant who intentionally or deliberately sought to obstruct or delay the cause of justice. That the applicants have explained the delay and demonstrated that they had instructed their advocate in good time. It is further submitted that the respondents are not likely to suffer prejudice and since the dispute involves their father's land it is only fair that the issues they are raising be ventilated in the intended appeal.

6. The applicant submits that this court has inherent powers under **Rule 73 of the Probate and Administration Rules** to make such orders as may be necessary to meet the ends of justice and to prevent the abuse of the process of the court. The applicants submits that the delay of four months was not inordinate and the delay has been explained. That if the application is not allowed the applicants will suffer irreparably.

7. For the respondents it is submitted that the application is an afterthought, the applicants have not demonstrated that they had instructed their advocate to appeal and the receipt from I.C. Mugo and Company Advocates is questionable. They submit that although the court has unfettered discretion under **Rule 67 of the Probate and Administration Rules**, the period having expired, that discretion ought to be exercised judicially and not only on merit. They rely on the case of *Paul Waheti Muchina. C. Henry Wanjohi Muchira .C Application No. 178/2003 (UR)* where the court observed that discretion ought to be granted judicially upon reason but not sympathy, whim or caprice. It is further submitted that the application is brought too late in the day. That **Rule 73 of the Probate & Administration Rules** was not designed to assist indolent litigants.

The urge the court to find that the application is devoid of merits and does not deserve to see the light of the day. The urge the court to dismiss the application and in the event that the court exercises its discretion to allow it, the applicants be ordered to deposit security for costs.

I have considered the application and the submissions. The issue which arises for determination is whether the court should extend time for the applicants to file their intended appeal.

The applicants contention is that they had instructed their advocate to file an appeal but he failed to file appeal in time. They have demonstrated that they had paid their advocate to lodge the appeal but he did not take action. The receipt is annexed to the supplementary affidavit. What the court has to consider is whether the delay has been explained, the merits of the appeal and the prejudice that may be occasioned to the parties. The court has to ensure that Justice is done without undue regard to technicalities of procedure and set time lines where the delay is not unreasonable and has been explained. On the issue of mistake by Counsel, the applicants have relied on the case of *Daniel Murithi Kamonde -v- Mary Wanjiru Kamonde (2005) eKLR* where the court stated that the applicants would have no redress against their own advocates as generally no amount of damages can compensate Kenyans for lost land. What the court was emphasizing is that the mistake of the advocate should not be visited on the applicants. The applicants have demonstrated that they moved to this court with speed upon realizing their advocate had not filed the appeal. The delay of four months in this case is not inordinate. The court of Appeal in the case of *Daniel Muriithi Kamonde -V- Mary Kamonde (Supra)* stated that the delay of 2 and half years was along one but allowed the application and also considered the case *Paula Waheti Muchira- V- Henry Wanjohi Muchina* where the court allowed the application in the interest of justice although the delay in filing the application was for ten years. In this case the respondents have stated that the appeal is an afterthought. There is no contention that the appeal is vexatious or frivolous. This is a succession matter. The applicant's intended appeal is challenging the distribution of the estate. The Law of Succession Act advocates for equal distribution of the estate to all the beneficiaries who are entitled. Distribution of the estate concludes the succession matter and therefore if any party is not satisfied, it is in the interest of justice that he be given a chance to move to the higher court on appeal. In this matter it is in the interest of justice that that the applicants are not denied a chance to appeal on account of the mistake by their former advocate.

8. The Probate and Administration Rules gives the court unfetter discretion to extend time. **Rule 67** states *“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 on its own motion may from time to time enlarge such period notwithstanding that the period originally fixed or granted may have expired.”*

The courts discretion is wide. The discretion is exercised judiciously and in the interest of justice what is at stake is distribution of the estate among siblings. The applicants have deponed that they have permanent homes on land parcel No. Mwimbi/Murugi/520 and the Respondents are likely to evict them. They have also submitted that the acreage of the deceased's estate has not been ascertained and land parcel No. Mwimbi/Chogoria/367 which was distributed to the applicants is landlocked . The applicant's have demonstrated that they are likely to suffer irreparably. I have also perused the mode of distribution. It is clear that the acreage of the parcels of land has not been indicated. It is therefore hard to tell whether the beneficiaries have been allocated equal shares. This being a dispute involving members of the same family, it behoves the court to ensure that substantive justice is done other than give undue regard to procedural technicalities. The applicants have a right to appeal. The discretion of the court should be exercised in manner that allows a consideration of the dispute in the higher court. Procedural technicalities should not be applied in a manner that fetters the exercise of courts discretion. **Rule 73** of the **Probate and Administration Rules** states that-

“ Nothing in this Rule shall limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process.”

The underlying principle is to ensure that justice is done. In this case, I find that the applicants have explained the reason for the delay. They ought not to suffer for the mistake of their former advocate.

The respondents do not stand to suffer any prejudice. The intended appeal is not vexatious or frivolous.

For these reasons, I find the application has merits. I order as follows:-

1. The application is allowed.
2. Time to file the appeal is extended.
3. The appeal be filed within 30 days from today.
4. There be stay of implementation of the certificate of confirmed grant issued on 15th January 2020 and any further proceedings in **Chuka Chief Magistrate's Court Succession Cause No.168/2017** pending the hearing and determination of the appeal.
5. Since the dispute involves members of the same family, I will not order security for costs.
6. Costs be in the cause.

Dated, signed and delivered at Chuka this 11th day of November, 2020.

L.W. GITARI

JUDGE

11/11/2020

The ruling has been read out in open court.

LW. GITARI

JUDGE