



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 1044 OF 2010

IN THE MATTER OF THE ESTATE OF NJAU

KANYORA alias NJAU S/O KANYORA (DECEASED)

PAUL GITHUMBI NJAU.....APPLICANT

VERSUS

SAMUEL KANYORA NJAU.....RESPONDENT

RULING

What was coming for hearing on the 9th March 2018 was the summons for rectification of grant dated 7th February 2017.

Mr. Warutere for the applicant told the court that he had just been served with an affidavit in response to the summons dated 29th March 2018. He sought leave to file and serve a further affidavit to deal with the issues so raised.

There was no objection by counsel for the respondents. I granted leave with a rider that the affidavit be filed and served within 14 days. The application was fixed for hearing on 30th April 2018.

On the 30th April 2018 when the matter came for hearing, Mr. Muchiri wa Gathoni, appearing for the respondents raised objection to Mr. Warutere's further affidavit, indicating that the same had been filed out of time, without leave and ought to be expunged from the record.

Mr. Warutere's response was that the delay was not inordinate and in any event was curable under Article 159 of the Constitution. That the objective of the court is to do justice for the parties. That the days counted without counting weekends brought them within time.

In his rejoinder Mr. wa Gathoni pointed out that the time for filing the affidavit ended on 23rd of April 2018. That the delay was inordinate in the sense that the other party was not given sufficient time to prepare to respond to whatever issues that were raised by the delayed affidavit.

That the affidavit continued annexures that he required him to seek instructions from his client yet due to the same being filed out of time he could not do that. That the only reason the applicant was doing all this was to cause further delay in the matter.

I have carefully considered all the submissions by counsel. Should this affidavit be expunged from the record? Is the delay inordinate?

It is now trite that courts must engage themselves with the delivery of substantive justice.

I have also considered the period of delay.

The affidavit ought to have been filed on or before 24th April 2018, counting 14 days from 9th April 2018. The delay is for two days. It is obviously out of time and it would only have been courteous for Mr. Warutere to point out, even before the objections by Mr. Wa Gathoni, that he had filed his affidavit out of the time allocated by court. Further, that he had just served the respondent. It would have saved this court time.

I do agree with Mr. wa Gathoni that the affidavit was filed out of time, and as a result the respondent was not given sufficient time to prepare for the hearing especially taking into consideration the kind of documents annexed to the affidavit.

I however do not think it would serve the interests of justice to expunge the affidavit from the record. Rule 73 of the P&A rules, saves this court's inherent jurisdiction to do justice.

Mr. Warutere urged the court to uphold the principles enshrined in Article 159 of the Constitution. Those principles are a double edged sword. While upholding the principle of substantive justice, by decrying the application of technicalities, it prohibits the delay of justice. Hence, a party seeking to have substantive justice done to them, must also know and keep in mind the principle of equality of all parties before the law: almost a case of 'do not do to others what you would not want done to yourself'. It is a delicate balance that must depend on the circumstances of the case.

In the circumstances of this case, the balance tilts in favour of the applicant. The objection is overruled. The affidavit stays.

Nevertheless, as pointed out herein above, had the applicant acted diligently, we would not be here. The applicant will pay costs for the day to the respondent, plus court adjournment fees.

Dated delivered and signed this 4th Day of May 2018 at Nyeri

Mumbua T. Matheka

Judge

In the presence of:

Court Assistant: Mr. Atelu

Mr. Gaceru: I am holding brief for the Mr. Warutere for the applicant. There is N/ A for Muchiri wa Gathoni for Respondent but Mr. Muchiri wa Gathoni's clerk is here.

Also present:

Paulo Githumbi Njau

Beatrice Waruguru

Joseph Maina

Simon Njau

Mr. Gaceru: The respondent can have leave to file any further affidavits or documents within a timeline.

Court: The Respondent has leave to respond to the affidavit filed on 26th of April within 21 days hereof.

Hearing on the 2nd October 2018.

Mumbua T. Matheka

Judge