



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 204 OF 2008

**IN THE MATTER OF THE ESTATE OF THE LATE NDUATI KIAMA alias NDUATI S/O
KIAMA-DECEASED**

**JOSEPH PAUL NDERITU.....PETITIONER/
RESPONDENT**

VERSUS

**GABRIEL GIKANDI KIAMA ALIAS NDUATI
KIAMA.....PROTESTOR/APPLICANT**

RULING

By way of a summons general dated 14th October 2015 expressed under the provisions of Rules 49 and 73 of the Probate and Administration Rules, the protestor (hereinafter referred to as the applicant) seeks orders *inter alia* that:-

- a. ***That*** for the purposes of execution of the relevant documents in this matter, the signature of **Joseph Paul Nderitu** dispensed with and in his place the Deputy Registrar be granted the mandate to sign.
- b. ***That*** the production of the original title for purposes of registration of **RL7** and **RL 19** forms in respect of Land Parcel Number **Kirimukuyu/Kiria/360** be dispensed with.
- c. ***That*** the petitioner herein be directed to remove the restriction on the suit property failure to which the Land Registrar be at liberty to remove the same.
- d. ***That*** the District Land Surveyor be provided with security from Karatina Police Station to enable him/her partition **Kirimukuyu/Kiria/360**.
- e. ***That*** if need be a temporary boundary be erected to put the applicant in actual possession of his portion.
- f. *Costs of this application.*

The grounds in support of the application are that the grant herein was confirmed on 16th March 2012 and the respondent filed a notice of appeal on 26th March 2012 but has never filed the appeal, that the Respondent herein has refused to sign the relevant forms to facilitative sub-division and transmission of the estate to the beneficiaries, that the Respondent lodged a restriction on the suit land and has refused to remove it, that the respondent has custody of the original title and further the respondent.

In his replying affidavit the Respondent states that filed a notice of appeal on 26th March 2012 and that he has been waiting for the proceedings to file the appeal.

Clearly there has been inordinate delay. The ruling in question was delivered on 16th March 2012. It is typed and all the proceedings are typed and are in the court file. There is a letter showing that the proceedings were applied for on 27th March 2012, just a day after the ruling in question. There is nothing to show what prevented the Respondent from collecting the proceedings from the court. For the Respondent to allege that he has been waiting for the proceedings, this to me is incredible. There has been either failure by the applicant to act or a deliberate effort to frustrate implementation of the court orders.

A distinction must be made between delay and inordinate delay for want of *bona fides*. Inaction or negligence or deliberate failure to act so as to frustrate court orders would deprive a party of the protection of the court. Sufficient cause is a condition precedent for exercise of discretion by the Court for condoning the delay. No sufficient cause has been demonstrated in this case.

When mandatory provisions of the law such as period prescribed for filing an appeal is not complied with and that delay is not properly, satisfactorily and convincingly explained, the court cannot condone the delay no matter how sympathetic it may be.

The legal principles governing undue delay were established in the Supreme Court decision in *Primor plc v Stokes Kennedy Crowley*.^[1] The Primor principles to guide the court are:-

- (a) *Was the delay inordinate?*
- (b) *If the delay was inordinate, was it excusable?*
- (c) *Even if the delay was inordinate and inexcusable, where does the balance of justice lie?*

In my view, considering the facts of this case and material presented before me, the delay in filing the appeal is "*quite plainly by any standards both inordinate and inexcusable*". The situation is characterised by inactivity and an unaccountable failure to file the appeal. This delay, in my view, is "*grievous*" and "*intolerable*." As to the balance of justice, "*without hesitation*" I come to the conclusion that the balance of justice requires that the orders of this court made on 16th March 2012 be implemented.

In addition to the above principles,^[2] the court handling an application such as the one before me needs to consider the following:-

- a. *the length of the delay and whether it was inordinate;*
- b. *any reasons for the delay either offered in evidence or inferred from the evidence, including whether the delay was intentional and tactical or whether it was the product of dilatoriness, negligence, impecuniosities, illness or some other relevant cause, the ultimate consideration being whether the delay is excusable in the circumstances;*
- c. *whether the delay has caused serious prejudice to the innocent party;*
- d. *whether, on balance, justice requires dismissal/allowing the application.*

I consider the fourth question to encompass the other three and to be the most important and decisive question because at the end of the day, the primary consideration of a court is to do real and substantial justice this being the main reason why courts exist.

In *Lindholm v. Pollen*,^[3] Justice Gow wrote these words of wisdom:-

"The animating principle lying back of any system of administration of justice is that litigation be proceeded with diligence and expedition. This principle is expressed in (the rules of court) that the object of the Rules ... is to secure the just, speedy and inexpensive determination of every proceeding.... "A just determination can only be attained if an action is tried while the facts are

still within the recollection of the witnesses."

In *Royal Bank of Canada v Jones*^[4] it was held that "The burden of proof with respect to serious prejudice ... simply put (is that) once the applicant has established that the delay complained of has been inordinate and is inexcusable, a rebuttable presumption of prejudice arises."

The leading case for delays of this nature is a British decision of 1969, *Allen v. Sir Alfred McAlpine & Sons*,^[5] which sets out a three part test:-

- a. *Inordinate delay,*
- b. *That this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable; and*
- c. *Applicants are likely to be seriously prejudiced by the delay.*

Applying the principles enumerated above, I find that the Respondents delay in filing their intended appeal is inordinate, inexcusable and prejudicial to the applicant. I hereby allow the application dated 14th October 2015 and order as follows:-

- a. ***That*** the Land Registrar, Nyeri County be and is hereby ordered to immediately remove the restriction, inhibition or caution registered on 21st April 2008 against title number ***Kirimukuyu/Kiria/360***.
- b. ***That Joseph Paul Nderitu*** be and is hereby ordered to within **14 days** from the date of this order, execute all the requisite documents including forms **RL 7** and **RL 19** and mutation forms or such documents as may be necessary to facilitate the sub-division of ***Kirimukuyu/Kiria/360*** into **two equal portions** and transfer of the said portions to the beneficiaries in conformity with the grant of letters of administration issued in this cause dated 16th March 2012 and the Ruling of this court delivered on 16th March 2012.

AND further to avail the original title for ***Kirimukuyu/Kiria/360***, certified copies of his national Identity card and income tax pin and pass port size photos or such documents as may be necessary to facilitate the aforesaid process.

- c. ***That*** in default of executing the requisite documents as herein above ordered, the Deputy Registrar of this Honourable court be and is hereby authorized to execute the said documents to facilitate the implementation of the grant of letters of administration issued in this cause dated 16th March 2012 and the Ruling of this court delivered on 16th March 2012.
- d. ***That*** in the event of the said ***Joseph Paul Nderitu*** failing to produce the original title as herein above ordered, the Land Registrar Nyeri County is hereby directed to dispense with the said original for purposes of effecting the aforesaid sub-division and registration/transfer as herein above ordered.
- e. ***That*** O.C.S Karatina Police Station be and is hereby directed to provide security to the District Surveyor, Nyeri County or such officers from the Lands office Nyeri when and if required to visit the title number ***Kirimukuyu/Kiria/360*** for purposes of sub-division and or establishing and or creating a common boundary between the two portions to be created pursuant to the implementation of the above court orders.
- f. ***That*** the said ***Joseph Paul Nderitu*** be and is hereby ordered to pay the costs of this application.

Right of appeal **30** days

John M. Mativo

Judge

^[1] {1996} 2 IR 459

[2] The relevant principles were summarized and restated in [0690860 Manitoba Ltd. v. Country West Construction Ltd.](#), 2009 BCCA 535 at paras. 27 – 29,

[3] [1986] 3 [BCLR 2d](#) 23 ([BCSC](#))

[4] 2000 [BCSC](#) 520

[5] [1969] 1 [All ER](#) 543