



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT CHUKA**  
**SUCCESSION CAUSE NO.719 OF 2015**  
**(FORMERLY EMBU SUCCESSION CAUSE NO. 173 OF 2002)**  
**IN THE MATTER OF THE ESTATE OF MIERI GICHUNGE (DECEASED)**

**AND**

**JACK GITAARI MIERI.....PETITIONER**

**VERSUS**

**BONFACE RUGENDO.....1<sup>ST</sup> OBJECTOR**

**AND**

**JULIET CIAMWARI.....APPLICANT**

**R U L I N G**

1. Before this court is an application through Notice of Motion dated 12<sup>th</sup> June 2018 praying for the following orders namely:-

- (i) That this honourable court be pleased to grant the applicant leave to file and serve Notice of Appeal out of time in respect to the ruling delivered in this matter on 28<sup>th</sup> May 2018.
- (ii) That the Notice of Appeal herewith attached be deemed as properly filed.

2. The applicant, Juliet Ciamwari has listed the following grounds to support her application.

- a) *That this honourable court delivered a Ruling regarding Summons for Revocation of Grant on 28<sup>th</sup> May 2018.*
- b) *That the applicant was aggrieved by the ruling and prepared a Notice of appeal dated 11<sup>th</sup> June, 2018 and intended to file it on the same day as 14 days period was lapsing that same day.*
- c) *That the applicant is apprehensive that her Notice of Appeal will be struck out or rejected for not conforming with the court procedures.*
- d) *That it is in the interest of justice that the applicant be allowed to appeal the Ruling.*
- e) *That the respondents will not suffer any prejudice if the said leave is granted.*
- f) *That there has been no inordinate delay in bringing this application.*
- g) *That the intended appeal has overwhelming chances of success as it is based on mandatory application of Section 40 of Law of Succession Act.*
- h) *That it is just and expedient that leave be granted in order that issues raised in the intended appeal are determined substantively.*

3. The applicant has supported the above grounds with a Supporting Affidavit sworn on 12<sup>th</sup> June 2018 where she has majorly stated the reasons why she was unable to file her Notice of Appeal on time and the main reason being that the court file was court's chambers as it was pending for another ruling scheduled for 18<sup>th</sup> July, 2018.

4. The Respondent, Jack Gitaari Mieri, has opposed this application through his Replying Affidavit sworn on 15<sup>th</sup> October, 2018. The Respondent contends that there has been inordinate delay on the part of the applicant because the ruling scheduled for delivery on 28<sup>th</sup> May, 2018 was delivered on the scheduled date but this application was filed on 30<sup>th</sup> July, 2018.

5. The Respondent has further faulted the applicant for not applying for leave to appeal. He further contends that the interest of justice is a double edged sword and that justice does not just become justice if it favours one side.

6. The Respondent further contends that the prayers sought would prejudice him as he spent time and money in court defending various actions against the estate.

7. The Respondents contends that the chances of success of the intended appeal are minimal in his view considering that the estate was properly distributed.

8. The Respondent further contends that this application is frivolous and vexatious because as the applicant has not annexed a copy of draft of Memorandum of Appeal to enable this court gauge the weight of the same.

9. It is the Respondent's case that substantive justice would be served if litigation in this cause is laid to rest.

10. The power to extend time for any litigant to file appeal out of time is donated by **Section 7** of the **Appellate Jurisdiction Act** which states:

***"The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired....."***

The provisions of **Rule 67** of Probate and Administration Rules also gives discretion to this court to enlarge time. It states;

***"Where any period is fixed or granted by these Rules or by an order of the court for doing of any act or thing, the court may 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."***

This court has power to extend time but the power to extend time is a discretionary, matter for this court and being discretionary latitude is granted to a court of law to exercise the discretion judiciously to meet the ends of justice. In the case of ***Mwangi- vs- Kenya Airways Ltd [2003] KLR***, the Court of Appeal set down the following guiding principles in the exercise of such discretion and they are as follows:-

- a) The period of delay
- b) The reason for the delay
- c) The arguability of the appeal
- d) the degree of prejudice the respondents would suffer if extension is granted.
- e) The importance of compliance with time limits to the particular litigation or issue.
- f) The effect, if any, on the administration of justice or public interest involved.

11. This court has considered the reasons given for the delay in filing the Notice of Appeal. There is a letter dated 11<sup>th</sup> June, 2018 on record from the Applicant addressed to the Executive Officer received by the Registry on 12<sup>th</sup> June, 2018.

The applicant in that letter states that she had been trying to obtain proceedings and ruling delivered on 28<sup>th</sup> May 2018 for purposes of appeal without success. Of course, the applicant knew that the matter was pending for a ruling scheduled. Having said that, this court finds that the application was filed not too long after the delivery of the scheduled ruling on 18<sup>th</sup> July, 2018. The delay is about two months but given the circumstances I do not find that there was inordinate delay on the part of the applicants. The reason for delay and length would have been excusable in the circumstances. However the reasons for delay and length of delay are not the only consideration in the exercise of a court's discretion to enlarge time for appeal. The critical issue in the exercise of discretion is the basis for appeal itself. A party invoking court's discretion to enlarge time to appeal in my view must demonstrate that he/she has an arguable appeal or at least show that there is something weighty or significant to be referred to the Court of Appeal.

12. In this application, the applicant's main grievance certainly was the subject of the ruling of this court dated 28<sup>th</sup> May 2018 which was desire to claim a share "***belonging to her deceased mother***" named **JESCA NKUI** (deceased) because according to her, her late father was married to two wives namely; **JESCA NKUI** (deceased) and **GLADYS CIAMATUMU** (deceased). At the trial it transpired Jesca Nkui

infact predeceased the deceased. This court found that because at the time of distribution the only surviving dependants were children of the deceased distribution of the estate had to be done equally among the children in accordance with **Section 38 of Law of Succession Act**. This court found no merit in the applicant's contention that the grant should be revoked because the estate was not distributed according to the number of houses. It was further this court's finding that the dead had no right over estate of another dead person and so the applicant's contention really was unsustainable in law.

13. The applicant has not attached to this application a draft of her intended Memorandum of Appeal to demonstrate whether she has other grounds other than the presumption I have raised above. This omission in my view is fatal to this application because this court is expected to exercise its discretion only after satisfied that the applicant has something tangible to pursue in the Court of Appeal. In the absence of a draft Memorandum of intended Appeal I am unable to find whether the applicant has an arguable appeal particularly given the Respondent's assertion that this application is vexatious and frivolous. The question posed is what does the applicant want the Court of Appeal to determine? This court is unable to answer that question affirmatively in favour of the applicant because nothing has been laid before me to do so.

14. The other important points raised by the Respondent is the fact that the applicant has no leave of this court pursuant to the provisions of **Section 50(2) of the Law of Succession Act** to appeal against the decision of this court. This is because in probate matters, appeal from the subordinate court to this court lie as a matter of right while appeal from this court to the Court of Appeal is done with leave of this court. The reason why that legal requirement is placed by Statue is to try and bring litigation to an end. That however does not mean that a party is prevented from appealing. He has every right to pursue the appeal but can only do so with leave. Where leave for some reason is denied, her aggrieved party can seek the same leave from the Appellate Court.

15. In this matter, the applicant never sought leave to appeal when the ruling was delivered on 28<sup>th</sup> May, 2018. She did not subsequently seek for such leave and brought this application for enlargement of time to appeal without seeking leave first. She has in effect put the cart before the horse and to that extent, this application is incompetent and unsustainable.

In the premises, this court finds no merit in this application for the aforesaid reasons. I also find the application incompetent and liable to be struck out with costs but because it can as it should suffer one fate, the Notice of Motion dated 12<sup>th</sup> June, 2018 is dismissed with costs to the Petitioner/Respondent.

**Dated, signed and delivered at Chuka this 13<sup>th</sup> December, 2018.**

**R.K. LIMO**

**JUDGE**

Ruling dated, signed and delivered in open court in the presence of Juliet Ciamwari (Applicant and Jack Gitaari (Respondent).

**R.K. LIMO**

**JUDGE**

**13/12/2018**