



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE 12 OF 1991**

**In the estate of Ndagacha Nkutha (alias Ndagacha Ikutha (Deceased))**

**M'MUGAMBI NDAGACHA.....PETITIONER**

**VERSUS**

**KARUKA NDAGACHA**

**NKUENE NDAGACHA.....OBJECTORS**

**SUCCESSION**

**: Law of Succession – Extension of time to appeal – no provision for**

**:Appellate Jurisdiction Act (Cap 9 Laws of Kenya)**

**S. 7 – Extension of time to appeal – Court's discretion**

**: Principles for exercise of such discretion\_**

**RULING**

By an Application brought by way of a Notice of Motion dated 12<sup>th</sup> May 2008, the Applicant M. Mugambi Ndagacha, sought leave of court to appeal out of time, and also an extension of time to file a Notice of Appeal and Record of Appeal in respect of the intended appeal, and that costs in the application be in the course of the appeal.

The grounds for the application appear on the face of the record and the Supporting Affidavit of the Applicant sworn on 12<sup>th</sup> May 2008. The principal ground for seeking an extension of time to file the Notice and Record of Appeal out of time is not that there was anything untoward in the Ruling of the

Court to be appealed against but rather that the judgment was read without notice to the parties and the applicant does not know when the judgment was read. The applicant blames it all on the Advocates then acting for him.

To the application was filed a 23 paragraph Replying Affidavit by the Objector and Administratrix of the estate of the late Ndagacha Ikutha alias Ndagacha Ikutha (deceased). I will refer to the relevant contents of the Replying Affidavit in the course of this Ruling.

The Motion was passionately urged before me by Mr. Lompo learned Counsel, holding brief for Mr. Mburungu M. Kioga, who filed the subject Notice of Motion. I have considered the arguments which are all on record. The issue is whether or not the court should grant the orders sought i.e allow the appellant to file a Notice of Appeal outside time, and thereafter file a Record of Appeal. Before deciding the issue it is necessary to lay out some background to the Motion.

### **The ruling of 28.01.2008**

The origin of the Motion the subject of this Ruling is the Ruling by my brother Hon. Mr. Justice Lenaola delivered on 28.01.2008. The issue in that Ruling was who was the rightful person under Section 66 of the Law of Succession Act (Cap 160, Laws of Kenya), to be appointed administrator or administratrix of the estate of the late Ndagacha Nkutha alias Ndagacha Ikutha. After hearing evidence both from the Applicant (then the Petitioner), and the Objector (Karuki Ndagacha) (as her co-objector, her sister, Nkuene Ndagacha had died) leaving her sole survivor of her father's estate, the Court found on the evidence before it that the respondent was the proper heir to the said deceased's estate and appointed her sole administratrix.

It is that Ruling and finding, and appointment of the Respondent as sole administratrix that the Applicant wants to challenge by way of an appeal out of time. The Motion is solely based upon the provisions of Section 7 of the Appellate Jurisdiction Act (Cap 9, Laws of Kenya) which donates to this Court the discretion to extend time of appeal in these terms—

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

**Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.**

The Ruling herein to be appealed against was delivered on 28.01.2008. The application to give a Notice of Appeal, and subsequently file a Record of Appeal out of time was filed on 12<sup>th</sup> May 2008 over 90 days after the Ruling. The excuse given by the Applicant in the grounds is that the Notice of the date of the Ruling was not given to the parties, and that the Applicant did not come to know the date of the Ruling until the 16<sup>th</sup> March 2008 when his former Advocate declined to prefer any appeal and advised him to look for another Advocate. And even then, the Motion for extension of time was not filed until 12.05.2008, some fifty five (55) days later. Mr. Carlpeters Mbaabu, learned Counsel for the Respondent, submitted that the delay was inordinate, and there is no explanation for it.

I agree with learned Counsel for the Respondent. The subject Ruling was originally scheduled for 20.11.2007. It was not delivered until 28.01.2008. The learned judge apologised to the parties Advocates for the delay in delivering the Ruling. Present at the Ruling were Mr. Kariuki for the Objector (now Respondents), and Mr. Lompo who was holding brief for the D. J. Mbaya Advocates for the Applicant. When the Applicant says in his grounds and Affidavit in Support of the Motion that he was unaware of the date of the Ruling he is being either ignorant of the facts or is being uneconomical with the truth. Either way, the Applicant was represented by Counsel, who were present at the time of the Ruling. The Advocates were the Applicant's lawful agents. There was no application for an appeal after the delivery of the Ruling.

Section 7 of the Appellate Jurisdiction Act is not unlike Section 68 of the Law of Succession Act, or Rule 17(1) of the Probate and Administration Rules. Both donate to the Court unfettered discretion to extend time to bring an application or to be granted some order or privilege out of the prescribed period. There is unfortunately no prescribed time to bring an appeal under the Law of Succession Act. The time prescribed to bring an application out of time under rule 17 (1) aforesaid is thirty (30) days. By analogy an appeal should be brought within thirty (30) days, and a Notice of Appeal filed within 14 days.

In this case as noted above, the Motion for extension of time to file a Notice of Appeal was brought after 58 days, - of the alleged knowing of the Ruling to be appealed against, and over 90 days since the said Ruling. The application for extension of time to file the Notice of appeal sounds more like an after thought.

However Section 7 of the Appellate Jurisdiction Act like the said Section 68 of the Law of Succession Act and Rule 17 (1) of the Probate and Administration Rules donate to the Court unfettered discretion to grant extension of time. Such discretion, like all discretion must be exercised judicially, and not arbitrarily or capriciously, and nor should it be exercised on the basis of sentiment or sympathy; So the Court held in the case of **SHAH MBOGO & ANOTHER [1967] E.A.116.**

In the application for extension of time, the Court is being asked to exercise its unfettered discretion so as to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct the course of justice.

In **FIRST AMERICA BANK OF KENYA LIMITED VS GRANDWAYS VENTURE LIMITED** (Civil Appeal No. 173 of 199 – at Nairobi) the Court of Appeal referred to the House of Lord's decision **IN SAVIL VS SOUTHEND HEALTH AUTHORITY - [1995] I.W.L. R. 1254** where Balcombe L. J. said at p.1259 –

“I have to say that the authorities are not all entirely easy to reconcile. I prefer to go back to the first principle and to the statement made by Lord Guest in the Ratram – case..that in order to justify in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise a party in breach would have an unqualified right to an extension of the time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation. There must be some material on which the court can exercise its discretion. There was no such material before the judge.”

Mann L. J. said at p. 1259. .... “I agree. The Rules of the Supreme Court are the rules for the conduct of litigation. They are for the benefit of the Plaintiffs and the protection of the defendants. Here, the rule was not complied with. We are asked to exercise our discretion to waive the application of the rule. There is no material before us on which we should grant a waiver. I do not see how one can exercise a discretion without material upon which to consider it. If I went beyond that point, I would regard the way in which the litigation has been conducted as entirely antipathetic to the exercise of discretion.....”

Indeed in the application at hand, I would say, there is no material upon which the Court can exercise its discretion. It certainly cannot be on the basis of sympathy because the Applicant is an old man of 80 years. The old man of that age would have been respectable enough (even if he was not yet 80 years) not to have done what he did – changed his name to lay a false claim to the Respondent's inheritance. An appeal on whatever the grounds, would most likely fail on that ground alone as a response.

Considering the evidence dealt with at length in the learned judge's Ruling delivered in the presence of Counsel for the parties on 28<sup>th</sup> January 2008, and further considering the authorities cited above, and the entirely inordinate and inexcusable delay in bringing the application, and the authorities, and my views on the limited chances of success of any appeal herein, I would dismiss the application's Notice of Motion dated 12<sup>th</sup> May 2008 with costs to the respondent.

There shall be orders accordingly.

Dated, delivered and signed at Meru this 3<sup>rd</sup> day of July 2009.

**M. J. ANYARA EMUKULE**

**(JUDGE)**