



REPUBLIC OF KENYA



**In re Estate of Esther Wanjiru Ng'ang'a (Deceased) (Succession Appeal
23 of 2023) [2024] KEHC 9197 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9197 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
SUCCESSION APPEAL 23 OF 2023**

AC BETT, J

JULY 26, 2024

IN THE MATTER OF THE ESTATE OF ESTHER WANJIRU NG'ANG'A (DECEASED)

BETWEEN

OWEN NG'ANG'A MUNGAI APPELLANT

AND

JANE NJERI KINYANJUI 1ST RESPONDENT

JANE WANJIKU EZEKIEL 2ND RESPONDENT

RULING

1. Before this court is the appellants' application dated 6th March 2024 brought pursuant to the provisions of sections 1A, 1B and 63 (c) & (e) of the *Civil Procedure Act*, section 7 of the Appellate Court Rules, section 47 of the *Law of Succession Act*, Rule 73 of the *Probate & Administration Rules* and Articles 48 and 164 of the *Constitution* of Kenya, 2010 seeking the following orders: -
 - a. Spent
 - b. Spent
 - c. That the Honourable Court be pleased to issue an order of stay of execution and/or implementation of the judgment/decree dated 15th February 2024 pending the hearing and determination of the intended appeal.
 - d. That leave be granted to the appellant to file an appeal to the Court of Appeal of Kenya against the judgment/decree of this court dated 15th February 2024.
 - e. Costs of this application do abide by the appeal.
2. The application is supported by the affidavit of Owen Ng'ang'a Mungai sworn on 4th March, 2024 and which is premised the ground ,inter alia ,that there is no automatic right of appeal from the High Court



to the Court of Appeal on probate matters, that the 2nd respondent has initiated succession proceedings for the estate of her late husband by the name of George Kinyanjui Ng'ang'a and that she has listed the suit property as part of the deceased's estate which she is likely to deal with to the detriment of the appellant and that, the applicant has filed a notice of appeal and unless stay of execution is granted, the substratum of the intended appeal shall be rendered nugatory.

3. The application is opposed by Jane Njeri Kinyanjui through an affidavit sworn on 20th April 2024 in which she contends that there is no automatic right of appeal from the High Court to the Court of Appeal on succession matters. She states that the decision of the High Court is final. She avers that the applicant has not demonstrated sufficient grounds to warrant judicial consideration whether by the High Court or the Court of Appeal and that the draft memorandum of appeal is a replica of the memorandum of appeal that was determined by this court. She avers that this cause has been pending in court since the year 1998 and that the applicant who is a step grandchild to the deceased has the sole intention to delay the matter further. She claims that Miscellaneous Application No. E016 of 2021; Jane Njeri Kinyanjui v Owen Ng'ang'a Mungai at the High Court of Kenya at Meru addresses the same issues addressed by this court and which issues the appellant wants addressed by the Court of Appeal. She further asserts that if leave is granted, Rule 5(2)(B) of the *Court of Appeal Rules* automatically protects an appellant against any execution appealed from.
4. The submissions narrow down the issues for determination to two namely, whether leave to appeal is necessary and/or merited and whether execution of the judgment herein should be stayed pending appeal.
5. On whether leave to appeal is necessary and/or merited, the appellant submits that there is no automatic right of appeal to the Court of Appeal from the decision of the High Court exercising original jurisdiction without leave of the High Court or where the application for leave is refused without leave of the Court of Appeal in which regard he cites the Court of Appeal decision in *Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another* (2014) eKLR.
6. On whether execution of the judgment herein should be stayed pending appeal, the appellant submits that he has filed a memorandum of appeal, and he is therefore clothed with the locus standi to apply for stay pending appeal. He claims that the intended appeal arises from this court's decision on the mode of distribution of the deceased's estate and that the 2nd respondent has initiated succession proceedings for the estate of her late husband, George Kinyanjui Ng'ang'a and she has listed the suit property as part of the deceased's estate and if stay of execution is not granted, the said property will be dealt with to the detriment of the appellant. He further submits that he has been in occupation of the property comprised in LOC/16/MWAGU/724.
7. The genesis of the subject appeal is the dismissal of the appellant's amended summons for revocation of a grant dated 17th August 2021 by a ruling delivered on 15th November 2022 in Thika SRM CM Succession Cause No. 155 of 1998. The appellant's case was that the grant issued to George Kinyanjui Ng'ang'a on 1st September 2000 had been obtained fraudulently. The court found that the appellant had failed to establish the grounds set out in the application to warrant revocation of the grant.
8. Aggrieved by the finding of the court, the appellant through an undated memorandum of appeal filed on 3rd April 2023 sought to have the ruling and decree set aside. In a judgement dated 15th February 2024 this court affirmed the ruling of the trial court and dismissed the appeal. The appellant now seeks to appeal against this court's decision.



9. Section 50 of the *Law of Succession Act* Cap 160 Laws of Kenya provides for the finality of proceedings in succession matters from the magistrate’s court to the High Court on appeal. It states as follows:-
- “(1) An appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court shall be final.
- (2) An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi’s court in respect of the estate of a deceased Muslim and with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.”
10. The *Law of Succession Act* is regarded as a special Act of Parliament and its provisions ought to be strictly construed and applied as was determined by the Court of Appeal in *Julius Kamau Kithaka v Waruguru Kithaka Nyaga & 2 Others* [2013]eKLR where it was held as follows;
- “It is trite law that where any proceedings are governed by a Special Act of Parliament, like in this case, the *Law of Succession Act* must be strictly construed and applied. Therefore, what is in the *Law of Succession Act* is what was intended to be therein in the manner and extend it is there. What is not therein expressly is what was intended not to be there by the Legislature. I find that the applicant in this case was not required to seek leave to appeal from the High Court.”
11. The provisions of Section 50 (1) of the *Law of Succession Act* was further elucidated by the Court of Appeal in the case of *Hafswa Omar Abdalla Taib & 2 Others v Swaleh Abdalla Taib* [2015]eKLR, where it was held as follows:
- “In this case, the appellate jurisdiction in respect of succession causes has been donated by Section 50 (1) of the *Laws of Succession Act*. From this provision, it is clear that decisions from the magistrate’s courts in succession causes are appellable to the High Court; whose decision on such an appeal is final. However, the decision of the Kadhi’s court are appellable to the High Court; and a party dissatisfied with the decision of the High Court on appeal can appeal further to this court (Court of Appeal) but only with leave of the High Court and in respect only on points of Muslim Law. However, there is no mention of an appeal to this court from the decision of the High Court made in exercise of its original jurisdiction. Indeed, even Section 47 of the same *Act* makes no mention of an appeal to the Court of Appeal from the decision of the High Court made in the exercise of its original jurisdiction.”
12. I need not say more on the finality of the proceedings in succession matters from the magistrate’s court to the High Court on appeal.
13. The appellant has severally cited the decision of the court of appeal in the case of *Rhoda Wairimu Karanja & Another - v- Mary Wangui Karanja & Another* [2014 eKLR to support his application. It is worth noting that in the said case the court emphasized that an appeal would lie to the Court of Appeal from the decision of the High Court exercising original jurisdiction.
14. The appellant further invoked the provisions of article 164 of the *Constitution* of Kenya, 2010 to the effect that the Court of Appeal is conferred with jurisdiction to hear appeals from the High Court. The



application of this provision in succession matters was explained by the Court of Appeal in *Hafswa Omar Abdalla Taib & 2 Others v Swaleb Abdalla Taib* [2015]eKLR where it was observed as follows;

“We are not however oblivious to the fact that currently, Article 164(3) of the *Constitution* of Kenya confers directly jurisdiction in the Court of Appeal to hear appeals from the High Court and from any court or tribunal if such an appeal is prescribed by an Act of Parliament. This court in the case of *Equity Bank Ltd v West Link MBO Ltd*, (App No 78/2011 considered the purport of the said Article and concluded and rightly so in our view that it did not confer unlimited right of appeal to this court which could not be restricted by statute. To hold otherwise could certainly have far reaching consequences that may affect the administration of justice generally and the functions of this court.”

15. Having found that the prayer for leave to file an appeal at the Court of Appeal is unmerited, I will not delve into the issue of stay of execution as it will be an exercise in futility.
16. Accordingly, for the reasons set out above, this court finds the appellant’s application dated 6th March 2024 to be devoid of merit and the same is thus dismissed with no order as to costs since it is a family dispute.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 26TH DAY OF JULY, 2024.

A. C. BETT

JUDGE

In the presence of:

..... for the appellant

..... for the respondents

Court Assistant: Polycap Mukabwa

