



In re Estate of George Owalla (Deceased) (Succession Cause 405 of 2014) [2024] KEHC 14900 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEHC 14900 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
SUCCESSION CAUSE 405 OF 2014**

A. ONG'INJO, J

OCTOBER 31, 2024

IN THE MATTER OF THE ESTATE OF: GEORGE OWALLO

.....DECEASED

BETWEEN

LUCY WANBUI ABOGE APPLICANT

AND

ORPHA ADONGO ABOGE 1ST RESPONDENT

BEATRICE WAMUYU ABOGE 2ND RESPONDENT

AND

BEATRICE ABICH OWALO INTERESTED PARTY

RULING

1. The Applicant Lucy Wambui Aboge filed application dated 17th November, 2023 seeking leave to file appeal against the Judgment dated 20th October 2023 and also orders staying the said judgment.
2. The Application is premised on the grounds on the face of the application and supporting affidavit of the applicant sworn on 7th November, 2023.
3. The application was opposed by the Replying Affidavit of Beatrice Wamuyu Aboge sworn on 16th November, 2023.
4. The 2nd Respondent averred that the estate of their late husband was distributed proportionally and she had no problem with the judgment dated 7th October 2023.
5. She said the Applicant had been collecting rent for 28 rooms in LR No. Aguthi/Gatitu/1744 since their husband died and had refused to allow them access the said plot to collect rent as per the order of



the court. She said the Applicant had demolished rooms made of timber and left those made of stones and had also constructed a permanent house on the same plot thus denying her and the 1st Respondent access to the same.

6. The 2nd Respondent averred that if stay is granted her and 1st Respondent will continue to suffer financially. She said the intended appeal is meant to deny her and her co-wife the outcome of the matter and gave way of continuing to collect rent on the remaining 14 rooms.
7. The 2nd Respondent urged that the Applicant should be compelled to give her access to the 9 rooms that the court awarded her. The 2nd Respondent said that it had not been shown that the intended appeal would be rendered nugatory if stay is not granted. That the Applicant did not prove that the intended appeal would be successful. The 2nd Respondent said the application is malicious, frivolous and vexatious and is meant to delay the Respondents the fruits of judgment and should be struck off with costs.
8. Directions were taken that application be heard by way of written submissions.
9. The Applicants submission are dated 19th March, 2024 and were filed on the same date.
10. This court has not seen submissions filed by the 2nd Respondent who opposed the application.
11. Having considered the application and the supporting affidavit the Replying Affidavit and the Applicants submission, the issues for determinations are:-
 - i) Whether the Applicant has satisfied conditions for grant of leave to appeal to the Court of Appeal under the *Law of Succession Act*
 - ii) Whether the Appellant has established sufficient grounds why stay of the judgment of this court should be granted
12. Section 50 (1) and (2) of the *Law of Succession Act* provides that an appeal to the High Court from the Magistrates court is final

“Section 50 (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 thereon shall be final.

Section 50 (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 the deceased Muslim and with prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.”
13. Section 50(1) of the Law of Succession speaks to the finality of proceedings in succession causes from the magistrate’s courts to the High Court on Appeal. However, appeal lies to the Court of Appeal from the decision of the High Court hence it is excusing appellate jurisdiction in an appeal from the Kadhi’s Court in respect of the estate of a deceased Muslim and with prior leave thereof in respect of any Muslim Law to the court of Appeal
14. In the case of Julius Kamau Kithaka vs. Waruguru Kithaka Nyaga & 2 Others [2013] eKLR the Court of Appeal held:-

“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*, the provisions of such an Act must be strictly construed and applied. See *Josephine Wambui Wanyoike -vs- Margaret Wanjira Kamau & another – Civil Appeal No. 279 of 2003* & H. Adongo & Others -vs- Savings and Loan Society (Kenya)



Ltd.- Civil Appeal No, 22 of 1987. Therefore, what is in the Law of Succession Act is what was intended to be therein in the manner and extent it is there. What is not therein expressly is what was intended not to be there by the legislator.”

15. In Rhoda Wairimu Karanja & Another vs. Mary Wangui Karanja & Another the court of Appeal dealt with the question whether an appeal would lie to the Court of Appeal from the decision of the High Court exercising original jurisdiction it was held that a party would only appeal with leave of the High Court & where such leave is declined, then with leave of the Court of Appeal.
16. In this case the court was exercising its original jurisdiction when it heard and delivered a judgment on 20th October 2023. It is therefore clear that appeal lies to the Court of Appeal with leave of the High Court.
17. Grant of leave is within the discretion of a judge where it is proved that grounds of intended appeal are arguable.
18. From the proceedings that led to the judgment dated 20/10/2023 the Applicant Lucy Wambui Aboge – DW1 was agreeable to the mode of distribution proposed by Orpha Adongo Aboge the 1st Respondent.
19. Having agreed with the proposal made by the 1st Respondent the Court made distribution as nearly as possible to the proposal made by the 1st Respondent – 1st wife to the deceased.
20. This court therefore finds that the Applicant has not satisfied this court that she is entitled to the discretionary orders for leave to appeal and stay of execution of the judgment delivered on 20.10.2023.
21. The application dated 17th November, 2023 is therefore dismissed with costs to Respondents.

DELIVERED DATED AND SIGNED AT MIGORI THIS 31ST DAY OF OCTOBER, 2024.**

.....

A. ONG'INJO

JUDGE

Judgment delivered in the presence of

..... Advocate for Appellants

..... Advocate for Respondents

Victor/ Lola – Court Assistants

