



REPUBLIC OF KENYA



KENYA LAW
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**Larabi & 5 others v Larabi & 4 others (Succession Cause E092 of 2023)
[2024] KEHC 13445 (KLR) (29 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13445 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE E092 OF 2023
HI ONG'UDI, J
OCTOBER 29, 2024**

BETWEEN

**NANDUTARI LARABI 1ST APPLICANT
SUSAN NAINTON LARABI 2ND APPLICANT
TONY MAIYON LARABI 3RD APPLICANT
EMILY NASIAN LARABI 4TH APPLICANT
NANCY NTENANAYON LARABI 5TH APPLICANT
ALICE SERIANOI LARABI 6TH APPLICANT**

AND

**MARGARET LARABI 1ST RESPONDENT
CHARLES KIPNGETICH LANGAT 2ND RESPONDENT
CHEPNG'ETICH LANGAT 3RD RESPONDENT
MAGADALINE NJOKI WANJIKU 4TH RESPONDENT
IRENE WAMBUI WANJIKU 5TH RESPONDENT**

RULING

1. In the notice of motion dated 7th February, 2024 the 1st – 6th Applicants have sought the following orders:
 - i. That the honourable court be pleased to certify the application urgent and to hear it ex-parte in the first instance, service thereof being dispensed with



- ii. That the honourable court do issue the 1st, 2nd, 3rd, 4th, 5th and 6th Applicants/Respondents leave to appeal the Ruling delivered on 6th February, 2024 to the Court of Appeal.
 - iii. That the honourable court be pleased to order for stay of execution of the Ruling delivered on 6th February, 2024 and all consequential orders arising thereof pending hearing and determination of the Application.
 - iv. That the honourable court be pleased to order for stay of execution of the ruling delivered on 6th February, 2024 and all consequential orders arising thereof pending hearing and determination of the Court of Appeal.
 - v. That costs of the Application be provided for.
2. The application is premised on the grounds on its face plus the supporting and supplementary affidavits of Nandutari Larabi the 1st Applicant dated 7th February, 2024 and 3rd June, 2024 respectively.
 3. In response to the said application the respondents filed a replying affidavit dated 18th March, 2024 by Margaret Larabi.

The applicants' case

4. From the grounds and the affidavit in support it is the Applicants' case that they have been aggrieved by the Ruling of this court delivered on 6th February, 2024 ordering for the unsealing of the deceased's gravesite for purposes of collection of DNA samples, and for both parties to present themselves at KEMRI for DNA sampling.
5. That in view of the above they filed a Notice of Appeal (NL – 1) against the said Ruling. Further that this being a succession cause they need leave of this court to appeal.
6. The applicants are apprehensive that if the orders sought are not issued the respondents may proceed to execute the orders in the Ruling and which orders have far reaching consequences. It is their case that issuance of the prayers sought will not prejudice the respondents in any way.

The respondents' case

7. The respondents have opposed the application. It is their case that they have not been served with the Notice of Appeal (NL – 1). That failure to serve the notice on them has a ripple effect on the application herein. Further that the said application has not been accompanied with a draft of the Memorandum of Appeal.
8. They state that allowing the application will unnecessarily prolong this case which has been pending for more than 5 years. That they have not shown that they have an arguable appeal. They thus pray for dismissal of the application.
9. A supplementary affidavit was filed by Nandutari Larabi. Its dated 3rd June, 2024. She counters the contents of the replying affidavit pointing out the errors she believes were made by this court at paragraph 9 of her affidavit. She deposes that it has been scientifically proved that DNA samples from a deceased person may not necessarily generate DNA profiles due to degeneration of samples over time. She does not however show her expertise on this subject. She further deposes that the application for revocation of grant can still proceed even as the appeal proceeds.
10. The application was canvassed by way of written submissions.



The applicants' submissions

11. The same are dated 3rd June, 2024 having been filed by Naikuni Ngaah & Miencha Co. Advocates. Counsel addressed two issues for determination. On whether leave to appeal should be granted, he referred to the *Law of Succession Act* which provides:

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
2. An appeal shall lie in the High Court in respect of any order or decree made by a Kadhi court in respect of the estate of a deceased Muslim and with the prior leave thereof in respect of any point Muslim law, to the Court of Appeal.

12. In support of these provisions he cited the case of Rhoda Wairimu Karanja & another Vs Mary Wangui Karanja & another [2014] eKLR where the Court of Appeal stated:

“We think we have said enough to demonstrate that under the *Law of Succession Act*, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court exercising original jurisdiction with leave of the high Court or where the application for leave is refused, with leave of this court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious consideration. We think this is good practise that ought to be retained in order to promoted finality and expedition in the determination of probate and administration disputes”.

Also see the case of Peter Wahome Kimotho V Josephine Mwiyeria Mwanu [2014] eKLR

13. It is counsel's submission that this court failed to take into account a number of issues as it did in its Ruling and on that account they were deserving of the request for leave.

On whether the court should grant stay of execution pending hearing and determination of the intended appeal counsel referred to section 47 of the *Law of Succession Act* which provides:

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient”.

14. He further referred to Rule 73 of the Probate and Administration Rules which stipulates:

“Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.

He also referred to Order 42 Rule 6 of the civil Procedure Rules. He argues that the Notice of Appeal was lodged in time on 7th February, 2024. He cited the case of Re Estate of Solomon Mungura Mathia (deceased) [2021] eKLR where the position of the Court in Nduhiu Gitahi & another V Anna Wambui Warugongo [1988] 2 KLR citing the decision of Sir John Donaldson M.R in Rosengrens V Safe Deposit Centres Ltd [1984] 3 ALLE.R 198 was referred to.

15. He thus argued that there was need to preserve the subject matter.



The respondents' submissions

16. These were filed by Elizabeth Wangari & Company advocates and are dated 10th June 2024. Counsel raised three (3) issues for determination. On whether leave to appeal should be granted she cited the cases of John Mwita Mwikabe Chacha Mwila & another [2019] eKLR and Rhoda Wairimu Karanja & another (supra) where it was settled that in succession matters there was no automatic right of appeal. She added that the applicants did not attach a draft Memorandum of Appeal to the supplementary affidavit to enable the court evaluate them. It is her submission that failure to attach the Memorandum of Appeal denied this court an opportunity to consider their intended grounds of appeal.
17. In support, she relied on the case of Sasini Tea & coffee Ltd (Ruiru Mills Ltd V Beatrice Mutune Mkuluo [2017] eKLR where it was held:

“In this case, the court is unable to assess the arguability of the appeal when no Memorandum of Appeal has been filed. The Applicant simply says in the supporting affidavit and on the face of the Notice of Motion that the appeal is arguable but it provides no basis for the court to come to that conclusion in this case without a Draft Memorandum of Appeal, I am unable to say that the intended appeal is arguable. I cannot simply believe the Applicant's word that it is”.

She thus urged the court to find that the grounds on which the applicants fault the court are of a general nature and a reproduction of the content of the 1st applicant's replying affidavit sworn on 29th June, 2023 and subsequent submissions.

18. On whether the applicants are entitled to an order of stay of execution pending the determination of their intended appeal she answered in the negative since the respondents were strangers to the Notice of Appeal. Counsel referred to Rule 77 of the Court of Appeal Rules 2022 which provides:
1. A person who desires to appeal to the Court shall give notice in writing which notice shall be lodged in two copies, with the registrar of the superior court
 2. Each notice under sub-rule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged.

Rule 79(i) of the Court of Appeal Rules provides:

An intended appellant shall before or within seven days after lodging notice of appeal under rule 77, serve copies of the notice on all person directly affected by the appeal

Provided that the court may, on application which may be made *ex parte*, within seven days after the lodging of the notice of appeal, direct that service need not be affected on any person who did not take part in the proceedings in the superior court.

19. Counsel argued that the exhibited Notice of Appeal was never lodged with the Registrar of the superior court. That it was only served at the registry and not lodged as required. It is her position that the said notice is therefore fatally defective.
20. She referred to the case of Asilingwa V Baumgartner & another Civil Appeal No. 372 of 2018 [2021] KECA 308 (KLR) where the Court of Appeal on such notices stated:

“In our view the failure to properly lodge the notice of appeal is a fatal defect which throws the appellant process into disarray and if allowed, is likely to occasion prejudice and injustice to respondents. The fact that the Notice of Appeal has a court stamp does not necessarily



mean that the same was lodged with the Registrar of the court as required. After all, we are not oblivious to the fact that fake court stamps are in use all over in this county. For avoidance of doubt, we reiterate that for a Notice of Appeal to be properly lodged, it must be stamped with the court stamp, endorsed by the Registrar by sealing, signing and dating it. This issue had been dealt with by this court in the case of Daniel Nkirimpa Meniere Vs Sayialel Olekoilel & 4 others [2016] eKLR where it was held that under rule 77 (1), the appellant must not only be seen to have lodged the Notice of Appeal but must have served it upon the respondent, that a Notice of Appeal which bears no rubberstamp of the High Court and or which lacks any other endorsement by the Registrar of the High Court is fatally defective. The court went on to add that such a notice cannot be said to have been duly lodged and termed it a glaring deficiency in authentication”.

21. She thus echoed the above sentiments of the Judges and further cited the case of Pauline Nyanchora Teya & another V Milka Kerubo Nyokwoyo [2016] eKLR. Relying on Order 42 rule 6 (2) of the civil Procedure Rules and the case of Faith Homes of Kenya V Robert Cherukwo [2021] eKLR she argued that there was no good reason for the court to exercise any discretion in view of the absence of a valid Notice of Appeal.
22. Counsel further submitted that no substantial loss will result to the applicants in the absence of stay of execution. Reliance was placed on the cases of:
 - i. James Wangalwa & another V Agnes Naliaka Cheseto [20212] eKLR and
 - ii. Machira t/a Machira & Company advocates V East African Standard (No2) 2002 2 KLR.
23. Counsel submitted that unsealing of the grave and exhumation was the best way of resolving the paternity issues involving a number of children. She cited the case of Re Estate of Jacob Mwalekwa Mwambewa (deceased) 2018 eKLR where Mugure Thande J stated:

“This court would wish to keep faith with the deceased herein and not disturb his remains, nevertheless the pursuit of the truth overrides the supposed wishes of the deceased. Further family as well as cultural discomfort and outrage must give way to establishing the truth regarding the paternity of the Objector/Respondent which as stated earlier is central to the succession dispute herein. The DNA testing will not prejudice the Objector/Respondent if anything it will reaffirm his claim as the only son of the deceased and settle the dispute herein with finality”.
24. She thus submitted that the applicants failed to discharge the burden placed on them to demonstrate to the required standard the substantial loss they would suffer in the absence of an order of stay of execution.
25. Counsel submitted while relying on the case of Arun C. sharma V Ashana Raikundalia T/A Rairundalia & Co Advocates & 2 others [2014] eKLR that the applicants had not provided any security for due performance of the decree emanating from this Court’s Ruling of 6th February, 2024. She further referred to the conditions set in Order 42 Rule 6 of the Civil Procedure Rules and submitted that the applicants had not met the three (3) conditions set therein. She thus urged the court to dismiss the application with costs.

Analysis and determination

26. I have carefully considered the application, grounds, all affidavits, both submissions, cited authorities and the law. The main issue for determination is whether this application is merited.



27. The two main orders sought in the application are:
- i. Leave to file Appeal against the Ruling delivered herein on 6th February, 2024.
 - ii. Stay of execution of the said Ruling
28. The first prayer seeking leave is premised on section 50 of the [Law of Succession Act](#). The provisions of this section have been set out at paragraph 9 of this ruling. It is clear that the provisions do not cover appeals from the High Court to the Court of Appeal. This has been succinctly dealt with in the cited cases of:
- i. John Mwita Murimi & 2 others (supra)
 - ii. Rhoda Wairimu Karanja & another (supra)
 - iii. Peter Wahome Kimothe (supra)
29. Counsel for the applicants has explained why the applicants wish to move to the Court of Appeal. The reason being that this court did not in its ruling consider the alternatives in DNA testing. This is a matter where the relationship of the respondents and the deceased is contested. A solution must be found for the determination to be made. There is no way the issue of revocation of grant which is based on the paternity of the respondents can be determined without DNA tests being conducted. Since the applicants believe there are other tests which can be conducted it is my hope that they will be willing to undergo those tests without any struggles. On the above stated grounds, I will not deny them leave to appeal.
30. Mrs Mukira submitted that they were never served with a Notice of Appeal and the draft Memorandum of Appeal for them to see the grounds, on which the intended appeal is based. She relied on the Sasini case (supra). The Sasini case was not in respect of an appeal to the Court of Appeal. It was an appeal from the lower court to the High court where a draft Memorandum of Appeal is filed. In the present case a Notice of Appeal only has a stamp of the High court dated 19th February, 2024. However, the part to be signed by the Registrar High Court Family division is blank and undated. Can the Notice of Appeal be said to have been formally lodged? What was allegedly served on counsel for the respondent by email as per the supplementary affidavit is the un-endorsed Notice of Appeal.
31. The Court of Appeal dealt with a similar scenario in the case of [Asiligwa V Baumgartner & Another \(Civil Appeal No. 372 of 2018\)](#) [2021] KECA 308 [KLR] where it stated:
- “In our view, the failure to properly lodge the notice of appeal is a fatal defect which throws the appellate process into disarray and if allowed, is likely to occasion prejudice and injustice to respondents. The fact that the Notice of appeal has a court stand does not necessarily mean that the mane was lodged with the Registrar of the court as required. After all, we are not oblivious to the fact that fake court stamps are in use all over in this county. For avoidance of doubt, we reiterate that for a notice of appeal to be properly lodged, it must be stamped with the court stamp, endorsed by the Registrar by sealing, signing and dating it. This issue had been dealt with by this court in the case of Daniel Nkirimpa Meniere Vs Sayialel Olekoilel & 4 others [2016] eKLR where it was held that under rule 77 (1), the appellant must not only be seen to have lodged the Notice of Appeal but must have served it upon the respondent, that a notice of appeal which bears no rubberstamp of the High Court and or which lacks any other endorsement by the Registrar of the High Court is fatally defective. The court went on to add that such a notice cannot be said to have been duly lodged and termed it a glaring deficiency in authentication”.



32. Since the prayer for stay of execution is based on the Notice of Appeal allegedly lodged in this court and in view of what I have stated above I find that no valid Notice of Appeal has been lodged to form the basis of granting the prayer for stay of execution which is hereby declined.
33. In the circumstances the Notice of Motion dated 7th February, 2024 partially succeeds, and the following orders are made:
- i. Leave to file appeal against the ruling dated 6th February, 2024 is granted. Same should be complied within 30 days.
 - ii. Prayer for stay of execution of the ruling dated 6th February, 2024 is declined. The applicants may make the application before the Court of Appeal within the stated period. Otherwise the ruling will be executed after 30 days if there are no stay orders from the Court of Appeal.
 - iii. Costs in cause.

Orders accordingly

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 29TH DAY OF OCTOBER, 2024 IN
OPEN COURT AT NAKURU**

H. I. ONG'UDI

JUDGE

