



REPUBLIC OF KENYA



**In re Estate of Peter Njeru N'nkiria alias Peter Nkiria (Deceased) (Succession Cause 52 of 2016) [2023] KEHC 2704 (KLR) (31 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2704 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
SUCCESSION CAUSE 52 OF 2016  
LW GITARI, J  
MARCH 31, 2023  
FORMERLY MERU SUCCESSION CAUSE NO.482 OF 2015  
IN THE MATTER OF THE ESTATE OF PETER NJERU N'NKIRIA  
ALIAS PETER NKIRIA (DECEASED)**

**BETWEEN**

**WYCLIFF GITONGA PETER ..... APPLICANT**

**AND**

**EUSTACE KENT NKONGE ..... 1<sup>ST</sup> RESPONDENT**

**BENSON MICHENI ..... 2<sup>ND</sup> RESPONDENT**

**PETKAY SHEN MIRITI ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**VIOLET CIAMUTEGI NDIA ..... INTERESTED PARTY**

**RULING**

1. This ruling is in respect of the Notice of Motion application dated 22<sup>nd</sup> August, 2022, the 1<sup>st</sup> Administrator herein sought for the following orders:
  - a. Spent.
  - b. That the honourable court be pleased to grant the 1<sup>st</sup> administrator/applicant/intended appellant leave to appeal against the ruling of this honourable court delivered on 4<sup>th</sup> August, 2022.
  - c. That status quo be maintained on the deceased's estate parcel number LR; Magumoni/Thuita/384 pending the hearing and determination of the intended Appeal.



- d. Cost of this application be provided for.
2. The application is premised on the grounds on the face of it and is supported by the affidavit sworn by the Applicant on 22<sup>nd</sup> August 2022. The Applicant deposes that he was dissatisfied with the ruling of this honourable court delivered on 4<sup>th</sup> August 2022 and has instructed this advocates to Appeal against the same at the Court of Appeal. That a Notice of Appeal has already been filed and served. Further, that unless an order of status quo is granted on the deceased's estate parcel number LR;Magumoni/Thuita/384 pending the hearing and determination of the intended appeal, the substratum of the intended appeal shall be rendered nugatory.
  3. In opposing the application, the 3<sup>rd</sup> Administrator filed a Replying Affidavit which she swore on 11<sup>th</sup> October, 2022. She deposed in the main that the Applicant filed a notice of appeal without the requisite leave of court as such, he is attempting to sanitize his actions through the instant application. The 3<sup>rd</sup> Administrator thus contends that the application should be considered incompetent and should be struck with costs.
  4. The application was canvassed by way of written submissions.
  5. The Applicant submitted that the intended appeal is arguable and has overwhelming chances and probability of success as the impugned ruling allegedly ignored the recommendation of the judgment rendered by this Court on 8<sup>th</sup> October, 2021 which required that the subdivision be carried out in a manner that takes into consideration the developments by the beneficiaries and avoid moving the beneficiaries from their current homes. That if the impugned ruling is implemented, this will see some beneficiaries having their houses demolished. Further, that the Applicant has attached the Memorandum of Appeal he has filed which, according to him, shows that he has triable issues that require further consideration by the Appellate Court.
  6. The Applicant relied on the case of *Rhoda Wairimu Karanja & Another v Mary Wangui Karanja and Another* [2014]eKLR to submit that this Court has jurisdiction to grant the leave sought by the Applicant who has demonstrated that there are issues requiring further serious consideration and interrogations.
  7. On their part, the Respondents submitted that in succession matters, there is no automatic right of appeal without leave of the High Court and where leave is not granted in the High Court, it must be sought at the Court of Appeal. According to the Respondents, the jurisdiction of this Court was ousted when the Applicant filed a Notice of Appeal which he annexed paragraph 3 of the Applicant's affidavit in support of the present application. They relied on the case of *In re Estate of Gurdip Kaur Sagoo* [2021] eKLR and submitted that by filing the Notice of Appeal, the Applicant is coming to this Court with unclean hands and is trying to sanitize his actions.
  8. On the other hand, it was the Respondents' submission that the impugned ruling gave the Surveyor the directive to visit the suit land L.R. Magumoni/Thuita/384 in line with the judgment of this Court and that the intended appeal has been rendered mute by the report that was filed on 12<sup>th</sup> October, 2022 and received in court on 31<sup>st</sup> January, 2023. The Respondents thus prayed that the application be dismissed with costs.

## Analysis

9. An order made by the High Court under the *Law of Succession Act* is not appealable to the Court of Appeal as of right. Leave must be sought and obtained. Rule 39 of the *Court of Appeal Rules* provides:

“39. In civil matters-



- (a) where an appeal lies with the leave of the superior court application for such leave may be made informally, at the time when the decision against which it is desired to appeal is given, or by motion or chamber summons according to the practice of the superior court, within fourteen days of such decision;
- (b) where an appeal lies with the leave of the Court, application for such leave shall be made in the manner laid down in rules 42 and 43 within fourteen days of the decision against which it is desired to appeal or, where application for leave to appeal has been made to the superior court and refused within fourteen days of such refusal.”

10. There has been a conflict of views as regards the requirement for leave to appeal to the Court of Appeal from a decision of the High Court, in succession matters. In the case of *Julius Kamau Kithaka v Waruguru Kithaka Nyaga & 2 others* [2013] eKLR, Otieno-Odek, JA, found that leave to appeal from the High Court to the Court of Appeal in succession matters was not required. On the other hand, in the case of *Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another* [2014] eKLR, Musinga, Ouko and Kairu, JJA found that such leave was necessary and stated:

“So, what is our decision in this application? We have found that the application was presented out of time; that the applicant lacked capacity to bring it at the time he did; that leave of the High Court to appeal to this Court in succession matters is necessary in the former's exercise of its original jurisdiction; and that where application for leave has been rejected by the High Court, it can be made to this Court.”

The *Law of Succession Act* is silent on the right of appeal to the Court of Appeal. Article 48 of *the Constitution* provides for the right to access to justice. On the other hand the Court of Appeal has jurisdiction to hear appeals from the High Court under Article 164 (3) of *the Constitution*. This jurisdiction is to be exercised in all matters arising from the High Court while exercising its original jurisdiction in succession matters. Under Section 50 of the *Law of Succession Act* the decision of the High Court on appeals from the sub-ordinate court are final. A party who desires to appeal against that decision must seek leave of the High Court.

- 11. Given this apparent conflict of decisions, seeking leave to appeal is the better option out of abundance of caution. In this case, the Applicant did not seek leave to appeal before filing his Notice of Appeal. By filing of his Notice of Appeal in the Court Appeal, the Applicant moved this matter outside the jurisdiction of this Court. It is trite that the notice of appeal initiates the appeal and it will be acting in vain this court to deal with the issue of the leave to appeal.
- 12. In any event, the Surveyor's report dated 12<sup>th</sup> October, 2022 has already been accepted by this Court. The same was served on the parties and the Surveyor came to explain the report. Parties were given an opportunity to raise their objections, if any, to the said report but none has done so. This indeed makes the intended appeal moot.

## Conclusion

13. From the foregoing, I find that the present application dated 22<sup>nd</sup> August, 2022 lacks merit.

I therefore order that:-

- 1) This application is dismissed.



2) No orders as to costs.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 31<sup>ST</sup> DAY OF MARCH 2023.**

**L.W. GITARI**

**JUDGE**

**31/3/2023**

The ruling has been read out in open court.

**L.W. GITARI**

**JUDGE**

**31/3/2023**

