



**Kiogora v Mbwiria & another (Succession Cause 345 of 2015)
[2023] KEHC 3814 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3814 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 345 OF 2015**

EM MURIITHI, J

APRIL 27, 2023

IN THE MATTER OF THE ESTATE OF M'NKIRITI MBWIRIA - DECEASED

BETWEEN

SALOME KINYA KIOGORA PETITIONER

AND

JOHN MURIUNGI MBWIRIA 1ST RESPONDENT

HELLEN GACHERI 2ND RESPONDENT

RULING

1. By summons under certificate of urgency dated November 4, 2022 pursuant to Section 47 of the [Law of Succession Act](#), Rules 59 and 73 of the [Probate and Administration Rules](#) and Articles 10,25 (c), 48, 50, 159 & 165 of the [Constitution](#), the applicant seeks that:
 1. Spent
 2. The petitioner/applicant be granted leave to lodge an appeal in the Court of Appeal at Nyeri against the decree from the judgment delivered herein on 21.10.2022.
 3. Pending interpartes hearing of the application, an order be issued maintaining the status quo existing on the ground and in the register, in respect of L.R Nos. Ntima/Ntakira/4089 and 4090 being the two subdivisions of L.R No. Ntima/Ntakira/166 and L.R No. Ntima/Ntakira/377 as at 21.10.2022 when judgment was delivered herein.
 4. Pending hearing and determination of the intended appeal in the Court of Appeal at Nyeri, an order be issued maintaining the status quo existing on the ground and in the register, in respect of L.R Nos. Ntima/Ntakira/4089 and 4090 being the two subdivisions of L.R No. Ntima/Ntakira/166 and L.R No. Ntima/Ntakira/377 as at 21.10.2022 when judgment was delivered herein.



5. Cost of the application be in the intended appeal.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Salome Kinya Kiogora, the applicant herein, sworn on even date. Being aggrieved by the judgment delivered on October 21, 2022, she has filed a notice of appeal and she has been advised that the Law of Succession Act does not provide for an automatic right of appeal. She has also applied and paid for the certified copies of the judgment and proceedings to enable her lodge an appeal to the Court of Appeal at Nyeri. The interested party has threatened, and is moving at an unprecedented tempo to implement the judgment herein, and unless the reliefs sought are granted, she will suffer substantial loss of being forcibly evicted from L. R No.s Ntima/Ntakira/4089 and 4090, where they have built dwelling houses, a kitchen, a pit latrine, piped water, coffee, bananas, cows, nappier grass, gravellia trees, yams, maize, beans among others. She is ready to offer security for the due performance of the decree herein and the interested party will not be prejudiced if the prayers sought are granted, as he will continue to occupy and utilize L.R No. Ntima/Ntakira/377 as he has always done. She urges the court to allow the application which has been filed timeously without unreasonable delay, and in the interest of justice.
3. The interested party has opposed the application vide his replying affidavit sworn on 8/12/2022. He denies either interfering or threatening eviction on the applicant since he has been away in Somalia and has never stepped foot in Kenya since September 2022. He is advised that the orders of status quo are an abuse of the court process as this court has already delivered its judgment in the matter, and the applicant is inviting the court to sit as an appellate court over its own judgment, which is irregular and unwarranted. He urges the court to bring the litigation herein to an end by dismissing this otherwise misconceived application with costs.
4. The applicant swore a supplementary affidavit on 27/1/2023 in support of her application.

Submissions

5. The applicant urges that the Law of Succession Act does not provide for an automatic right of appeal, and relies on the Court of Appeal case of Eliud Mwendia Wandu v Jane Muthoni Muchira (2021) eKLR. She urges that she is entitled to the sacrosanct right of appeal, so that her right to be heard may not be limited as enshrined under Articles 25 (c) and 50 (1) (q) of the Constitution. She urges the court to grant the status quo order sought so that she, her children and grandchildren are not evicted from L.R No. Ntima/Ntakira/4089 and 4090, which they have extensively developed, and cites the Court of Appeal case of Mesback Otieno Aida & Another v Sharon Atieno Aidah & 7 Others [2018] eKLR. She urges that unless the application is allowed, she will suffer profound, monumental, gigantic and irredeemable prejudice and injustice.
6. The interested party accuses the applicant of being hell bent to forestall distribution of the estate in his favour without demonstrating to the court the chances of success of the intended appeal, and cites Ndubiu Gitabi and Another v Anna Wambui Warugongo (1988) 2 KAR and Antoine Ndiaye v African Virtual University 2015) eKLR. He urges that substantial loss has not been remotely demonstrated by the applicant who simply stated that there might be a risk of execution, when evidently he has not in any way, shape or form began the process of execution of the judgment of October 21, 2022. He urges that he is a successful litigant entitled to enjoy the fruits of a successful litigation but is being restricted while in pursuit for the same. He maintains that failure to prove loss is enough reason by its own, to warrant dismissal of the application, and the applicant needs to embrace the fact that litigation must come to an end in one way or another. He urges that the applicant has neither demonstrated to the court that there exists an arguable appeal with high chances of success nor satisfied the pre-requisite



conditions for stay of execution pending the hearing and determination of the intended appeal. He prays that in the event stay of execution is granted, the same should be conditional on depositing into court security for costs, to protect his interests, and cites *Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 Others* [2013] eKLR, *Mohammed Salim T/A Choice Butchery v Nasserpuria Memon Jamat* [2013] eKLR and *Re Estate of Sarastino M'chabari M'ukabi (Deceased)* [2019] eKLR. He urges that litigation must come to an end and the court became functus officio upon delivery of the judgment of October 21, 2022, and relies on *Telkom Kenya Limited v John Ochanda* [2014] eKLR.

Analysis and Determination

7. The sole issue for determination is whether leave to appeal to the Court of Appeal against the judgment of October 21, 2022 should issue.
8. Order 43 Rule 1 (3) of the *Civil Procedure Rules* provides that, “An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.”
9. There is clearly no automatically right of appeal to the Court of Appeal under the *Law of Succession Act* as was aptly put by the Court of Appeal in *Rhoda Wairimu Karanja & Another v Mary Wangui Karanja & Another* [2014] eKLR that: “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 merits serious consideration. We think this is good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes.”
10. The intended appeal arises from the decision of this court of October 21, 2022 where the court revoked the grant issued to the petitioner/applicant on 22/1/2013 in view of the existence of a trust between the deceased herein and the interested party’s grandfather. The court held that:

“A new Grant of Letters of Administration shall be issued in the names of the Applicant and the 1st Respondent jointly. Parcel of Land LR No. Ntima/Ntakira/4089 and Parcel of land LR No. Ntima/Ntakira/4090, the two subdivisions of Parcel of Land L.R No. Ntima/Ntakira/166, shall revert to the estate of of M’nkiti Mbwiria, if already transferred on transmission, and the same shall be distributed in such a manner so that together with Parcel of land L.R No. Ntima/Ntakira/377 the aggregate acreage of the two plots of land is divided between the Estates of two M’Mbiria brothers, M’Turuchiu Mbwiria and M’Kiriti Mbwiria, in Equal Shares. There shall be liberty to apply for any necessary orders with regard to implementation of the decision of the Court hereinabove.”
11. The applicant has not exhibited a memorandum of appeal to demonstrate the questions to be put before the Court of Appeal but that is really a matter better dealt with the appellate court gauge whether she has any real complaint for consideration.
12. The applicant has further failed to demonstrate any prejudice which she will suffer if the status quo is not maintained as the interested party has denied either interfering or threatening to evict the applicant from the estate properties.
13. This court is not convinced that the applicant has demonstrated a serious grievance to be escalated to the Court of Appeal, and, therefore, declines to grant the leave sought. However, the applicant is



at liberty to seek for leave in the appellate court, as was held by the Court of Appeal in *John Mwita Murimi & 2 Others v Mwikabe Chacha Mwita & Another* [2019] eKLR, that:

“...Under the *Law of Succession Act*, there is no express automatic right of Appeal 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...”

Orders

14. Accordingly, for the reasons set out above, the applicant’s application dated 4/11/2022 is dismissed.

15. There shall be no order as to costs

Orders accordingly.

DATED AND DELIVERED THIS 27TH DAY OF APRIL, 2023

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Carlpeters Mbaabu for Applicant.

Mr. Ashaba for 1st Respondent.

2nd Respondent in person.

