



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY
CIVIL APPEAL NO. E055 OF 2021

BETWEEN

MARTHA AKINYI MIGWAMBO.....APPELLANT

AND

SUSAN ONGORO OGENDA.....RESPONDENT

RULING

1. On 8th November, 2021 the respondent herein raised a preliminary objection on the following grounds:

- a. That the appeal has been overtaken by events and/or rendered nugatory, academic and moot following the execution of the impugned ruling dated 31st May, 2021.
- b. The appeal was filed without application for and grant of the mandatory leave to appeal in succession matters.
- c. The appeal is an abuse of the court process.

2. A preliminary objection must be on a point of law. The Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969]EA 696** at page 700 paragraphs D-F Law JA as he then was had this to say:

....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

At page 701 paragraph B-C Sir Charles Newbold, P. added the following:

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....

In the instant case, it is clear that ground (b) above is the only point of law.

3. It was argued that the appellant filed this case without the leave of court and that this leave is mandatory. The respondent relied on the decision in the case of **In re Estate of Gitucha Magochi (Deceased) [2020] eKLR** where the learned judge expressed herself as follows:

In this instance, the court was reviewing an order of the Chief Magistrate's Court and not exercising its original jurisdiction and if this is in doubt, in any event, an appeal without leave in a succession matter is a nonstarter.

In the case of **Rhoda Wairimu Karanja and another vs Mary Wangui Karanja & Another 2014 eKLR** which was cited in the **In re Estate of Gitucha Magochi**, 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 be 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, was 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 a good practice that ought to be returned in order to promote finality and expedition in the determination of probate and administration disputes. [Emphasis added]

4. Section 50 of the Law of Succession Act 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 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.

The current application falls under section 50 (1) of the Law of Succession Act. The appellant did not require leave to file the appeal.

5. I therefore dismiss the preliminary objection with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 26TH DAY OF JANUARY, 2022

KIARIE WAWERU KIARIE

JUDGE