



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 69 OF 2017

JOSPHAT NJAGI NJERU.....APPLICANT/ RESPONDENT

VERSUS

JOSECK IRERI MARK.....RESPONDENT/ APPLICANT

RULING

A. Introduction

1. The applicant herein filed the instant application seeking the orders that the Appellant's/Respondent's Notice of Appeal dated 22/10/2019 and lodged in court on 28/10/2019 to be struck out and that the original subordinate court file No. Runyenjes Misc. App Case No. 3 of 2016 be remitted back to the lower court to facilitate implementation of the orders of the court as per the judgment/ ruling dated 9/11/2017.

2. The grounds upon which the application was premised were that the Respondent appealed to this court in Misc. Application No. 3 of 2016 and which appeal was dismissed vide a judgment delivered on 17/10/2019. That under section 50 of the Law of Succession Act, no appeal lies against the judgment/order of this court which is final. As such the Notice of Appeal by the Respondent dated 22/10/2019 and which was duly filed is an abuse of the court process and is an impediment to full implementation and execution of the orders made by the subordinate court on 9/11/2017 and the same ought to be struck out and the court file remitted back to the subordinate court. The application was further supported by the affidavit by Njeru Ithiga - Advocate.

3. Vide the letter 6/06/2020, the Applicant's Advocates requested that the application be disposed of *sui moto* without calling other evidence or submissions as it was based purely on a specific provision of the law. However, the court gave directions that parties do exchange submissions to support their respective arguments.

4. The Applicant proceeded to file his submissions in support of the application and he relied on the provisions of section 50 of the Law of Succession Act and further on the Court of Appeal's decision in **Francis Gachoki Murage vs- Juliana Waino Kinyua & Another (2010) eKLR** to the effect that appeal to the Court of Appeal from the High Court while exercising appellate jurisdiction in probate matters was not allowed.

B. Issues for determination

5. Having analyzed the application, the submissions and the issues attending to the same as herein above, it is my opinion that the issue which ought to be decided is whether the application ought to be allowed as prayed.

C. Analysis of the law and determination

6. As I have indicated above, the Applicant has raised an important point of law that the applicant cannot appeal against the decision of the High Court pursuant to the provisions of **Section 50(1) of the Law of Succession Act**. The said section provides as follows: -

“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.”

7. In **Francis Gachoki Murage –vs- Juliana Wainoi Kinyua & another [2010] eKLR** the Court of Appeal in allowing an application to strike out an appeal from a decision of the High Court (Khaminwa J) while exercising appellate jurisdiction, held that: -

“We agree with the respondents that the appellant's Civil Appeal No. 139 of 2009 does not and cannot lie to this Court in view of the unambiguous provisions of section 50 (1) of the Law of Succession Act. The two cases which Mr. Njage cited to us namely KABOI VS. KABOI & OTHERS [2003] 2 EA 472 and MAKHANGU VS. KIBWANA were cases where the High Court was exercising its original and not appellate jurisdiction. They are irrelevant to the issue at hand.....”

8. In Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another [2014] eKLR (D.K. Musinga, W. Ouko and S. Gatembu Kairu J.JAs) the Court of Appeal reiterated this provision of the law when the Learned Judges held as thus: -

“We reiterate that section 50 of the Law of Succession Act is clear that decisions from the magistrate’s courts are appealable to the High Court and the decision of the High Court is final. Decisions of the Kadhis Court, on the other hand are appealable first to the High Court and only with leave and in respect of point(s) of Muslim law, to the Court of Appeal”

9. It is imperative to note that the above authorities of the Court of Appeal are binding to this court.

10. The appellant was served with the letter by Njeru Ithiga & Co. Advocates representing the Respondent that requested the court to give directions on the Notice of Appeal filed by the appellant. He was also served with the mention date of 05/10/2020 but failed to attend court.

11. The court had directed the parties on 18.08.2020 to file submissions on the issue raised by the Respondents that the Notice of Appeal was incompetent. The appellant did not file any submissions in that regard.

12. I am satisfied that the appellant was granted his constitutional right of hearing but failed to exercise it.

13. Section 50 of the Law of Succession Act has very clear provisions as I have stated above and also cited case law. The appellant had no right of appeal to the Court of Appeal as he purported to. The filing of the Notice of Appeal may have been intended to delay justice on part of the other beneficiaries.

14. I reach the conclusion that the Notice of Appeal filed by the Respondent is contrary to the law and it is hereby struck out with costs to the appellant.

15. It is hereby ordered.

DELIVERED, DATED and SIGNED at EMBU this 22nd day of October 2020.

F. MUCHEMI

JUDGE

Ruling delivered through video link in the presence of Ms. Muriuki for Ithiga for the respondent