



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**SUCCESSION CAUSE NO. 139 OF 2006**

**IN THE MATTER OF THE ESTATE OF SYLVESTER E.M. OCHANJI**

**AND**

**IN THE MATTER OF PETITION FOR LETTERS OF ADMINISTRATION BY  
MARGARET ALOO OCHANJI.....ADMINISTRATOR/RESPONDENT**

**-VERSUS -**

**JANE ADHIAMBO MITO OCHANJI.....1<sup>ST</sup> APPLICANT**

**BENARD ODHIAMBO OCHANJI.....2<sup>ND</sup> APPLICANT**

**CLARY AWUOR OCHANJI.....3<sup>RD</sup> APPLICANT**

**MERCY AWINO OCHANJI.....4<sup>TH</sup> APPLICANT**

**CATHERINE NGANYI OCHANJI.....5<sup>TH</sup> APPLICANT**

**KEVIN ERASTUS OCHANJI.....6<sup>TH</sup> APPLICANT**

**BENJAMIN MITO OCHANJI.....7<sup>TH</sup> APPLICANT**

**VINCENT OKOTH OCHANJI.....8<sup>TH</sup> APPLICANT**

**RULING**

1. The application before me is for leave to appeal to the Court of Appeal.
2. The Ruling in respect to which the applicant wishes to appeal, if leave is granted, was made on 31<sup>st</sup> May 2018.
3. As the applicants have pointed out, the Ruling dismissed their application, which was for the revocation of the Grant dated 23<sup>rd</sup> January 2006.
4. By dint of the dismissal of the application for the revocation of the Grant, the court confirmed the Grant of Probate dated 17<sup>th</sup> February 2018.
5. The reason why the applicants have sought leave to appeal is that there was no automatic right of appeal to the Court of Appeal, arising from decisions made by the High Court in succession cases.
6. The respondent opposed the application. The first ground for the said opposition was that the application had been made after a period of inordinate delay. In effect, the respondent deemed the applicants to be guilty of laches.
7. The 1<sup>st</sup> Applicant, **JANE ADHIAMBO MITO OCHANJI**, had explained that on the date when the Ruling was delivered, she was unwell in Migori, whilst the other applicants were engaged in various work related activities in Migori.

8. All the applicants were residents of Migori.
9. After the Ruling was delivered, the advocate for the applicants notified his clients about the outcome, by way of a phone-call.
10. The applicants then asked their said advocate to obtain a copy of the Ruling, so that they could make an informed decision on the way forward.
11. On 8<sup>th</sup> June 2018, the applicants received a copy of the Ruling through the whatsapp Mobile Phone Application.
12. Upon giving consideration to the Ruling, the applicants decided that it was appropriate to challenge it through an appeal. However, the advocate for the applicants advised his clients that they did not have an automatic right of appeal to the Court of Appeal.
13. It was then that the current application was lodged in court on 11<sup>th</sup> June 2018.
14. In my considered view, the length of time between 31<sup>st</sup> May 2018, (**when the Ruling was delivered**) and 11<sup>th</sup> June 2018, (**when the applicants filed the application for leave**), cannot be said to constitute inordinate delay. I so hold because the application was brought within a period of 14 days, which would ordinarily be available to a party who intended to file an appeal.
15. Secondly, the applicants have offered an explanation for the time it took them to bring the application.
16. Of course, the respondent has pointed out that the 1<sup>st</sup> respondent did not provide evidence that he had been unwell. It is true that there is no evidence which was provided to this court to demonstrate that the 1<sup>st</sup> applicant was unwell.
17. Whereas the evidence would have made the matter clear, I hold the considered view that the respondent has not given the court any good reason why the deposition of the 1<sup>st</sup> applicant should not be believed.
18. A statement made on oath constitutes sworn evidence. The court should accept sworn evidence as such, unless the party wishing to cast doubt on the evidence, gives reasons why the evidence ought not to be believed.
19. In this case the respondent has not provided the court with any plausible reason to warrant a rejection of the deposition by the 1<sup>st</sup> applicant, concerning her ailment. Therefore, on the basis of the affidavit sworn by the said 1<sup>st</sup> applicant I find that at the time when the Ruling was delivered, she was unwell.
20. The Court of Appeal has made it clear that its jurisdiction to hear and determine appeals from the High Court is now derived from both the **APPELLATE JURISDICTION ACT** and the **CONSTITUTION** of the Republic of Kenya.
21. In the case of **FRANCIS GACHOKI MURAGE VS JULIANA WAINDI KINYUA AND ANOTHER, CIVIL APPLICATION NO. 139 OF 2009**, the Court of Appeal said:

**“We have considered this issue of whether this appeal lies with considerable anxiety. First, leave was never sought in the High Court. The practice has always been where there is no automatic right of appeal, an aggrieved party wishing to appeal, is enjoined to seek leave.**

**Granting of leave is within the discretion of a judge. In this case, the appellant is appealing against an order of distribution of the deceased estate. That order is capable of execution as a decree of the court; thus following the dicta in the MAKHANGU VS KIBWANA [1996-1998] 1 E .A. 168 case, the appellant can be said to have an automatic right of appeal. Also, we have taken note of the fact that the appeal is against a judgment that was rendered by the High Court in March 2012, under the Constitution of Kenya, 2010. That being the case, the provisions of Article 164(1) of the Constitution, the Court of Appeal has jurisdiction to hear appeals from the High Court. This is an appeal from an order or decree from the High Court”.**

22. In effect, when there was an Order or decree issued by the High court, the Court of Appeal would have jurisdiction to hear an appeal arising therefrom. However, as their Lordships said in **RHODA WAIRIMU KARANJA AND ANOTHER VS MARY WANGUI KARANJA AND ANOTHER, CIVIL APPLICATION NO. 69 OF 2014**, whilst the Court may have jurisdiction, the party who wishes to lodge his appeal may not necessarily have an automatic right of appeal to that court. In those circumstances, the Court made the following observation;

**“In short, and generally speaking, the practice alluded to by their Lordships in the above passage, is that where there is no automatic right of appeal an aggrieved party wishing to appeal must seek leave to do so and the granting of leave is a discretionary power. It cannot therefore be correct to maintain that no appeal in Succession Causes lies to the Court of Appeal”.**

23. The respondent appreciates the fact that this court has discretion to determine whether or not to grant leave to appeal.
24. However, he reasons that such discretion cannot be exercised in favour of these applicants, because they have failed to provide the court with a draft memorandum, which would have enabled the court determine whether or not there were any serious issues which merit

consideration by the appellate court.

25. In the case of RHODA WAIRIMU KARANJA (above cited). The Court of Appeal made it clear that;

**“Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration”.**

26. In my considered view, there is no strict requirement that a draft memorandum of appeal be lodged before an application for leave to appeal can be entertained by the court.

27. Of course, when a draft memorandum of appeal was filed, that would form the basis for determination as to whether or not there were grounds which merit serious judicial consideration.

28. However, even when a memorandum of appeal had not been lodged, it would still be possible for the court to determine whether or not there were any issues which would merit serious judicial consideration.

29. Mr. Orenge, the learned advocate for the respondent submitted that it was not enough for the applicants to say that they were beneficiaries of the estate.

30. Earlier, Mr. Odeny, the learned advocate for the applicants had informed this court that the applicants were the widow and the children of the deceased. Notwithstanding their said connection to the estate, the applicants had been disinherited, and it is because of that fact that they intend to appeal.

31. In my considered view, the matter being raised by the applicants, merits serious judicial consideration.

32. I am therefore satisfied that the applicants have made out a strong case, entitling them to leave to appeal to the Court of Appeal.

33. In the result, I grant leave to the applicants to appeal to the Court of Appeal, in relation to the Ruling delivered on 31<sup>st</sup> May 2018.

34. The intended appeal should be filed within the next 14 days.

**DATED, SIGNED and DELIVERED at KISUMU, this 21<sup>st</sup> day of June 2018.**

**FRED A. OCHIENG’**

**J U D G E**