



**REPUBLIC OF KENYA**

**High Court at Meru**

**Succession Cause 56 of 2001**

***IN THE MATTER OF THE ESTATE OF M'MUKINDIA M'KUUGIA ALIAS S/O  
MUKINDIA(DECEASED)***

**M'MBUI MUKINDIA.....PETITIONER**

**VERSUS**

**NKANATA MUKINDIA.....OBJECTOR**

**R U L I N G**

The applicant/petitioner in his application dated 21<sup>st</sup> October, 2009 brought under Section 49 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules seeks an order that he be granted leave to appeal against the orders of this honourable Court dated 31<sup>st</sup> July, 2009 issued by Honourable Lady Justice Kasango. The application is based on the ground that leave is indispensable before the applicant can lodge intended appeal and that the application is merited. The application is supported by an affidavit of Mbui Mukindia the applicant dated 21<sup>st</sup> October, 2009.

The respondent is opposed to the applicant's application. He has filed a replying affidavit dated 11<sup>th</sup> March, 2013.

When the application came up for hearing the Counsel sought direction that the application be determined by way of written submissions. The learned Counsel for the applicant Mr. M. Kariuki filed his submissions on 19<sup>th</sup> March, 2013, whereas Mr. B. G. Kariuki, learned Counsel for the respondent filed his submissions on the same day. Both Counsel attached copy of authorities relied upon in support of their opposing position. The court has carefully considered the written submissions and authorities relied upon by the respective parties. It has also considered the application, affidavit in support, affidavit in opposition and the annexures thereto and the pleadings in support and against the application.

The undisputed facts of this application are that on 31<sup>st</sup> July, 2009 the Honourable Court made an order to the effect that land parcel No. Abothuguchi/U-Chure/434 be shared equally amongst the surviving children of the deceased in this Succession Cause. The applicant being aggrieved with the court's decision instructed his advocates to lodge an appeal. The applicant lodged Notice of Appeal on 4<sup>th</sup> August, 2009 with court which notice was received by Deputy Registrar on 6<sup>th</sup> August, 2009. Copy of the Notice of Appeal is attached to applicant's affidavit as annexure "MMI". The applicant applied for certified copies of the proceedings and judgment on 7<sup>th</sup> August, 2009 as per annexure "MM2" attached to applicant's affidavit. Both parties further in their respective affidavits agree that leave of this Honourable Court is necessary before an appeal can be filed.

The instant application is brought under Section 49 of the Law of Succession Act which deals with the jurisdiction of the Magistrate's court. I believe the correct Section that the applicant's Counsel intended to rely on is Section 47 of the Law of Succession Act which provides:-

***“47. The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:***

***Provided that the High Court may for the purpose of this section be represented by resident magistrates appointed by the Chief Justice.”***

The application is further based on Rule 73 of the Probate and Administration Rules which provides:-

***“73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”***

Section 47 of the Law of Succession Act gives High Court jurisdiction to adjudicate on any matter under the Law of Succession Act and pronounce such decrees and make such orders as may be expedient. Further under Rule 73 of Probate and Administration Rules, nothing in those rules limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of the court.

The issue for determination in this application is whether the appeal lies as of right against the orders issued by this Honourable Court on 31<sup>st</sup> July, 2009 on whether leave of court is necessary before an appeal can be lodged to Court of Appeal.

Section 75(1),(2),(4) of the Appellate Jurisdiction Act(Chapter 9) provides as follows:-

***“75. Notice of appeal.***

***(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.***

***(2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.***

***(4) When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.”***

In the case of **Margaret Makhanju John – V- David John Kibwana (Executor)** Civil Appeal No.84 of 1995(Msa) Court of Appeal stated:

***“ We respectfully agree with that view entirely and in the same token accept that finding as an authority that the use of the word decree in Section 47 of the Act has made the decision of the High Court appealable by way of right.***

***The position here, however, is that the appeal is from an order and not a decree. But in our view the use of the two words “decrees” and “orders” in Section 47 of the Act is significant. Had a word such as “decision” or “adjudication” been used in place of these two distinct words then clearly the High court’s decision or adjudication would have been non-appealable altogether. The effect of the use of the word “decree” as Hancox J.A(as he then was) very correctly pointed out in the income tax***

***decision(supra), was that the decision of the High Court was appealable as of right under Section 66 of the Civil Procedure Act. But provision of appeals by way of right in respect of orders in Section 66 has been made subject to” where otherwise expressly provided in the Act”(Civil Procedure Act). As we stated earlier Section 75 of the Act has clearly defined the orders where an appeal lies by way of right. The order of dismissal made by the High Court in this matter does not fall under any of these. The term” order” having been specifically used together with the term “decree” is conclusive that an appeal from this order of dismissal lies not by way of right but with leave of court only.”***

The respondent relied also on the above mentioned case in which Court of Appeal dismissed appellants appeal as being incompetent as no leave had been obtained before lodging the appeal. The Court of Appeal held:-

***“Under Section 47 of the Succession Act(Cap.160), the High Court had jurisdiction on hearing any application to pronounce decrees or orders. Any order made under this section was appealable under section 66 of the Civil Procedure Act either as of right if it fell within the ambit of Section 75 of the Civil Procedure Act or by leave of the court if it did not.***

***The order dismissing the application in this case was not covered by section 75 of the Civil Procedure Act and was therefore only appealable by leave of the Court. Since no leave had been obtained the appeal was incompetent.”***

In the instant case both applicant and the respondent Counsel in their submissions conceded that leave of the court was and is necessary before the appeal can be lodged against the ruling of the court in this matter as appeal did not lie as of right from the decree and orders of the High Court in Succession matters.

The applicant herein could not after giving Notice of Appeal file appeal against the ruling dated 31<sup>st</sup> July, 2009 without the leave of the court consequently he filed the present application to be granted leave to file an appeal. section 75 of the Civil Procedure Act does not lay down the conditions applicant should satisfy before leave is granted but I believe as I stated in my ruling in the case of **IN THE MATTER OF ESTATE OF MUTHURI M'RUTARA(deceased) JOSHUA M. MUTHURI-APPLICANT HCSC.NO.500 OF 2008(MERU)** that the applicant has to show the intended appeal is not frivolous and is arguable. That if leave is not granted the applicant shall suffer injustice and prejudice by being denied chance to exercise his right of Appeal and that the respondent shall not suffer any prejudice. The applicant has not made averments to the effect that the intended appeal is not frivolous and is arguable. I had earlier on stated that the conditions for granting leave have not been set out under Section 75 of the Civil Procedure Act and even where a party has not stated that the appeal is not frivolous and is arguable the court has discretion to grant leave after weighing the nature of the claim and likelihood of injustice that applicant may suffer if leave is not granted. The matter in issue in this cause relates to land, which is a very sensitive issue in this country and in the interest of justice I feel land matters must be handled with a lot of caution and care and all parties given opportunity to ventilate their claim in the court of law. I would therefore exercise my discretion and allow this application.

Having gone through the applicant's application and after careful consideration of the nature of the claim, submission by both Counsel, and authorities relied upon, I am satisfied that the refusal to grant this application would result to injustice and prejudice to the applicant and that the respondent would not be prejudiced in anyway by granting this application.

In the circumstances the application dated 21<sup>st</sup> October, 2009 is allowed and the applicant is granted leave to lodge an appeal in the Court of Appeal against the ruling delivered on 31<sup>st</sup> July, 2009.

Costs be in the cause.

DATED, SIGNED AND DELIVERED AT MERU THIS 18<sup>TH</sup> DAY OF APRIL, 2013.

**J. A. MAKAU**  
**JUDGE**

**Delivered in open court in the presence of:-**

1. Mr. M. Kariuki for applicant
2. Mr. B. G. Kariuki for the respondent

**J. A. MAKAU**  
**JUDGE**