



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Succession Cause 239 of 2001

**IN THE MATTER OF THE ESTATE OF CHANAN SINGH SAIMBHI AND
JOGINDER KAUR..... DECEASED**

BETWEEN

1. INDERJIT SINGH SAIMBHI)APPLICANT

AND

2. MOHINDER SINGH SAIMBHI) 1ST RESPONDENT

3. HARDEV SINGH SAIMBHI) 2ND RESPONDENT

RULING

Through **Messrs Morris Njage & CO Advocates** Inderjit Singh Saimbhi, hereinafter referred to as “the applicant” filed the application dated 5th August, 2009 that is the subject of this ruling. In the said application the applicant sought that this court be pleased to grant him leave to appeal to the court of appeal from the decision of this court dated 22nd July, 2009. The applicant also sought that the costs of the application be provided for. The application was expressed to be bought under Order XLII rules (2), (3) and (4) of the Civil Procedure Rules.

The grounds in support of the application were that the applicant being dissatisfied with the decision of this court was desirous of appealing to the court of appeal, that there was no automatic right of appeal donated by the relevant law under Order XLII of the Civil Procedure Rules and finally that this being a family matter involving succession and distribution of family property and raising issues of estate and intestate succession is weighty and not frivolous.

In support of the application **Mr. Morris Guchura Njage** swore an affidavit which merely expounded and or reiterated the grounds in support of the application aforesaid.

Mohinder Singh Saimbhi and **Hardev Singh Saimbhi** hereinafter referred to as “the respondents” reacted to the application by filing grounds of opposition and notice of preliminary objection respectively. In his grounds of opposition to the application, the 1st respondent through **Messrs Wahome Gikonyo & Company advocates** stated that the application was misconceived and incompetent, the application was a gross abuse of the process of the court and untenable, that order XLII was not one of the orders and rules applicable to succession matters under rule 63 of the Law of Succession Act, that the applicant had filed a notice of appeal on 31st June, 2009 long before filing this application in effect placing the cart before the horse thereby rendering the instant application superfluous.

Through **Messrs Karweru & CO Advocates** the 2nd respondent in his notice of preliminary objection stated that the application was incurably defective and a non-starter in law as order XLII rules 2, 3, and 4 of the Civil Procedure Rules do not lie under the law of Succession Act to confer jurisdiction on this court, that even assuming the converse to the above, the application was time barred and bad in law. Finally the 2nd respondent pointed out that the application was superfluous in law as the applicant had already filed the notice of appeal.

In support of the application, **Mr. Njage**, learned counsel for the applicant orally submitted that the order from which leave is sought was an order relating to an application for revocation of grant. There is no automatic right of appeal from such an order. The intended appeal is weighty. The application too was made timeously. In support of his submission counsel relied on the following authorities;-

1. **Makhangu Kibwana (1995 – 1998) 1 E.A. 175.**
2. **Kamlesh Mansukhlal Damji Pattni V Central Bank of Kenya and others, Civil Appeal No. 15 of 2002 (UR).**
3. **J.P. Machira t/a Machira & Company Advocates V Wangethi Mwangi & another, Civil Application Number Nai 433 of 2002 (UR).**

In opposing the application, **Mr. Wahome** learned counsel for the 1st respondent orally submitted that the application was filed out of time, Order XLII was not one of the orders and rules imported in to the Law of Succession

Act, that the applicant had already filed a notice of appeal before this application thus rendering the application superfluous. Finally the court could not address the merits of the intended appeal as no copy of the intended memorandum of appeal had been annexed to the application.

Mr. Karweru, learned counsel for the 2nd respondent associated himself fully with the submissions of **Mr. Wahome**.

I have carefully considered the application, the supporting affidavit and the annexures thereto, the grounds in opposition, Notice of preliminary objection and rival oral submissions. My take on the issues canvassed in the application is that jurisdiction cannot be conferred where none exists nor can parties acquiesce where the law says otherwise. Order XLII of the Civil Procedure Rules is not among the orders imported into the Law of Succession Act courtesy of rule 63 of the Probate and Administration Rules. The words used in rule 63 aforesaid are mandatory. As correctly submitted by **Mr. Wahome**, rule 63 is cast in stone for a party to invoke any other order or rule of the Civil Procedure Rules in a Succession Cause not covered by rule 63. There to that effect must be an order in writing by the court or registrar permitting the use of any order in the Civil Procedure Act and the rules made thereunder other than those imported by rule 63 aforesaid. It is not for the parties and or their advocates to make that decision. In the circumstances of this case order XLII is not available to the applicant, nor was there an order by this court or the

registrar authorizing the applicant to bring this application pursuant to the said order and rules. This application having been brought under order XLII of the Civil Procedure Rules which is not among the orders imported into the Law of Succession Act, it is incompetent. Without amending the application rule 73 of the Probate and Administration Rules would be inapplicable.

At the hearing of the application, the court was at pains to explain to counsel for the applicant, the incompetence and hopelessness of the application. However the applicant's counsel did not heed the advice but elected to soldier on the incompetence notwithstanding.

Assuming however that the application was properly before court, it would still fail on the issue of time. The decision of this court, the subject of the intended appeal was given on 22nd July, 2009. Time for purposes of this application started to run on 23rd July, 2009. This application was filed on 6th August, 2009. Fourteen days ended on 5th August, 2009. The application was thus filed out of time by a day. Mukhangu's case (supra) relied on by the applicant is clearly distinguishable with the circumstances obtaining in his case. The court of appeal in that case was considering a sole issue as to whether an order emanating from a determination of an application for revocation of grant was a decree or order for determining whether a decision of this court on a revocation of grant can lead to an order and not a decree. The court went further and held that a decision of the court on that basis is not appealable as

of right. Leave must be sought and obtained. However since this application has been made out of time, it is incompetent once again.

The court of appeal gave guidelines as to what should be considered in an application of this nature in the case of J.P. Machira (supra). However those considerations do not fall for determination as the application is incompetent for having been filed under the wrong provisions of the law as well as out of time.

The applicant filed a notice of appeal on 31st July, 2009 going by the annexures in the affidavit in support of the application. The instant application was filed on 6th August, 2009 long after the notice of appeal had been filed and served. It would appear therefore that the applicant has placed the cart before the horse rendering this application superfluous. The Notice of appeal so filed would therefore appear to be incompetent. The applicant should ideally have sought and obtained leave to file appeal first before he could contemplate filing Notice of appeal. If I granted leave as sought by the applicant, the applicant will still have to file a fresh notice of appeal. The Notice of appeal filed being incompetent as aforesaid, the applicant cannot be heard to say that he commenced in the appellate process and on that basis I should exercise my unfettered discretion in his favour.

No draft memorandum of appeal was annexed to the application. Accordingly I am not in a position to address the issue of the

merits of the intended appeal if at all. See the case J.P. Machira (supra). It is incumbent upon the applicant to place before court sufficient material upon which the court may be able to exercise its discretion. No such materials have been placed before me.

Accordingly I find the application lacking in merit. It is dismissed with costs to the respondents.

Dated and delivered at Nyeri this 25th day of January 2010.

M.S.A. MAKHANDIA

JUDGE