

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Succession Cause 1610 of 2000

IN THE MATTER OF THE ESTATE OF PETER NJENGA KINYARA (DECEASED)

RULING

This ruling determines the Summons dated 12th November, 2004, which is brought under Rule 73 of the Probate and Administration Rules by Elizabeth Wanjiru Njenga. The Applicants are seeking for leave to appeal from the order of September 17th 2004. The application is supported by the affidavits of Elizabeth Wanjiru Njenga one of the petitioners and her Advocate Mr. Kenneth Kiplangat.

The reason why the Applicant is seeking for leave is because when the ruling was delivered, Mr. Kiplangat had requested another counsel to hold his brief, but the said counsel did not apply for leave to lodge the appeal. When the proceedings were prepared on or about 19th October, 2004, he realized that leave was not sought and since the Applicants are dissatisfied with the ruling of 17th September, 2004, it is necessary that leave be granted.

When the application first came up for hearing, I directed counsel for the Applicant to address this court substantially on the provisions of section 50 of the Law of Succession which 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 shall be final”

Counsel for the Applicant submitted that, the above provision only deals with the decision from the Subordinate court and cannot be considered to refer to decision that emanate from the High Court. The decision of Appeal in the case of **MAKHAGU VS. KIBWANA E.A.L.R. 1995-1998** held as follows: -

“Under section 47 of the Law of Succession Act (chapter 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 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.”

It is obvious in this case as in the above case the Applicants require leave to file an appeal. I find my hands tied by the above decision. Since the Applicants are desirous of filing an appeal, I think it is in the interest of justice and fair play that leave should be granted to expand the scope within which she can ventilate her rights. Accordingly, the Applicant is granted leave to file an appeal against the ruling of this court of 17th September, 2004. The period within which to file the appeal is extended for 30 days from the date hereof.

Costs of this application shall be in the cause.

It is so ordered

Judgement read and signed on 21st January, 2005

MARTHA KOOME

JUDGE