

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
Succession Cause 408 of 1998

IN THE MATTER OF EZEKIEL LUKALO ALUDA DECEASED
AND
BEATRICE LUKALO
MARGARET OSOLIKA PETITIONERS/RESPONDENTS
V E R S U S
TOM LUKALO OBJECTOR/APPLICANT

R U L I N G

The Applicant, Tom Lukalo, made an application to this court on 14.1.2005 by way of Notice of Motion dated 5.1.2005 seeking leave to file appeal to the Court of Appeal from the Ruling of this Court dated 17.12.2004 in which this court struck out the Applicant's chamber summons dated 1st September, 1999.

The grounds for the making of the application stated that no appeal lies to the Court of Appeal without leave and that the intended appeal is not frivolous. The application was supported by an affidavit sworn on 7.1.2005 by Laban Akula Anziya, the advocate for the Applicant.

Mr. Anziya was not able to show whether the Court of Appeal to which his client is desirous of lodging appeal has jurisdiction. It was necessary for him to show that this court's decision is appealable to the Court of Appeal and that the leave sought was necessary and that there was no delay in seeking such leave. For good measure he could also indicate that the intended appeal was not frivolous.

Decisions of the High Court under the Law of Succession Act, Chapter 160 of the Laws of Kenya sitting as an appellate court are under section 50 of the Law of Succession Act final. They are not appealable. However, decisions of the High Court in its original jurisdiction do not appear to be final. But section 47 of the Law of Succession Act is silent on the point. It does not state that the decision of the High Court in its original jurisdiction is final or that it is not appealable. Section 3 (1) of the Appellate Jurisdiction Act, Chapter 9 of the Laws of Kenya stipulates that the Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases **in which an appeal lies to the Court of Appeal under any law**. In effect therefore, if the Court of Appeal has such jurisdiction as may be vested in it under any law, has the Succession Act Cap. 160 vested the Court of Appeal with jurisdiction? It is debatable. But it is plain to see that if the legislature intended not to have the decisions of this court under Cap. 160 in its original jurisdiction appealed from to the Court of Appeal, the Act would have so stipulated in the same manner that it has with regard to decisions of this court in its appellate jurisdiction.

Although the applicant took 30 days to seek leave to appeal, the delay was not inordinate and I am disinclined to deny the applicant the leave he seeks. In the circumstances, I grant the applicant leave to appeal to the Court of Appeal against the Ruling of this court delivered on 17.12.04.

Dated at Kakamega this 8th day of July 2005

G. B. M. KARIUKI

J U D G E