



**In re Estate of Mugo Mutuangure (Deceased) (Civil Appeal
41 of 2018) [2025] KEHC 1557 (KLR) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1557 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 41 OF 2018
RM MWONGO, J
FEBRUARY 13, 2025**

IN THE MATTER OF THE ESTATE OF MUGO MUTUANGURE (DECEASED)

BETWEEN

NDEGWA MUGO 1ST APPLICANT

NDERI MUGO 2ND APPLICANT

AND

SUSAN WAIRIMU NJAU 1ST RESPONDENT

MARY WANJIRU GITHINJI 2ND RESPONDENT

RULING

The Applicant

1. The applicants filed the summons dated 16th January 2024 by which they seek the following orders:
 1. Spent;
 2. That the honourable court be pleased to stay execution of its judgement delivered on 22nd September 2023 pending hearing and determination of the intended second appeal;
 3. That the honourable court be pleased to issue orders of status quo in respect of land parcel number Inoi/Thaita/95 pending hearing and determination of the intended appeal;
 4. That the honourable court be please to grant leave to the applicants to file a notice of appeal out of time;
 5. That the honourable court be pleased to grant leave to the applicants to file a second appeal at the Court of Appeal at Nyeri;



6. That upon consideration of prayer (4) above, the honourable court be pleased to deem fit the notice of appeal herein as duly filed after paying the requisite fees; and
 7. That the costs of the application be provided for.
2. The applicants are aggrieved by the decision of this court (Olel, J) delivered on 22nd September 2023, and wish to lodge a 2nd appeal in the Court of Appeal. The application is filed under section 50(1) of the [Law of Succession Act](#). According to the applicants, the impugned judgment was scheduled to be delivered on 12th June 2023 but it was deferred until the day it was delivered in September. As they awaited the judgment, they visited their advocate's offices and the court registry severally seeking updates but the same was not forthcoming. They were not aware that the judgement had been delivered in September and they only learned of this on 1st December 2023, after the window of appeal or stay had already closed, hence the application herein. They are also aware that they need to seek leave before lodging the second appeal in the circumstances.
 3. The application was opposed through grounds of opposition in which the respondents stated that the application has been made too late in the day and that the delay has not been sufficiently explained in view of Order 42 Rule 6 of the Civil Procedure Rules. Further, that the court lacks jurisdiction to determine prayers 4 and 6 of the application as the jurisdiction lie with the Court of Appeal according to Rules 4 and 75 of the Court of Appeal Rules. It is their assertion that the prerequisites for granting leave to file a second appeal under section 50(1) of the [Law of Succession Act](#) have not been met. Moreover, they argued that the intended appeal is incompetent thus the orders sought should not be granted. It was their case that the application is fatally defective since the applicants filed the application in person yet the record shows that they are represented.

Parties Submissions

4. The application was canvassed by way of written submissions.
5. The applicants submitted that this court is clothed with the relevant jurisdiction to determine the application. They rely on Rule 73 of the Probate and Administration rules and stated that leave to appeal out of time may be granted by this court through its discretion. They also rely on the case of *Mugo & others v Wanjiru & Others (1970) EA, 482*. It was their argument that it is necessary for the order of stay to be granted as the applicant satisfied the requirements provided under Order 42 Rule 6 of the Civil Procedure Rules.
6. That the applicants will suffer prejudice if the order of stay is denied given that they intend to file an appeal. On this they rely on *Butt v Rent Restriction Tribunal [1979] KECA 22 (KLR)*. They stated that the application is not defective in light of Order 9 Rule 9 of the Civil Procedure Rules since that provision is meant to protect the rights of an advocate who is dismissed at the appeal stage. That the applicants do not need leave to act in person since they filed a consent with their advocate. On this they relied on the case of *Charles N. Ngugi v ASL Credit Limited [2022] KEHC 1951 (KLR)*.
7. On their part, the respondents submit that the application lacks merit and it ought to be dismissed. They argued that the findings of the court in the impugned judgment were that the mater reverts to the trial court for the parties to produce evidence. Without such evidence being produced, the second appeal is futile and it should not be entertained. They stated that the application is also premature since the estate of the deceased is yet to be distributed since there is no certificate of confirmation of grant in place. They took issue with the fact that the firm of Kamuga Mburu & Co Advocates is now acting for the applicants in place of the firm of Igati Mwai & Co. Advocates who had conduct of the matter, yet no leave was sought for this change in accordance with Order 9 Rule 9 of the Civil Procedure Rules.



Issues for Determination

8. In my view, the issues for determination are as follows:
 1. Whether the court has jurisdiction to determine the application;
 2. Whether leave to file a second appeal should be granted in light of section 50 of the *Law of Succession Act*;
 3. Whether the court may or should grant stay of execution;

Jurisdiction and leave to file appeal

9. The first two issues will be determined at the same time. Section 50 of the *Law of Succession Act* provides for instances where an appeal may be lodged as follows:

- “(1) 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 thereon shall be final.
- (2) An appeal shall lie to the High Court in respect of any order or decree made by a Kadhis' Court in respect of the estate of a deceased Muslim and, with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.”

10. The provision is silent on the issue of second appeals in succession causes. However, it expressly provides for second appeals where issues of Islamic law arise. In the case of Frances Gachoki Murage v Julia Wainoi Kinyua & another [2009] KECA 102 (KLR), the Court of Appeal referred to the *Appellate Jurisdiction Act* and stated that the Court of Appeal is deprived of jurisdiction to hear and determine second appeals in light of section 50(1) of the *Law of Succession Act*.
11. However, in the course of time, courts have invoked the provisions of Articles 48 and 50(1) of *the Constitution* and determined the question of jurisdiction. For instance, in the case of Obange & another v Oganyo & 4 others [2022] KEHC 14401 (KLR) the court, exercising its appellate jurisdiction over a succession cause, determined that it had jurisdiction to determine an application for leave to file a second appeal. In that case, it was held:

“The question, therefore, is, what position should this Court take? In view of the conflicting determinations above, I would invoke the provisions of Article 48 of *the Constitution* of the right to access justice and Article 50(1) of *the Constitution* on the right to a fair hearing and to have any dispute that can be resolved by application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body, and find that there is such right of appeal to the Court of appeal under section 50(1) of the *Law of Succession Act* but only with leave of the High Court..... this court had the jurisdiction to grant leave to the applicants to file a second appeal...”

12. I agree with the position of the Court in that case. An application for leave to file a second appeal under section 50(1) of the *Law of Succession Act* may be granted through the court's discretion on the strength of the constitutional imperative of the right to appeal. It may also be granted on the strength of section 47 of the *Law of Succession Act* and Rules 49 and 73 of the Probate & Administration Rules. These provisions empower the Court to make any orders in furtherance of justice even where an application is not expressly provided for by the *Law of Succession Act*. Therefore, this court has jurisdiction to



determine the application for leave to file a second appeal, and this is the general practice adopted by High Courts throughout the country.

13. As to whether leave should be granted to appeal, there is a draft notice of appeal attached to the application, which the applicants seek should be deemed as properly filed. The applicants are simply challenging the judgment of the first appellate court.
14. Regarding the notice of appeal, the same has been filed out of time and the applicants want this court to deem it as properly filed. This Court's view is that the question of filing in or out of time should be determined by the court to which the appeal lies, if any. However, this does not pre-empt this Court from granting leave to lodge the second appeal.

Stay of execution

15. On the issue of stay of execution, such applications are governed by Order 42 rule 6(2) of the Civil Procedure Rules which provides:

“No order for stay of execution shall be made under subrule (1) unless—

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

16. In general, stay of execution may be granted where the court is satisfied that: either substantial loss will result if the order is not granted or that the application has been brought without delay. The impugned judgment was delivered on 22nd September 2023 and the stay orders were sought three (3) months later in January 2024.

17. According to the applicants, the delay was occasioned by lack of communication by his advocates at the time. They assert that they only learned that the judgment had been delivered after perusing the court file severally. Having already determined that the applicants are entitled to be given leave to file a second appeal, it follows that stay of execution should be ordered to preserve the subject matter, lest it be lost.

18. Finally, the respondents raised the issue of representation and stated that the applicants have offended Order 9 Rule 9 of the Civil Procedure Rules which provides:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

- (a) upon an application with notice to all the parties; or
- (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

19. There is a consent dated 19th December 2024 which shows that the applicants and their advocates agreed that they could take over conduct of this matter in person. That the question of representation is a non-issue.



Conclusions and Disposition

20. In conclusion, this Court has found that it has jurisdiction to determine the application, and that it ought to grant leave to appeal. Similarly, the Court has found that stay of execution is necessary, leave to appeal having been granted.
21. Ultimately, the application partially succeeds. Prayers (2), (3) and (5) are allowed as prayed. Each party shall bear its own costs.
22. Orders accordingly.

DELIVERED VIRTUALLY AT KERUGOYA HIGH COURT THIS 13TH DAY OF FEBRUARY, 2025

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R. MWONGO

JUDGE

Delivered in the presence of:

1. Kahiga for Applicants/Respondents
2. Kamuga for Respondents/Applicants
3. Francis Munyao - Court Assistant

