



REPUBLIC OF KENYA



**In re Estate of JKG (Deceased) (Succession Cause 1383 of 2016)
[2025] KEHC 3339 (KLR) (Family) (11 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3339 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1383 OF 2016
EKO OGOLA, J
MARCH 11, 2025
IN THE MATTER OF THE ESTATE OF JOSEPH KARANJA GITAU (DECEASED)**

BETWEEN

GWN APPLICANT

AND

MNK RESPONDENT

RULING

1. The application before this court is dated 10th March 2023. The applicant prays for the following orders:-
 - a. Spent;
 - b. That this honorable court be pleased to grant leave to the applicant to lodge an appeal in the Court of Appeal;
 - c. That this honorable court be pleased to stay proceedings and the execution of the Ruling and/or order of the High Court of Kenya (Hon. Justice E.K. Ogola) delivered on 7th February 2023 pending inter-partes hearing and determination of this application.
 - d. That this honorable court be pleased to stay the proceedings and the execution of the Ruling and/or order of the High Court of Kenya (Hon. Justice E.K. Ogola) delivered on 7th February 2023 pending the hearing and final determination of the Appeal.
 - e. Any further orders that the court may wish to grant for ends of Justice to be met.
 - f. That the cost of this application abides the outcome of the Appeal.



2. The application was based on the grounds set out therein and the applicant's supporting affidavit. The applicant, being aggrieved with the Ruling of this court dated 7th February 2023, seeks leave to file an appeal to the Court of Appeal. According to the applicant, the impugned Ruling erred in awarding the respondent a share of the deceased estate. The applicant claims the respondent has no legal right to claim any property in the deceased estate. Therefore, if stay of proceedings and execution of the impugned Ruling is not granted, she will suffer prejudice. Furthermore, the applicant deposed that the respondent will not suffer any irreparable loss if the orders sought are granted because her children are heirs of the estate and have been provided for.
3. The application was opposed by the respondent's replying affidavit dated 13th October 2023 and one of the administrators, Paul Mwangi Kiromo's replying affidavit dated 22nd September 2023. The respondent deposed that the deceased was his former husband and that plot No. Ruiru East Block 1/5XX8 was their matrimonial home. She added that the applicant's matrimonial home was in Kiine/Nguguine/2XX3, Kirinyaga County. The respondent further deposed that the deceased continued to support her and her children till his death. Therefore, she is a beneficiary of the estate by dint of Sections 26 and 29 (a) and of the *Law of Succession Act*.
4. The respondent contended that the application does not raise arguable points of appeal since former wives can be beneficiaries of the deceased estate hence she is entitled to her matrimonial home.
5. Paul Kiromo in his Replying affidavit supported the averments of the respondent.
6. The parties canvassed the application by way of submissions. I have read and considered them.

Determination

7. I have considered the application, the rival affidavits and the submission. The first issue for determination is whether leave for appeal should be granted. As per the provisions of the *Law of Succession Act*, there is no express automatic right of appeal to the Court of Appeal. This was buttressed by the Court of Appeal in the case of Rhoda Wairimu Karanja & Another -Vs- Mary Wangui Karanja & Another [2014 eKLR which made the following observations with regards to appeals in succession matters against the decisions of the High Court exercising its original jurisdiction:

“We think we have said enough to demonstrate that under the *Law of Succession Act*, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court exercising original jurisdiction with leave of the High Court or where the application for leave is refused, with leave of this court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merits serious consideration. We think this is good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes.”
8. As held in Rhoda Wairimu Karanja (supra), this court can be prompted to grant the leave sought by the applicant herein where circumstances require, such as when weighty issues arise requiring further serious judicial consideration and interrogations. If this court declines to grant the leave sought by the applicant, then she will be at liberty to seek the same in the appellate court.



9. In *John Mwita Murimi & 2 Others v. Mwikabe Chacha Mwita & Another* [2019] eKLR, the Court of Appeal re-affirmed this position by holding as follows:

“...Under the *Law of Succession Act*, there is no express automatic right of Appeal to the Court of Appeal from the decision of the High Court exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this court...” (sic)

10. The intended appeal arises from the decision of this court as to the mode of distribution of the deceased’s estate. The beneficiary who is aggrieved has a right to appeal. I have perused the issues aggrieving the applicant as stated in her supporting affidavit and noted that they raised substantive points of law for consideration by the Court of Appeal. The respondents will not suffer any prejudice if the applicant appeals the impugned Ruling.

11. In view of the age of the matter, I opine that it is in the interest of all the parties that the dispute is brought to an end expeditiously.

12. Furthermore, it is not in dispute that both parties were at some point, the deceased wives. Also, the respondent, in her affidavit, deposed that she is not currently in occupation of plot No. Ruiru East Block 1/5XX8. As such, it is my view that the respondents will not suffer any prejudice if the leave to appeal is granted. Section 47 of the *Law of Succession Act* empowers this court to make such orders as may be just and expedient. I believe that the applicant should be given an opportunity to pursue the appeal.

13. Furthermore, Section 3A of the *Appellate Jurisdiction Act* provides that:-

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.

(3) An advocate in an appeal presented to the Court is under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court.”

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

14. This provision donates jurisdiction to the Court of Appeal to entertain appeals from decisions of the High Court. This includes Probate and Administration disputes determined by the High Court. Since the applicant has demonstrated that he has substantive points of law to raise on appeal, I should exercise discretion and allow her to appeal.

15. The second issue for determination is whether these proceedings and execution of the impugned ruling should be stayed. The principles upon which the court may stay the execution of orders appealed from are well settled. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application



being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.

No order for stay of execution shall be made under sub rule 1 unless:-

- a) The Court is satisfied that substantial loss may result to the 1st 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. The onus of proving substantial loss rests upon, and must be discharged accordingly by the applicant. It is not enough to state that loss is likely to be suffered, but that loss will be suffered. In this case, the applicant’s main contention is that the respondent is a former wife and is not deserving of plot No. Ruiru East Block 1/5XX8. Furthermore, since the respondent lives in the United States of America, once the property is transferred in her name, she might disappear, and there will be no recourse if her appeal succeeds.
17. I am not satisfied that the applicant has proved that she will suffer substantial loss. The question of whether the respondent is a former wife and whether a former wife could inherit from the deceased estate is a question to be answered by the Court of Appeal. Furthermore, if stay is not granted, and the property is transferred to the respondent, there are ways under the Law of Succession to cancel the transfer even if the transferee refuses to execute the transfer documents.
18. Since the respondent is not in actual possession of the land, I direct that status quo ante be maintained on plot No. Ruiru East Block 1/5XX8 until the Court of Appeal makes its determination.

Disposition

- a. Leave to Appeal the Ruling of this Court dated 7th February 2023 is hereby granted.
- b. status quo ante be maintained on plot No. Ruiru East Block 1/5XX8 until the Court of Appeal makes its determination.
- c. Costs be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MARCH 2025.

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E.K. OGOLA

JUDGE

In the presence of:

Ms. Mbesa h/b for Ms. Ndirangu for the Applicant

Ms. Moindi h/b for Mr. Mwangi for the Respondent

Ms Gisiele M court Assistant

E. OGOLA J.

