



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Malakwen Sisiwa (Deceased) (Succession Cause
167 of 1998) [2025] KEHC 8229 (KLR) (13 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8229 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 167 OF 1998
RN NYAKUNDI, J
JUNE 13, 2025**

**IN THE MATTER OF THE ESTATE OF THE LATE MALAKWEN SISIWA (DECEASED)
IN THE MATTER OF THE LAND PARCELS LR.
776/4/1, LR 776/4/2, LR 773/1 AND LR 775/1
IN THE MATTER OF THE AMENDED CERTIFICATE OF CONFIRMATION OF GRANT**

BETWEEN

RURAL HOUSING ESTATES APPLICANT

AND

SOPHIA CHEROTICH SISIWA 1ST RESPONDENT

HASSAN KIPKORIR SISIWA 2ND RESPONDENT

SALIM KIPTOO SISIWA 3RD RESPONDENT

MUSA KIPKEMBOI KITUR 4TH RESPONDENT

RULING

1. What is pending before me for determination is Chamber Summons dated 27th March 2025 premised under Article 40 and Article 159 (2)(d) of the *Constitution* of Kenya 2010, sections 1A, 1B and 63(c) & (e) of the *Civil Procedures Act*, sections 47, 50, 74 and 76 of the *Law of Succession Act*, and Rules 43, 44 and 73 of the *Probate and Administration Rules* where the Applicant is seeking the following orders;
 - a. That leave be granted to the applicant to appeal against the ruling of this court delivered on 15/11/2024.
2. The application is based on the grounds on the face of it among others: -



- a. The Honourable Court delivered a ruling on 15th November 2024, dismissing the Applicant's summons dated 26th July 2024, despite the Applicant's legitimate claim to proprietary rights over land parcels LR 776/4/1, LR 776/4/2, LR 773/1 and LR 775/1.
- b. The Applicant lawfully purchased and has been the absolute proprietor of these parcels since 1980, yet they were erroneously included as part of the deceased's estate in the amended certificate of confirmation of Grant.
- c. That the Applicant in the said application sought to protect its interests in land parcel LR 776/4/1, LR 776/4/2, LR 773/1 and LR 775/1 which land parcels do not comprise the deceased estate but have been distributed as land parcels comprising the deceased estate vide amended certificate of confirmation of grant issued on 28/4/2023.
- d. That as a result of the ruling, the administrators of the deceased estate who held the land parcels LR 776/4/1, LR 776/4/2, LR 773/1 and LR 775/1 in trust for all the bonafide purchasers are at liberty to distribute to the land parcels to the alleged bonafide purchasers despite the same being registered in the name of the applicant who is the actual and legal owner thereof.
- e. The ruling attempts to safeguard third-party interest through a trust arrangement. However, this mechanism does not sufficiently address the Applicant's proprietary claims or ensure adequate protection against imminent transfer to third parties.
- f. That the applicant's interests in land parcels LR 776/4/1, LR 776/4/2, LR 773/1 and LR 775/1 will thus be distributed to the third parties and/or purchasers despite the applicant being the registered owner of those land parcels.
- g. That the Applicant being aggrieved by the ruling delivered on 15th November 2024 thus intends to file an appeal against the decision order to protect his interest in the above mentioned land parcels which do not comprise the deceased estate.
- h. The applicant thus prays that he be granted leave to pursue an appeal against the ruling of this court delivered on 15th November 2024 as it stands to lose its interest in land and parcels LR 776/4/1, LR 776/4/2, LR 773/1 and LR 775/1 to third parties' despite being the registered owner of the land parcels.
- i. The applicant stands to suffer substantial loss and harm if leave is not granted to pursue an appeal against the ruling delivered on 15/11/2024 as it shall lose all its interest in the abovementioned land parcels to third parties who have no proprietary interests on the land parcels.
- j. That it is thus proper that leave be granted to the applicant to enable him protect his interest in LR 776/4/1, LR 776/4/2, LR 773/1 and LR 775/1.
- k. That no prejudice shall be occasioned to the respondent if the orders sought are granted as they shall be heard on appeal.
- l. That the applicant immediately after the delivery of the ruling did make an application and filed the same in court but no orders were given and neither a date for the said application to date hence the applicant despite following up is apprehensive that there might be further developments unknown to him which would prejudice the appeal herein.
- m. That it is thus proper and in the interest of justice that the orders sought be granted.
- n. The Honourable Court is vested with the powers to grant the orders sought.



3. The Application is supported by the annexed affidavit dated 27th March 2025 sworn by Shrikesh Gheewala, one of the Directors of the Applicant company which averments echo the grounds of the application herein.
4. The Chamber Summons application was opposed by the Respondents vide the Grounds of opposition dated 10th April 2025 in which the Respondents opposed on the following grounds:
 - a. The Application is a duplication of Interested Party/Applicant's application dated 22nd November 2024 which has not been heard and determined.
 - b. The application is time barred since the Interested Party/Applicant has already filed an application to the Court of Appeal in Eldoret Court Of Appeal Civil Application No E005/2025 seeking injunctive orders pending the hearing and determination.
 - c. The Application is *res judicata* as the issues raised therein are directly and substantially the same as those held in *Rural Housing Estate v Mohammed Ghani; Administrator of the Estate of Ahmed Malakwen Arap Sisiwa (Third Party)* [2021] KEELC 2900 (KLR) and *National Land Commission v Estate of Sisiwa Arap Malakwen & Attorney General* [2017] KEELC 1140 (KLR) which cases were heard and decided by a court of competent jurisdiction.
 - d. The deponent in the Interested Party/Applicant's application has neither attached a Board Resolution nor a copy of minutes to prove his authority to institute this application on behalf of Rural Housing Estates.
 - e. The Interested Party/Applicant's application is waste of judicial time as the grounds raised seeking for leave to appeal are untenable in law.
 - f. The Application is an abuse of the court process and is devoid of merit, hence ought to be dismissed.
5. The Applicant filed a Further Affidavit in response to the Grounds of Opposition dated 10/4/2025 sworn by Shrikesh Gheewala dated 5th May of 2025 in which he deponed as follows;
 - a. That from the onset, I wish to state that the applicant company after the delivery of this court's ruling on the 15/11/2024 passed a resolution authorizing the firm AK Advocates LLP to pursue an appeal against the ruling of the court delivered on 15/11/2024 as the same affected the applicant's properties which were distributed as lands comprising the deceased estate when the same in essence do not comprise the deceased estate.
 - b. That on the issue of filing the first application dated 22/11/2024 and the second one dated 27/3/2025, I am informed by my advocates whose advice I verily believe to be true that the same was occasioned by an inadvertent lapse on the court to give a date and/or issue directions on our application dated 22/11/2024.
 - c. That we had done several correspondences to the court seeking to be issued on date for hearing of application dated 22/11/2024 without any success.
 - d. That it was thus on the advice of the court registry official that we filed a fresh application dated 27/3/2025 seeking fresh leave to appeal against the ruling of the Court delivered on the 15/11/2024. By then, the application dated 22/11/2024 was yet to be acted upon by the court.
 - e. That the court thus acted on the application dated 27/3/2025 and gave its directions thereon and is the one for consideration by court.



- f. That being that the application dated 22/11/2024 has not been acted upon and no directions issued to the effect, I thus pray that the two application be consolidated and urge as one as the same raises similar issues of law and fact which is to seek leave from the ruling delivered on 15/11/2024 to enable the applicant appeal to the court of appeal.
- g. That I further wish to state that this application dated 27/3/2025 is not statute barred as the applicant is yet to lodge an appeal in respect of the ruling of court delivered on 15/11/2024.
- h. That after the delivery of the ruling, the applicant has only lodged a notice of appeal in line with Rule 77 of the [Court of Appeal Rules 2022](#).
- i. That is after lodging the notice of appeal that the applicant filed Eldoret Civil Application No E005/2025 seeking for grant of orders of injunction pending hearing and determination of the intended appeal as such, application is not an appeal
- j. That filing of appeal is regulated by Rule 84 of the [Court of Appeal Rules 2022](#) which states that an appeal shall be lodged only upon filling of memorandum of appeal or the record of appeal which documents are yet to be lodged herein.
- k. That in response to the allegation that this suit is *res judicata*, the same is not true as the issues in dispute in this matter is not similar to the issues raised in the suit cited by the respondent.
- l. That the plea of *res judicata* cannot be bar after the court has rendered its ruling on a matter as the court is now *functus officio* on the same. Such an issue can only be litigated during trial or in the appellate court.
- m. That the application dated 27/3/2025 is thus properly filed before court and I pray that the same be heard on its merits

Analysis and Determination

6. I have read and considered the Chamber Summons dated 27th March 2025, the Affidavit in support of the same, the Grounds of Opposition and the further affidavit. The main issue which arises for determination is Whether this court should grant the Applicant leave to appeal.
7. This Chamber Summons Application calls for the review of Necessity of leave to appeal in succession cases. The debate on whether leave is necessary before filing appeal from the High Court exercising its original jurisdiction in succession cases is not quite closed. A dichotomy still lingers amongst eminent commentators, scholars and lawyers. One school of thought posits that there is necessity of leave to appeal in succession matters; and the reasons advanced by the proponents of this school of thought are two-fold.
8. The first one was well captured in the case of [Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another](#) [2014] eKLR by the Court of Appeal in these words: -“We think this is a good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes.”
9. The second, which has its origins in the Anarita Karimi case, was enunciated in the case of [Mary Wangui Karanja & another v Rhoda Wairimu Karanja & another](#) [2014] eKLR, by Musyoka J. to be that: "...A right of appeal is statutory and since the [Law of Succession Act](#) has not provided for such a right the same does not exist. “
10. Another school of thought takes the view that the [Constitution](#) of Kenya, 2010 provides for unfettered right of appeal. And such provisions in the [Law of Succession Act](#) requiring leave to appeal being existing



law should be dealt with in accordance with section 7(1) of the Transitional Provisions in the Sixth Schedule of the Constitution: -

7. Existing laws

- (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution. [Emphasis mine]

11. The Court of Appeal recognized this dichotomy of opinion in the case of Peter Wabome Kimotho v Josphine Mwiyeria Mwanu [2014] eKLR the when Visram, Koome & Maraga, JJ. A (as they then were) stated thus: -

There is no provision for appeals from the High Court to the Court of Appeal. What are provided for are appeals from lower courts to the High Court. That is why Mr. Gikonyo argued that it was necessary for the appellant to seek leave of the Court as there was no automatic right of appeal. We must state that this is clearly a grey area as it may also be argued that Section 66 of the Civil Procedure Act is not automatically imported into the Law of Succession Act. There is also a thin line to be drawn as to whether the order appealed against was a decree or a mere dismissal order that did not amount to a decree. This is because upon the dismissal of the application for revocation, the grant was confirmed thereby resulting into a decree. Be that as it may, this appeal was filed in 2011 after the Constitution of Kenya 2010 that gives the Court of Appeal jurisdiction to hear appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament was operational. Under the Constitution, all matters from the High Court are appealable to the Court of Appeal. We therefore find that this appeal is competently before us.’

12. Be that as it may, the Court of Appeal in the case of John Mwita Murimi & 2 others v Mwikabe Chacha Mwita & another [2019] eKLR held: -

“

“9We re-affirm the decisions of this Court in Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another [2014] eKLR and Josephine Wambui Wanyoike v Margaret Wanjari Kamau & another [2013] eKLR, where it was clearly stated that in succession matters, there is no automatic right of appeal without leave of court.

10. It is not in dispute that the impugned ruling in this matter arises from a succession cause and the respondents did not obtain leave to appeal. The decision in Makhangu v Kibwana [1996] EA cited by the respondent was succinctly considered by this Court in Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another [2014] eKLR In analyzing the Makhangu decision (supra), this Court held 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. (See also in Re Estate of Mbiyu Koinange (Deceased) [2015] eKLR; HCC Succession Cause No 527 of 1981).

In the instant matter, we are satisfied that no leave of the court was obtained to file the instant appeal. The present application to strike out the record of appeal has merit. We allow the



Notice of Motion dated 9th August 2018 with the result that the record of appeal filed in Civil Appeal No 93 of 2018 be and is hereby struck out with costs to the applicant.”

13. Even as the debate rages on, I should think that the focus should be on the considerations a court should take into account in granting or refusing leave. This necessity emerged in the case of *Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another* [2014] eKLR when the Court of Appeal held that;

“In view of these and given the adversarial nature of litigation in our system of justice, it would be unconscionable to allow as final the decision of a single judge, and limit the right of appeal to the High Court, especially now when the court hierarchy has been opened by the creation of the Supreme Court as an apex court.

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 merit serious judicial consideration. [Emphasis supplied]

14. According to this precedent, leave to appeal should normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration by the Court of Appeal. I should add that, exercise of the discretion in granting leave to appeal in succession causes, should be underpinned by the right of appeal provided in the *Constitution*.

15. 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.
- (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).
- (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.”

16. Further Article 164(3) (a) of the *Constitution* provides that: -

- “(3) The Court of Appeal has jurisdiction to hear appeals from—(a) the High Court.”

17. These provisions donate 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.

Applying the test

18. The applicant has expressed grievance on the decision of this court vide a ruling delivered on 15th November 2024, wish to litigate in the Court of Appeal and they have further, annexed the draft memorandum of appeal which raises triable issues to be adjudicated upon. The Court had dismissed



the Applicant's summons dated 26th July 2024 as the Applicant's contention was that he had the legitimate claim to proprietary rights over land parcels LR 776/4/1, LR 776/4/2, LR 773/1 and LR 775/1.

19. I have considered the grounds of appeal raised in the Memorandum of Appeal attached to the present application and in light of the right of appeal enshrined in the Constitution, I grant the applicant leave to experience the appeal tour. Accordingly, I order as follows:
- a. Leave is granted to the appellant to appeal to the Court of Appeal.
 - b. The appeal be filed within fourteen (14) days.
 - c. Costs to abide the outcome of the appeal.
 - d. It is so ordered

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 13TH DAY OF JUNE, 2025

.....

R. NYAKUNDI

JUDGE

