



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Geoffrey Githigi Kanyigi (Deceased) (Civil Appeal E019 of 2023) [2025] KEHC 9951 (KLR) (10 July 2025) (Ruling)

Neutral citation: [2025] KEHC 9951 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CIVIL APPEAL E019 OF 2023**

JR KARANJA, J

JULY 10, 2025

IN THE MATTER OF THE ESTATE OF GEOFFREY GITHIGI KANYIGI [DECEASED]

BETWEEN

SUSAN NJERI APPELLANT

AND

JANE ALEMENYA ALUMASI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JAMES MACHARIA) RESPONDENT

RULING

1. The basic order being sought by the Applicant in the summons dated 17th April 2025 is extension or enlargement of time to file and serve the Notice of Appeal, the memorandum of Appeal and the Record of Appeal.

The Applicant thus seeks leave to appeal out of time the judgment rendered by this court on 18th March 2025 respecting the appeal lodged by the Applicant against the ruling of the chief magistrate made on 10th July 2023 in Kapsabet Succession Cause No. 24 of 1985.

2. Prayers three [3] and four [4] of the summons are the most significant. These are anchored on the grounds set out in the summons as buttressed by the averments in the Applicant's supporting affidavit dated 17th April 2025. The Respondent opposed the application on grounds and averments in the replying affidavit dated 16th May 2025.
3. Section 47 and 50[1] of the *Law of Succession Act* and Rules 49 and 73 of the *Probate and Administration Rules* were invoked in bringing this application which was canvassed by written submissions filed herein by both parties through their respective counsel.



Whereas Section 47 of the Act gives this court the mandate to consider and determine the application, Section 50[1] provides for appeals to this court respecting any order or decree made by the magistrate's court.

4. Application's not otherwise provided for in the *Probate and Administration Rules* are catered for under Rule 49 of the Rules. The court, under Rule 73 of the Rules is conferred with inherent powers to make any such orders as may be necessary for the ends of justice or to prevent abuse of the court's process.
5. This court's consideration of the application on the basis of the enabling provisions of the law, the grounds in support of the application and the rival submissions shows that the basic issue arising for determination is whether the application is competent and proper before the court and if so, whether satisfactory grounds have been provided by the Applicant for exercise of discretion in her favour.
6. As a starting point, the *Law of Succession Act* does not provide for appeal from the High Court to the Court of Appeal where the High Court exercises its original jurisdiction.

The Succession Act, being a special Act of parliament ought to be accordingly construed and applied as was held by the Court of Appeal in *Julius Kamau Kithaka v Waruguru Kithaka Nyaga and another* [2013] eKLR.

7. Basically, Section 50[1] of the *Succession Act* provides for finality of succession proceedings from the magistrate's court to the High Court on appeal.

The provision provides that: -

“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.”

8. This would therefore mean that there is no provision for a second appeal to the Court of Appeal under the Succession Act except as provided for in Section 50[2] of the Act respecting points of Muslim Law.

The impugned judgment of this court delivered on the 18th March 2025 therefore signified the finalization of the succession proceedings before the Magistrate's Court which culminated in the dismissal of the Applicant's application for revocation of the grant issued on 19th June 1986 and confirmed on 11th April 1995.

9. In *Hafswa Omar Abdallah Taib and others v Swaleh Abdalla Taib* [2015] eKLR. The Court of Appeal observed that the Appellate jurisdiction in respect of succession cases is donated by Section 50[1] of the *Succession Act* which makes it clear that decisions from the magistrate's court in succession cases are appealable to the High Court whose decision on such appeals is final.
10. The court further observed that the decision of the Kadhi's Court are appealable to the High Court and a party dissatisfied with the decision of the High Court on appeal can appeal further to the Court of Appeal, but only with leave of the High Court and in respect only on points of Muslim Law. That, there is no mention of an appeal to the Court of Appeal from the decision of the High Court made in exercise of its original jurisdiction.
11. It was further observed in the same case that even Section 47 of the Succession Act makes no mention of an appeal to the Court of Appeal from the decision of the High Court made in exercise of its original jurisdiction.

It would follow from all the foregoing factors and observations that the present application is incompetent and improper before this court for grant of the orders sought herein under the Succession Act.



12. However, the application was again brought under the provisions of the Constitution and move so, Articles 48 and 50 of the Constitution of Kenya 2010. Article 159[2] [a] was also invoked, but it would not be applicable in the present circumstances for reason that the right to appeal is a substantial legal issue and not a mere procedural technicality.
13. Be that as it may, the constitutional principles laid down in the aforementioned provisions of the Constitution and in generality indicate that a denial of the right to appeal to a higher court under the Law of Succession Act would amount to a breach and/or violation of an individual's fundamental rights under Articles 48 and 50 [1] of the Constitution.

Whereas, Article 48 provides for access to justice for all persons, Articles 50[1] provides for fair hearing which includes the right to have any dispute that can be resolved by the application of Law decided in a fair and public hearing before a court or any other independent and impartial tribunal or body.
14. In the case of Rhoda Wairimu Karanja and another v Mary Wangui Karanja and another [2014] eKLR, the Court of Appeal noted that Section 50 of the Law of Succession Act is clear that decision from the magistrate's court are appealable to the High Court and the decision of the High Court is final and that decisions of the Kadhis Court on the other hand are appealable first to the High Court and only with leave and in respect of points of Muslim Law, to the Court of Appeal.
15. It was further noted in the same case that Section 47 of the Law of Succession Act makes no mention of an appeal to the Court of Appeal from the decision of the High Court made in the exercise of its original jurisdiction, but on the authority of the decision in the case of MaKhangu v Kibwana [1996 - 1998] 1EA 168, an appeal does lie to the Court of Appeal from the decision of the High Court in Succession Matters.
16. In the Makangu Case [supra], the Court of Appeal found that under Section 47 of the Law of Succession Act, the High Court has jurisdiction on hearing a matter to pronounce decrees or orders and that any order or decree made under this section is appealable either as a matter of right under Section 66 of the Civil Procedure Rules if it falls within the ambit of Section 75 of the Civil Procedure Rules or by leave of the Court if it did not.
17. In the Rhoda Wairimu Karanja Case [supra], the court noted that despite the criticism of the Makangu Case in the manner the court applied the provisions of the Civil Procedure Act or Rules which were not expressly permitted to apply in Succession matters under Rule 63 of the Probate and Administration Rules, the decision in the Makungu Case continued to be widely used as a basis of giving a party a right to appeal to the Court of Appeal.
18. The court in Rhoda's case [supra] further noted and held that where there is no automatic right of appeal an aggrieved party wishing to appeal must seek leave to do so and the granting of leave is a discretionary power. That, it cannot therefore be correct to maintain that no appeal in succession matter lies to the Court of Appeal. That, there cannot be such a thing in law and moreso today as borne out by constitutional principles under Article 164[3] and Article 48 of the Constitution.
19. The court further held that Article 48 of the Constitution requires all state organs inclusive of the courts to ensure access to justice for all persons and that that duty considered along Section 47 of the Law of Succession Act and Rule 47 of the Probate and Administration Rules would enable the High Court to grant leave to any party aggrieved by its decision to challenge it on appeal to the Court of Appeal.
20. It is for the reasons foregoing that this court would also say and hold that the present application despite the finality of succession cases under Section 50[1] of the Law of Succession Act, is competent and proper before the court for grant of the main order sought herein by the Applicant. However, it was



incumbent upon the Applicant to demonstrate satisfactory grounds for which the court's discretion may be exercised in her favour.

21. There being no express automatic right of appeal under the *law of Succession Act*, the Applicant was required to demonstrate that "prima-facie" there exists satisfactory grounds which merit serious judicial considerations at a higher level.

The draft memorandum of appeal annexed to the Applicants supporting affidavit does not in the opinion of this court demonstrate existence of serious issues which are arguable and merit serious judicial consideration by the Court of Appeal especially taking into consideration that due to passage of time the subject estate is since spent such that there is nothing to distribute or re-distribute. The entire estate being Land Parcel No. Nandi/Kamobo/302 ceased to exist after it was distributed to the identified beneficiaries as per the certificate of confirmation of grant dated 11th April 1995.

22. The parcel of land alluded to in the draft memorandum of appeal being Parcel No. LOC-12/SUB WE 3/8 was not availed for distribution as part of the deceased's estate and would therefore be irrelevant for the purpose, of the intended appeal.

In sum, the present application is devoid of merit and is hereby dismissed with costs to the Respondent.

Ordered accordingly.

DELIVERED AND DATED THIS 10TH DAY OF JULY, 2025.

HON. J. R. KARANJAH,

JUDGE

