



**In re Estate of Mong'are Obanyi (Deceased) (Probate & Administration
1 of 2022) [2025] KEHC 10500 (KLR) (3 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10500 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
PROBATE & ADMINISTRATION 1 OF 2022**

WA OKWANY, J

JULY 3, 2025

IN THE MATTER OF THE ESTATE OF MONG'ARE OBANYI (DECEASED)

BETWEEN

ELIZABETH KERUBO MONG'ARE PETITIONER

AND

GEORGE OCHARO MONG'ARE 1ST BENEFICIARY

JONES MBOGA O MONGARE 2ND BENEFICIARY

RICHARD MOCHACHE MONG'ARE 3RD BENEFICIARY

JOSEPH RAINI MONG'ARE 4TH BENEFICIARY

JACKSON RAINI MONG'ARE 5TH BENEFICIARY

MOSES NYAMORA MONG'ARE 6TH BENEFICIARY

LAWRENCE OSOO MONG'ARE 7TH BENEFICIARY

JAPHETH MAYAKA MONG'ARE 8TH BENEFICIARY

FLORENCE NYABOKE SOROBI 9TH BENEFICIARY

RULING

1. The deceased herein died intestate on 5th December 1996. His Estate comprised LR No. Kisii West Mugirango/siamanI/769. He was survived by one wife and 11 children. Grant of Letters of Administration Intestate was issued to Elizabeth Kerubo Mong'are and Joshua Mong'are Ocharo on 31st January 2022. Joshua Mong'are Ocharo however died before the conclusion of the case and in a ruling delivered on 11th April 2024, this court appointed Richard Mochache Mong'are as a co-administrator and confirmed the Grant as set out in the said Ruling.



2. Aggrieved by the said ruling, on confirmation of grant, the Applicants filed the Application dated 9th December 2024 that is the subject of this ruling. They seek the following orders in the said application: -
 1. Spent
 2. That the Honourable Court be pleased to grant the Applicant leave to appeal against the Ruling of the honourable Court delivered on 11th April 2024.
 3. That there be a stay of the distribution process pending the hearing and determination of the intended appeal.
 4. That costs of this Application be provided for.
 5. That any other Orders that meet the ends of justice.
3. The Application is supported by the affidavit of Moses Nyamora Mong'are who avers that they are desirous of filing an appeal against the orders, on confirmation of grant, and that the Respondents are in the process of demarcating the suit parcel of land with the intent of administering the Estate of the deceased in accordance with the Ruling of 11th April 2024. They state that the appeal may be rendered nugatory unless the orders sought in the application are granted.
4. The Respondent, Richard Mochache Mong'are, opposed the Application through the Replying Affidavit sworn on 17th January 2025 wherein he states that the Applicants have not explained the inordinate delay in filing the application and the appeal. The Respondent states that the Applicants have not come to this court with clean hands and that the continued delay in distributing the deceased's estate is prejudicial to the beneficiaries of the estate.
5. The Application was canvassed by way of written submissions which I have considered.
6. I find that the main issue for determination is whether the Applicant has made out a case for the granting of the orders sought in the Application.
7. While it is clear that an aggrieved party may appeal against a court's decision to the higher court in hierarchy, the Law of Succession Act does not provide for a scenario where aggrieved parties may automatically appeal against the decisions of the High Court to the Court of Appeal.
8. It is trite that jurisdiction is conferred on courts by either the Constitution or Statute. Section 3 of the Appellate Jurisdiction Act states: -
 1. The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other Court or Tribunal prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under any law.
9. Article 164 (3) of the Constitution provides for the jurisdiction of the Court of Appeal as an appellate court as follows: -
 - (3) The Court of Appeal has jurisdiction to hear appeals from—
 - (a) the High Court; and
 - (b) any other court or tribunal as prescribed by an Act of Parliament.
10. Section 50 the of the Law of Succession Act (the Act) stipulates as follows on the right of a party to appeal to the Court of Appeal from the decisions of High Court: -



- (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 Kadhi's 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.
11. From the above provisions, it is evident that the Act is silent on whether a party, who is aggrieved by the decision of a High Court in Succession matters, can appeal to the Court of Appeal. This means that the right of a party to appeal to the Court of Appeal, in succession matters, is not automatic as the law does not expressly state as much. The power to institute an appeal must be founded on the basis of appropriate jurisdiction conferred upon that higher court by statute or *the Constitution*. It is for this reason that leave becomes a prerequisite.
12. In *Newlands Surgical Clinic (Pty) Page 16 of 17 Ltd v Peninsula Eye Clinic (Pty) Ltd* 2015 (4) SA 34 SCA; [2015] 2 All SA 322 (SCA) para 13 Brand JA succinctly held as follows: -
- “Leave to appeal . . . constitutes what has become known, particularly in administrative law parlance, as a jurisdictional fact. Without the required leave, this court simply has no jurisdiction to entertain the dispute.”
13. In the case of *John Mwita Murimi & 2 others v Mwikabe Chacha Mwita & Another* [2019] eKLR the Court of Appeal rendered itself thus: -
- “
- “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.” [Emphasis added].



14. It is also trite that leave is granted at the court's discretion, which discretion should not be exercised whimsically but by considering the right of a party to appeal, the need to meet the ends of justice and by considering whether the intended appeal raises triable issues that require consideration by the appellate court. In *Francis Gachoki Murage v Juliana Waindi Kinyua & Another* C.A No. 139/2009, the Court of Appeal stated: -

“We have considered this issue of whether this appeal lies with considerable anxiety. First, leave was never sought in the High Court. The practice has always been where there is no automatic right of appeal an aggrieved party wishing to appeal is enjoined to seek leave. Granting leave is within the discretion of a Judge...The court has discretion to grant leave to appeal to the Court of Appeal.”

15. I have considered the grounds of appeal as outlined in the draft Memorandum of Appeal dated 18th April 2024 and I find that they raise serious points of law, in the nature of the doctrine of constructive trust and proprietary estoppel, which may require further interrogation and determination by the Court of Appeal. For this reason, I find that the Applicants have demonstrated that they deserve the exercise of this court's discretion to grant them leave to appeal against the Ruling dated 11th April 2024.

16. On the issue of stay of execution pending appeal, it is trite that a party seeking stay of execution must demonstrate that he is likely to suffer substantial loss if stay is not granted and that the intended appeal would be rendered nugatory. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR it was held thus: -

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

17. In the instant case, the Applicant submitted that if the orders of stay are not granted, the parties may be subjected to chaotic resettlement process should the appeal succeed after the distribution of the estate has already been undertaken. I concur with this proposition and find that the Applicants have established valid grounds for the granting of orders of stay of execution. I find that the intended appeal would be rendered an academic exercise once the Administrators proceed to distribute the Estate of the deceased. The distribution will entail the elaborate task subdividing the deceased's land in accordance with the acreage and portions as stated by the Court in its impugned Ruling.

18. For the reasons that I have stated in this ruling, I find that the instant application is merited and I therefore allow it as prayed with orders that costs shall abide the outcome of the intended appeal.

19. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 3RD DAY OF JULY 2025.

W. A. OKWANY

JUDGE

