



**Republic v Senior Principal Ogembo Law Courts & another;
Gekombe & another (Interested Parties) (Judicial Review Application
01 of 2023) [2024] KEHC 1212 (KLR) (7 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1212 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
JUDICIAL REVIEW APPLICATION 01 OF 2023**

DKN MAGARE, J

FEBRUARY 7, 2024

**IN THE MATTER OF AN APPLICATION BY JOSEPH OGEKA ONGERI FOR
JUDICIAL REVIEW IN THE NATURE OF CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF THE SENIOR PRINCIPAL MAGISTRATE’S COURT AT OGEMBO
IN THE (CITATION) SUCCESSION CAUSE NO. E10 OF 2023**

AND

**IN THE MATTER OF THE ESTATE OF ALOYS ONGERI GICHANA (DECEASED)
IN THE MATTER OF THE MAGISTRATE’S COURT ACT 2015**

AND

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE
JUDICIAL REVIEW PROCEEDINGS AGAINST THE RESPONDENT**

BETWEEN

REPUBLIC APPLICANT

AND

THE SENIOR PRINCIPAL OGEMBO LAW COURTS 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

AND

LUSIA KWAMBOKA GEKOMBE INTERESTED PARTY

JOSEPH OGEKA ONGERI INTERESTED PARTY



RULING

1. This application must be dismissed. It is an application challenging the decision of the court, Hon PC Biwott in Ogembo CMCC Misc Succession Cause No. 10 of 2023. Section 50 of the [Succession Act](#) provides as follows:-

The provisions related to appeal are set out in section 50 of the [law of succession act](#) which provides as follows: -

“ Appeals to 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.”
2. The order sought to be quashed is not a quasi-judicial order but an order made by a court of law. The form of Appeal is provided under Order 42 Rule 1 provides as doth: -

“ 1. Form of appeal –

- (1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
 - (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”
3. The period for challenging the court's decision is given under section 79 G of the [Civil Procedure Act](#) as doth: -

“79G. Time for filing appeals from subordinate courts Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

4. The impugned application had been made under Order 40 Rules 7, 45 and 51 Rule 1 of the [Civil Procedure Act](#). In that connection, Section 75 of the [Civil Procedure Act](#) as doth: -

75. Orders from which appeal lies



- (1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—
 - (a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;
 - (b) an order on an award stated in the form of a special case;
 - (c) an order modifying or correcting an award;
 - (d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration; an order filing or refusing to file an award in an arbitration without the intervention of the court;
 - (e) an order under section 64;
 - (f) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
 - (g) any order made under rules from which an appeal is expressly allowed by rules.
- (2) No appeal shall lie from any order passed in appeal under this section.

5. Essentially the Applicant was aggrieved by a decision of the Court in its decision in Ogembo Succession Cause No. 10 of 2023. Though parties have written unnecessarily long submissions, the remedy available to the parties is circumscribed in Section 79G of the [Civil Procedure act](#).
6. Where there is an established procedure, parties cannot use a different one. In this case as right by submitted by the ex parte applicant regarding to the cases of [Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others](#) [1997] eKLR and [Municipal Council of Mombasa v Republic & Umoja Consultants Ltd](#). Date Delivered: 01 Nov 2002.
7. A decision of the Court, however, wrong can only be challenged through Appeal or review. Judicial review is not one of the available remedies. Whether the court has powers to punish for contempt is neither here nor there. This question can only be addressed by this court sitting as an appellate Court.
8. Consequently, the entire cause is struck out with costs.

Determination

9. In the end I make the following orders: -
 - a. The application as filed is incompetent and is consequently struck out in limine and the entire suit is dismissed with costs.
 - b. Costs of 65,000/= to the interested party.
 - c. This file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 7TH DAY OF FEBRUARY, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE



In the presence of: -

No appearance for parties

Court Assistant - Brian

