



REPUBLIC OF KENYA



**Emojel v Atyang (Succession Appeal E020 of 2022)
[2024] KEHC 3850 (KLR) (19 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3850 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
SUCCESSION APPEAL E020 OF 2022
WM MUSYOKA, J
APRIL 19, 2024**

BETWEEN

DENNIS THOMAS EMOJEL APPELLANT

AND

KEFINA ATYANG RESPONDENT

(an appeal arising from orders made in the ruling of Hon. L Ambasi, Chief Magistrate, CM, in Busia CMCP&A No. 9 of 2021, of 12th May 2022)

RULING

1. On 10th November 2023, I delivered a ruling herein, wherein I dismissed an application, dated 15th March 2023, in the presence of Mr. Wanyama for Mr. Onsongo for the appellant, and Ms. Sibika for Mr. Ashioya for the respondent.
2. The appellant then filed a summons, dated 21st November 2023, under certificate of urgency, seeking, in principal, leave to file a notice of appeal and, thereafter, an appeal to the Court of Appeal, and stay of execution of the ruling of 10th November 2023. He expresses aggrievement with the orders of 10th November 2023, and states that he cannot appeal against the same, without leave of court. He says that he stands to suffer irreparable loss.
3. The respondent filed grounds of opposition, dated 23rd November 2023. She argues that the said application is *res judicata*, as it raises the same issues as those raised in the application that was dismissed in the ruling of 10th November 2023, and, for that reason, there was no jurisdiction to determine it.
4. On 5th February 2024, I allowed the parties to file written submissions, on the application. On 4th March 2024, the appellant indicated that he would not file written submissions, but would rely solely on his affidavit. The respondent did file written submissions, dated 22nd December 2023, which I have read through and noted the arguments made.



5. The principle prayer in the application is for leave to file notice of appeal and appeal, as no automatic right of appeal exists. I note that the respondent has not submitted on this aspect of the application, for she has confined herself to the prayer for stay. I shall take it that she is not opposed to such leave being granted
6. The *Law of Succession Act*, Cap 160, Laws of Kenya, does not provide for appeals, from decisions of the High Court, in exercise of its appellate jurisdiction, on appeals from the magistrates' courts, and, in fact, states, at section 50(1), that the decisions of the High Court on appeal are final. The provisions in the *Civil Procedure Act*, Cap 21, Laws of Kenya, and the *Civil Procedure Rules*, on appeals, have not been imported into probate practice, either by the *Law of Succession Act* or the *Probate and Administration Rules*. However, it is now settled, by such decisions as *Makbangu vs. Kibwana* [1996-1998] 1 EA 168 (Cockar CJ, Kwach & Shah, JJA) *Rhoda Wairimu Karanja & another vs. Mary Wangui Karanja & another* [2014] eKLR (Musinga, Ouko & Gatembu, JJA) and *Sophia Salim Gathiaka & another vs. Mariam Mbuve Abdalla & 9 others* [2016] eKLR (Mwilu, Azangalala & Kantai, JJA), that an appeal lies from a decision of the High Court, sitting as an appellate court, to the Court of Appeal. Whether the appeal is as of right, or leave is required, is still unsettled. Therefore, to be on the safe side, it would be prudent to obtain leave.
7. On the matter of obtaining leave to file appeal, from appellate probate decisions of the High Court, contrast *Peter Wabome Kimotho vs. Josphine Mwiyeria Mwanu* [2014] eKLR (Visram, Koome & Maraga, JJA), *Zeinab Khalifa and 4 Others vs. Abdulrazak Khalifa and Another* [2016] eKLR (Makhandia, Ouko & M'Inoti, JJA), *John Mwita Murimi & 2 Others vs. Mwikabe Chacha Mwita & Another* [2019] eKLR (Makhandia, Kiage & Otieno-Odek, JJA), *In re Estate of Chege Muikaria (Deceased)* [2020] eKLR (Meoli, J), *In re Estate of Joel Thaara Ruria (Deceased)* [2022] eKLR (Gitari, J), *In re Estate of Wang'a Ole Oiyie* [2022] eKLR (Gikonyo, J) and *Peter Kiiru Chomba & 3 others vs. Julius Mungiri Kiiru & another* [2022] eKLR (SM. Githinji, J) with *Makbangu vs. Kibwana* [1996-1998] 1 EA 168 (Cockar CJ, Kwach & Shah, JJA) *Rhoda Wairimu Karanja & another vs. Mary Wangui Karanja & another* [2014] eKLR (Musinga, Ouko & Gatembu, JJA) and *Sophia Salim Gathiaka & another vs. Mariam Mbuve Abdalla & 9 others* [2016] eKLR (Mwilu, Azangalala & Kantai, JJA).
8. On the prayer for stay, the respondent argues that the same is res judicata the decision of 10th November 2023. I do not agree with that submission. The stay sought in the application, dated 21st November 2023, is of the orders made in the ruling of 10th November 2023, and so it cannot be res judicata that same ruling. The stay sought in the application, dated 15th March 2023, which was the subject of the ruling of 10th November 2023, was with respect to orders made by the trial court on 12th May 2022. Therefore, the orders sought to be stayed in the 2 applications are different, and the issue of res judicata should not arise.
9. Should I grant the stay sought, of the orders made in the ruling of 10th November 2023? I do not think I should. The orders made in that impugned ruling are not capable of execution. That ruling merely dismissed the application, dated 15th May 2023. The dismissal of an application cannot be executed, hence there is nothing to stay. There is nothing to be achieved by staying such an order. The application has been dismissed, and purporting to stay the dismissal order would be futile, for that cannot have the effect of lifting the dismissal order. A dismissal order can only be dealt with in 2 ways: by the trial court by way of review or setting aside or vacating it; or by the appellate court by way of vacating the dismissal order or reversing it.



10. The final orders on the application, dated 21st November 2023, are that prayers 2 and 3 of that application are allowed, while prayers 5 and 6 are dismissed. Each party shall bear their own costs. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 19TH DAY OF APRIL 2024

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Onsongo, instructed by Obwoye Onsongo & Company, Advocates for the appellant.

Mr. Ashioya, instructed by Ashioya & Company, Advocates for the respondent.

