



**Kiganda v Mwangi (Succession Cause 88 of 2007)  
[2024] KEHC 5556 (KLR) (8 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5556 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
SUCCESSION CAUSE 88 OF 2007  
LM NJUGUNA, J  
MAY 8, 2024  
IN THE MATTER OF THE ESTATE OF SAMUEL MWANGI  
GITONGA (DECEASED)**

**BETWEEN**

**JANE WANGUI KIGANDA ..... APPLICANT**

**AND**

**SHELMISE KABAIRE MWANGI ..... RESPONDENT**

**RULING**

1. The matter for determination is a Summons general dated July 20, 2023 through which the applicant seeks the following orders;
  1. That the honourable court be pleased to grant the applicant leave to appeal to the Court of Appeal against the decision of this court delivered on July 12, 2023; and
  2. The costs of this application be in the intended appeal.
2. The summons was premised on the grounds stated on its face and facts deposed in the supporting affidavit thereof. It was the applicant's case that she seeks leave to appeal to the Court of Appeal against the decision of this court given that she does not have an automatic right of further appeal. That the appeal raises an arguable case and that it is important that leave be granted. She argued that the main issue of contention on appeal is that this court adjudged itself as lacking jurisdiction yet in the circumstances, it had the relevant jurisdiction. That the intended appeal raises a question of law and of general public importance.
3. The application was opposed through the respondent's replying affidavit dated October 16, 2023 sworn by James Ndumbi Mwangi as her guardian *ad litem*. He deposed that the respondent is the lawful wife of the deceased who was the lawful owner of the suit land. That any other disputes as



- to ownership of the said land were determined and that the respondent should be left to enjoy the property according to the grant issued. That the intended appeal does not present any triable questions of law and this court has already become functus officio, meaning the application herein should not be entertained.
4. The application was canvassed by way of written submissions.
  5. The appellant submitted that this court has the discretion to grant her leave to appeal against the decision and she relied on the cases of *Rhoda Wairimu Karanja & Another v. Mary Wangui Karanja & Another* (2014) eKLR and *Hafswa Omar Abdalla Taib & 2 Others v. Swaleh Abdalla Taib* (2015) eKLR where the court held that since section 50 of the *Law of Succession Act* is silent on appeals to the Court of Appeal where the High Court is exercising its original jurisdiction, the court may apply its discretion as donated to it by Section 47 of the same *Act*. She urged the court to grant her leave to appeal to the Court of Appeal since she has sufficient grounds of appeal.
  6. The respondent submitted that the applicant has not fulfilled conditions necessary for granting of leave to appeal to the court of appeal. Reliance was placed on the cases of *In re Estate of Joel Thara Ruria (Deceased)* [2022] eKLR and *Rhoda Wairimu Karanja & Another v. Mary Wangui Karanja & Another* (2014) eKLR where the court held that the court must consider whether *prima facie* grounds of the intended appeal has been established. That from the intended grounds of appeal stated in the application, the same do not warrant granting of the orders sought. That the issues raised are matters that arose in the Magistrate's courts and which this court has conclusively addressed. She urged the court to dismiss the application.
  7. The issue for determination is whether the applicant should be granted leave to appeal to the Court of Appeal.
  8. The application has been filed under Rules 39 and 40 of the *Court of Appeal Rules 2010* which provide thus:
    - “(a) where an appeal lies on certification by the superior court that the case is fit for such leave may be made informally, at the time when the decision against which it is desired to appeal is given, or by motion or chamber summons according to the practice of the superior court, within fourteen days of such decision;
    - (b) where an appeal lies with the leave of the Court, application for such leave shall be made in the manner laid down in rules 42 and 43 within fourteen days of the decision against which it is desired to appeal or, where application for leave to appeal has been made to the superior court and refused, within fourteen days of such refusal.
  40. Where no appeal lies unless the superior court certifies that a point of law of general public importance is involved, application for such a certificate may be made—
    - (a) informally, at the time when the decision against which it is desired to appeal is given; or
    - (b) by motion or chamber summons according to the practice of the superior court, within fourteen days of that decision:”
  9. Rules 49 and 73 of the *Probate & Administration Rules* empower the court to make any orders in furtherance of justice even where an application is not provided for by the law. Such orders may be made on the strength of the court's discretion. This is also provided for under section 47 of the *Law of Succession Act*. As rightly stated by the applicant, there is no appeal to the Court of Appeal as of



right under section 50 of the [Law of Succession Act](#). However, with the leave of court, granted through discretion as abovementioned, an appeal may lie to the Court of Appeal from the decision of the High Court exercising its original jurisdiction. In the case of [Rhoda Wairimu Karanja & Another -Vs- Mary Wangui Karanja & Another](#) (2014) eKLR (*supra*) the court made the following observations with regards to appeals in succession matters against the decisions of the High Court exercising its original jurisdiction:

“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 merits serious consideration. We think this is good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes.”

10. In applying discretion on this issue, the court should consider if the appeal raises a *prima facie* case. Additionally, and in accordance with Rule 39(b) of the [Court of Appeal Rules](#), whether the application for leave was filed within the stipulated 14 days. The impugned judgment was delivered on July 12, 2023 while the application herein was filed promptly on July 26, 2023, satisfactorily within 14 days.
11. Through its judgment delivered on July 12, 2023, this court found itself lacking jurisdiction to determine the issues raised in the summons for revocation of grant since they were issues of ownership of the suit land. Consequently, the summons for revocation of grant was dismissed. The applicant, in the summons herein, has stated the grounds of the intended appeal which include the fact that this court erred in finding itself without jurisdiction to determine that the property formed the free estate of the deceased.
12. In my view, this issue of jurisdiction is key and the applicant should be given the right to be heard at the Court of Appeal on the same. Further to the provisions of the [Law of Succession Act](#), and the [Probate & Administration Rules](#) that give this court discretion to determine this application, I am also guided by Section 3A of the [Appellate Jurisdiction Act](#) which 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.”

Moreover, Article 164(3) of the [Constitution](#) empowers the Court of Appeal to hear appeals from the High Court.

13. Therefore, I am inclined to exercise the discretion of this court in favour of the applicant. I find that the application has merit and it is hereby allowed. The following orders to issue:



1. The applicant is granted leave to appeal against the Judgment of this court dated July 12, 2023; and
  2. Each party to bear its own costs of the application.
14. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 08<sup>TH</sup> DAY OF MAY, 2024.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicant

.....for the Respondent

