



REPUBLIC OF KENYA



**In re Estate of the Late Joseck Thuo Ngeta (Deceased) (Succession Cause E076 of 2022) [2024] KEHC 7155 (KLR) (12 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7155 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE E076 OF 2022  
HM NYAGA, J  
JUNE 12, 2024**

**BETWEEN**

**NAHASHON MAHUGU KABIRI ..... 1<sup>ST</sup> PETITIONER**

**WAIHARO HARRISON NGETA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**SUSAN WANJIRU THUO ..... 1<sup>ST</sup> OBJECTOR**

**NIXON KARIUKI THUO ..... 2<sup>ND</sup> OBJECTOR**

**MAUREEN JUDY MUKAMI THUO (ACTING THROUGH HER MOTHER &  
GUARDIAN- SUSAN WANJIRU THUO) ..... 3<sup>RD</sup> OBJECTOR**

**RULING**

1. The Applicants have filed this summons dated 23<sup>rd</sup> April, 2024, brought under Rules 49, 63 & 73 of the Probate and Administration Rules, Sections 47 and 11 of the *Law of Succession Act*, Sections 1A, 1B, 3, 3A, 63(e), 66 and 75 of the *Civil Procedure Act* and Article 159 of *the Constitution* seeking for ORDERS: -

1. That pending the hearing and determination of this Application inter-partes, this Honourable Court be pleased ex debito justitiae to stay any further proceedings in this matter pending the hearing and determination of an intended appeal lodged against the impugned ruling and order issued on 17<sup>th</sup> April, 2024 vide a notice of appeal lodged in the superior court on 19<sup>th</sup> April, 2024.
2. That this Honourable Court be pleased to stay its proceedings and in particular the objection proceedings and/or mark the matter as stood over generally until the intended appeal lodged against the impugned ruling and



order issued on 17<sup>th</sup> April, 2024 vide a notice of appeal lodged in the superior court on 19<sup>th</sup> April, 2024 is finally heard and determined.

3. That costs be in the cause.
2. The Application is premised on grounds on its face and supported by an affidavit of Susan Wanjiru Thuo and Nixon Kariuki Thuo sworn on the even date.
3. They aver that being aggrieved by this court ruling delivered on 17<sup>th</sup> April, 2024 they lodged a notice of Appeal in the superior court on 19<sup>th</sup> April, 2024 and they are in the process of preparing a record of Appeal as per Rule 82 of the Court of Appeal Rules, 2022.
4. It is their deposition that their right to appeal shall be tampered upon if these proceedings were to proceed since the finding of the court vide the impugned ruling shall remain in force and binding on this court and the Applicants herein, and their intended shall be rendered nugatory and a mere academic exercise since this Honourable Court shall proceed to make final determination on the objection proceedings by the Applicants in reliance of the contested will and which is the subject of the intended appeal.
5. They assert that this Honourable Court has inherent jurisdiction to stay further proceedings in this cause awaiting the final determination of the intended appeal.
6. They depose that the application is not prejudicial to the interests and rights of the petitioners/ respondents and hence ought to be allowed.
7. The Petitioners, Waiharo Harrison Ngeta and Nahashon Mahugu Kabiri opposed the application through their replying affidavit sworn on 23<sup>rd</sup> April, 2024.
8. They believe the Application herein is intended to unnecessarily delay and to defeat the expeditious determination of this matter.
9. It is their averment that the court's discretion to stay proceedings cannot be exercised to facilitate the derail of its own process as that would be rewarding abuse of the court process and is antithetical to the edicts of the constitution on the administration of justice expeditiously and prudent utilisation of court resources.
10. It is their contention that to stay proceedings herein which relate to an estate that is without administrator until the proposed appeal is heard and determined which might take years is to abandon the estate that is currently in the hands of the court to plunder and to deny the beneficiaries of any meaningful prospects of inheritance, and it would be defeatist of the will of the deceased.
11. They posit that the applicants have not demonstrated that they stand to suffer irreparable loss if stay of proceedings is not granted.
12. It is their averment that refusing to stay proceedings as the court ought to will not and cannot in any way or sense render the proposed appeal nugatory because the objectors can always appeal against the eventual judgement if aggrieved.
13. They depose that the objectors have not demonstrated how will in a separate and unique way separate from other beneficiaries who desire the conclusion of the matter and how they would insulate the other beneficiaries from the loss that would result from keeping the estate un-administered during the pendency of the proposed appeal. That the objectors have moreover not proposed how the estate would be managed in the interim period as they pursue their appeal and how they would secure the interest of the other beneficiaries who do not share their position.



14. They thus contend that acceding to the application would be validating the frivolous enterprise of the 2<sup>nd</sup> objector of focusing the courts attention to side shows and issues that are peripheral to the probaton of a will under the Law of Succession and or matters that are irrelevant much less determinant of a valid will.
15. They aver that the proposed will has been filed without leave of court and thus the application is incompetent and an abuse of the court process.
16. The respondents urged the court to dismiss the application.
17. The Application was canvassed through written submissions.

### **Applicants' Submissions**

18. The Applicants framed three issues for determination. Namely:-
  - a. Whether the Appellants/Applicants have an arguable appeal.
  - b. Whether it is in the interest of justice that this Honourable Court does grant an order of stay of proceedings.
  - c. Whether the instant application has been brought expeditiously.
19. On the first issue, the applicants submitted that the impugned ruling dismissed a technical issue that sought to deal with the authenticity of the collection of wills or otherwise, which goes to the very root of the main proceedings and unless countermanded the ultimate outcome of the proceedings will foreseeable be unjust.
20. In buttressing their submissions, the Applicants cited the case of Niazons (Kenya) Ltd. vs China Road & Bridge Corporation (Kenya) Ltd. Nairobi (Milimani) HCCC No. 126 of 1999 for the proposition that stay of proceedings should be granted where the Appeal may have serious effects on the entire case.
21. The Applicants also relied on the cases of Wachira Waruru & Another vs. Francis Oyatsi Civil Application No. Nai. 223 of 2000 [2002] 2 EA 664 & Re Global Tours & Travel Ltd HCWC No. 43 of 2000
22. Regarding the second issue, the Applicants submitted that the spirit of the law as espoused in the *Judicature Act* ought not to be expediently relegated but be objectively upheld. They posited that the instant application has been brought in good faith. They cited the case of Butt vs Rent Restriction Tribunal (1982) KLR 417 where it was held that as a general rule, the court ought to exercise its best discretion in such a way as to prevent the appeal, if successful from being rendered nugatory.
23. Regarding the averment by the Respondents that they should wait for the proceedings to end then appeal the eventual judgement, the applicants submitted that these averments are made in hindsight of abusing court processes and aimed at misleading this Honourable Court. To bolster their submissions, reliance was placed on the case of Mark Omollo Agencies & 2 Others vs Daniel Kioko Kaindi & Another [2004] eKLR where the court opined that if the hearing was to proceed on the basis of an amended pleadings would render an appeal nugatory and the fact that an appeal against the ultimate judgement could still be filed would not make any difference to the intended appeal being nugatory because the Court of Appeal Rules require the institution of an appeal against each order or decree and there is no clear provision for consolidation, and additionally proceeding with the hearing while an appeal is pending would constitute an abuse of the court process.



24. With respect to the third issue, the Applicants submitted that the instant application has been filed timeously since the ruling was delivered on 17<sup>th</sup> April, 2024 and the instant application filed on 23<sup>rd</sup> April, 2024 to the very expectation provided in the case of *Re Global Tours & Travel Ltd* (supra).
25. They prayed for costs to be in the cause.

### **Petitioners'/Respondents' Submissions**

26. The Respondents equally framed three issues for determination. Namely;
  - a. Whether the Objectors/Applicants were mandated to seek leave before filing the intended appeal.
  - b. Whether the Objectors/Applicants have met the threshold for grant of stay orders.
  - c. Who should bear the costs of the suit?
27. On the first issue, the respondents submitted that the applicants were mandated to seek leave before filing the intended appeal and their failure to seek and obtain the said leave renders the instant application impotent and deprives this court of jurisdiction to hear the same.
28. The Respondents argued that the *Law of Succession Act* does not envisage instances where an appeal from the decision or order of the High Court is donated to litigants as of right. In support of this proposition, reliance was placed on the cases of *Daniel Gicheru Kingori & 2 Others vs Wambugu (Civil Application E167 of 2022)* [2022] KECA [1168] (KLR) (28 October 2022) (Ruling) & *John Mwita Murimi & 2 others vs Mwikabe Chacha Mwita & another* [2019] eKLR.
29. With respect to the second issue, the Respondents cited the provisions of Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, 2010 on threshold that an applicant must meet in order for an order of stay of execution pending appeal to be granted and the case of *Mocha Hotel Ltd vs Kwanza Estates Ltd (Environment & Land Case 14 of 2022)* [2023] KEELC 21729 (KLR) for the proposition that courts are prevented from granting orders of stay of proceedings pending appeal unless there are sufficient cause.
30. On the issue of substantial loss, the Respondents posited that the applicants have failed to demonstrate that they stand to suffer substantial loss in the event their application is declined and that in the any case they stand to suffer loss if the application is granted as the proceedings herein will be derailed and resultantly they will be kept from accessing their bequests which are currently facing massive wastage on account of the current void in the management of the estate.
31. The Respondents argued that the overriding objective espoused in the *Civil Procedure Act* advocates for a just, speedy and affordable resolution of disputes. They argued that courts should therefore in determining whether or not to grant orders of stay of execution should consider the substantive ramifications of the overriding objective and lean towards decisions that would promote justice and the rule of law.
32. They argued that the dispute herein was filed close to two years ago and the applications filed by the Applicants have since been disposed off by the court and as such granting of the orders sought will prevent the onward probate of the deceased's will that would negate the purpose and essence of the aforesaid overriding objective.



33. They argued that the intended appeal lacks merit and is a further ploy by the applicants to engage the court in a wild goose chase while at the same time continuing to derive merits from the estate of the deceased.
34. In support of their submissions, the Respondents cited the cases of Jason Ngumba Kagu & 2 others vs Intra Africa Assurance Company Limited (2014) eKLR; Kenya Shell Limited vs. Kibiru [1986] KLR 410; James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR; & Re Global Tours & Travels Limited (supra).
35. On the issue of costs, the Respondents prayed that the same be awarded to them.

### **Analysis & Determination**

36. I have duly considered the Application, the affidavit in support and in opposition to the Application as well as the parties' rival submissions. In my view, the questions that crystalize for determination are:-
  - a. Whether the Applicants were required to seek leave before lodging a Notice of Appeal and, the consequences of the failure to seek such leave.
  - b. Whether the Applicants have made out a case to warrant the grant of the orders for stay of proceedings pending appeal.
37. Depending on the finding on the first issue, I may not dwell on the other issue, so as not pre-empt the arguments thereon to the detriment of either party.
38. On the first issue, section 50 *Law of Succession Act* in regards to appeals provides that:
  - (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 prior leave thereof in respect of any point of Muslim law, to the Court of Appeal."
39. It is clear from the above provision that decisions from the subordinate courts in succession matters are appealable to this court and this court decisions on the same are final while appeals from the Kadhi's court lie to this court and are further appealable to the Court of Appeal but with leave of the High Court.
40. It is also clear that an appeal against the original decision of the High Court sitting as a Probate Court is not provided for an aggrieved party.
41. There are conflicting decisions from the Court of Appeal on whether the judgment and decree from the High Court to the Court of Appeal is appealable with leave of the High Court or not.
42. For example, In Julius Kamau Kithaka v Waruguru Kithaka Nyaga & 2 others [2013] eKLR, Otieno-Odek, JA, found that leave to appeal from the High Court to the Court of Appeal in succession matters was not required. The court stated as follows:-

“It is trite law that where any proceedings are governed by a Special Act of Parliament, like in this case, the *Law of Succession Act*, the provisions of such an Act must be strictly construed and applied...therefore, what is in the *Law of Succession Act* is what was intended to be therein



in the manner and the extent it is there. What is not therein expressly is what was intended not to be there by the legislature. I find that the applicant in this case was not required to seek leave to appeal from the High Court.”

43. On the other hand, in *Rhoda Wairimu Karanja & another vs. Mary Wangui Karanja & another* [2014] eKLR, the Court of Appeal (Musinga, Ouko & Gatembu, JJ.A.) while deliberating on the import of section 50 opined thus:

“But 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 the latter’s original jurisdiction. Decisions on this point have been varied both in the High Court and in this Court. The holding in the leading case of *Makhangu vs. Kibwana* [1996-1998] 1 EA 168 (Cockar, CJ, Kwach and Shah, JJ.A), which has been cited invariably in almost all the subsequent decisions is to the effect that an appeal does lie to the Court of Appeal from the decision of the High Court in probate matters; that under section 47 of the *Law of Succession Act*, the High Court has jurisdiction on hearing a matter to pronounce decrees or orders; that any order or decree made under this section is appealable under section 66 of the *Civil Procedure Act*, either as a matter of right if it falls within the ambit of section 75 of the Civil Procedure Rules or by leave of the Court if it did not. It has been said in criticism of this decision that the *Law of Succession Act* is a complete code with its own rules and that there would be no justification to import into it provisions of the *Civil Procedure Act* and Rules unless expressly permitted under Rule 63 of the Probate and Administration Rules.

In short, and speaking generally, the practice alluded to by their Lordships in the above passage, is 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.

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 merit serious judicial consideration. We think this is a good practice that ought to be retained in order to promote finality and expedition in the determination of the probate and administration dispute.

So what is our decision in this application...leave of the High Court to appeal to this Court in succession matters is necessary in the former’s exercise of its original jurisdiction.”

44. In *Daniel Gicheru Kingori & 2 others vs Wambugu* (supra) the Court of Appeal (J Mativo) ,with respect to the issue herein opined as follows:-

“My reading of the law and decided cases leaves me with no doubt that there is no automatic right of appeal from the judgments/decrees and orders made by the High Court in succession matters. On the other hand, there is absence of a positive provision in the act stipulating that the judgment, decree and order made by the High Court are final. In the absence of a clear provision to that effect, I do not agree that the intention of the Parliament was to make the judgment, decree or order of the High Court as final. If that was the intention, then Parliament could have stipulated expressly.”



45. In John Mwita Murimi & 2 others vs Mwikabe Chacha Mwita & another [2019] eKLR the Court of Appeal (Makhandia, Kiage & Otieno-Odek, JJ.A.) stated:

“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-vs Kibwana [1996] EA cited by the respondent was succinctly considered by this Court in Rhoda Wairimu Karanja & another vs 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 it 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.”

In Hafswa Omar Abdalla Taib & 2 others vrs. Swaleh Abdalla Taib [2015] eKLR, this Court rendered itself as follows:

“In this case the appellate jurisdiction in respect of Succession Causes has been donated by Section 50 of the Law of Succession Act. From this provision, it is clear that decisions from the magistrates’ courts in Succession Causes are appealable to the High Court; whose decision on such an appeal is final. However, 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 this Court but only with leave of the High Court and in respect only on points of Muslim law. However, there is no mention of an appeal to this Court from the decision of the High Court made in exercise of its original jurisdiction.

Indeed even section 47 of the same 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. It is trite that where a right of appeal is not expressly provided for by statute or the statute is silent, then a party wishing to proceed further by way of appeal should seek leave for such an undertaking from the court whose decision he seeks to impugn by way of further appeal or from the appellate court. To our mind we have no doubt at all that an appeal lies to this Court from the decision of the High Court in Succession Causes in its original jurisdiction. However, that must be with leave of the High Court. This proposition was first propounded by this Court differently constituted almost 18 years ago in the case of Makhangu vs. Kibwana [1996-1998] I E.A 168. In a nutshell the court held that an appeal does lie to this Court from the decision of High Court in Succession Causes, that under section 47 of the law of Succession Act, the High Court has jurisdiction on hearing a Succession Cause to pronounce decrees or orders; that any order or decree made under this section is appealable under section 66 of the Civil Procedure Act, either as a matter of right if it falls within the ambit of section 75 of the Civil Procedure Act or by leave of the Court if it did not. This decision has reigned supreme and we are not aware of any other decision to the contrary. If anything, there have been a plethora of subsequent appeals to this Court in Succession Causes but only after leave was duly obtained from the High Court whose decision is being appealed. See for instance Kaboi vs. Kaboi & Others [2003] E.A 472, Francis Gachoki Murage vs. Juliana Wainoi Kinyua & another, Civil Appeal (Application) No. 139 of 2009 (UR) and Rhoda Wairimu Karanja vs. Mary Wangui Karanja & Another [2014] eKLR.



What runs through all these decisions is that whereas this Court has jurisdiction to entertain appeals in Succession Causes from the High Court in its original jurisdiction that right is not automatic. Where there is no automatic right of appeal, it behoves the aggrieved party wishing to appeal to seek and obtain leave to do so from the High Court and the granting of leave is a discretionary power. This is how this Court delivered itself on this question in the case of Francis Gachoi (supra): “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 of leave is within the discretion off a judge ...”

46. Guided by the above cases and the aforesaid statutory provisions, I hold the view that a party should seek leave to appeal decisions of the High Court exercising original jurisdiction in succession matters and failure to obtain such leave is fatal.
47. In the instant case the decision which the Applicants intend to appeal against arises out of a succession cause and the ruling thereof was delivered by this Court exercising its original jurisdiction.
48. The Applicants did not seek leave before filing Notice of Appeal and despite the Respondents raising it in their Replying affidavit, the Applicants did not deem it fit to explain why such a prayer for leave was omitted and or not sought.
49. In the circumstances, I find that the instant application is rendered incompetent by failure to seek leave to appeal. Without a valid appeal, there is nothing on which an order of stay of proceedings pending appeal can stand on.
50. The upshot of the foregoing is that the application dated 23<sup>rd</sup> April, 2024 is dismissed with costs to the respondents.
51. As I had stated, in view of my finding on the above, I will not delve into the merits of the application.
52. Needless to add, the applicants are at liberty to file an appropriate application which shall be considered on merits.
53. It is so ordered.

Dated, Signed and Delivered at Nakuru 12<sup>th</sup> Day of June, 2024.

**H. M. NYAGA**

**JUDGE**

**In the presence of;**

C/A Jeniffer

Mr. Kibet for Applicants

Mr. Kisilah for Respondents

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