



**Rotich v Rotich & 3 others (Civil Appeal E041 of 2021)  
[2024] KEHC 7229 (KLR) (19 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7229 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
CIVIL APPEAL E041 OF 2021  
JK SERGON, J  
JUNE 19, 2024**

**BETWEEN**

**FREDRICK ROTICH ..... APPELLANT**

**AND**

**ISAAC ROTICH ..... 1<sup>ST</sup> RESPONDENT**

**RICHARD ROTICH ..... 2<sup>ND</sup> RESPONDENT**

**MICHAEL ROTICH ..... 3<sup>RD</sup> RESPONDENT**

**DOMINIC ROTICH ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The application coming up for determination is a chamber summons dated 27th November, 2023 seeking the following orders;
  - (i) Spent
  - (ii) That this Honourable Court be pleased to grant an order that the notice of appeal lodged on 29th May, 2023 be deemed to have been duly filed.
  - (iii) That in the alternative and absolutely without prejudice to prayer (ii) above, this Honourable Court be pleased to grant the applicant leave to appeal against the judgment of this Honourable Court dated 16th May, 2023.
  - (iv) That there be stay of execution of the judgment and decree of this Honourable Court delivered on 16th May, 2023, pending hearing and determination of this application.
  - (v) That there be a stay of execution and implementation of the certificate of confirmation of grant issued by this Honourable Court dated 10th February, 2023, pending hearing and determination of the appeal.



- (v) That the necessary directions be given.
2. The application is supported by grounds on the face of it and the supporting affidavit of Fredrick Rotich the applicant herein.
  3. The applicant avers that on 16th May, 2023 this Court rendered a judgment in which it interalia dismissed their appeal and found that whereas the magistrate had failed to consider their proposed mode of distribution, the magistrate did not proceed on a wrong principle of law.
  4. The applicant avers that being aggrieved by the said judgment, he promptly lodged a notice of appeal and requested for a certified copy of the proceedings.
  5. The applicant avers that his advocates on record advised him to file an application for leave to appeal as emerging jurisprudence suggests that second appeals on probate matters are lodged subject to the leave of court.
  6. The applicant avers that he has an arguable appeal with high chances of success as this Court dismissed the first appeal in its entirety despite finding that some of the grounds in the memorandum of appeal had merit.
  7. The applicant avers that this Court is vested with the power to grant leave to appeal and the discretion to allow stay of execution against the terms of the judgment and decree delivered on 16th May, 2023.
  8. The applicant avers that on his part, he was ready to offer security and/or abide in the terms that this Court would deem fit and just to impose.
  9. The applicant avers that unless the instant application is allowed, they would suffer substantial loss and prejudice as the substratum of the appeal would be lost in the event that the estate subject to the instant succession proceedings is distributed and/or alienated before the Court of Appeal renders itself on their appeal.
  10. Michael Rotich the 3rd respondent herein and on behalf of the 1st, 2nd and 4th respondents, filed a replying affidavit in opposition to the chamber summons dated 12th February, 2024.
  11. The respondent avers that the application seeking leave to file a second appeal had been overtaken by events and that the chances of the appeal were low since the grant was confirmed within the full knowledge of the applicant and that the children of the second household had already transmitted the land parcel Kericho/Kaptebengewet/209 formerly registered in the name of their mother Elizabeth Chepkorir Kelelyo (now deceased) and obtained title deeds in respect of the said parcel and that the copies of the said transmission is in the court file.
  12. The respondent avers that this Court did not err in law when rendering its decision and upholding the findings of the lower court, this Court's determination was guided by facts and evidence and that in any event that the wives of the deceased had lived on the respective parcels for over fifty (50) years without interference.
  13. The respondent reiterated that their mother's land parcel number Kericho/Kaptengewet/209 was not in existence and therefore could not be subjected to an appeal as the said land parcel had been transmitted to the beneficiaries.
  14. The respondent therefore urged this Court to dismiss the application for leave to appeal and stay of execution pending appeal with costs and maintain status quo.



15. Having considered pleadings filed by the parties, the sole issue for determination by this court is whether the applicant is entitled to the orders sought for stay and for leave to appeal from this Court to the Court of Appeal in a succession matter where this court is exercising appellate jurisdiction from an appeal arising from the Magistrate's Court. The answer is in the negative. Section 50 of the [Law of Succession Act](#) Cap 160 Laws of Kenya 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 shall be final.
- (2) An appeal shall lie to the High Court in respect of any order or decree made by a Kadhis 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.'
16. The above section 50 (1) of the [Law of Succession Act](#) is clear and it needs no further elaboration. It speaks to the finality to the proceedings in succession matters from the Magistrate's court to the High Court on appeal. The Court of Appeal in *Josephine Wambui Wanyoike v Margaret Wanjiru Kamau* [2013]eKLR, held that the [Law of Succession Act](#) is a self-sufficient Act of Parliament with its own substantive law and rules of procedure.
17. A similar situation arose in *Alexander Dismas Kosegi v Grace Chebor Muhena & Another and Jacob Buhangi Elaki & 16 Others (Interested parties)*[2020] eKLR in Eldoret High Court Civil Appeal No 74 of 2017 where the Learned Judge clearly stated that: 'This appeal arose from the decision of the Senior Resident Magistrate at Kapsabet in Kapsabet Succession Cause No 1 of 2012. Accordingly, and as correctly pointed by counsel for the Respondent, no second appeal to the Court of Appeal would arise therefrom, for Section 50 (1) of the [Law of Succession Act](#) is explicit that: '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.'
18. Accordingly, I find that the application dated 27th November, 2023 to be devoid of any merit. It is hereby dismissed. Each party has to bear its own costs.

**DELIVERED, SIGNED AND DATED AT KERICHO THIS 19TH DAY OF JUNE, 2024.**

**J.K. SERGON**

**JUDGE**

In the presence of:

C/Assistant – Rutoh

No Appearance for the Parties

