



**Gachoki & another v Karia (Civil Appeal E056 of 2021)
[2024] KEHC 11711 (KLR) (2 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11711 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E056 OF 2021
RM MWONGO, J
OCTOBER 2, 2024**

BETWEEN

BEATRICE KANYIBA GACHOKI 1ST APPELLANT

DAVID MARINGA GACHOKI 2ND APPELLANT

AND

NAOMI WAMBUI KARIA RESPONDENT

RULING

1. The appellants filed this application by summons seeking orders as follows:
 1. Spent.
 2. Spent.
 3. That pending the hearing and determination of the intended appeal, the Honourable Court be pleased to grant an order of Stay of execution, staying the Certificate of confirmation of grant issued on 3rd February, 2016 and dated 9th February, 2016 in Succession Cause No.327 of 2016.
 4. That the Honourable Court be pleased to grant leave to the applicant to file a second appeal to the Court of Appeal from the Judgment of this Court delivered on 24th October, 2023.
 5. That upon consideration of prayer (4) four above, this Honourable Court be pleased to give directions as to the filing and service of a notice of appeal herein.
 6. That in the alternative to prayer four (4) above, the Honourable Court be pleased to grant an order for review of its judgment delivered on 24th October, 2023.
 7. That the cost of the application to abide the outcome of the appeal.



2. The application is premised on the grounds set out in it and on the supporting affidavit of David Maringa Gachoki, to the effect that:
 - i. The Honourable Court delivered a judgment on the 24th October, 2023 dismissing the applicants appeal emanating from a judgment delivered on 17th January, 2020 in Kerugoya CM Succession Cause No.327 of 2016 before Hon. E.O Wambo (SRM).
 - ii. The applicants being aggrieved by the said Judgment seek leave before this court to file a second appeal to the court of appeal in light of Section 50(l) of the *Law of Succession Act*.
 - iii. The applicant's appeal is arguable and has high chances of success.
 - iv. If an order of stay of execution is not granted as prayed for, then the object of this application and the intended appeal will be defeated and rendered nugatory.
 - v. The application has been made without unreasonable delay; and substantial loss may result to the applicants unless the orders sought are granted.
 - vi. If the Certificate of Confirmation of Grant issued on 3rd February, 2016 is implemented by subdividing the land into two equal portions as per the distribution schedule, the applicants will suffer substantial loss.
 - vii. The applicants have an arguable appeal as shown by the draft Memorandum of Appeal with high chances of success and that it's in the interest of Justice that leave be granted.
3. The Respondent's Replying Affidavit substantially avers that:
 1. The Judgment herein was delivered on 24.10.2023 dismissing the Appeal and also upholding the Judgment of the lower court; and the said Judgment of the High court is final as to matters of succession and hence the Application is misconceived and is an abuse of court process.
 2. The entire Application filed herein is overtaken by events since the Certificate of the Confirmation of Grant issued on 3.2.2016 in Kerugoya C.M Succession Cause No.327 of 2016 was duly executed and the process of transfer by transmission completed in that, the Estate of the deceased herein is now registered in the names of all lawful beneficiaries as per the Certificate of Confirmed Grant.
 3. From the foregoing, there is nothing left to be stayed and thus the entire application amounts to an abuse of the court process as all beneficiaries are also settled on their respective portions out of L.R Inoi/Kamondo/259 which was the estate of the deceased herein.

Appellants/Applicants Submissions

4. As to whether there is a arguable appeal: The applicants have attached a draft memorandum of appeal substantially raising five (5) grounds of appeal. They urge that the Court erred in law in making a determination premised on a claim of trust in land while constituted as a Succession Court but devoid of jurisdiction; and that the learned judge erred in law in upholding the judgment of the trial Court that distributed the suit land into two (2) equal portions, a mode of distribution not supported by the *Law of Succession Act*.
5. The appellants contend that the foregoing constitutes an arguable appeal.
6. As to whether they should be granted leave to file a second appeal; The applicants submit that Section 50 (1) of the *Law of Succession Act* limits appeals arising from any order or decree by a Resident



Magistrate to this Court, whose decision shall be final. However, they argue that the High Court and the Court of Appeal have expanded the scope for leave to appeal. They cite the case of *Jacob Kinyua Kigano v Tabitha Njoki Kigano & Another* [2014] eKLR, where the Court of Appeal stated that the granting of leave is within the discretion of a Judge.

7. They also cite the case of *Obange & another v Oganyo & 4 others* (Civil Appeal E033 of 2021) where Aburili J, while considering the question of leave for a second appeal against the judgment of the High Court exercising appellate jurisdiction, had this to say:

“The question, therefore, is, what position should this Court take? In view of the conflicting determinations above, I would invoke the provisions of Article 48 of the *Constitution* of the right to access justice and Article 50(1) of the *Constitution* on the right to a fair hearing and to have any dispute that can be resolved by application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body, and find that there is such right of appeal to the Court of appeal under section 50(1) of the *Law of Succession Act* but only with leave of the High Court.”

“For the above reasons, I find and hold that even if this court had the jurisdiction to grant leave to the applicants to file a second appeal, the application for leave was brought with unexplained inordinate delay which translate to an afterthought and secondly, that no points of law have been identified in the draft Memorandum of appeal for consideration by the second Appellate Court.”

8. The applicants therefore contend that the High Court has the residual jurisdiction to grant an order of leave for a second appeal notwithstanding the fact that this Court has been limited in that regard by Section 50(1) of *Succession Act*. The applicant asserts that this residual jurisdiction is invoked to correct an injustice and boost the confidence of the public in the judicial system.
9. On whether the Court can review its judgment: The appellants submit that pursuant to Section 47 of the *Law of Succession Act*, this Honourable Court is bestowed with the jurisdiction to entertain any application and determine any dispute under the *Act* and to pronounce such decrees and make such order therein as may be expedient. The applicants submit that this Court is permitted by Rule 63 of the *Probate administration rules* to apply Order 45 Rule 1(1)(b) which provides that,

“any person considering himself aggrieved by a decree or order from which no appeal is hereby allowed.....may apply for a review of judgment”

10. It is submitted that the Court of Appeal in the Case of *Shanzu Investments Ltd v Commissioner of Lands* [1993] eKLR reaffirmed the position posed by the case of *Sadar Mohamed v Charan Singh*, (1959) EA 1793 where Farrel J stated as follows:

“that there was unfettered discretion in court to make such orders as it thinks fit on an application for review and that the omission of any qualifying words was deliberate.”

11. The applicants' prayer number 6, for review, is sought as an alternative to prayer 4 of the summons dated 6th November, 2023.

Respondent's Submissions

12. As to whether the appellants deserve to be granted leave to file a second appeal: The respondent submitted that the appellants herein were initially dissatisfied by the judgement of the trial court in CM Succession Cause No.327 of 2016 in which the learned magistrate distributed the property between



two houses equally. The respondent notes that the current appeal was dismissed as the court held that the distribution of the estate was fair and reasonable and that the trial court did not err in its finding.

13. The Respondent cited the case of *Rboda Wairimu Karanja & Another v Mary Wangui Karanja & Another* [2014 eKLR the court made observations with regard to appeals in succession matters against the decisions of the High Court exercising its original jurisdiction. These include that 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.
14. Point of Law: The respondents submit that the appellants, in seeking leave to appeal a second time, have a duty to demonstrate the point of law that needs the attention of the Court of Appeal. It is urged that the appellants have no clear point of law that they seek to appeal against, and are only on a fishing expedition aimed at frustrating the Respondent from enjoying her fruits of the judgment.
15. As for review, the respondent contends that Section 80 of the *Civil Procedure Act* and Order 45 rule 1 of the *Civil Procedure Rules* that give the court unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision, is a discretion that should be exercised sparingly, judiciously and not capriciously.
16. Finally, the respondent argues that the Appellants have failed to give a good reason as to why the said judgment ought to be reviewed. This again is a fishing expedition, and should not be entertained.

Issues for Determination

17. The key issue for determination is: Whether the appellants should be granted leave to file a second appeal. The secondary issue is whether, in the alternative, this court can review its judgment.

Analysis and Determination

Grant of Leave to file a Second Appeal

18. The appellants seek the leave of this Court to file a second appeal to the Court of Appeal from the judgment delivered on 24th October, 2023. In the alternative, they seek an order for review of its judgment delivered on 24th October, 2023.
19. Section 50 (1) of the *Law of Succession Act* limits appeals arising from any order or decree by a Resident Magistrate to this Court, it also provides that the High Court's decision shall be final. However, the High Court and in deed the Court of Appeal have on several instances expanded the scope for leave to appeal.
20. The appellants herein were initially dissatisfied by the judgement of the trial court in CM Succession Cause No.327 of 2016 in which the learned magistrate distributed the property between two houses equally.
21. The current appeal was dismissed as the High Court held that the distribution of the estate was fair and reasonable based on the peculiar facts presented to the court, and that the trial court did not err in his finding.



22. The appellants submit that this court has the residual jurisdiction to grant an order of leave to file a second appeal notwithstanding the inhibitions to this Court by Section 50(1) of *Succession Act*. In *Jacob Kinyua Kigano v Tabitha Njoki Kigano & Another* [2014] eKLR, the Court of Appeal had this to say:
- “Granting of leave is within the discretion of a Judge. In this case the appellant is appealing against the order of distribution of the deceased estate. That order is capable of execution as a decree of the court; thus, following the dicta in the Makhangu, case, the appellant can be said to have an automatic right of appeal.”
23. The respondent submits that in seeking leave to appeal a second time, it is the Appellant’s duty to demonstrate the point of law that needs the attention of the Court of Appeal. The Respondent states that the Appellants only point was that of a trust which the Judge readily analysed and found it formed no basis in relation to the distribution of the estate.
24. From the annexed memorandum of appeal, the Appellants allege that the learned magistrate erred in applying trust law in determining a succession case. The respondent submits that the magistrate never applied the law of trust in distributing the estate of the deceased.
25. In the case of *Rhoda Wairimu Karanja & Ors v Mary Wangui Karanja & Anor* [2014 eKLR the court made the following observations with regard 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.”
26. In *Kenya Breweries Limited v Godfrey Odoyo* [2010] eKLR (Civil Appeal No.127 of 2007) Onyango Otieno, J.A. succinctly stated as follows:
- “In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters, they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”
27. From the annexed memorandum of appeal, the Appellants allege that the learned magistrate erred in applying trust law in determining a succession case. It is however clear that the magistrate never applied the law of trust in distributing the estate of the deceased.
28. It is clear that in this regard the appellants have not raised any specific point of law that would be considered by the Court of Appeal as a point of law.
29. The applicants’ prayer number 6, invites this Court to review its judgment delivered on the 24th October, 2022 pursuant to Order 45 Rule1(1)(b) where no appeal is hereby allowed in lieu of Section



50(1) of the Law of Succession Act. In National Bank of Kenya Limited v Ndungu Njau (1997) eKLR it was held that:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter”.

30. The appellants cannot seek for both review and leave for appeal in this application. They have not identified the correction or apparent error or omission on the part of the Court that requires review. It is apparent that the alternative prayer is merely an attempt to grasp at straws.

Order 45 rule 2 of the said Rules, provides as follows:

“A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

31. In Nditinya v Total Kenya Limited (Miscellaneous Civil Application E218 of 2021) [2022] KEHC 10080 (KLR) (14 July 2022) (Ruling) Odunga J held:

“It is clear from the foregoing that the review remedy is only available to a party who, though has a right to challenge the decision in question by an appeal, is not appealing or to whom there is no right of appeal. In other words, a person cannot exercise both the right of appeal and review at the same time.”

32. In the present case, the respondent rightly submits that the appellants have failed to give a good reason as to why the said judgement ought to be reviewed. This court agrees with the respondent on that issue.

Conclusions and Disposition

33. From the foregoing discussion, it is clear that a second appeal is only permissible where a clear point of law is sought to be canvassed at the Court of Appeal. This was not demonstrated in the present application. On that prong the application fails.
34. With regard to the alternative prayer for the court to review its judgment, it has already been shown that there is no identified correction or apparent error or omission on the part of the court that justifies review. The prong of this application also fails.
35. In the result the application fails on its entirety and is hereby dismissed with costs.
36. Orders accordingly.

DATED AT KERUGOYA THIS 2ND DAY OF OCTOBER, 2024

R MWONGO

JUDGE

Delivered in the presence of:

1. Gitari - holding brief Ndegwa for 1st & 2nd Applicants



2. Kahiga G. for Respondent

3. Court Assistant - Murage

