



REPUBLIC OF KENYA



**In re Estate of Waronja Gachunga Kihiu (Deceased) (Succession Cause 3111 of 2015) [2024] KEHC 13010 (KLR) (Family) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13010 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY**

**SUCCESSION CAUSE 3111 OF 2015**

**PM NYAUNDI, J**

**OCTOBER 11, 2024**

**IN THE MATTER OF THE ESTATE OF WARONJA GACHUNGA KIHU  
(DECEASED)**

**BETWEEN**

**MOSES WARONJA KINYA ..... 1<sup>ST</sup> APPLICANT**

**SAMUEL KAMWE KINYA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JOSEPH GACHUNGA WARONJA ..... 1<sup>ST</sup> RESPONDENT**

**GODFREY KAMATU WARONJA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Joseph Gachunga Waronja and Godfrey Kamatu Waronja, the Respondents filed a Notice of Motion dated 11<sup>th</sup> September 2023 seeking the following orders;
  - a. That the Respondents/intended Appellants be granted leave by this Honourable Court to appeal against this Honourable Court's judgment that was delivered on 28<sup>th</sup> April 2023.
  - b. Spent.
  - c. That there be a stay of execution of the judgment delivered on 28<sup>th</sup> April 2023 pending the hearing and determination of the main appeal.
  - d. Costs of the suit.
2. The application was supported by the Affidavit of even date sworn by the Respondents.



3. The Applicants did not respond to the application and neither did they file written submissions.
4. The Application was canvassed by way of written submissions. The Respondents filed written submissions dated 6<sup>th</sup> May 2024. Relying on the Court of Appeal decision in *Rhoda Wairimu Karanja & Another v Mary Wangui Karanja & Another* [2014] eKLR, they conceded that an appeal to the Court of Appeal is not automatic, that leave must be obtained from the High Court. It was their submission that they are aggrieved by the mode of distribution in the judgment. That the draft memorandum of appeal raises substantive points of law for consideration by the Court of Appeal. They submitted that although stay pending appeal is discretionary, its objective is to prevent substantial loss and to prevent the appeal from being rendered nugatory. Reliance was placed on the decision in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR.

### **Analysis And Determination**

5. I have considered the application, the grounds thereof, the Respondents submissions and the law. The following issues for determination: -
  - i. Whether leave to appeal ought to be granted?
  - ii. Whether execution of the Judgment herein should be stayed pending appeal.
  - iii. Whether the Application for leave to appeal is merited.
6. The question as to whether an appeal lies to the Court of Appeal as a matter of right in succession causes against the decisions of the High Court exercising its original jurisdiction is settled. The Court of Appeal in the case of *Francis Gachoki Murage v Juliana Waindi Kinyua & another* Civil Appeal No. 139 of 2009 held thus:

“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 of a judge. In this case, the appellant is appealing against an 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 v Kibwana* (1996-1998) 1 EA 168 case, the appellant can be said to have an automatic right of appeal.”

7. Also, in the case of *Rhoda Wairimu Kioi & Ano. v Mary Wangui Karanja & Ano.* (2014) eKLR, the Court of Appeal stated:

“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 its original jurisdiction with the leave of the High Court or where the application for leave is refused, leave with 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 probate and administration disputes....that leave of the High Court in succession matters is necessary in the former’s exercise of its original jurisdiction and that where that application for leave has been rejected by the High Court, it can be made to this Court.”



8. Similarly, the Court of Appeal in the case of *Peter Wabome Kimocho v Josphine Mwiyeria Mwanu* [2014] eKLR (Visram, Koome & Maraga, JJA (as they then were) )stated thus: -

“There is no provision for appeals from the High Court to the Court of Appeal. What are provided for are appeals from lower courts to the High Court. That is why Mr. Gikonyo argued that it was necessary for the appellant to seek leave of the Court as there was no automatic right of appeal. We must state that this is clearly a grey area as it may also be argued that Section 66 of the *Civil Procedure Act* is not automatically imported into the *Law of Succession Act*. There is also a thin line to be drawn as to whether the order appealed against was a decree or a mere dismissal order that did not amount to a decree. This is because upon the dismissal of the application for revocation, the grant was confirmed thereby resulting into a decree. Be that as it may, this appeal was filed in 2011 after the *Constitution* of Kenya 2010 that gives the Court of Appeal jurisdiction to hear appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament was operational. Under the Constitution, all matters from the High Court are appealable to the Court of Appeal. We therefore find that this appeal is competently before us.’

9. The Court of Appeal in the cited decision stated that all matters from the High Court are appealable. Since the *Law of Succession Act* does not expressly provide for leave to apply, it’s only in order that the Respondents seek leave to appeal. Being dissatisfied with the judgment, the Respondents like any litigant have a right to appeal. I therefore grant them leave to appeal against the judgment dated 28<sup>th</sup> April 2023. The appeal shall be lodged within 30 days from the date of this ruling.

#### **Whether execution of the Judgment herein should be stayed pending appeal.**

10. This court is empowered to issue orders for stay of execution pending appeal as sought by the Respondents. This is provided under rule 63 and 73 of the *Probate and Administration Rules* as well as section 47 of the *Law of Succession Act*. The main aim of stay in this case being preservation of the estate pending the hearing and determination of the appeal. This consideration is to be weighed against the successful litigants right to the fruits of their judgment.
11. The Court of Appeal in the Case of *Absalom Dova v Tarbo Transporters* (2013) eKLR succinctly enunciated the applicable principle when it stated as follows: -

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the Court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

12. Accordingly, I find that this application has merit and is allowed on the following terms;
- a. The Respondents are granted leave to appeal against the Judgment of this court dated 28<sup>th</sup> April 2023. The Appeal to be lodged within 30 days
  - b. Stay of execution of the proceedings herein and implementation of the judgment delivered on 28<sup>th</sup> April 2023 pending the hearing and determination of the appeal is granted for a period of 45 days to enable the Applicant lodge appeal in the Court of Appeal and make application for stay of execution pending appeal at the Court of Appeal



c. Since the Application was not opposed there shall be no order as to costs.

**SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 11TH DAY OF OCTBER, 2024.**

**P. NYAUNDI**

**JUDGE**

In presence of: -

Fardosa Court Assistant

Mrs Muhuhu Advocate for Applicant

Moses Waronja Kinya Respondent in person

