



REPUBLIC OF KENYA



KENYA LAW
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**Kabunga v Kabunga & another (Civil Appeal E032 of 2021)
[2024] KEHC 12013 (KLR) (7 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12013 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E032 OF 2021
RM MWONGO, J
OCTOBER 7, 2024**

BETWEEN

MWAI KABUNGA APPELLANT

AND

LEONARD KAROKI KABUNGA 1ST RESPONDENT

NANCY WAMUNGE KARUIRU 2ND RESPONDENT

RULING

1. The Appellant herein filed this appeal following a judgment by Hon. L. W Kabaria delivered on 13.8.2021 in Gichugu PM's Succession cause No.72 of 2017. There the deceased's estate comprising of land parcel Kabare/Njiku/278 was shared equally among the 3 beneficiaries of the deceased. Upon appeal and this Court did not find any reason to fault the judgment of the lower court. It upheld the decision of the trial court through its judgment an appeal delivered on 26.10.2023 by Hon. Lady Justice F. Muchemi.
2. Dissatisfied, the Appellant now wants to file a second appeal in the Court of Appeal. He has filed the summons herein dated 13 December 2023, and seeks the orders that:
 1. The Honourable court be pleased to stay execution of its judgement delivered on 26.10.2023 pending the hearing and determination of an intended Appeal.
 2. The Honourable Court be pleased to issue orders of status quo in respect to the suit land LR. Kabare/Njiku/278 pending the hearing and determination of the intended Appeal at Court of Appeal at Nyeri.
 3. The Honourable Court be pleased to grant leave to the Applicant to file a second appeal at the Court of Appeal.



3. The Application is based on the grounds on the face of the application, and is supported by the annexed affidavit of Mwai Kabunga, in which he avers, inter alia that:
 - i. The judgement in this matter was delivered on 26.10.2023 dismissing my appeal.
 - ii. There is now eminent risk of subdivision, sale, transfer, alienation and disposal of LR.Kabare/Niku/278.
 - iii. He has instructed my advocate on record to institute an appeal and have requested and paid for certified copies of proceedings and judgment.
 - iv. He was unable to timely instruct my advocate to proceed and file the current application as I got ill and subsequently, I was unable to give instructions.
 - v. The delay in bringing the current application is not unreasonable nor an afterthought.
4. In response the Respondent objected to the summons and filed grounds of opposition to the effect that:
 - a. The application is an abuse of the court's process and is filed as an afterthought with a view of delaying justice in this matter and to prevent the Respondents from enjoying the fruits of their judgment.
 - b. The application offends the provisions of Section 50(1) of the *Law of Succession Act* Cap 160 of the Laws of Kenya as no appeal lies to the Court of Appeal from the High Court in succession matters where the High Court has exercised its appellate jurisdiction in matters emanating from the Magistrate's court.
5. The respondent also filed a Replying Affidavit with the following major averments:
 1. That this court on appeal held that there was no reason to fault the judgment of the lower court and it upheld the decision of the trial court vide an appeal delivered on 26.10.2023.
 2. That the estate of the deceased was fairly distributed and it is clear the Appellant had his day in court and the appeal was determined on merits and this application was filed as an afterthought with a view of delaying justice in this matter and ensuring we do not enjoy the fruits of our judgment.
 3. That I am advised by my advocate on record which advise I verily believe to be true that an appeal from the Magistrate's court to the High court is final and an appeal to the court of appeal is clearly restricted by Section 50(1) of the *Law of Succession Act* and the High court has no jurisdiction to stretch the right thereof by granting leave to appeal to the court of appeal.
 4. That the Applicant herein has not annexed a draft intended memorandum of appeal for the court to determine whether he has an arguable appeal and to enable the court satisfy itself that the ground raised are pure points of law, this being a second appeal.
 5. That no evidence has been adduced to show what irreparable loss the Applicant will suffer if stay orders are not granted.
 6. That this application was filed as an afterthought as judgment was delivered on 26.10.2023 and the annexure marked "MK2" which is a doctor's prescription is dated 15.11.2023 meaning that the Applicant was taken ill exactly 20 days after the judgment was delivered and hence he had ample time to give instructions to his advocate which delay has not reasonably been explained.



7. That further the Applicant took another 28 days from the date he alleges to have been ill to the date he filed the instant application, an indication that he is an indolent litigant and equity should not come to his aid.
6. The parties filed written submissions as directed by the court.

Appellant's submissions

7. The appellant submits that the law under Section 50(1) of the *Law of Succession Act* limits appeals arising from any Orders or decrees by a resident Magistrate to this Court whose decision shall be final. However, they submit, the High Court and Court of Appeal has expanded the scope of the jurisdiction to grant leave.
8. The expansion view of courts scope is seen in *Rhoda Wairimu Karanja & Another vs Mary Wangui Karanja & Another* [2014] eKLR, where the Court of Appeal stated as follows: that given the nature of litigation in our justice system it would be unconscionable to allow as final the decision of a single judge, and limit the right of appeal to the High Court, especially now when the Court hierarchy has been opened by the creation of the supreme court as an apex court.
9. Similarly, in *Obange & another v Ogando & 4 others (Civil Appeal E033 of 2021)* the court stated as follows:

“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 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.”
10. The applicant thus contends that it is not in dispute that this Court has the residual jurisdiction to grant an order of leave to file appeal. The Appellant's herein being dissatisfied with the judgement seeks to appeal to the Court of Appeal against the whole judgment of the High Court in regard to the mode of distribution. They urge this court can grant the Applicant leave to appeal to the Court of Appeal.

Respondent submissions

11. The Respondents contend that despite the appellants application for leave for a second appeal in the Court of Appeal they have not annexed a draft memorandum of appeal. This would enable the court to know the reason for preferring a second appeal. This the court is unable to satisfy itself that they have an arguable appeal, and since this is a second appeal, the grounds raised ought to be pure points of the law.
12. The Respondents argue that the application was filed as an afterthought since judgment was delivered on 26.10.2023 and annexure "MK2" is dated 15.11.2023 meaning that the appellant was taken ill exactly 20 days after the judgment and hence he had ample time to give instructions to his advocate and the 20 days' delay has not been explained. This application was filed on 13.12.2023 which is exactly about 1(one) month from the date the Applicant was allegedly taken ill. Further, he has not explained what he was doing for the one month.
13. The respondents contends that the applicant has been in occupation and use of L.R Kabare/Njiku/278 and he is employing delay tactics to ensure the estate is not distributed. In that way, he can



continue utilizing the land, which is unfortunate, as the deceased died way back on 5/9/1975 yet the estate is yet to be distributed.

14. Having pointed out that the applicant has not annexed a draft memorandum of appeal, it is clear he has no legitimate grievance since the estate was equally distributed among all the beneficiaries of the deceased. Thus, this application lacks merit.

Issues for Determination

15. The only issue for determination is whether the applicant should be granted leave to file a second appeal.

Analysis and Determination

16. I have carefully considered the parties representations and the law
17. The Appellant herein being dissatisfied with the judgement seeks to appeal against the whole judgement in regard to the mode of distribution of the suit land. He deposed that there is now eminent risk of subdivision, sale, transfer, alienation and disposal of LR.Kabare/Njiku/278.
18. Section 50(1) of the *Law of Succession Act* 160 of the laws of Kenya provides:

“50(1) An appeal shall lie to 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.”
19. In *Jacob Kinyua Kigano v Tabitha Njoki Kigano & Another* [2014] eKLR, the Court of Appeal had this to say on grant of leave:

“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.”
20. The appellant deposed that he was unable to give timely instructions to his advocate to proceed and file the current application as he became ill and subsequently was unable to give instructions.
21. The Respondents argue that the application was filed as an afterthought as judgment was delivered on 26.10.2023 and annexure"MK2" is dated 15.11.2023 meaning that the appellant was taken ill exactly 20 days after the judgment. As such he had ample time to give instructions to his advocate and the 20 days delay has not been explained. This application was filed on 13.12.2023 which is exactly about 1(one) month from the date the Applicant was allegedly taken ill and again he has not explained what he was doing for the one month.
22. I agree that the explanation by the appellant does not appear reasonable. However, even if this court found the delay to be reasonable what other aspects does it need to be satisfied upon, to exercise its discretion?
23. I think it is reasonable to consider other factors such as whether the appellant has an arguable appeal; whether the appeal raises issues of general public importance; or whether the appeal raises substantive points of law.
24. As to whether there is an arguable appeal: the appellant has not annexed a draft memorandum of appeal so that the court identify whether there are serious arguable grounds that justify leave for a second appeal.



- 25. As to whether the appeal raises issues of general public importance or points of law, again no information or representations were made on these by counsel. What was stated by the applicant is that they seek “to appeal against the whole judgement in regard to the mode of distribution”.
- 26. In the case of *Rhoda Wairimu Karanja & Another v Mary Wangui Karanja & Another* [2014] eKLR where it was held:

“We think we had 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 jurisdiction 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.”

Conclusions and Disposition

- 27. It is clear that an applicant seeking a second appeal in the Court of Appeal in succession matters does not have an automatic right of appeal, but must seek leave. The grant of leave is a matter for the court’s discretion, which discretion must be exercised judiciously. Leave will generally be granted if, *prima facie*, there are grounds which merit serious consideration by the Court of Appeal.
- 28. It is for the applicant to put forth and explain the grounds which merit serious consideration for leave for a second appeal. It is upon consideration of these that the court exercises its discretion judiciously to grant leave.
- 29. Here, I am not persuaded that the applicant has made out a case that justifies the exercise of this court’s discretion in his favour.
- 30. Accordingly, leave is declined and the application is dismissed.
- 31. Orders accordingly.

DATED AT KERUGOYA THIS 7TH DAY OF OCTOBER, 2024

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R. MWONGO
JUDGE

Delivered in the presence of:

- 1. Kahiga for Applicant
- 2. Wanjiru for Respondent
- 3. Murage, Court Assistant

