



**In re Estate of Ajit Singh Bhabra (Deceased) (Succession Cause 1175 of 1997)
[2023] KEHC 2198 (KLR) (Family) (10 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 2198 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1175 OF 1997
MA ODERO, J
FEBRUARY 10, 2023
IN THE MATTER OF THE ESTATE OF AJIT SINGH BHABRA (DECEASED)**

BETWEEN

JASVINDER SINGH BHABRA 1ST APPLICANT

GURVIR SINGH 2ND APPLICANT

AND

KULVINDERJIT KAUR BHABRA 1ST RESPONDENT

SIMAR KAUR BHABRA 2ND RESPONDENT

AND

AVTAR SINGH BHABRA INTERESTED PARTY

RULING

Background

1. Before this Court for determination is the Chamber summons dated September 15, 2023 as well as the Notice of Preliminary objection dated September 29, 2022. The court directed that the two would be canvassed together by way of written submissions. The Applicant filed the written submissions dated February 28, 2022 whilst the 1st Respondent relied upon their written submission dated June 29, 2022.
2. A ruling in this matter was delivered in this court on June 17, 2022. The Applicants being aggrieved by that ruling sought to appeal against the same. However the said appeal was not filed within time hence the application dated September 15, 2022 seeking leave to appeal out of time.
3. The 1st Respondent in opposing the application filed the Notice of Preliminary objection dated September 29, 2023.



4. The definition of a Preliminary Objection was given in the case of *Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd* [1969] EA where the court stated as follows: -

“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submissions that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”.....A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion.”
5. In *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* [2015] eKLR, the Supreme Court of Kenya stated as follows:-

“a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”
6. Therefore in order for a preliminary objection to succeed the following tests must be satisfied;
 - (i) The Preliminary Objection should raise a pure point of law.
 - (ii) The Preliminary Objection must be argued on the assumption that all the facts pleaded are correct.
 - (iii) The Preliminary Objection cannot be raised if any fact is to be ascertained or if what is being sought is the exercise of judicial discretion.
 - (iv) A valid Preliminary Objection ought if successful dispose of the entire suit.
7. The Preliminary Objection raised by the 1st Respondent was premised on the following grounds:-
 - i. That the application is filed grossly out of time and in contravention of rule 39 of the *Court of Appeal Rules*, 2010.
 - ii. That this matter is before the Court of Appeal therefore this court does not have jurisdiction to entertain this application.
 - iii. That this application is overtaken by events as the Applicant has already filed a notice of appeal.
8. A casual glance at the above grounds reveal clearly that the Preliminary Objection does not raise matters of law, but rather is premised upon questions of fact which would require proof by way of evidence.
9. The question of whether the application dated September 15, 2022 was filed out of time is not a question of law. This is a matter of fact which would require interrogation by the court. Similarly, the question of whether or not the application has been overtaken by events is not a question of Law but one of fact which would require proof.
10. The claim by the 1st Respondent that this court lacks jurisdiction to hear the application as the matter is before the Court of Appeal again is a matter of fact not of Law.



11. This Application for extension of time is primarily predicated on section 7 of the [Appellate Jurisdiction Act](#), which provides as follows:

“7. Power of High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.”

12. Section 7 of the [Appellate Jurisdiction Act](#) expressly donate the power to extend time of filing notice of appeal in the High Court. Therefore the contention that this court does not have jurisdiction to entertain this application is not proper. It is trite that in succession matters, appeals from the decisions of the High Court to the Court of Appeal only lie with the leave of the High Court. This position was reiterated by the Court of Appeal in the case of [John Mwita Murimi & 2 others v Mwikabe Chacha Mwita & another](#) [2019] eKLR where the court held:-

“9.We re-affirm the decisions of this Court in [Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another](#) [2014] eKLR and [Josephine Wambui Wanyoike v Margaret Wanjari Kamau & another](#) [2013] eKLR, where it was clearly stated that in succession matters there is no automatic right of appeal without leave of court.

10. 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 v Kibwana [1996] EA cited by the respondent was succinctly considered by this Court in [Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another](#) [2014] 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 the application for leave 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)......”

13. I therefore find that the application filed by the Applicant is properly before this court. Consequently, I find no merit in the Notice of Preliminary Objection dated September 29, 2022. The same is hereby dismissed in its entirety.

Chamber summons dated September 15, 2022

14. The Applicants filed the above application seeking the following orders:-

- “1. Spent
2. That time be extended for the applicants/intended appellants to apply for leave to appeal to the Court of Appeal and this application be deemed to have been duly filed.
3. That leave be granted to the Applicants to file an appeal to the Court of Appeal of Kenya against the Ruling and Order of this court dated June 17, 2022.”



15. The application was premised upon Rules 5(2)(b), 41(1), 49 of the Probate and Administration Rules 2022, Section 47 of the Law of Succession Act Rule 73 of the Probate and Administration Rules, Article 159 (2) (a) (b), (d) and (e) of the Constitution of Kenya and all other enabling provisions of the Law and was supported by the Affidavit of even date sworn by Evan Mbugua Kamau an Advocate of the High Court of Kenya.
16. Section 7 of the Appellate Jurisdiction Act expressly donates to the High Court the power to extend time for filing Notice of Appeal.
17. The Applicants are by their application seeking leave to file appeal out of time. Rules 82(1) and 83 of the Court of Appeal rules provides that an Appellant who has served a Notice of Appeal ought to file his appeal within sixty (60) days of lodging the notice of Appeal. If this is not done, then the appeal is deemed to have been withdrawn.
18. In the case of Mwangi vs Kenya Airways [2003] e KLR the Court of Appeal set out the factors which a court ought to bear in mind in deciding whether or not to extend the time for filing an appeal. These include:
 - (i) The period of delay
 - (ii) The reason for the delay
 - (iii) The arguability of the Appeal
 - (iv) The degree of prejudice which the Respondent is likely to suffer if the application is allowed.
 - (v) The importance of compliance with time limits to the particular litigation in issue; and
 - (vi) The effect if any on the administration of justice or public interest in the matter.
19. The Applicants herein filed their Notice of Appeal on June 22, 2022. Therefore in compliance with Rule 75 of the Court of Appeal Rules, the Notice of Appeal was duly lodged in court within twelve (12) days of the date of the ruling. On the same date the Applications applied for a certified copy of the Court's ruling which had been delivered on June 17, 2022.
20. Thereafter a certificate of Delay was issued to Counsel for the Applicants on September 8, 2022 which certificate indicated that it had taken forty three (43) days to prepare and supply copies of the proceedings to the Applicants. The delay in availing the proceedings cannot be blamed on the Applicants.
21. The present Application seeking extension of leave within which to file appeal was filed on September 15, 2022.
22. All in all the period of delay from the date when this court delivered its ruling is about three (3) months. In my view, the Applicants have given convincing explanation for said delay.
23. It is not for the court to comments on the merits or otherwise of the intended appeal suffice to say I am satisfied that the appeal is indeed arguable.
24. On the question of prejudice given that the Respondents will be allowed ample opportunity to respond to the appeal and to be heard by the superior court I fail to see what prejudice they stand to suffer if



the extension sought is granted. I therefore allow the prayer for extension of time within which to file appeal.

Conclusion

25. Finally based on the foregoing this court makes the following orders:-

- (a) The Notice of Preliminary Objection dated September 29, 2022 is dismissed in its entirety.
- (b) The summons dated September 15, 2022 is allowed.
- (c) Time for Applicants to file appeal against the Ruling delivered on June 17, 2022 is hereby extended.
- (d) The Applicants are directed to file and serve their appeal within thirty (30) days of the date of this ruling.
- (e) Failure to comply with (d) above means that the extension of time granted to the Applicants will lapse automatically with no further reference to the Applicants.
- (f) Since this is a family matter, each side will bear their own costs.

DATED IN NAIROBI THIS 10TH DAY OF FEBRUARY, 2023.

MAUREEN A. ODERO

JUDGE

