



In re Estate of Gichuhi Wakano alias Wilfred Wakano Gichuhi (Deceased) (Succession Cause 241 of 1993) [2023] KEHC 23484 (KLR) (13 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23484 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 241 OF 1993
SM MOHOCHI, J
OCTOBER 13, 2023**

**IN THE MATTER OF THE ESTATE OF GICHUHI WAKANO ALIAS
WILFRED WAKANO GICHUHI (DECEASED)**

BETWEEN

**JOSEPH WAWERU GICHUHI 1ST APPLICANT
MARY NJOKI WAWERU 2ND APPLICANT**

AND

**HANNAH NJERI KINYANJUI 1ST RESPONDENT
MARY WAITHERA 2ND RESPONDENT
RUTH NJOKI 3RD RESPONDENT**

RULING

1. The Deceased the Late Gichuhi Wakano Alias Wilfred Wakano Gichuhi, died on the 20th October 1985 and Judgment was made on the 7th March 2022 after a (37) thirty-seven yearlong protracted contestation of the execution of his will.
2. By Summons dated the 10th June 2022, filed pursuant to Section 47 *Laws of Succession Act*, Order 73 of the *Probate and Administration Rules*, (Cap 160, Laws of Kenya, seeking the following Orders
 1. Spent
 2. Spent.
 3. That the Court be pleased to grant the applicants leave to appeal to the Court of Appeal against the ruling, decree and judgment issued against them on the 7th March, 2022.



4. That the Court be pleased to issue stay of execution and implementation of its ruling/ judgment and order issued on the 7th March, 2022 pending the hearing and
 5. determination of the intended appeal.
 6. That the costs of this application be provided for.
3. This Application is supported by the sworn affidavit of Joseph Waweru Gichuhi dated 10th June and is premised on the following grounds:
- a. That on the 7th March, 2022 the Honorable Court issued decree, ruling and judgment against the applicants who being greatly aggrieved by the same wish to appeal to the Court of Appeal.
 - b. That the applicants were not aware of the date of delivery of the judgment, received information that the same had been delivered from third parties and managed to obtain a copy of the same about 30th May, 2022.
 - c. That the respondents have already started to implement and execute the judgment and are meeting by themselves in their attempts to fashion fresh distribution of the suit estate and have not even bothered to formally invite the applicants and other persons on the ground to any such meetings.
 - d. That unless the Honourable Court intervenes and moves and determine the application the actions of the respondents may cause undue harm and loss to the applicants and cause displacement and massive disruption of lives and livelihood, an avalanche of civil law suits. chaos and acrimony.
 - e. That the applicants have a right to appeal and the grounds of appeal raise grave and weighty issues and if stay is not granted the appeal might be rendered nugatory and superfluous.
 - f. That the *Succession Act* is silent on appeals and leave is therefore necessary to serve as notice to the parties and provide a forum for housekeeping on any relevant issues pending the appeal.
 - g. That without orders to cancel the said subdivision, the orders of this Court stunt in vain.
 - h. That it is in the interest of Justice that this application be granted
4. This matter came up for directions on 11th July 2023, and the Court directed that the Application shall be heard and disposed off on the basis of the pleadings and written submissions and parties were duly directed to file their written submissions.
5. The Respondent filed their written submissions on the 18th September 2023 while the Applicants did not. The Court shall however Consider the Application against the pleadings.

Applicants Case

6. The applicants claim not to have been aware of the date of delivery of the judgment, and that they received information that the same had been delivered from third parties and managed to obtain a copy of the same about 30th May, 2022.
7. The Applicant's advocate confirmed to them that he did not receive a copy of the judgment in his email, he was not aware that the judgment had been delivered and only rushed to find out and obtained a copy of the same after getting information from us that judgment had been delivered.



8. That the Respondents have already started to implement and execute the judgment and are meeting by themselves to attempt to fashion out how to distribute the estate afresh.
9. That the Respondents have not even bothered to formally approach them or any of the other parties on the ground to give us notice of the judgment or inform us of any intended action on the ground.
10. That the Respondents have not even bothered to initiate the process of acquiring the guidance of a Court Mediator as directed by the Court's judgment.
11. That the Respondents are aware of the enormity of the task awaiting them and the same may inform the reluctance to formally invite and involve them in the deliberations as they are fully aware that the ground is fully distributed to many third parties on the ground and all that with their knowledge and participation.
12. That unless the Court intervenes and moves and determines the application the actions of the Respondents may cause undue harm and loss to the Applicants and other innocent massive disruption of lives, livelihoods, the same is likely to result in chaos and an avalanche of third parties on the ground as any single move on the ground is likely to cause displacement and an avalanche of Civil Suits.
13. That the Applicants have resided on various portions of the land parcel as subdivided by themselves as per the directions in the Will of their deceased father and the directions of the Court all way back since the year 1985.
14. That the Applicants have a right to appeal and the grounds of appeal raise grave and weighty matters as indicated in the draft memorandum of appeal and if stay is not granted the appeal might be rendered nugatory and superfluous.
15. That there is need to issue orders of stay to preserve the estate in the current form pending the appeal and to ensure that the state of affairs is maintained in order not to negate the essentials of the appeal that has high chance of success.
16. That the *Succession Act* is silent on appeals and leave is therefore necessary to serve as notice to the parties and provide a forum for housekeeping on any relevant issues pending the appeal.
17. That the applicants undertake to execute the intended appeal expeditiously in order not to guide the respondents and to ensure the appeal is not an abuse of the Court process but to determine the grave and weighty matters in the appeal.

Respondents Case

18. The Respondents have contested the Applicant's application as a ploy to deny them the fruits of their judgment.
19. That the Applicants had unlawfully dealt with the estate of the deceased hence their reluctance to enforce the judgment.
20. The Respondent in their submissions have framed the two issues for consideration by the Court to be:
 - a. Whether the Court should grant the applicants leave to appeal to the Court of Appeal against the ruling, decree and judgment issued against them on the 7th March 2022?
 - b. Whether the Court should issue an order staying the execution and implementation of its ruling, judgment and order issued on the 7th March, 2022?



21. The Respondent submits that it is trite law that in succession matters a party intending to appeal against a High Court decision must seek leave to appeal to the Court of Appeal as is provided for under Rule 39 of The *Court of Appeal Rules* which provides the timeline for instituting an application for leave. It states that:
- a. Where an appeal lies on certificate by the Superior Court that the case is fit for such leave may be made informally, at the time when the decision against which it is desired to appeal is given, or by motion or chamber summons according to the practice of the superior Court,
 - b. Where an appeal lies with the leave of the Court, application for such leave shall within fourteen days of such decision; be made in the manner laid down in rules 42 and 43 within fourteen days of the decision against which it is desired to appeal or, where application for leave to appeal has been made to the superior Court and refused, within fourteen days of such refusal.
22. The Respondent submits that the Applicants instituted this application after an unreasonable delay. The Court delivered its Judgment on 7th March 2022 and sent it to the parties via email after giving them prior notice and that, this application was filed on 13th June 2022, 3 months after the judgment was delivered.
23. That the applicants have not adequately demonstrated the reason for their delay, the applicant's claim that they were informed of the judgment through third parties has not been substantiated as they have not disclosed the identities of the third parties.
24. The Respondents urged the Court to dismiss this application as the applicants have not tendered sufficient reasons as to why they are seeking leave out of time.
25. That the intended appeal does not raise triable issues with any chances of success and that this is a very old matter and it is only fair and just that it should be brought to an end.
26. We urge you to consider the case of *Rhoda Wairimu Karanja & another VS Mary Wangui Karanja & another* [2014] eKLR where the Court struck out an application for leave which was instituted out of time while stating that:
- “... 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 so, what is our decision in this application? We have found that the application was presented out of time; that the applicant lacked capacity to bring it at the time he did.”
27. Section 7 of the *Appellate Jurisdiction Act* provides for the 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: Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence”.
28. Filing of a Notice of appeal precedes the application for leave to Appeal out of time Rule 75: -
- (1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the Superior Court.



- (2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.
 - (3) Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision and where it is intended to appeal against a part only of the decision, shall specify the part complained of, shall state the address for service of the appellant and shall state the names and addresses of all persons intended to be served with copies of the notice.
 - (4) When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.
 - (5) where it is intended to appeal against a decree or order, it shall not be necessary that the decree or order be extracted before lodging notice of appeal.
29. The Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 gave guidance on how a Court should exercise discretion and held that:-
- a. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 - b. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the judge's discretion.
 - c. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 - d. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 - e. The Court in exercising its powers under Order XLI rule 4(2)(b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
30. Substantial loss is a factual issue which must be raised in the supporting affidavit and further supported by evidence. The Applicant has not demonstrated the substantial loss he will suffer should the Court disallow his prayer for stay. In the case of *Machira T/A Machira & Co. Advocates vs East Africa Standard* [2002] eKLR Kuloba J. as he then was held that, an Applicant's ground for substantial loss must be specific and detailed as it is not enough merely stating that substantial loss will result or that if the appeal is successful it will be rendered nugatory.
31. Having considered the rival submissions and this being a discretionary application I am unconvinced that a plausible reason or ground for delay in filing a notice of appeal has been tendered.
32. The Applicant has not demonstrated basis that he and his advocate were unaware of the judgment and in fact, the matter was referred to a Court Mediator after judgment and it was the Applicant's uncooperating that resulted in the return of the matter to the Court by the Mediator on the 9th June 2022.



33. The Application fails on account of the fact that no sufficient cause has been demonstrated to show why the appeal was not processed within time.
34. The Application dated 10th June 2022, is hereby found to be without merit and is accordingly dismissed.
35. Costs of this Application are awarded to the Respondents.

It is So Ordered.

SIGNED, DELIVERED VIRTUALLY ON TEAMS PLATFORM ON THIS 13TH OCTOBER 2023

MOHOCHI S.M

JUDGE

