



REPUBLIC OF KENYA



In re Estate of the Late Esther Nau Phares (Deceased) (Succession Cause 745 of 2015) [2023] KEHC 23184 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23184 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
SUCCESSION CAUSE 745 OF 2015**

LW GITARI, J

OCTOBER 5, 2023

IN THE MATTER OF THE ESTATE OF THE LATE ESTHER NAUPHARES (DECEASED)

BETWEEN

JOHN MUNENE KINYUA APPLICANT

AND

EUNICE KAARI 1ST RESPONDENT

MARY IGOJI 2ND RESPONDENT

RULING

1. Before this Court is the Summons application dated November 17, 2022. The said application is seeking for the following orders:
 - a. That the applicant be granted leave to appeal to the Court of Appeal against the ruling delivered in this cause on October 19, 2022.
 - b. That costs of the application be provided for.

It is based on the following grounds:

1. That this Honourable court made a ruling on October 19, 2022 in which it found the will left behind by the deceased herein to be invalid.
2. That the applicant is aggrieved by the said finding is desirous of preferring an appeal to the Court of Appeal.
3. That there is no automatic right of appeal in probate proceedings and hence this application.
4. That the intended appeal raises weighty and arguable issues of law and fact.



5. That the application has been lodged timeously.
2. The application is premised on the grounds on the face of it and the averments of the Applicant in his supporting affidavit sworn on November 17, 2022. In summary, it is the Applicant's contention that he was the executor of the last will and testament of the deceased herein. That through a ruling issued on October 19, 2022, this Court declared the said will as invalid. That the applicant is dissatisfied with the said decision and wishes to challenge the same at the Court of Appeal. That intended appeal raises arguable issues and that the Respondents shall not suffer any prejudice if the application is allowed.
3. The Application is opposed by the Replying Affidavit sworn jointly by the Respondents. The Respondents depones that is notably a very old matter that has been in court since 2013 and having been transferred from Meru High Court where it was initially filed vide Succession Cause No 86 of 2013 to Chuka High Court. Further, that the conclusion of this matter has been delayed by the Applicant and his other conspirators and clearly, this yet one more of the Applicant's endless attempts at further delaying the conclusion of this matter hence frustrating the Respondents from being able to get their rightful shares of the deceased's estate.
4. The application was canvassed by way of written submissions.

The Applicant's Submissions

5. The Applicant filed his written submissions on May 2, 2023. Placing reliance on Section 48 of the *Law of Succession Act* and the holding of the courts in *Rhoda Wairimu Karanja & Another vs Mary Wangui Karanja & Another* [2014] eKLR; and *In Re Estate of Joel Thara Ruria (Deceased)* [2022] eKLR, the Applicant submitted that the legal issues raised in the draft memorandum of appeal attached to the instant application are weighty and arguable and hence the Applicant should be granted an opportunity to canvass the same on appeal. It is further the Applicant's submission that the Respondents opposition of the application on account of the age of the dispute is an unsubstantiated allegation of ill will and malice and on the view that the intended appeal has no chance of success. It is thus the Applicant's submission that he has met the threshold for granting of leave to institute an appeal to the Court of Appeal.

The Respondents' Submissions

6. On their part, the Respondents filed their written submissions on May 2, 2023. It is their submission that the intended appeal has either nil or minimal chances of success which makes the instant application to be without merit. That the Respondents herein are elderly and suffering ill-health and that the intended appeal is not at all a serious undertaking but one purposed to waste time, deny the Respondents the opportunity and render them incapable of benefitting from the estate of the deceased who is their mother. Further, that the fact that the Applicant has not even sought to stay execution of the impugned judgment is a clear demonstration that the Applicant is not serious or intent with proceeding with the appeal which, if granted leave to proceed may take a long time before determination.

Issues for Determination

7. I have considered the application dated November 17, 2022, the affidavits in support and opposing the application as well as the rival submissions filed by the counsels of the parties. The main issue that arises for determination is whether the this court should grant the applicant leave to appeal.



Analysis

8. The application is expressed to have been brought pursuant to the provisions of Section 47 of the Law of Succession Act, and Rules 49 and 73 of the Probate and Administration Rules.

“Section 47 of the Law of Succession Act provides as follows:

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:

Provided that the High Court may for the purpose of this section be represented by resident magistrates appointed by the Chief Justice.”

This Section gives this court jurisdiction to entertain any application, determine any dispute and pronounce orders. It does not make any reference to an appeal to the court of Appeal. It gives the High Court jurisdiction to issue such orders as may be expedient.

9. Section 50 of the Act deals with appeals to the High Court from the Sub-ordinate Courts and Kadhis Court. The decision of the High Court on appeals from sub-ordinate court shall be final while decisions of the High Court on an appeal from Kadhis Court are appealable to the Court of Appeal on any point on Muslim Law in respect of any point of Muslim Law. The provision is silent on Appeals from the High Court to the Court of Appeal. Under Section 47 the Act provides that the High Court may be represented by a magistrate.

In the absence of any express provision with regard to appeals to the Court of Appeal from the High Court made in the exercise of its original jurisdiction in succession matters, it is presumed that leave to appeal must be applied for and issued by the High Court.

10. In the case of Rhoda Wairimu Karanja & Another Vs Mary Wangui Karanja & Another [2014 eKLR, relied upon by the Applicant, the Court of Appeal held as follows with regards 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.”

11. The intended appeal by the Applicant arises from the decision of this Court dated October 19, 2022 as to the validity of the will of the deceased. This Court found that the will produced as an exhibit was not a valid will of the deceased as the deceased was suffering from cerebral vascular accident which is a condition which affected her brain and she therefore had no capacity to make a valid will.
12. The Applicant who is dissatisfied by the said decision has a right to appeal. The Constitution gives the Court of Appeal; jurisdiction to entertain Appeal from the High Court. Article 164(3) (a) provides that –

“The Court of Appeal has jurisdiction to hear Appeals from-



- a. The High Court” “ See Section 3 [Appellate Jurisdiction Act](#).

13. I have considered the grounds of appeal raised in the draft Petition of Appeal attached to the present application. The same raise substantive points of law for consideration by the Court of Appeal. In the circumstances, it is my view that the application has merits and I should allow it by granting the Applicant leave to appeal against the judgment of this Court dated October 19, 2022.

Conclusion:

- 14 For the reasons stated I find that the application has merits. I order as follows: -
- a. Leave is granted to the appellant to appeal to the Court of Appeal.
 - b. The appeal be filed within fourteen (14) days.
 - c. Costs to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 5TH DAY OF OCTOBER 2023.

L.W. GITARI

JUDGE

