

REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GICHERU, AKIWUMI & TUNOI, JJ.A.)

CIVIL APPLICATION NO. NAI. 314 OF 1996

BETWEEN

MARGARET MAKHANJU JOHN APPLICANT

AND

DAVID JOHN KIBWANA (EXECUTOR) RESPONDENT

(Application for leave to appeal in an intended appeal
from a Ruling of the High Court of Kenya at Mombasa
(Wambilyangah, J) dated 21st September, 1994
in
P & A CAUSE NO. 258 OF 1993)

RULING OF THE COURT

The applicant seeks leave to appeal to this court against the ruling of the High Court of Kenya at Mombasa (Wambilyangah, J.) made on 21st September, 1994 in Probate and Administration Cause No. 258 of 1993 on the grounds that Ang'awa, J. declined to grant leave to appeal on 26th August, 1996 and that there is no express provision under the Law of Succession Act allowing an automatic right of appeal from ruling or order of the superior court to this Court without leave of either courts. This application must fail for the reason that the learned judge of the superior court, Ang'awa, J. never heard and decided on the application for leave lodged by the applicant. What she did for the reason she gave and with which we have some misgivings was to strike it out for being merely defective.

Rule 39(b) of the Rules of this Court provides that where an application for leave to appeal has in the first instance to be made to the superior court, it must first be considered and refused as opposed to being struck out before an application for such leave may be made to this Court. In the result we decline to grant this application and order that it be dismissed with costs. Dated and delivered at Mombasa this 29th January, 1997.

J. E. GICHERU

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JUDGE OF APPEAL

A. M. AKIWUMI

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR