



In re Estate of the Late Francis Kamau Kinuthia (Deceased) (Succession Cause E177 of 2024) [2025] KEHC 14641 (KLR) (16 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14641 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE E177 OF 2024
HI ONG'UDI, J
OCTOBER 16, 2025**

IN THE ESTATE OF THE LATE FRANCIS KAMAU KINUTHIA (DECEASED)

BETWEEN

ROBINSON KINUTHIA KAMAU 1ST PETITIONER

DAMARIS NJERI KINUTHIA 2ND PETITIONER

AND

PATRICK NJUGUNA KIMANI RESPONDENT

RULING

1. The Notice of motion dated 2nd August 2024 by the applicants herein pray for the following orders;
 - i. That this honourable court may be pleased to grant leave to the applicants/petitioners to appeal to the Court of Appeal in Kenya against part of the ruling delivered on the 27th June 2024 on the finding that the applicant/objector Patrick Njuguna Kimani be subjected to a DNA analysis to confirm whether he is the deceased's son.
 - ii. That this honourable court may be pleased to grant leave to the applicants/petitioners to appeal to the Court of Appeal in Kenya against part of the ruling delivered on the 27th June 2024 on the finding that the said part of the ruling was that the above exercise shall be undertaken within 60days from the date herein.
 - iii. That cost of this application be in the cause.
2. The application is based on the grounds on its face and the affidavit of the petitioner /2nd applicant sworn on 31st July 2024. She deposed that the applicants are administrators to the estate of the deceased and that this court vide the ruling dated 27th June 2024, directed that the respondent/objector herein be subjected to a DNA analysis to confirm whether he is the deceased's son. The said exercise was to be undertaken within 60 days from the date of the ruling.



3. She further deponed that they were aggrieved by the said decision and had since filed a Notice of Appeal (annexed to the affidavit) and their advocate on record had been instructed to apply for typed proceedings. She stated that she had been advised by their advocate that they do not have an automatic right of appeal to the Court of Appeal in Kenya. Thus, the need for leave from this court.
4. In response to the summons, the respondent/objector filed a replying affidavit dated 13th August 2024. He averred that the application had been made to solely delay the conclusion of the succession exercise as well as to frustrate the DNA exercise. He stated the notice of appeal had not been duly served upon any of the parties within the timelines provided. He further stated that there was nothing absolutely wrong with the DNA paternity being done at his cost to confirm his connection with his deceased father. He added that the petitioners/applicants would not suffer any prejudice.
5. One Vicky Wanjiru Nyoro who claims to be the daughter in - law to the deceased filed an affidavit sworn on 25th August 2024 in support of the petitioners'/applicants' application.
6. In response, the respondent/objector filed a further affidavit sworn on 12th September 2024 where he denied the contents of the said affidavit.
7. The application was canvassed by way of written submissions.

Petitioners'/applicants' submissions

8. These were filed by Wanjiru Theuri & company advocates and are dated 3rd July, 2025. Counsel submitted that the petitioners/applicants needed leave of court in order for them to file an appeal. She placed reliance on section 75 (1) of the *Civil Procedure Act* which provides for orders against which an appeal would lie as of right and/or with the leave of court.
9. She further cited order 43 rule 1 of the Civil Procedure Rules which provides for appeals from orders and rule 2 for where an appeal shall lie with leave of the court from any other order made under the rules. The court's attention was drawn to the decision in *Nyutu Agrovet Ltd vs Airtel Networks Ltd* [2015] eKLR, the Court of Appeal held as follows:

“...right of appeal only lies where the law specifically provides for such right to accrue and where no such right is automatic, then a party seeking to appeal must first obtain leave of court. Further, the right of appeal is conferred by statute and cannot be inferred. It follows that where a right of appeal does not lie automatically, a party can only invoke the provisions of section 75 of the *Civil Procedure Act* and order 43 of the Civil Procedure Rules, to seek and obtain leave from the lower court to appeal to this court.”
10. Counsel further submitted that section 47 of the *Law of Succession Act* grants this court powers to entertain any application before it and grant orders based on its discretion. She urged the court to allow the application in order for the appeal not to be rendered nugatory.

Respondent/objector's submissions

11. These were filed by Koome & Koome Advocates and are dated 8th July, 2025. Counsel in a brief introduction of the appeal identified one issue which is whether the application is merited.



12. Counsel cited the Supreme Court decision in *Nicholas Kiptoo Korir arap Salat v IEBC and 7 others* [2014] eKLR where the court enunciated the applicable principles in an application for leave to appeal out of time as follows;

“The underlying principles a court should consider in exercise of such discretion should include: -

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondent-if the extension is granted;
- f. Whether the application has been brought without undue delay.

13. See also; *Diplack Kenya Limited v William Muthama Kitonyi* [2018] eKLR and *Paul Musili Wambua v Attorney General & 2 Others* [2015] eKLR.

14. While relying on the principles set out in the authorities cited herein above, counsel submitted that the ruling herein was delivered on 27th June 2024 while the present application was filed on 2nd August 2024. Thus, the said period was outside the 30 days period which is the time required for filing an appeal. He added that no explanation for the delay was given by the petitioners/applicants.

15. Counsel further submitted that no draft memorandum of appeal was filed which was an indication of the fruitless endeavour by the petitioners/applicants. He stated that the respondent would be greatly prejudiced if the orders sought are issued. Reference on this was placed on the decision in *KRep Bank’ Limited V Segment Distributors Limited* (2017) eKLR where the Court while dealing with an application to set aside a judgment where a defendant had failed to annex a draft defence held as follows;

“...It did not exhibit a draft defence to demonstrate whether indeed there are triable issues raised worth setting aside the regular judgement for. I therefore find no merit in the application dated 5th October, 2016 and would dismiss it with costs.”

16. He thus urged the court to dismiss the application with costs.

Analysis and determination

17. I have considered the application, affidavits and rivalry submissions by the parties herein. In my opinion the only issue arising for determination is whether leave sought to appeal is merited.



18. The Court of Appeal in the case of Francis Gachoki Murage v Juliana Waindi Kinyua & another Civil Appeal No. 139 of 2009 held thus:

“We have considered this issue of whether this appeal lies with considerable anxiety. First, leave was never sought in the High Court. The practice has always been where there is no automatic right of appeal, an aggrieved party wishing to appeal is enjoined to seek leave. Granting of leave is within the discretion of a judge....”

19. In the case of Rhoda Wairimu Kioi & Another Vs Mary Wangui Karanja & Another (supra), the Court of Appeal stated:

“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 its original jurisdiction with the leave of the High Court or where the application for leave is refused, leave with this Court. 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 administration disputes....that leave of the High Court in succession matters is necessary in the former’s exercise of its original jurisdiction and that where that application for leave has been rejected by the High Court, it can be made to this Court.”

20. The courts have analyzed the above cited authorities and applied the same and the unanimous conclusion is that indeed, there is need and indeed legal requirement that appeals from the High Court to the Court of Appeal in succession causes lie with the leave of the High Court. Such leave, as was held in the Rhoda Kioi case (supra) was desirable for purposes of expeditious disposal of succession causes in order to bring disputes to an end and allow families to settle.

21. Moreover, if the high court declines to grant the leave sought by an applicant then he/she will be at liberty to seek for the same in the appellate court. In John Mwita Murimi & 2 Others v. Mwikabe Chacha Mwita & Another [2019] eKLR, the Court of Appeal re-affirmed this position by holding as follows:

“...Under the *Law of Succession Act*, there is no express automatic right of appeal 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...” (sic)

22. In the instant case, the intended appeal arises from the ruling of this court dated 27th June 2024 where it was ordered that the respondent/objector herein be subjected to a DNA analysis to confirm whether he is the deceased’s son. The law is that the beneficiaries who are aggrieved herein have a right to appeal, which is however not automatic. I have perused the application and note that the applicants have filed a Notice of Appeal as required by the Court of Appeal.

23. This court takes judicial notice that the applicant /petitioners have a right to appeal against the said ruling. In Muchemi v Roy Trans motors Limited (Employment and Labour Relations Page 10 of 2 Appeal E147 of 2024) [2025] KEELRC 650 (KLR) (28 February 2025) (Ruling) the court held as follows;

“.....The exercise of jurisdiction of the court in appeal is guided to be to sustain appeals.(Butt -vs Rent Restriction Tribunal (1982) KLR 417). Any prejudice caused by the delay can be



cured by throw-away costs as submitted by the applicant. The court exercised its judicial discretion under Rule 18 of Court (Procedure) Rules in favour of the applicant by allowing an enlargement of time to file the appeal.”

24. I see no prejudice that the respondent/objector will suffer if leave to appeal is granted. It is in the interest of all the parties that the dispute is brought to an end expeditiously. Further, Section 47 of the [Law of Succession Act](#) empowers this court to make such orders as may be just and expedient. Therefore, I opine that the petitioners/applicants should be given an opportunity to pursue the appeal.
25. The upshot is that the application succeeds and the petitioners/applicants are granted leave to file an Appeal against the ruling delivered on 20th June, 2024. The same should be filed within 14 days from today’s date.
26. Costs shall be in the cause.
27. Orders accordingly.

DELIVERED, VIRTUALLY, DATED AND SIGNED THIS 16TH DAY OF OCTOBER, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG’UDI

JUDGE

