

**IN THE COURT OF
APPEAL AT
NAIROBI**

(CORAM: MUSINGA (P), KARANJA & M'INOTI, JJ.A.)

CIVIL APPLICATION NO. NAI E016 OF 2025

BETWEEN

ANNA WANGARI WAWERU.....APPLICANT

AND

MARGARET MUGURE WAWERU.....RESPONDENT

*(Being an application for stay of execution of the Ruling of the
High Court of Kenya at Nairobi (**Chemitei, J.**) delivered on 25th
April 2024*

in

Succession Cause No. 2708 of 2012)

RULING OF THE COURT

1. Before this Court is a Notice of Motion dated 14th January 2025 which is brought under the provisions of rules 5(2)(b) and 47 of the Rules of this Court. The main order sought in the application is **stay** of execution of the ruling of **Chemitei, J.** delivered on 25th April 2024 in Milimani HC Succession Cause No. 2708 of 2012 pending hearing and determination of the applicant's intended Appeal.

2. The background to this application is that a dispute arose regarding the distribution of the assets of the estate of Ezekiel Waweru Muiruri (**the deceased**). The dispute was between the first widow of the deceased, the applicant herein, and the deceased's second widow, the respondent. The High Court (**Ali- Aroni, J.**) (as she then was), vide a judgment delivered on 31st October 2019 excluded three properties from distribution of the deceased's estate, namely Plot No. 8 Ithang'arari, Plot No. 47 Section SSS/4 Thika and Stall No. 375 Garissa Market in Thika, on grounds they were acquired before the respondent got married to the deceased. The court further ordered valuation of the rest of the estate to enable the court equitably distribute the same.
3. A later attempt by the applicant to review that judgment so as to exclude Plot No. SSS/68 Makongeni Phase 6 from what the two houses should share equally was dismissed on 16th May 2022 on account of, *inter alia*, delay in bringing the application. The matter then went to court annexed mediation, leading to a partial settlement agreement adopted by the court on 20th June 2023 which distributed most of the estate but left two properties outstanding, that is, Loc. 1/Mugumo-

ini/253 and Plot No. SSS/68 Makongeni Phase 6.

4. When the dispute was taken back to court after mediation, only the respondent filed proposals on the distribution of the two contested properties. She proposed that the Mugumo-ini property be subdivided so that each widow would have a portion, the applicant retaining the existing farmhouse, while she (the respondent) would relocate to another section. She further proposed that the accrued rental income of about Kshs.6,580,000.00 from the Makongeni property which the applicant had been collecting be utilized to fund the construction of her new house and other related expenses, after which the property would pass absolutely to the applicant.
5. The court, vide a ruling delivered on 25th April 2024, found the proposals made by the respondent reasonable in the circumstances, particularly since the applicant had not filed submissions as directed. It therefore ordered that the two properties be distributed as proposed, including the release of the sum of Kshs.6,580,000.00 in the account, and that the exercise be completed within ninety days from the date of the ruling.
6. The applicant was aggrieved by the ruling and intends to lodge

an appeal to this Court as evinced by the Notice of Appeal dated 8th May 2024.

7. In the application, the applicant contends that her intended appeal raises serious triable issues, including the proper application of **section 40** of the **Law of Succession Act**, the legal weight of prior court judgments and mediation agreements in succession disputes, as well as the exclusion of the deceased's children in the distribution of the estate. These questions, she asserts, are neither frivolous nor vexatious, but go to the heart of the succession proceedings and protection of beneficiaries' rights.
8. She contends that the impugned ruling disregarded the earlier judgment of 31st October 2019 and a partial mediation agreement adopted on 20th June 2023 which had allocated SS6/68 Makongeni Phase 6 to the first house. She also faults the High Court for adopting a mode of distribution that treated both houses equally despite the first house comprising the widow and eleven children (twelve units), and the second house comprising the widow and five children (six units). She asserts that this was contrary to section 40 of the Law of Succession Act which mandates distribution of a polygamous intestate estate in proportion to the number of units in each house. She further challenges the reliance on the

unsubstantiated figure of Kshs.

6,580,000, arguing that no accounts or evidence were provided to support it.

9. On the nugatory aspect, the applicant maintains that unless the orders sought are granted, the intended appeal will be rendered nugatory, for the reason that the contested property may pass to the respondent, who may dispose of it by sale or otherwise deal with it, making it impossible to reverse the consequences if the appeal ultimately succeeds.
10. The application was opposed through a replying affidavit sworn by the respondent. It is averred that the application lacks merit and is intended to delay conclusion of the succession proceedings. The respondent further avers that the ruling of 25th April 2024 was fair, considered all relevant facts, and was delivered after the applicant failed to file submissions as directed. She points out that the applicant has been the sole beneficiary of rental proceeds from the Makongeni property estimated at Kshs. 6,580,000, and the court was right in directing that the said proceeds be used for the construction of her house and related expenses before vesting the property absolutely in the applicant.
11. The respondent also avers that this application has been

brought after unreasonable delay; that the applicant has not met the

threshold required for grant of the orders sought; and that in the event this Court is minded to allow the application, it should compel the applicant to deposit Kshs. 6,580,000 as security.

12. At the hearing of the application, learned counsel **Mr. Mburu** appeared for the applicant, while the respondent was represented by learned counsel **Mr. Kiruchi**. Both counsel made brief oral highlights of their respective clients' written submissions, which was reiteration of the positions articulated hereinabove. It therefore serves no useful purpose for us to rehash the oral arguments made by counsel, save to state that the applicant's counsel contended that under **section 50** of the **Law of Succession Act** leave to appeal to this Court is not required if it is a first appeal.
13. We have considered the application, the submissions, as well as the applicable law. It is trite law that in an application of this nature an applicant must satisfy the Court that the appeal or the intended appeal is arguable, and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. See **Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others** [2013] eKLR. Even one arguable ground of appeal

will suffice. See

Damji Pragji Mandavia vs. Sara Lee Household & Body Care

(K) Ltd, Civil Application No. Nai 345 of 2004.

14. However, before we delve into the merits of this application, it is necessary that we first address the question of competence of the intended appeal, as to whether leave to appeal was necessary or not, as that is a jurisdictional issue. In this regard, we note that the ruling sought to be stayed was issued in succession proceedings brought under the Law of Succession Act. It is trite law that under the Act there is no automatic right of appeal to this Court. Indeed, this Court in **Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another** [2014] KECA 255 (KLR) stated thus:

“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 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.”

15. Similarly, in **John Mwita Murimi & 2 others v Mwikabe**

Chacha Mwita & another [2019] KECA 422 (KLR), this

Court held:

“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] eKLR. 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).”

16. In the circumstances herein, the applicant did not provide any proof that she sought and obtained leave of the High Court before lodging the notice of appeal dated 8th May 2024. The existing jurisprudence on the question of leave clearly shows that leave to appeal is mandatory, irrespective of whether the matter is a first or second appeal. As such, this application is premised on a defective notice of appeal. The Supreme Court in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others** [2014] eKLR held that a notice of appeal is a jurisdictional prerequisite. This, therefore, means that without a proper notice of appeal the Court is not vested with jurisdiction to

hear and determine an appeal, and by parity of

reasoning, an ancillary application such as the one before us is bad in law.

17. In the circumstances, the only finding which we return is that we have no jurisdiction to determine this application on its merits and we must accordingly down our tools. Consequently, this application fails and we hereby strike it out with costs to the respondent.

Dated and delivered at Nairobi this 7th day of November 2025.

D. K. MUSINGA, (PRESIDENT)

.....
JUDGE OF APPEAL

W. KARANJA

.....
JUDGE OF APPEAL

K. M'INOTI

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.