



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KABARNET
MISC SUCCESSION CAUSE NO. 1 OF 2020

PETER KIPKENEI KIPRAISIAPPLICANT

VERSUS

JOHNSTONE KIGEN CHELAL.....1ST RESPONDENT

OSSSEIN KANGOGO.....2ND RESPONDENT

RULING

1. This is a ruling on application dated 10th June,2025 the Applicant seeks the following reliefs:-

- (i) **THAT** this application be certified urgent and its service of be dispensed with in the first instance.
- (ii) **THAT** this Honourable court be pleased to grant an order that the Notice of Appeal lodged on 4th June,2025, without leave, be deemed to have been duly filed.
- (iii) **THAT** in the alternative, this Honourable Court be pleased to grant the Applicant leave to file appeal out of time against the Judgment of this Honourable Court delivered on 22nd May, 2025.

(iv) **THAT** the necessary directions be given.

2. The application is supported by the annexed affidavit sworn by the 1st Applicant on the 10th June 2025.

THE APPLICANTS' CASE

3. It is the Applicant's case that on the 22nd May, 2025, this Honourable Court rendered a Judgment which inter-alia found that the Respondents herein were entitled to a share in the estate of the deceased, particularly the property known as TITLE NO. BARINGO/KEWAMOI "A"/175.

4. Being dissatisfied and aggrieved by the said decision of the trial court, the Applicants lodged a Notice of Appeal against it on 4th June, 2025.

5. The Applicant avers that it is now apparent that emerging jurisprudence indicates that appeals on succession matters from this Honourable Court to the Court of Appeal are not lodged as matter of right but subject to leave of either this Court or Court of Appeal.

6. The Applicant further avers that this Honourable court is vested with the discretion to grant leave to appeal or even

direct that an appeal or already lodged been deemed to have been duly lodged/filed.

7. It is the Applicant's case that the Applicants have an arguable appeal with good chances of success and has been brought in the interest of justice and without unreasonable delay.
8. The Applicant avers that unless this application is allowed, the Applicant and the beneficiaries of the estate of Kipraisi Chemwetich (Deceased) stand to suffer undue prejudice as their intended appeal to the Court of Appeal would never be considered on its merits.

THE RESPONDENTS' CASE

9. The Respondents opposed the Application vide a Replying Affidavit sworn on the 14th Day of August 2025 by Johnstone arguing that the Judgment of this Honourable Court delivered on 22nd May 2023 was the culmination of a long and protracted litigation in which all parties, including the Applicant, were fully heard and the issues in dispute conclusively determined.

10. The Respondents aver that the application before the Court is misconceived, bad in law, and an abuse of the court process.

11. It is the Respondents case that the current application seeks to cure their own inaction and negligence, which is not a ground for the court to exercise discretion in their favour.

12. Further, that the application is brought after undue delay, considering that the judgment was delivered on 22nd May 2025 and the Applicant only moved this court on 10th June 2025, without any explanation why leave was not sought contemporaneously with the Notice of Appeal.

13. The Respondents avers that the application is intended to delay the conclusion of this matter and frustrate the beneficiaries' enjoyment of their rightful shares as determined by the court.

APPLICANT'S SUBMISSIONS

14. The applicant submits that the main issue for determination is whether application for leave to appeal is merited. The applicant submits that it is evident from emerging jurisprudence that appeals arising from succession matters decided by the High Court in its original jurisdiction do not lie to the Court of Appeal as of right, but only with leave of either the High Court or the Court of Appeal and cited the case of **Rhoda Wairimu Kioi & ANo Vs Mary Wangui Karanja & ano (2014) eKLR**, where 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. 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.”

15. The applicant submits that in view of these jurisprudential developments, the Applicant through the instant application seeks, inter alia, that the Notice of Appeal lodged on 4th June 2025 without leave be deemed as duly filed, or, in the alternative, that leave be granted to file an appeal out of time against the judgment delivered on 22nd May 2025.

16. Further, Sections 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules vests this Honourable Court with the inherent power to make such

orders for the ends of justice to be met, and which discretion extends to the grant of leave to appeal.

17. That it is not in dispute that the impugned Judgment was delivered on 22nd May 2025 and that the **Notice of Appeal was lodged on 4th June 2025, thirteen (13) days** thereafter. In this regard, the Applicant humbly submits that they acted well within the statutory fourteen-day period prescribed under Rule 77(2) of the Court of Appeal Rules, 2022, for the filing of a notice of appeal.

18. That the only contestation is that the Notice was filed without leave, in view of the evolving jurisprudence that appeals in succession matters from decisions of the High Court in its original jurisdiction do not lie as of right but with prior leave of either the High Court or the Court of Appeal; that the omission complained of relates solely to the procedural aspect of leave.

19. In view of the above, the applicant submits that this procedural objection is precisely the mischief the instant application seeks to cure, by regularizing an otherwise timeous and bona fide appeal, and to ensure that justice is not defeated at the altar of technicality.

20. The applicant submits that even if, the instant application was filed out of time as the Respondent alleges, it

does not in any manner bar the Applicant from approaching court at a later stage for the same and relied on the case of **In re Estate of the Late Juma Matayo Murere (Deceased) [2023] KEHC 2131 (KLR)** where the court when faced with a similar question stated as follows:-

*“A perusal of prayer No. 3 of the application indicates that indeed the applicant has sought leave to lodge appeal to the Court of Appeal. **Even though the applicant did not make the request at the time of delivery of the judgement, he is not barred from approaching the court at a later stage for the same.**”*

21. The Applicant further submit that lodging the notice of appeal without prior leave is not fatal to the proceedings and the Applicant has properly invoked this Court’s discretion to regularize that step, and to seek confirmation that the notice filed within time, and in compliance with Rule 75 of the Court of Appeal Rules, be deemed as duly filed.

22. That the Respondents’ claim of delay is thus wholly misplaced as the application herein is not an attempt to cure indolence but an act of procedural prudence, filed promptly upon appreciation of the evolving legal position that leave to appeal was necessary.

23. That the entire period between date of Judgment 22nd May 2025 and date of this application 10th June 2025 is less than three weeks, an interval that is reasonable and excusable. Furthermore, there are no prescribed statutory timelines for seeking leave to appeal in succession matters, and what is required is that the Applicant acts within a reasonable time. It is also noteworthy that within this short interval, the Applicant sought and retained new counsel, who promptly moved the Court to regularize the procedural position.

24. Further, that the intended appeal is arguable in so far as the Applicants challenge, among other issues, the finding that the Respondents were entitled to a share in the suit property TITLE NO. BARINGO/KEWAMOI "A"/175, notwithstanding that they were neither dependants within the meaning of Section 29 of the Law of Succession Act, nor beneficiaries lawfully entitled under the confirmed grant.

25. The Applicant submits that these are substantial questions of both law and fact, requiring interpretation of the scope of dependency, which the Court of Appeal ought to have the opportunity to consider these matters.

26. The Applicant further invites the Court to consider the **prejudice** to be suffered by the Applicants if this application is declined far outweighs any conceivable inconvenience to the Respondents. The impugned judgment affects proprietary

rights in the estate of the deceased, and unless the Applicants are afforded an opportunity to challenge it on appeal, they stand to suffer permanent deprivation of their lawful inheritance.

27. That declining the Respondents leave to appeal would effectively extinguish their right of appeal, a fundamental component of the right to be heard under Articles 48 and 50(1) of the Constitution, and would further amount to shutting the doors of justice on substantive grounds before the dispute is tested on its merits by the appellate court. Furthermore, Article 159(2)(d) of the Constitution enjoins this Honorable Court to administer justice without undue regard to procedural technicalities

29. On the other hand, the Respondents would suffer no comparable prejudice if leave is granted. The grant of leave does not overturn the judgment but merely preserves the Applicants' right to ventilate their grievances before the appellate court.

30. The applicant urges this court to find that the Respondents' interests in finality of litigation, ought not supersede the constitutional imperative of access to justice and fair hearing.

31. That the balance of convenience and justice therefore tilts heavily in favour of allowing this application, thereby ensuring that the matter proceeds on its merits rather than on a procedural technicality.

32. In conclusion, the applicant submits that they have demonstrated that there was indeed no delay, and if there was any, it is explained, not inordinate and acted in good faith in moving the Court and that they have satisfied all the criteria for grant of leave to appeal and humbly prays that this Court be pleased exercise its discretion and deem the Notice of Appeal lodged on 4th June 2025 as duly filed, or in the alternative, grant leave to appeal out of time, together with such consequential directions as the Court may deem fit to secure the ends of justice.

RESPONDENT'S SUBMISSIONS

33. The Respondent submits that issues for determination is whether leave is required to appeal to court of appeal in succession matters, whether the applicant has met legal threshold for grant of leave to appeal out of time and whether notice of appeal filed without leave can be deemed as duly filed.

34. The respondent submits that it is well settled that appeals from High court to court of appeal do not lie as of

right but only with leave either of the High court or court of appeal and relied on the case of Rhoda Wairimu Karanja & Another v Mary Wangui Karanja & Another [2014] eKLR, where the court of appeal held as follows:

“It is clear to us that no appeal shall lie from the High court to the court of appeal in succession matters unless leave has been granted either by the High court or this court.”

35. The respondent submits that the applicant submits in paragraph 4 of the supporting affidavit that no leave was sought before filing the Notice of Appeal. The notice of appeal was therefore filed contrary to law and is incompetent ab-initio.

36. On whether the applicant has met the threshold for grant of leave out of time, the principles for extension of time to file an appeal were restated by the supreme court in Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others [2014] eKLR, namely that extension of time is not a right of a party but an equitable remedy available at court's discretion, and the applicant must satisfactorily explain the delay. The court considers the length of delay, reason for delay, degree of prejudice to the respondent and whether the matter raises issues of public importance.

37. The respondent submits that in this case, judgment was delivered on 22nd may 2025. The applicant filed a notice of appeal on 4th June 2025, and only moved this court on 10th June 2025 for leave. The applicant has provided no cogent explanation why leave was not sought contemporaneously with the notice of appeal. Further that ignorance of the law is not a valid excuse and relied on the case of Republic v public procurement Administrative Review Board & 2 others ex parte P.S.C. of Kenya [2018] eKLR.

38. On whether the notice of appeal can be deemed duly filed, the Respondent submits that a document filed contrary to express statutory requirements is void and cannot be validated retrospectively and the only lawful course is for the applicant to seek leave first, and if granted, file a fresh notice of appeal in compliance with the rules.

39. On prejudice to respondents, they submit that the matter has been in court for a protracted period and the estate is at an advanced stage of administration and granting orders sought will delay finalization, prejudice the beneficiaries, and offend the overriding objective under section 1A and 1B of the CPC and Article 159 of the constitution.

40. In conclusion, the respondent submits that the applicant has not met the threshold for grant of leave to appeal out of time; the notice filed is incompetent and cannot be validated and urged this court to uphold the principle of finality in succession proceedings and dismiss the application.

ANALYSIS AND DETERMINATION

41. I have considered the application, the affidavits on record, and the rival submissions. The issues that emerge for determination are:-

- a) Whether leave is required to appeal from a decision of the High Court in a succession matter to the Court of Appeal;
- b) Whether the Notice of Appeal filed without prior leave can be deemed as duly filed; and
- c) Whether the applicant has satisfied the criteria for grant of leave to appeal out of time.

42. On the first issue, the law is now settled that appeals from the High Court exercising its original jurisdiction in succession matters do not lie to the Court of Appeal as of right, but only with leave. The Court of Appeal in *Rhoda Wairimu Kioi & Another v Mary Wangui Karanja & Another*

[2014] eKLR held that under the Law of Succession Act, there is no automatic right of appeal, and that leave of the High Court or the Court of Appeal is a prerequisite. The rationale, as the Court observed, is to promote finality and expedition in the determination of probate disputes.

43. From the foregoing, the Applicant was required to seek leave before lodging a Notice of Appeal. The Notice of Appeal dated 4th June 2025 was therefore irregularly filed in the absence of prior leave. However, the question that follows is whether such an omission is fatal or capable of regularization.

44. Rule 73 of the Probate and Administration Rules preserves the inherent power of this Court to make such orders as may be necessary for the ends of justice. Similarly, Section 47 of the Law of Succession Act vests this Court with wide discretion in the administration of estates. That discretion extends to regularizing procedural missteps, provided no prejudice is occasioned to the opposite party and justice is better served by doing so.

45. The purpose of the instant application is to regularize the notice filed without leave and, in the alternative, to obtain leave to file an appeal out of time. The record shows that the impugned judgment was delivered on 22nd May 2025, and the Notice of Appeal was lodged on 4th June 2025 which is a

period within the 14 days prescribed under Rule 77(2) of the Court of Appeal Rules, 2022. The present application was filed on 10th June 2025, barely three weeks after delivery of judgment. I find that this was within a reasonable time and does not amount to undue delay.

46. The Respondents argue that ignorance of the law is no excuse and that the notice filed without leave is incompetent. While the Court agrees that ignorance of the law is not a ground for extension of time, the Court must also consider that the requirement for leave in succession appeals has crystallized through evolving jurisprudence. The Applicant's explanation that the notice was filed under the mistaken belief that an appeal lay as of right is plausible in the circumstances and does not amount to willful indolence.

47. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR set out the principles guiding the exercise of discretion to extend time, namely:

- a) Extension of time is not a right but an equitable remedy;
- b) The applicant must satisfactorily explain the delay;

c) The Court considers the length of delay, the reason for the delay, the degree of prejudice to the respondent, and the chances of the appeal succeeding.

48. Applying these principles, the delay in this case is minimal and sufficiently explained. The Respondents have not demonstrated specific prejudice they stand to suffer if leave is granted. On the other hand, denying leave would permanently shut the Applicant from pursuing an arguable appeal touching on proprietary rights in the estate, which is a matter of substantial importance.

49. In view of the above, I find merit in the Applicant's argument that the omission to seek leave contemporaneously with the notice of appeal was a procedural lapse curable under the Court's inherent jurisdiction. The Notice of Appeal filed on 4th June 2025 can properly be deemed as duly filed, and in the alternative, leave to appeal out of time may issue.

50. From the foregoing, I am satisfied that the Applicant has met the threshold for grant of leave to appeal and for regularization of the notice of appeal already lodged. The interests of justice favour allowing the application to enable the intended appeal to be heard on its merits rather than defeated on technical grounds.

51. **FINAL ORDERS:** -

a) The Applicant is hereby granted leave to file an appeal out of time against the Judgment of this Court delivered on 22nd May 2025.

b) The Notice of Appeal lodged on 4th June 2025 is hereby deemed as duly filed.

c) Costs of the application shall abide the outcome of the intended appeal.

Ruling delivered, dated and signed Virtually at Kabarnet this **13th of November 2025.**



.....
RACHEL NGETICH
JUDGE

In the presence of:

- CA Elvis.
- Mr. Kipkorir for Applicant.
- No appearance for Respondent.