

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NO. E043 OF 2024
IN THE MATTER OF THE ESTATE OF KIIMANI THAIRU
(DECEASED)

**HENRY KIMANI
THAIRU.....APPELLANT/APPLICANT**

VERSUS

**TERESIAH WANJIRU NGARI.....1ST
RESPONDENT**

**JAMES NJOROGE NGARI.....2ND
RESPONDENT**

R U L I N G

Brief facts

1. The application dated 13th August 2025 seeks for orders of leave to file a second appeal to the Court of Appeal from the judgment of this court delivered on 29th May 2025.
2. In opposition to the application, the respondents filed a Replying Affidavit dated 8th September 2025.

Appellant's /Applicant's Case

3. The applicant states this Court delivered judgment in this appeal on 29th May 2025 dismissing the appeal that had emanated from a

judgment delivered on 20th February 2024 in Thika CM Succession Cause No. 253 of 1998. Being aggrieved by the said judgment, the applicant seeks leave before the current court to file a second appeal to the Court of Appeal pursuant to Section 50(1) of the Law of Succession Act. Being a succession matter, the applicant argues that he has no automatic right of appeal to go to the Court of Appeal.

4. The applicant further argues that his draft memorandum of appeal raises substantial grounds of law for example whether his summons for revocation of grant was res judicata and whether he had *locus standi* to lodge the said Summons. The applicant states that no prejudice shall be occasioned to the respondents if the application is allowed since the position held at the time of filing the current application shall not be altered and a final and just determination of the issues between the parties will be made upon hearing of the intended appeal.

The Respondent's Case

5. The respondent states that litigation must come to an end and the applicant cannot litter the courts with numerous unending cases. The respondent argues that the trial court rightly held that all the issues the applicant was raising before it was res judicata having been conclusively

dealt with in Murang'a ELC Case No. 30 of 2018 where the applicant was the plaintiff while the respondents were the 1st and 3rd defendants.

6. The respondent argues that the issue of identity of the applicant was determined in the ELC Case and thus it is improper for the applicant to keep on litigating over the same issue at the lower court instead of preferring an appeal at the Court of Appeal. The respondent further argues that there is nothing new which was not determined in the ELC Case that the applicant is going to raise in the Court of Appeal even if she were to preempt his appeal.
7. The respondent states that the applicant has no connection with the deceased estate be it by blood or marriage thus making him a stranger to the current proceedings. Further, the trial court sitting as a probate court would not have adjudicated on issues of land ownership relating to LR No. GIKINDU/MIRIRA/816.
8. Parties put in written submissions.

The Applicant's Submissions

9. The applicant refers to the decision in **Re Estate of Francis Waithanje Munaithaga (Deceased) [2021] eKLR** and submits that his draft memorandum of appeal raises substantial points of law on whether his summons

for revocation of grant were barred by *res judicata* and whether he had *locus standi* to institute them.

10. Relying on **Section 50(1) of the Law of Succession Act** and the cases of **Rhoda Wairimu Karanja & Another vs Mary Wangui Karanja & Another [2014] eKLR**; **Obange & Another vs Oganyo & 4 Others (Civil Appeal E033 of 2021)**; **Jacob Kinyua Kigano vs Tabitha Njoki Kigano & Another [2014] eKLR** and **Machuka & Another vs Nyangute & Another [2025] KECA 538 (KLR)**, the applicant argues that this court's jurisdiction to grant leave is not ousted by Section 50(1) of the Act but exists to protect his constitutional right to a fair hearing and access to justice.

The Respondent's Submissions.

11. The respondent submits that the applicant has not attached a draft memorandum of appeal to his application thus the court cannot discern what the applicant has been aggrieved by in the judgment. The respondent further refers to the cases of **Re Estate of the late Kibet Sang (Deceased) (Succession Cause E105 of 2020) [2025] KEHC 2736 (KLR) (11 March 2025)** and **Re Estate of Geoffrey Githigi Kanyigi (Deceased) (Civil Appeal E019 of 2023) [2025] KEHC 9951 (KLR) (10 July 2025) (Ruling)** and submits that the estate has been distributed and there is nothing to redistribute to the applicant. Furthermore, the applicant has no blood relationship with the deceased and

additionally he did not provide any evidence to show such relationship in order to qualify as a beneficiary. Thus he has no *locus standi* in the deceased's estate. Additionally, the Court of Appeal cannot determine the issue of jurisdiction as there is a clear demarcation of the roles of the probate court and the ELC court. That notwithstanding, the Court of Appeal cannot change the verdict of the ELC Court which is part of this court's record and whereby the applicant regurgitated the issues before the trial court which were already determined in the ELC Court.

The Law

Whether the application is merited.

12. **Section 50 of the Law of Succession Act** provides:-

- 1) An appeal shall lie to the High Court in respect of any order or decree made a Resident Magistrate in respect of any estate and the decision of the High Court thereon shall be final.**

- 2) An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi's Court in respect of the estate of a deceased Muslim and with prior leave thereof in respect of any point of Muslim law, to the court of Appeal.**

13. There is no specific procedure for appeal to the Court of Appeal. However, the High Court is granted unlimited power to entertain any application and determine any dispute under the Act. Further Rule 49 of the Probate and Administration Rules provides for applications not otherwise provided for and Rule 73 of the Probate and Administration Rules also saves the inherent powers of the court to make orders necessary for the ends of justice.
14. In the Court of Appeal decision in **M’Inkanatha vs Kaberia (Civil Appeal 22 of 2019) [2025] KECA 1429 (KLR) (31 July 2025) (Judgment)** the court held:-

The Law of Succession Act does not provide for appeals, from decisions of the High Court, in exercise of its appellate jurisdiction, on appeals from the Magistrate’s Courts, and, in fact, states, at Section 50(1) that the decisions of the High Court on appeal are final. However, it is settled, by such decisions as Makhangu vs Kibwana [1996-1998] 1 EA 168 (Cockar CJ, Kwach & Shah JJA); Rhoda Wairimu Karanja & another vs Mary Wangui Karanja & another [2014] eKLR (Musinga, Ouko & Gatembu JJA) and Sophia Salim Gathiaka & Another vs Mariam Mbuve Abdalla & 9 Others [2016] eKLR (Mwilu, Azangalala & Kantai JJA), that an appeal lies from a decision of the High Court sitting as an

appellate court, to the Court of Appeal. Whether the appeal is as of right or leave is required, is still unsettled. Therefore, to be on the safe side, it would be prudent to obtain leave.

15. Further guided by the case of **John Mwita Murimi & 2 Others vs Mwikabe Chacha Mwita & Another [2019] eKLR**, the 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 vs Kibwana [1996] EA cited by the respondent was succinctly considered by this Court in Rhoda Wairimu Karanja & Another vs 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 the leave of this Court.

16. In determining whether to grant leave to appeal, the court must examine whether the applicant has demonstrated prima facie grounds that merit serious judicial consideration. The applicant has not annexed any draft memorandum of appeal but has averred in his

affidavit that his grounds of appeal are whether his summons for revocation of grant were barred by the doctrine of *res judicata* and whether he had requisite *locus standi* to lodge a second appeal.

17. As for the intended appeal to the Court of Appeal, the grounds relied on as stated by the applicant in his affidavit do not demonstrate existence of any serious issue which is arguable and merits serious judicial consideration by the Court of Appeal. The issue of ownership of the suit land was indeed decided in Murang'a ELC Case No. 30 of 2018. The law is clear that a magistrate sitting in a probate court has no jurisdiction to determine ownership of land but can only distribute the estate to its rightful beneficiaries upon identifying them. Where issues of ownership of the property of the estate arise in a succession cause, such issues ought to be resolved before the property of the deceased is distributed. The ELC Court having established the ownership of the suit land and the applicant having not appealed against the said judgment, he has no legal interest in the deceased's land LOC 20/MIRIRA/816 being the only asset of the estate of the deceased. It goes without saying that the ELC Court judgment is valid for no appeal was lodged by the applicant.

18. Therefore an appeal to the Court of Appeal from the succession matter would only amount to an academic exercise since the ownership of the land has already been

established and determined by a court of competent jurisdiction, the ELC Court. All that the magistrate's court did as a probate court was to distribute the estate of the deceased to the beneficiaries.

19. It is my considered view that the application dated 13th August 2025 lacks merit and is hereby dismissed with costs to the respondents.

20. It is hereby so ordered.

***RULING DELIVERED VIRTUALLY, DATED AND SIGNED
AT THIKA THIS 4TH DAY OF DECEMBER 2025.***

F. MUCHEMI
JUDGE