**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**(FAMILY DIVISION)**

**SUCCESSION CAUSE NO E014 OF 2021**

**IN THE MATTER OF THE ESTATE OF ESMAIL ABDULKARIM EBRAHINJEE alias ESMAIL ABDULKARIM alias ESMAIL ABDULKARIM MULLA EBRAHIMJEE (DECEASED)**

**MOHAMED NAJMUDIN ABDULKARIM ……EXECUTOR**

**VERSUS**

**NOMAN ABDULKARIM ……..OBJECTOR/APPLICANT**

**RULING**

**1.** Vide a notice of motion dated 22nd October 2025, the objector/applicant sees the following orders;

a. Spent

b. That this honorable court be pleased to extend time for the applicant for the filing of an application for leave to appeal;

c. That leave be granted to the applicant to appeal the judgment of this honorable court delivered on 8th September 2025;

d. That the notice of appeal filed in this honorable court, dated 12th September 2025, be deemed as property on record for the purposes of the applicant's intended appeal.

**2.** It is contended that due to an error on the part of counsel for the applicant, no leave to appeal was sought. The objector/applicant stated that the bona fide mistake on the part of his advocate ought

not to be visited upon him and that the respondent would not be prejudiced. The application is supported by the affidavit of Idris Ahmed, the learned counsel for the objector/applicant. The same was sworn on **22nd October 2025**.

**3.** The application is opposed. Counsel for the executor filed grounds of opposition dated **4th November 2025,** in which it was urged that this court lacks jurisdiction to grant the orders sought as it is *functus officio*. It was also contended that the matter is pending at the Court of Appeal. The executor/respondent filed a replying affidavit sworn on 4th November 2025, in which he stated that the instant application was a ploy by the objector/applicant to defeat the pending application at the Court of Appeal, vide which it is sought to strike out the appeal for want of leave.

**4.** The application was also opposed by the interested party through a replying affidavit sworn on 10th November 2025, in which the same grounds as those made by the executor/respondent herein were raised.

**5.** The application was canvassed by way of both oral and written submissions. The submissions of the counsel for the objector /applicant are dated 11th November 2025. Those of the executor/respondent are dated 24th November 2025. The interested party's submissions are also dated 24th November 2025. The executor/respondent and the interested party oppose the application.

**6.** I have considered the application, the responses thereto, the parties' submissions, as well as the applicable law. The sole issue is whether this court should grant leave to the objector/applicant to file an appeal.

**7.** It is trite law that there is no automatic right of appeal in succession matters. In the case of **Machuke & 3 others v Ngare & 6 others [2025] KECA 27 (KLR),** it was stated by the Court of Appeal that:

> **"We have deliberately quoted the above decisions extensively in order to appreciate the debate regarding the right of appeal to this court in succession matters, and the varying opinions. In our view, considering the relevant provisions of the law, and the above authorities, the Rhoda Wairimu Karanja decision puts the matter into its proper perspective as the provisions of the *Law of Succession Act*, should not be inconsistent with the *Constitution*, and must therefore be interpreted in a way that advances the purposes, values and principles of the *Constitution*. Therefore, the absence of a provision in the *Law of Succession Act* for appeals originating from the High Court to this Court does not completely exclude such appeals from this Court. In accordance with the general purport of Article 164(3) of the *Constitution*, the Court has jurisdiction to hear such appeals from the High Court. However, the right of appeal in such matters is circumscribed to the extent that it is not an automatic right. There must be leave to appeal given either by the High Court or this Court. In**

**this case, no leave to appeal was sought either from this Court or the High Court. Therefore, the appeal before us is incompetent, as the appellants have not properly invoked the jurisdiction of the Court."**

**8.** In his affidavit, Mr. Idris Ahmed averred that the failure to seek leave was his mistake and that his client should not be punished for it.

**9.** It would appear to me that the objector/applicant was keen to appeal. That is evident given the alacrity with which the notice of appeal was filed. The error appears to have been on the part of the counsel who failed to seek leave. Should this error be visited on the litigant? I do not think so.

**10.** In the case of **Belinda Murai & 9 others v Amos Wainaina [1979] KECA 25 (KLR)**, it was stated by Madan JA (as he then was that

**"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel, though in the case of a junior counsel, the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of**

**justice themselves make mistakes, which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view, which courts of appeal sometimes overrule. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of the years since the decision was delivered so requires. It is all done in the interests of justice. A static system of justice cannot be efficient."**

**11.** Similarly, in the case of **Philip Keipto Chemwolo & another v Augustine Kubende [1986] KECA 87 (KLR)**, it was stated by Apaloo, JA, as he then was, that:

**"I think a distinguished equity judge has said:**

> **"Blunders will continue to be made from time to time, and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits."**

**I think the broad equity approach to this matter is that, unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."**

**12.** In my view, it would be in the interest of justice to allow the notice of motion dated 22nd October 2025 so that the grievances of the objector/applicant can be determined on merits by the Court of Appeal. In the circumstances, the said application is allowed.

**13.** On costs, each party shall bear his own costs of the application.

**Dated** and **signed** in Mombasa, this **2nd** day of **March 2026**. Delivered virtually through **Microsoft TEAMS.**

**Gregory Mutai**

**JUDGE**

In the presence of:

Mr. Idris Ahmed for the Objector/Applicant;

Mr. Sugow, for the 1st and 2nd Interested Parties;

Mr. Ezekiel Njagi, for the Executor/Respondent; and

Mr. Hamisi – Court Assistant.