

**IN THE COURT OF  
APPEAL AT  
NAIROBI**

**(CORAM: W KARANJA, GATEMBU & ACHODE, JJ.A.)**

**CIVIL APPEAL (APPLICATION) NO. E141 OF 2021**

**BETWEEN**

**GIDEON OLE NKAI NOAH.....APPLICANT  
AND**

**HELLEN NAISERIAN NKAI.....1<sup>ST</sup>**

**RESPONDENT**

**JOYCE LASOI NKAI.....2<sup>ND</sup> RESPONDENT**

**DEBRA SIMALOI SHININI.....3<sup>RD</sup>**

**RESPONDENT**

**EMILY KANWANKA KOIKAI.....4<sup>TH</sup>**

**RESPONDENT**

*(An application for a stay of execution pending appeal of the Judgement  
and Decree of the High Court at Kajjado (R. Nyakundi J.) dated 21<sup>st</sup>  
February 2020*

*in*

**HCCC 73 OF 2017)**

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**RULING OF THE COURT**

1. Before us is a Notice of Motion dated 7<sup>th</sup> April 2021 by Gideon Ole Nkai Noah (the applicant) brought under **section 3(1), (2), 3, 3A and 3B** of the **Appellate Jurisdiction Act** and **Rules 5(2)(b), 41, 42(1) and 47(1), (2), (3), (4) and (5)** of the **Court of Appeal Rules**.
  
2. The main order sought in the application is stay of execution of the judgment of Nyakundi, J. delivered on 21<sup>st</sup> February 2021 in **Kajjado HC Succession Cause No. 73 of 2017** pending

hearing and determination of the applicant's intended appeal.

3. The background to this application is that a dispute arose regarding the distribution of the assets of the estate of Noah Malita

Nkai (the deceased). The dispute was between the applicant, a son of the deceased and the respondents, the deceased's daughters. The High Court (Nyakundi, J.), vide a judgment delivered on 21<sup>st</sup> February 2020 by (Chacha Mwita, J.) revoked the Grant of Letters of Administration issued to the applicant and confirmed on 2<sup>nd</sup> June 2004. The learned Judge ordered the applicant to submit an authentic and detailed account of all the beneficiaries and liabilities incurred by the deceased's Estate since confirmation of the grant of letters of administration. The learned Judge also ordered that, subject to the provisions of **section 93(1)** of the **Law of Succession Act**, a fresh distribution of the Estate be undertaken in compliance with **section 38** of the **Act** and that the principle of equity and equality shall not be derogated from at the time of distribution of the Estate to the beneficiaries.

4. The applicant was aggrieved by the judgement and he intends to lodge an appeal to this Court. In this application which is supported by the grounds on the face thereof and in the applicant's affidavit in support, the applicant contends that his intended appeal raises arguable points of law with high chances of success and that if the stay sought is not granted, the intended appeal will be rendered nugatory.

5. The application is opposed through a replying affidavit sworn by Hellen Naserian Nkai, the 1<sup>st</sup> respondent on her own behalf and on behalf of the other respondents dated 15<sup>th</sup> October 2021. The respondents contend that the instant application was filed one year after the judgement which means that it is not urgent; further that the intended appeal is a waste of time as they are entitled to their father's estate from which they were excluded absolutely by the applicant without their knowledge; that the applicant benefited more than any member of the family as he sold more than 200 acres of the deceased's estate and eventually and fraudulently transferred to himself 150 acres of their aged mother's share which was the only parcel left; and that they will suffer prejudice and they ought to be allowed to proceed and get an equal share of their late father's estate.
6. At the virtual hearing of the application on 12<sup>th</sup> March 2025, there was no attendance by either counsel or the parties. We noted, however, that the applicant had filed submissions pursuant to this Court's directions given earlier. There were no submissions by the respondents. In his written submissions the applicant submits that he has demonstrated that his intended appeal raises eight (8) arguable issues which are raised in his memorandum of appeal and that the same are worthy of

consideration by this Court.

7. As regards the nugatory aspect, the applicant contends that the appeal will be rendered a mere academic exercise if stay is not granted. He submits that the appeal involves ancestral land which is a very emotive issue and that if the stay sought is not granted, the respondents are very likely to waste away the said land by way of wanton subdivision, alienation, gift or otherwise and that in the likely event that he succeeds in the appeal he will not recover the same and that not even monetary compensation will suffice. He contends that the purpose of the stay is to ensure that the Estate in form of land is preserved pending the appeal.
8. We have considered the application, the rival affidavits, the submission by the applicant, and the law. It is trite law that in an application of this nature the applicant must demonstrate, first, that the intended appeal is arguable, and secondly, that unless the orders sought are granted, the appeal will be rendered nugatory. See **Stanley Kang'ethe Kinyanjui -vs- Tony Ketter & 5 Others [2013] eKLR.**
9. However, before we delve into the merits of this application, it is imperative that we first address the question of competence of the intended appeal. Our first observation is that there is no

notice of appeal attached to the application. There is also no notice of appeal in the record of appeal which is annexed to the application.

This point has been raised by the respondents in their replying affidavit and there was no rejoinder or rebuttal to that deposition. There is, therefore, no way for the Court to confirm that there is a notice of appeal filed in compliance with **rule 5(2)(b)** which makes it a prerequisite that there be a notice of appeal lodged in accordance to **rule 77** of the **Court of Appeal Rules**.

- 10.** There is also another hurdle in this application. Another jurisdictional issue arises and although it was not raised by the parties, the Court can raise it *suo moto*. In this regard, we note that the judgment 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 -vs- 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.”***

11. Similarly, in **John Mwita Murimi & 2 others -vs- 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 - 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 leave of this Court. (See also in Re Estate of Mbiyu Koinange (Deceased) [2015] eKLR; HCC Succession Cause No. 527 of 1981).”***

See also this Court’s recent decision in **Anna Wangari Waweru**

**-vs- Margaret Mugure Waweru Civil Application No. Nai E 016**

**of 2025.**

12. The applicant did not provide any proof that he sought and obtained leave of the High Court before lodging the notice of appeal (if any) as none is attached to the application. The Supreme Court in **Nicholas Kiptoo Arap Korir Salat -vs- 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.

13. Even assuming, *arguendo*, that the Court has jurisdiction to hear the application, we are not persuaded that the appeal raises any arguable grounds as the only problem the applicant seems to have is that his sisters should inherit his father's Estate. Accordingly, we find this application devoid of merit and dismiss it, with no order as to costs, this being a family matter.

**Dated and delivered at Nairobi this 13<sup>th</sup> day of March 2026.**

**W. KARANJA**

.....  
**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb, C.Arb.**

.....  
**JUDGE OF APPEAL**

**L. ACHODE**

.....  
**JUDGE OF APPEAL**

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

***Signed***

**DEPUTY REGISTRAR.**