

**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: W. KORIR, H. ONG'UDI & S. OKONG'O

JJ.A.) CIVIL APPLICATION NO. NAI 76 OF 2019

BETWEEN

ISAAC GATHUNGU WANJOHI.....APPLICANT

AND

**JACKSON SIMEI NKARU PARTERU 1ST
RESPONDENT SIMON MOLOMA NKARU.....2ND
RESPONDENT**

*(Being an application for leave to appeal against the ruling
and orders of the High Court of Kenya at Kajiado (**R.
Nyakundi, J.**) made on 26th February 2019*

in

HC. Misc. Application No. 49 of 2018)

RULING OF THE COURT

1. The respondents herein applied for and were issued with a Grant of Letters of Administration in respect of the estate of **Nkaru Ntekee** (“the deceased”) in the Principal Magistrate’s Court at Kajiado in Succession Cause No. 44 of 2015 (“the Magistrate’s court succession cause”). The deceased died on 22nd November 1998. At the time of the application for the said Grant of Letters of Administration,

the deceased was said to
own all that parcel of land known as Title No.

Kajiado/Kaputiei-North/3169 measuring 10.12 hectares (“the suit property”).

2. The application was published in the Kenya Gazette of **14th August 2015**. The respondents were issued with a Grant of Letters of Administration in respect of the estate of the deceased on **4th September 2015**, and the same was confirmed immediately thereafter on **8th September 2015**.
3. The suit property, according to the certificate of confirmation, was shared equally by the respondents. Following the confirmation of the said Grant of Letters of Administration, the respondents were registered as the joint proprietors of the suit property on **18th September 2015**. The respondents thereafter sold the suit property to Francis Nganga Mundia (“Mundia”) on **1st October 2015** at a consideration of Kshs. 67,500,000/-
. The suit property was registered in the name of Mundia on **5th November 2015**, and he was issued with a title deed on the same date.
4. By the time the respondents were applying for and obtaining a Grant of Letters of Administration in respect of the estate of the deceased, transferring the suit property to

themselves, selling and transferring the same to Mundia,
the suit property

is said to have been registered in the name of the applicant herein. The applicant is said to have purchased the suit property from the deceased while he was still alive on 23rd December 1993 at a consideration of Kshs. 150,000/-.

5. The applicant is said to have purchased the suit property as a portion of the hitherto larger parcel of land known as Kajiado/Kaputiei-North/1531("Plot No. 1531"), which measured a total of 20.44 hectares. Plot No. 1531 is said to have been subdivided into two portions, Kajiado/Kaputiei-North/3150 and Kajiado/Kaputiei-North/3169 (the suit property) in 1993 after the consent of the Land Control Board was obtained for that purpose. The suit property is said to have been transferred to the applicant on 13th January 1994, and he was issued with a title deed for the same on the same date.
6. On 2nd August 2016, the Land Registrar, Kajiado, wrote to the applicant and Mundia to the effect that it had come to their attention that each of them held a title deed for the suit property, and that one of them might have obtained his title unfairly.
7. On or about 3rd November 2016, Mundia filed a suit at the

Environment and Land Court at Machakos, namely,

Machakos ELC No. 175 of 2016, seeking declaratory orders in his favour in respect to the suit property. The applicant filed a defence and counterclaim.

8. The Machakos ELC suit between the parties was transferred to the Kajiado Environment and Land Court and assigned a new case reference number, **Kajiado ELC No. 502 of 2017 (“the ELC suit”)**.
9. While the ELC suit was pending, the applicant filed a Chamber Summons application at the Family Division of the High Court at Kajiado on 24th September 2018 in **Kajiado High Court Miscellaneous Application No. 49 of 2018 (“the High Court suit”)** seeking the revocation of the Grant of Letters of Administration intestate in respect of the estate of the deceased, Nkarru Ntekee which was issued to the respondents herein in the Magistrate’s court succession cause on 4th September 2015 and confirmed on 8th September 2015. The applicant sought a further order that the order made on 8th September 2015, confirming the said Grant of Letters of Administration, be cancelled together with all consequential transactions carried out on the strength thereof.

10. The Application was brought on several grounds. The

applicant averred that the deceased sold and transferred the suit property to him on 13th January 1994, before the deceased's death. He averred that when the respondents brought the Magistrate's court succession cause, they concealed from the court that the value of the suit property, which was indicated as the sole asset of the deceased, was over Kshs. 20,000,000/- and as such was beyond the jurisdiction of the Principal Magistrate's Court, whose pecuniary jurisdiction was Kshs. 10,000,000/-.

11. The applicant averred that the Magistrate's Courts could not handle succession matters in respect of estates whose value exceeded Kshs.100,000/-, at the time the Magistrate's court succession cause was instituted. He further averred that since the suit property was worth Kshs. 67,500,000/-, the Magistrate's court had no jurisdiction to entertain the respondents' application for a Grant of Letters of Administration in respect of the estate of the deceased owner.
12. He averred that the Principal Magistrate's Court at Kajiado had no jurisdiction to issue the impugned Grant of Letters of Administration and to purport to confirm the same, which

confirmation was also irregular as it was undertaken less than

6 months from the date of the issuance of the said Grant.

13. He averred that the ELC suit filed by Mundia was founded on the Grant of Letters of Administration and the Certificate of Confirmation of the said Grant, which were issued by a court lacking jurisdiction. He averred that the impugned Grant of Letters of Administration was null and void, and should be revoked.
14. The respondents opposed the application by way of a replying affidavit, a further affidavit, and an additional further affidavit of the 2nd respondent, sworn on 12th November 2018, 27th November 2018 and 18th December 2018, respectively. The respondents, while maintaining that the title for the suit property held by the applicant was a forgery, did not respond to the issues raised by the applicant in the application concerning the validity of the Grant of Letters of Administration, which they obtained from the Principal Magistrate's Court at Kajiado. The respondents contended that instead of defending himself in the ELC suit, the applicant was engaged in forum shopping in the guise of raising a jurisdictional issue touching on the issuance of a Grant of Letters of Administration in respect

of the deceased's estate.

15. The High Court heard the Applicant's application and delivered a judgment on 26th February 2019. The Court found that the Applicant's purported purchaser's interest had not been demonstrated nor supported by the register of the suit property or a certificate of search. The Court also found that the Principal Magistrate's Court lacked pecuniary jurisdiction to deal with the application for Grant of Letters of Administration in respect of the estate of the deceased. The High Court was, however, of the view that the respondents were not aware of the value of the suit property when they moved the Principal Magistrate's Court for the impugned Grant, and as such could not be taken to have concealed from the court the value of the suit property.
16. The High Court considered the legal position of an innocent purchaser of a property conveyed through a defective Grant of Letters of Administration. The Court observed that, whereas the applicant had not demonstrated his interest in the suit property, Mundia had, on the other hand, established that he had acquired the suit property lawfully in good faith without any act of fraud. The Court found that

Mundia was a bona fide purchaser of the suit property for value, without notice of any

defect in the title held by the respondents.

17. The High Court concluded that there was no need to cancel or revoke the process through which the suit property was sold and transferred to Mundia. The Court was of the view that the applicant had moved to attack the root of Mundia's title so that he could have an upper hand in the ELC suit. The Court observed that the applicant could still ventilate his grievances against Mundia's title in the ELC suit, despite the title having passed to Mundia through a Grant of Letters of Administration issued without jurisdiction.
18. The Court held that the probate and administration proceedings before the Principal Magistrate's Court could be impeached without affecting the title to the suit property held by Mundia. The Court stated that it had a duty to protect the interest of Mundia, who was the bona fide purchaser of the suit property pending the determination of the ELC suit.
19. In conclusion, the High Court made the following orders;
 - a) The Grant of Letters of Administration issued to the respondents by the Principal Magistrate's Court at Kajiado on 4th September 2015 and confirmed on 8th September 2015 was revoked for having been issued without jurisdiction.

b) The Court issued a fresh Grant of Letters of Administration in favour of the respondents and

confirmed the same.

- c) The Court ordered that the Applicant's claim be determined in the ELC suit, and that the applicant should not raise in the ELC suit the issue that the Grant of Letters of Administration through which the respondents acquired the suit property had been issued without jurisdiction.
- d) The Court ordered that the Applicant's claim lacked merit and dismissed it with costs.

20. The applicant was dissatisfied with the said judgment and filed a Notice of Appeal on 8th March 2019.

21. What is now before us is the Applicant's application brought by way of Notice of Motion dated 11th March 2019 under Rules 5(2)(b), 39, 42 and 43 of the Court of Appeal Rules 2010. In the application, the applicant has sought leave to appeal against the said judgment of the High Court delivered on 26th February 2019. The application, which was supported by the Applicant's affidavit sworn on 11th March 2019, was brought on several grounds.

22. The applicant averred that he was dissatisfied with the judgment of the High Court and wished to appeal against the same to this Court. He averred that he sought leave to appeal from the High Court, but the same was denied. He averred that the impugned judgment arose from a

succession matter and

could only be appealed with leave.

23. He averred that he had an arguable appeal which merited consideration by this Court. He averred that the High Court erred in not holding that all proceedings and actions taken pursuant to the illegal Grant of Letters of Administration, which was issued to the respondents, including the sale and transfer of the suit property to Mundia, were null and void. He further averred that the High Court erred when it usurped the jurisdiction of the court seized of the ELC suit and purported to adjudicate on issues touching on title to land, and to direct the said court on how to adjudicate the matter pending before it.
24. The applicant averred that the High Court erred further in issuing Letters of Administration in respect of the estate of the deceased, while there was neither a petition for such a Grant nor a Summons for confirmation of the Grant. He further averred that the High Court erred by holding that ignorance of the law is a defence.
25. The application was opposed by the respondents through the 1st respondent's replying affidavit, sworn on 15th November 2024. The respondents averred that the

application was

incompetent for failure to comply with Rules 42 and 43 of the Court of Appeal Rules 2010.

26. They averred that, the Applicant's application for leave, having been dismissed by the High Court, the present application was an abuse of the process of the Court. They averred that the application had been overtaken by events in that the orders of the High Court had been executed.
27. They further averred that Mundia, who was the legitimate owner of the suit property, had not been joined as an interested party in the application, although he was likely to be prejudiced should the Court grant the orders sought. They contended that the High Court did not commit any of the errors alleged in the application.
28. When the application came up for hearing before us, learned Senior Counsel Mr. Gibson Kamau Kuria for the applicant and learned counsel Mr. Odhiambo for the respondents relied on their filed written submissions, which they also highlighted very briefly.
29. Relying on the submissions dated 22nd February 2024, counsel for the applicant submitted that the applicant had satisfied the requirements for the grant of the leave sought,

as laid down by

the Court in ***Sango Bay Estates & Another v. Dresdner Bank [1971] E.A 17***, and ***Rhoda Wairimu Kioi and John Kioi Karanja v. Mary Wangui Karanja and Salome Njeri Karanja, Court of Appeal Civil Appeal (Application) No. NAI.69 of 2014***.

30. The applicant submitted that he had demonstrated that the intended appeal raised valid questions that merit consideration by the Court. The applicant referred to ground (d) of the application, and submitted that the intended appeal was not frivolous and that the Court had jurisdiction to grant the sought leave.
31. In opposition to the application, the respondents, through submissions dated 18th February 2026, argued that failure on the part of the applicant to annex a draft memorandum of appeal to the affidavit in support of the application was fatal to the application in that there was no way in which the Court could determine whether the intended appeal was arguable. In support of this submission, the respondents cited ***Supreme Court Application No. E033 of 2023, Kennedy Thindiu Ithongo v. Harry Thindiu***

Ithongo.

32. The respondents further submitted that the application had

been overtaken by events in that the orders issued by the High Court had been implemented, thereby rendering the intended appeal an academic exercise. The respondents submitted that the intended appeal would only cause confusion in the pending ELC suit. The respondents further submitted that the application was an abuse of the Court's process, as it was not brought in good faith. In conclusion, the respondents submitted that the application lacked merit and should be dismissed with costs.

33. The applicant's application was principally brought under Rules 39, 42 and 43 of the repealed Court of Appeal Rules, 2010. Rule 39 (b) gave the Court the power to grant leave to appeal, while Rules 42 and 43 provided for the manner in which the application for leave should be brought.
34. Rule 39 of the Court of Appeal Rules 2010 provides as follows:

“39. Application for leave to appeal in civil matters In civil matters—

- (a) where an appeal lies on certification by the superior court that the case is fit for such leave may be made informally, at the time when the decision against which it is desired to appeal is given, or by motion or chamber summons according to the practice of the superior court, within fourteen days of such decision;**
application for such ¹³ **leave shall be made in**

(b) where an appeal lies with the leave of the Court,

application for such ¹³leave shall be made in

manner laid down in rules 42 and 43 within fourteen days of the decision against which it is desired to appeal or, where application for leave to appeal has been made to the superior court and refused, within fourteen days of such refusal.”

35. In ***Sango Bay Estates Ltd v. Dresdner Bank AG*** (*supra*) ***Spry V P*** stated that:

“I turn to the application itself which can, I think, be disposed of very briefly. As I understand it, leave to appeal from an order in civil proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial considerations but where, as in the present case, the order from which it is sought to appeal was made in the exercise of a judicial discretion, a rather stronger case will have to be made out.”

36. In ***Rhoda Wairimu Kioi and John Kioi Karanja v. Mary Wangui Karanja and Salome Njeri Karanja*** (*supra*), cited by both parties, the Court stated that:

“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.”

37. We have considered the Applicant's application together with the supporting affidavit, the replying affidavits by the respondents in opposition to the application, and the submissions by counsel, both oral and written.
38. We have reproduced the foregoing provisions of the Court of Appeal Rules because some of the objections which have been raised by the respondents to the application are based on form.
39. We find no merit in the objection raised by the respondents regarding the form of the application. The application was brought by way of a Notice of Motion within 14 days from the date of the impugned judgment of the High Court, and was based on the grounds on the face thereof and the supporting affidavit of the Applicant, as was required under Rules 39(b), 42 and 43(1) of the repealed 2010 Rules.
40. Failure by the applicant to accompany the application with a copy of the superior court's ruling denying him leave to appeal is not fatal to the application. Rule 43(3) of the Court of Appeal Rules provides that such a ruling should accompany the application "where practicable". It is therefore not mandatory that the application be

accompanied by the ruling of the

superior court refusing leave to appeal.

41. On the merits, we are satisfied that the application has met the threshold for granting leave set out in the cases we have cited above. The applicant has demonstrated that his intended appeal raises grounds that require consideration by this court.
42. What was before the High Court was an application for revocation of a confirmed Grant of Letters of Administration issued to the respondents, which the applicant claimed was issued by the Principal Magistrate's Court without jurisdiction, and which, according to the Applicant, had been fraudulently used by the respondents to acquire and sell the suit property owned by the Applicant.
43. The High Court was aware that there was an ELC suit pending between Mundia, the Applicant, and the respondents, in which the issue of the ownership of the suit property was to be determined. The High Court made a finding that the Principal Magistrate's Court at Kajiado had no jurisdiction to issue the impugned Grant of Letters of Administration to the respondents.
44. Having reached that finding, it is arguable whether the High

Court was right in its decision to issue a new Grant of Letters

of Administration in respect of the estate of the deceased to the respondents in place of the one found to have been issued without jurisdiction and to confirm it in its impugned judgment without a petition for Grant of Letters of Administration before it.

45. It is also arguable whether the High Court was right in failing to declare the impugned Grant of Letters of Administration and all consequential actions based thereon null and void, having found that it was issued by a court without jurisdiction.
46. It is further arguable whether the Court was right to declare Mundia as a bona fide purchaser of the suit property without notice of any defect in its title while that issue was pending determination in the ELC suit.
47. Finally, it is arguable whether the Court was right in gagging the ELC from considering the validity of the Grant of Letters of Administration through which the respondents acquired the suit property before they sold and transferred it to Mundia.
48. All these issues merit this Court's consideration. We are not persuaded by the respondent's argument that the

application before the Court has been overtaken by events and that it is an abuse of the process of the court.

49. In conclusion, we find merit in the application dated 11th March 2019. The same is allowed as prayed.

Dated and delivered at Nairobi this 25th day of March 2026.

W. KORIR

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JUDGE OF APPEAL

H. ONG'UDI

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JUDGE OF APPEAL

S. OKONG'O

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JUDGE OF APPEAL

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

tr

Signed

DEPUTY REGISTRAR.

