



**Boit v Kumin; Boit & another (Interested Parties) (Civil Appeal (Application)
E101 of 2021) [2025] KECA 568 (KLR) (28 March 2025) (Reasons)**

Neutral citation: [2025] KECA 568 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) E101 OF 2021
JM MATIVO, PM GACHOKA & WK KORIR, JJA
MARCH 28, 2025**

BETWEEN

SOLOMON BOIT APPLICANT

AND

EVALINE CHERUTICH KUMIN RESPONDENT

AND

TOM KIPKOSGEI BOIT INTERESTED PARTY

SERAH WANGARI CHERONO INTERESTED PARTY

*(Being an application for stay of proceedings in the High Court of Kenya, Nakuru
(J. Ngugi, J.) dated 17th September 2020 in Succession Cause No. 585 of 2016)*

REASONS

1. On 17th March 2025, after hearing the applicant's application dated 3rd February 2025, we dismissed it and reserved the reasons for this Court's decision in accordance with Rule 34(7) of the [Court of Appeal Rules, 2022](#).
2. A brief factual matrix, (which is essentially common ground or uncontroverted), is necessary in order to properly contextualize the application the subject of this ruling, and our reasons for dismissing the application. Solomon Boit (the applicant) is embroiled in a succession dispute with his 86 year old biological mother, Evaline Cherutich Kumin (the respondent), who is the widow to the late John Ezekiel Kiboit- deceased who died on 26th November 2013.
3. On 2nd September 2016, the respondent petitioned for grant of letters of administration for the deceased's estate in Nakuru High Court Succession Cause No. 585 of 2016. In her petition, she listed all her nine children including the applicant as beneficiaries to the estate. On 12th June 2017, the



grant was issued to her. On 9th July 2018, the applicant through his advocates Tarus & Company Advocates applied for orders inter alia, that: (a) the said grant be revoked; (b) that the respondent be restrained from transferring, leasing or in any manner dealing with the estate property so as not to disenfranchise them pending the determination of the suit. (c) the costs of the application be provided for. The grounds in support of the application were inter alia that he never consented to the respondent being appointed as the administrator nor was he consulted prior to filing of the petition, some of the persons listed in the petition are not the deceased's biological children, and that the respondent was intermeddling with the estate. On 10th June 2019, the parties compromised the said application by consent in the following terms:

“By consent, the 2nd prayer in the application dated 09/07/2018 is abandoned. The estate is preserved pending the filing of summons for confirmation of grant, the administrator to file for confirmation within 21 days. If a protest is desired to be filed within 21 days of service of the summons for confirmation.”

4. The above consent was recorded by learned counsel Mr. Geke holding brief for Mr. Tarus for the applicant and Mr. Langat, advocate representing the respondent. The applicant's application to set aside the said consent was dismissed by Joel Ngugi, J (as he then) was on 17th September 2020. Aggrieved by the said ruling, the applicant lodged a notice of appeal dated 29th September 2020 and instituted this appeal against the said ruling.
5. In his application dated 3rd February 2025, the subject of this ruling, the applicant prays for stay of proceedings in Nakuru High Court Succession Cause No. 585 of 2016, *Evaline Cherutich Kumin v Solomon Boit & 2 Others* pending hearing and determination of this appeal. He also prays for costs of the application. The application is brought under Rule 5 (2) (b) and 44 (1) of the [Court of Appeal Rules, 2022](#). It is premised on the grounds that his appeal is arguable and absent of stay, the proceedings before the trial court will proceed and he will be denied the opportunity to challenge the grant.
6. The applicant in his supporting affidavit averred that he was apprehensive that he will be denied an opportunity to challenge the revocation of grant if the hearing proceeds before the trial court, thus rendering his appeal nugatory. It was his contention that no prejudice will be suffered by the respondent if the proceedings before the High Court are stayed pending determination of the appeal before this Court.
7. In her replying affidavit, the respondent maintained that the applicant's main ground is that she is intermeddling with the estate. She averred that the said issue can be canvassed before the trial court without the need to stop the already delayed proceedings and in any event the applicant has not particularized the alleged intermeddling to warrant the stay sought. The respondent further maintained that the instant application is belated, it is tainted by mala fides, it is an abuse of court process and it lacks merit, especially given the age of the succession case.
8. The interested parties did not file any responses to the application or submissions. Even though the 2nd interested Party attended the court, other than registering her presence, she opted not to make any submissions.
9. During the hearing of the application, this Court posed a simple question to the applicant's counsel Mr. Odoyo, that is, whether the applicant has an automatic right of appeal against the decision of the learned judge of the High Court issued in succession proceedings. Specifically, Mr. Odoyo was asked by the Court whether this appeal which was instituted without leave either from the trial court or this Court is maintainable in law. Mr. Odoyo, admitted that the applicant never sought and obtained leave to appeal to this Court. He conceded that leave ought to have been sought and obtained to appeal



against the ruling delivered on 17th September 2020. However, counsel beseeched this Court to be guided by the oxygen principle and allow the appellant to prosecute his appeal. Simply put, he insisted on proceeding with his application and briefly highlighted his written submissions.

10. The respondent's counsel Ms Sabaya maintained that this appeal was filed without leave and as such, the jurisdiction of this court has not been properly invoked. She cited this Court's holding in *Esther Kabon Rokocho & Ano. v Kobilu Chepkiyen & Ano.* [2021] eKLR that leave is a fundamental jurisdictional issue without which this Court cannot entertain an appeal from a decision made by the High Court in a succession cause in exercise of its original jurisdiction. Ms Sabaya also relied on this Court's decision in *Hafswa Omar Abdalla Taib & 2 others v Swaleh Abdalla Taib* [2015] eKLR which underscored that an appeal to this Court against a decision made in succession proceedings which are governed by the Law of Succession Act can only lie with the leave of the trial court, or if refused with the leave of this Court.
11. A useful starting point in this determination is to refer to a recent decision of this Court in *Mughal & Rashid (Suing as the legal representatives of the Estate of the Late Rashid Mughal) & Ano. v Bhola* [2025] KECA 420 (KLR) which succinctly illuminated the law regarding the question of leave to appeal to this Court in proceedings governed by the Law of Succession Act. In the said case confronted with the issue of whether under the Law of Succession Act, an aggrieved party had an automatic right of appeal, this Court stated:

“Undeniably, the *Law of Succession Act* does not have an express provision allowing an aggrieved party in succession matters to appeal to this Court against decisions made by the High Court. Section 50 (1) & (2) of the *Law of Succession Act*, the only provisions in the said statute which deal with appeals provides for appeals against- (a) decisions made by the Resident Magistrates' Courts, and, (b) decisions made by the Kadhi's Court. Regarding decisions made by the Resident Magistrates, sub-section (1) clearly provides that appeals against such decisions lie in the High Court whose decision shall be final. Regarding decisions made by the Kadhi's Court in respect of estates of a deceased Muslim, appeals lie in the Court of Appeal, with the leave of the court. Parliament could not have been clearer than that. To provide clarity to the foregoing, we here below reproduce the said provisions: It reads:

1. An appeal shall lie to the High Court in respect of any order or decree made by 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 the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.

To illuminate the above statutory provisions, it is important refer to the provisions of the *Constitution* and the statute that confer jurisdiction to this Court. Article 164 (3) of the *Constitution* provides that the Court of Appeal has jurisdiction to hear appeals from— (a) the High Court; and (b) any other court or tribunal as prescribed by an Act of Parliament. The phrase “as prescribed by an act of Parliament is highly instructive. A court's jurisdiction flows from either the *Constitution* or legislation or both. The Supreme Court *In the matter of the Interim Independent Electoral Commission* [2011] eKLR. Neutral citation: [2011] KESC 1 (KLR) discussed the issue of jurisdiction in the following manner: “Assumption of jurisdiction by courts in Kenya is a subject regulated by the constitution; by statute law, and by principles laid out in judicial precedent.” Thus, a court of law can only exercise



jurisdiction as conferred by the Constitution or other written laws. (See the Supreme Court decision in *S.K.Macharia & another v Kenya Commercial Bank Limited & 2 others* (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012) (Ruling).

The relevant statute is the Appellate Jurisdiction Act which confers on the Court of Appeal jurisdiction to hear appeals from the High Court and for purposes incidental thereto. Section 3 of the said Act provides as follows:

- (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other Court or Tribunal prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under any law.

In very certain terms, the above provision contemplates appeals which lie under any law. The question that falls for determination is whether an appeal can lie where the law does not expressly provide for it. In our considered opinion, for this Court to properly entertain an appeal from the High Court, as the above section suggests, the appeal must lie to this Court under any written law. In other words, unless a right of appeal is clearly and expressly provided by a statute, it does not exist. This is because a right of appeal infers in no one and therefore an appeal for its maintainability must have the clear authority of law. If the statute does not create any right of appeal, no appeal can be filed.”

12. Decided cases are generally in agreement that the right to appeal is a statutory right, meaning it must be explicitly provided under a law, and a mere common law right to a suit does not imply a right to appeal. There is a basic distinction between the right of suit and the right of appeal. There is an inherent right in every person to bring a suit of civil nature, but an appeal for its maintainability must be clearly provided under the law. We are not saying where a statute is silent on whether an appeal lies, an aggrieved party cannot appeal. Conversely, in such a situation an appeal lies, but with the leave of the court. If the High Court sat as a court of first instance, (as was the case in these proceedings), the applicant ought to have sought leave to appeal from the High Court, and if refused, to this Court. It is not just as simple as seeking and obtaining leave. In this regard, Rule 41(1) of this [Court's Rules](#), clearly defines the path to be followed. provides that:

41.

- (1) In a civil matter
 - a. where an appeal lies with the leave of the superior court, application for such leave may be made
 - i. informally at the time when the decision against which it is desired to appeal is given; or
 - ii. by motion or chamber summons according to the practice of the superior court, within fourteen days of such decision;
 - b. where an appeal lies with the leave of the Court, application for such leave shall be made
 - i. in the manner laid down in rules 44 and 45 within fourteen days after the decision against which it is desired to appeal; or
 - ii. where application for leave to appeal has been made to the superior court and refused, within fourteen days after such refusal.



13. The above rule requires an aggrieved party to obtain leave of the High Court within 14 days from the date of the ruling or judgment being appealed against. This Court in *Mughal & Rashid (Suing as the legal representatives of the Estate of the Late Rashid Mughal) & Ano. v Bhola* (Supra) stated:

“ 21. ..The question that falls for determination is whether an appeal can lie where the law does not expressly provide for it. In our considered opinion, for this Court to properly entertain an appeal from the High Court, as the above section suggests, the appeal must lie to this Court under any written law. In other words, unless a right of appeal is clearly and expressly provided by a statute, it does not exist. This is because a right of appeal iners in no one, that is, it cannot be assumed, and therefore an appeal for its maintainability must have the clear authority of law. That is the entry point that grants this Court jurisdiction to adjudicate on the matter. If the statute does not create any right of appeal, no appeal can be sustained by this Court. It is a prerequisite for invoking the jurisdiction of this Court.

22. It is important to underscore the requirement that an appeal must lie under any law is a jurisdictional prerequisite for this Court to be properly seized of the matter. Although this Court has the inherent power to protect and regulate its own process, that does not extend to the assumption of jurisdiction not conferred upon it by the Constitution or the statute. If the Constitution or a statute does not provide for such a right that is the end of the matter and this Court cannot assume the power. In addition to the constitutional and statutory requirement that the appeal be provided under the law, there is yet another twofold requirement: first, the existence of a decision of the High court; and, second, where leave to appeal is required, it has been sought and obtained in the first instance, and if leave to appeal has been refused, it is applied and granted by this Court. It is important to stress that the right to appeal to this Court is neither automatic, nor absolute. This is because an appeal must lie to this Court under any law and where leave is a prerequisite, it must be sought and obtained. As Brand JA said in *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* 2015 (4) SA 34 SCA; [2015] 2 All SA 322 (SCA) para 13: “Leave to appeal . . . constitutes what has become known, particularly in administrative law parlance, as a jurisdictional fact. Without the required leave, this court simply has no jurisdiction to entertain the dispute.”

14. It is important to underscore that the requirement that an appeal must lie under the law is a jurisdictional precept for this Court to be properly seized of an application for stay pending hearing of an appeal. This Court’s inherent power to protect and regulate its own process does not extend to the assumption of jurisdiction not conferred upon it by the *Constitution* or the statute. It is important to emphasize that the right to appeal to this Court is neither automatic, nor absolute. (See *Mughal & Rashid (Suing as the legal representatives of the Estate of the Late Rashid Mughal) & Ano. v Bhola* (Supra)). This is because an appeal must lie to this Court under any law and where leave is a prerequisite, it must be sought and obtained.

15. Brand JA said in *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* 2015 (4) SA 34 SCA; [2015] 2 All SA 322 (SCA) para 13 cited in *Mughal & Rashid (Suing as the legal representatives*



of the Estate of the Late Rashid Mughal) & Ano. v Bhola (Supra)) underscored the importance of leave to appeal in the following words:

“Without the required leave, this court simply has no jurisdiction to entertain the dispute.”

16. The above statement sums up the law in cases where leave to appeal to this Court is a prerequisite. Simply put, leave is a jurisdictional hurdle for a party seeking to approach this Court in proceedings governed by the *Law of Succession Act*. The applicant was mandatorily required by the law (see Rule 41) to first seek and obtain leave from the court of first instance, and if refused, from this Court. Leave to appeal was not obtained in this case. Therefore, the applicant’s application dated 3rd February 2025 fails on two fronts, one, it is incompetent for want of leave, two, this Court has no jurisdiction to entertain an improperly filed application. Having held that the application is incurably defective, there is no need for us to consider whether the applicant has satisfied the twin principles of arguability and the nugatory aspect.
17. The upshot is that the application dated 3rd February 2025 is bad in law and is for striking out, which we hereby do. The applicant shall bear the costs of the application.

DATED AND DELIVERED AT NAKURU THIS 28TH DAY OF MARCH, 2025.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C. Arb, FCIArb.

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR.

