



**Mugambi & 3 others v Mugambi (Civil Application  
E048 of 2023) [2025] KECA 1088 (KLR) (5 June 2025) (Ruling)**

Neutral citation: [2025] KECA 1088 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION E048 OF 2023  
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA  
JUNE 5, 2025**

**BETWEEN**

**JOSEPH MWITI MUGAMBI ..... 1<sup>ST</sup> APPLICANT  
PATRICK MWENDA MUGAMBI ..... 2<sup>ND</sup> APPLICANT  
ANGELICA NKIROTE MUGAMBI ..... 3<sup>RD</sup> APPLICANT  
REBECCA MAKANDI MUGAMBI ..... 4<sup>TH</sup> APPLICANT**

**AND**

**JULIUS KIMATHI MUGAMBI ..... RESPONDENT**

*(An application for leave to file and serve a Record of Appeal against the Judgment of the High Court at Meru (P.J.O. Otieno, J.) dated and signed at Kakamega on 2nd November, 2022 and delivered at Meru on 9th November, 2022 in Succession Cause No. 196 of 1998.)*

**RULING**

1. The Motion before us creates some confusion because it seeks leave to be granted to the applicants to file and serve an appeal out of time. Such an application is provided for in rule 4 of the Court of Appeal Rules (the rules) on “extension of time” and is usually heard by a single Judge of this Court.
2. This Motion is said to be brought under rules 39, 41 and 42 of the rules (probably the 2010 version – since replaced by the 2022 rules). Rule 39 of the 2010 rules provided:
  - “ 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;

- b. where an appeal lies with the leave of the Court, application for such leave shall be made in the 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.”

3 Rule 41 of the former rules provided:

“41. Application to superior Court

The Court may in its discretion entertain an application for stay of execution, injunction, stay of further proceedings or extension of time for the doing of any act authorized or required by these Rules, notwithstanding the fact that no application has been made in the first instance to the superior court.”

4. Rule 42 on “Form of application to Court” provided that, save for informal applications, applications to this Court were to be made by motion and should state the grounds of the application.
5. In the Motion before us the applicants Joseph Mwiti Mugambi, Patrick Mwenda Mugambi, Angelica Nkirote Mugambi, Purity Gacheri Mugambi, Rebecca Makandi Mugambi, Regina Kananu and Margaret Naitore pray that leave be granted to them to file and serve an appeal in respect of the judgment in High Court Succession Cause No. 196 of 1998 dated 2<sup>nd</sup> November, 2022 and delivered on 9<sup>th</sup> November, 2022 out of time, that notice of appeal already filed be deemed as properly filed; that they be granted leave to file and serve record of appeal out of time and costs be in the intended appeal. In the grounds in support of the application and in a supporting affidavit by the 1<sup>st</sup> applicant Joseph Mwiti Mugambi, it is said amongst other things that their application for revocation of grant was dismissed in the impugned judgment; that the lawyer who received the judgment orally applied for leave to appeal and was under the impression that leave had been granted; that notice of appeal was filed and served on time; a letter bespeaking proceedings was lodged on time; that the applicants later learned that leave to appeal had not been granted. Further, that the applicants were later supplied with proceedings and judgment of the High Court with a Certificate of Delay; that there is no inordinate delay in bringing the application; that the applicants have an arguable appeal and will suffer substantial irreparable loss unless the orders sought are granted.
6. There is a replying affidavit by the respondent Julius Kimathi Mugambi who depones that the applicants did not apply for or obtain leave to appeal; that since obtaining proceedings and judgment from the High Court on 20<sup>th</sup> May, 2023 the applicants have not explained delay in filing the application for over 6 months; that notice of appeal filed without leave is void ab initio. He depones at paragraphs 8 – 11 (inclusive) of replying affidavit:

- “8. That I am advised by my advocates on record which advice I verily believe to be true, that the

Notice of Appeal filed on 18<sup>th</sup> December 2022 is void ab initio as leave to Appeal had not been granted.



9. That I am aware the suit property that was the subject of trial has already been distributed as per the confirmed grant in 2015, and subsequently sold to bona fide purchasers who have already developed it.
  10. That notwithstanding, the Applicants failed to demonstrate in trial that they were children of the deceased having been born well after the deceased died in 1978 and are therefore strangers to the estate. (Annexed and Marked 'JKM 2' are extracts of the Judgment pages 6 & 7).
  11. That I am advised by my advocates on record which advice a (sic) verily believe to be true, the Appeal is not arguable and has little chances of success since the Applicants failed to demonstrate that they are children of the deceased or that the grant was acquired by fraud or concealing material facts. (Annexed and Marked 'JKM 3' are extracts of the Judgment pages 8-9)."
7. We have seen and considered the respective written submissions filed by the parties.
  8. There is no dispute that the judgment from which the applicants wish to appeal arose from succession proceedings. The applicants are required to obtain leave of the High Court before approaching this Court. The issue of such leave has been considered by this Court in *Nkoliai vs. Ololparaki & 2 Others* [2023] KECA 1228 (KLR) and this is what the Court stated:

“The *Law of Succession Act* provides for no express right of appeal in such a matter. This then brings into play the competing interests between article 163(4) of *the Constitution*, section 3(1) and (2) of the *Appellate Jurisdiction Act*, and the *Law of Succession Act*. The *Law of Succession Act* provides for no right of appeal to this Court while section 3(1) of the *Appellate Jurisdiction Act* limits appeals to this Court from the High Court as prescribed by an Act of Parliament. Article 164(3) of *the Constitution* on the other hand clothes this Court with the jurisdiction to hear and determine appeals emanating from the High Court or any other court or tribunal as prescribed by an Act of Parliament.

whereas a litigant in a succession matter should not be denied the right of appeal, such a right ought to be subjected to scrutiny in order to justify the expenditure of the limited resources on the matter. To this end, we are persuaded by the holding of this Court in *John Mwita Murimi & 2 others vs. Mwikabe Chacha Mwita & another* [2019] eKLR that:

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 – v- Kibwana* [1996] EA cited by the respondent was succinctly considered by this Court in *Rhoda Wairimu Karanja & another – v- 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.”
  17. It is our conclusion that leave to appeal was a pre-requisite in the present appeal. We note that the same was not obtained prior to filing of this appeal. Consequently, this Court lacks the requisite jurisdiction to hear and determine this appeal. For the stated reason, this appeal is struck out.”



9. The applicants do not have an automatic right of appeal to this Court from a decision of the High Court sitting as a succession court. They required to obtain leave of that court or if such leave is refused, apply to this Court as required by our rules. The application is therefore incompetent and is hereby struck out. We award costs of the Motion to the respondent.

**DATED AND DELIVERED AT NYERI THIS 5<sup>TH</sup> DAY OF JUNE, 2025.**

**S. OLE KANTAI**

.....

**JUDGE OF APPEAL**

**J. LESIIT**

.....

**JUDGE OF APPEAL**

**ALI – ARONI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

