



**Kimathi v M’Mwithirwa & 2 others (Civil Application
E067 of 2024) [2024] KECA 1366 (KLR) (3 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1366 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E067 OF 2024
S OLE KANTAI, JA
OCTOBER 3, 2024**

BETWEEN

GEORGE MWENDA KIMATHI APPLICANT

AND

CAROLINE NCHARIBA M’MWITHIRWA 1ST RESPONDENT

STEPHEN KIRIMI RUTERE 2ND RESPONDENT

FLORENCE GAITI SAMUEL 3RD RESPONDENT

*(An application for extension of time to file and serve record of appeal
out of time from the Judgment of the High Court at Meru (A. Mabeya,
J.) dated 24th October, 2019 in H.C. Succ. Cause No. 299 of 1997.)*

RULING

1. The ruling intended to be appealed was issued by Mabeya, J. on 24th October, 2019 in High Court of Kenya at Meru Succession Cause No. 299 of 1997 In the Matter of the estate of Mwithirwa Thiuru alias M’mwuthirwa Thoro (deceased) where there was an amendment to the distribution of the estate of the deceased. That followed a judgment dated 6th December, 2018 which distributed the estate of the deceased.

The applicant has applied under rules 4 and 5 of The Court of Appeal Rules and Article 159 of the [Constitution](#) of Kenya, 2010 in the main (where it concerns a single judge):

“That this Honourable Court be pleased to issue an order to enlarge time and/or allowing the Applicant to file an appeal out of time against the Order/Ruling of Hon. Justice A. Mabeya in Meru HC Succ Cause No. 299 of 1997 delivered on 24th October, 2019.”



There is a Notice of Preliminary Objection taken by the 2nd and 3rd respondents to the effect that:

“The Court lacks jurisdiction to deal with the aforementioned application as the impugned ruling herein arises from a succession cause, and the applicant did not obtain leave to appeal at the High Court and none has been sought herein.”

I have seen the applicants written submissions where he attempts to answer the said preliminary objection by stating that the Motion before me is brought under the said rule 4 of The Court of Appeal Rules; that:

“There is no appeal that had been filed in this matter and the applicant is seeking leave for the enlargement of time to enable him move the court appropriately and file an appeal. ...”

One of the factors I have to consider in an application for leave to extend time as recognized in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231 is whether the intended appeal has a chance of success.

2. There is no denial by the applicant that the matter that was before the High Court at Meru was a succession dispute.

The 2nd and 3rd respondents have taken a preliminary objection on a point of law relating to jurisdiction. The predecessor of this Court recognized a preliminary point of law in the famous case of *Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited* [1969] EA 696 as follows:

“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration.”

3. The preliminary objection taken here is on jurisdiction to the effect that the intended appeal arises from a succession cause and the applicant did not seek or obtain leave to appeal from the High Court.

This is what this Court stated on that issue in the case of *John Mwita Murimi & 2 Others v Mwikabe Mwita & Another* [2019] eKLR:

“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.”



4. My learned brother Kiage, JA. rendered himself as follows in [Francis Macharia Karanja & 6 others v Virginia Muthoni Karanja](#) [2020] eKLR:

“As I considered the record of this appeal and was on the verge of rendering my decision on it, a fundamental jurisdictional issue came to my attention. The same relates to the procedure to be invoked by an intended appellant before this Court can assume jurisdiction to hear succession matters. The issue goes to the heart of this Court’s jurisdiction and as such must be dealt with before we get into the merits of the appeal, if at all. It is trite law that jurisdiction is everything. It therefore must be raised and addressed at the earliest since without it, the Court must down its tools as well elucidated in the famous dicta by Nyarangi, JA in [The Owners Of The Motor Vessel "lillian S" v Caltex Oil Kenya Ltd](#) [1989] KLR 1.

5. I appreciate that the respondents did not raise this issue. However, on crucial question of jurisdiction, the Court has authority to act on its own motion. It was so held by this Court in [Hafswa Omar Abdalla Taib & 2 Others v Swaleh Abdalla Taib](#) [2015] eKLR;

“Unfortunately for the parties and despite their industry in ventilating the issue of goodwill, the determination of the appeal will disappoint them as it turns on the question of jurisdiction; that is, whether this Court has jurisdiction to entertain this appeal in the first place. We appreciate that it is an issue that was not raised by any of the parties. However, it is an issue of law that has long been settled and the parties and indeed their legal teams are deemed to know. Accordingly, this Court can suo moto raise and determine the same.”

There is a long line of authorities in which it has been held consistently that no appeal lies to this Court in succession matters unless with leave. This was echoed in [Rhoda Wairimu Karanja & Another v Mary Wangui Karanja & Another](#) [2014] eKLR;

6. We reiterate that section 50 of the [Law of Succession Act](#) is clear that decisions from the magistrate's courts are appealable to the High Court and the decision of the High Court is final. Decisions of the Kadhis Court, on the other hand are appealable first to the High Court and only with leave and in respect of point(s) of Muslim law, to the Court of Appeal. But section 47 of the [Law of Succession Act](#) makes no mention of an appeal to the Court of Appeal from the decision of the High Court made in the exercise of the latter's original jurisdiction.”

7. Without leave having been sought or obtained the applicant cannot appeal. The preliminary point taken has merit and succeeds. I therefore strike out the Notice of Motion in as far as it seeks leave to extend time. I award costs to the 2nd and 3rd respondents.

DATED AND DELIVERED AT NYERI THIS 3RD DAY OF OCTOBER, 2024.

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

