



M'Mbwi & another (Suing as the legal representatives of the Estate of M'Mwuthimbu M'Mwiira alias Mwithimbu Tubu - Deceased) v M'Mwuthimbu & 4 others (Civil Application E078 of 2024) [2024] KECA 1367 (KLR) (3 October 2024) (Ruling)

Neutral citation: [2024] KECA 1367 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E078 OF 2024
S OLE KANTAL, JA
OCTOBER 3, 2024**

BETWEEN

THOMAS MBURUGU M'MBWI 1ST APPLICANT

GEOFFREY M'MBOROKI 2ND APPLICANT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF
M'MWUTHIMBU M'MWIIRA ALIAS MWITHIMBU TUBU - DECEASED**

AND

BASILIO M'MUNGANIA M'MWUTHIMBU 1ST RESPONDENT

STEPHEN GITONGA 2ND RESPONDENT

KAREGA JASON KAROBI 3RD RESPONDENT

PAUL MURIITHI M'ITUAMWARWA 4TH RESPONDENT

MOSES MUTHAURA 5TH RESPONDENT

(An application for extension of time to lodge Notice of Appeal and Leave to file appeal out of time from the Judgment of the High Court at Meru (Cherere, J.) dated 24th February, 2022 in HC Succession Cause No. 227 of 2004.)

RULING

1. The applicants Thomas Mburugu M'Mbwi and Geoffrey M'Mboroki have by Motion on notice brought under "rules 49, 59 and 73 of the Probate and Administration Rules and all other enabling provisions of the law" applied in the main that I be pleased to grant them leave to file and serve a notice of appeal and appeal out of time against the ruling delivered on 24th February, 2022 (Cherere, J.) In the Matter of the Estate of the late M'Mwuthimbu M'Mwiira alias Mwithimbu Tubu (Deceased). In



grounds in support of the application and in a supporting affidavit of Thomas Mburugu M'Mbwi it is said that the applicants intend to appeal the said ruling; that they were not able to do so within the stipulated period because they were unable to obtain certified copies of proceedings and ruling on time; they got the same on 2nd February, 2024 but were unable to instruct their former lawyers due to financial issues.

2. I have seen the ruling intended to be appealed where the applicants' summons for revocation of a grant was dismissed.
3. Paul Muriithi M'ituamikwa (the 2nd respondent) in a replying affidavit says many things: that he was appointed as the 2nd administrator of the estate after the death of Basilio M'Mungania M'Mwuthimbu; that Stephen Gitonga, Karega Jason Karobi and Moses Muthaura were never parties in High Court of Kenya at Meru Succession Cause No. 227 of 2004 but were beneficiaries thereon yet have been joined as respondents in this application; that the applicant is a grandson in the said estate yet he filed the cause claiming to be a son of the deceased to whom the estate related; that the applicant and Basilio M'Mungania were appointed to act as joint administrators by the Court on 13th June, 2018 where the estate was distributed equally amongst the rightful beneficiaries; that the applicant did not appeal a 2016 ruling also relating to distributorship of the estate; the 2nd administrator was granted orders to the effect that the confirmed grant be implemented; that the grant has been implemented and Land Reference No. Kiirua/Ruiri/512 has been subdivided; that the applicant has not collected or processed his title; that the applicant is now and has always acted to frustrate the other beneficiaries of the estate; that the applicant and his family were allocated Land Reference No. Kiirua/Ruiri/8417 and:

“I am further advised by my advocate which advice I believe to be true that the applicants' application for leave to appeal out of time should not be granted as the delay is inordinate and intended to prevent the taking over of the beneficiaries shares and the estate has fully been distributed and the administration of the estate has been completed...”

4. Parties were required in the hearing notice dated 2nd September, 2024 to file written submissions within stimulated time. I have not seen any submissions by the applicants. I have seen and considered written submissions by the 3rd respondent.
5. The principles that apply in an application to extend time under rule 4 of our rules are well known and were well captured in *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi* [1999] 2 EA 231 as follows:

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this Court takes into account in deciding whether to grant an extension of time, are first, the length of the delay, secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted, and fourthly, the degree of prejudice to the respondent if the application is granted."

6. As we have seen the Motion is predicated upon Probate and Administration Rules enacted under The *Law of Succession Act*. The matter before the High Court which it is intended to appeal was a succession matter. I have not seen on record that the applicants either sought or obtained leave to appeal to this Court from the High Court, an appeal to this Court being available to an applicant in those circumstances with leave to appeal. There is no automatic right of appeal. I am fortified in this position by decisions of this Court where we have consistently held that an applicant requires leave to appeal



from succession proceedings. In the case of *John Mwita Murimi & 2 Others v. Mwikabe Mwita & Another* [2019] eKLR this Court pronounced:

“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.”

7. My learned brother Kiage, JA. had this to say on the same point 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.

8. 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.”

9. 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;

“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.”

10. It is an issue of law which goes to jurisdiction which can be taken at any point or taken by the Court suo moto.



11. The applicants have not obtained leave to appeal it being a succession matter and the intended appeal does not therefore lie at all but must fall at this stage. The Motion is hereby struck out for being incompetent. Let each party carry their own costs in the circumstances.

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

S. OLE KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

