



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kagina v Kagina & 2 others (Civil Application E003 of 2021)  
[2023] KECA 55 (KLR) (3 February 2023) (Ruling)**

Neutral citation: [2023] KECA 55 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION E003 OF 2021  
HM OKWENGU, MSA MAKHANDIA & J MOHAMMED, JJA  
FEBRUARY 3, 2023**

**BETWEEN**

**CHRISTOPHER NDARU KAGINA ..... APPLICANT**

**AND**

**ESTHER MBANDI KAGINA ..... 1<sup>ST</sup> RESPONDENT**

**TABITHA IKAMBA KAGINA ..... 2<sup>ND</sup> RESPONDENT**

**CHARITY NJOKI KAGINA ..... 3<sup>RD</sup> RESPONDENT**

*(An application for leave to appeal to the Supreme Court of Kenya against the Judgment of the Court of Appeal at Nyeri (Nambuye, Karanja & Murgor, JJ.A) delivered on 3rd December 2021 in Nyeri Civil Appeal No 21 of 2017)*

**RULING**

1. By a notice of motion dated December 15, 2021, the applicant Christopher Ndaru Kagina has moved this Court under Article 163(4)(b) of the Constitution, Sections 15 and 16 of the Supreme Court Act, Rule 24 of the Supreme Court Rules 2011 and Rule 1(2) of the Court of Appeal Rules 2010. He seeks several orders including an order for stay of execution of the Ruling of the High Court delivered on September 20, 2016, pending the hearing and final determination of his intended appeal to the Supreme Court, and leave to appeal to the Supreme Court against the decision of this Court delivered on December 3, 2021 in Civil Appeal No 21 of 2017. The applicant also seeks certification that the matters involved in the intended appeal to the Supreme Court are matters of general public importance.
2. The application is anchored on grounds stated on the face of the motion and an affidavit sworn by the applicant. The facts that emerge are that the litigation arises from a succession dispute involving the estate of Silas Kagina Gichoni (deceased). The applicant and the respondents were joint administrators of the estate when the applicant filed an application under section 47 and 48 of the Law of Succession



Act, and Rule 73 and 49 of the Probate and Administration Rules, seeking declarations that the respondents were intermeddling in the deceased's estate by defrauding the estate through collusion with third parties, relying on false sale agreements, alleging that the deceased had disposed of some of the properties during his lifetime.

3. The respondents opposed the applicant's motion contending that the deceased had shared out most of his properties amongst his wives and children during his life time, and had sold some of the properties to third parties. They explained that all they were doing was transferring those properties by simply effecting the wishes of the deceased, by completing transfers where the documents were already executed by the deceased, but the transactions had not been finalized.
4. In his Ruling, the learned Judge of the High Court (Mativo, J - as he then was) held that the law permitted a person to give gifts inter vivos and such gifts were protected by law as valid, as they were in accordance with the wishes made by the deceased during his lifetime. In addition, that the applicant had failed to prove fraud alleged against the respondents. The learned Judge therefore dismissed the application for want of merit.
5. The applicant who was not satisfied with the ruling of the High Court filed an appeal before this Court in which he raised nine grounds. The memorandum of appeal was not annexed to the application before us, but the grounds are paraphrased in the judgment of this Court dated December 3, 2021, as follows:

“that the learned judge erred in law and in fact in: failing to properly or sufficiently consider and apply the provisions of the Law of Succession Act to the issues in controversy as between the respective parties to the appeal; failing to consider the applicant's supporting affidavits and written submissions in support of the issues raised in the application thereby arriving at the wrong decision; erred in rejecting and/or dismissing the forensic examiners report without any contrary expert opinion; showing a clear bias in favour of the respondents in the assessment and reasoning on the facts on the record to the applicant's prejudice; failing to properly appreciate that on the facts on the record, Embu Municipality/1112/37 and 107 were illegally and fraudulently transferred to the respondents; in failing to properly appreciate or sufficiently consider the weight of the appellant's witnesses testimonies as tendered before court; introducing a Will in the matter which Will was totally nonexistence; and lastly, the impugned decision was against the law and facts placed before the Judge by the respective parties and therefore should be interfered with, set aside and substituted with an order allowing the appellant's application in its entirety.”

6. Upon hearing the appeal and the contending submissions made by the parties, this Court in its judgment dated 3<sup>rd</sup> December 2021 upheld the Ruling of the High Court, finding that it properly addressed and appreciated the law in regard to section 45(1) of the Law of Succession Act, and took into consideration both foreign and local jurisprudence on the threshold for sustaining a plea of intermeddling in a deceased person's estate. The Court agreed with the position of the High Court discounting the expert evidence, finding that the learned Judge of the High Court considered the principles of law on admission, and acting on the evidence of an expert witness, and the role of the court in assessing the credibility of such evidence.
7. As regards bias, this Court found that no instances or particulars of the alleged bias were given by the appellant. The Court therefore dismissed the appeal finding that there was no sufficient justification for it to interfere with the exercise of discretion by the learned Judge of the High Court, with regard to the evidence presented at the trial, and the evidence of the expert witness.



8. The applicant has annexed a draft petition dated December 14, 2021 that is intended for the Supreme Court, in which he contends that this Court erred in disregarding his pleadings through which he sought the declaration that part of the estate intermeddled with, was for distribution to the beneficiaries of the deceased; that in so doing, the Court erred in failing to find that the applicant's application against the respondents was to salvage the estate of the deceased for fair distribution to the beneficiaries; that the Court erred in disregarding the laws of succession, in particular section 45(1), (2) (a) & (b), and accepted baseless pleadings in failing to find the respondents guilty of intermeddling; and that the Court erred in failing to find that the intermeddling of the respondents was a skilled scheme to disinherit the applicant.
9. In the draft petition, the applicant has identified the questions he intends to refer to the Supreme Court for determination as follows:
- “(a) whether 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents have intermeddled with the deceased's estate in light of section 45(1)(2)(a) & (b) of the Law of Succession, Cap 160;
  - b. whether an intermeddling crime can be resolved by simply pleading in a Court that the offender was executing the wishes of a deceased person, bearing in mind that it is logic and law that in absence of either an oral or a written Will, the issue of wishes of a deceased person does not arise at all;
  - c. whether the petitioner's action of seeking the help of a government forensic document examiner whom himself aver his competence in Court by way of statement and documentation, and asserting that he had worked for government of Kenya for twenty one (21) years, and who testified while still in service of government, could have his findings be rejected by the Court of Appeal without a contrary opinion and on basis of competence.”
10. Article 163(4)(b) of the Constitution provides that appeals shall lie from the Court of Appeal to the Supreme Court in any other case in which the Supreme Court or the Court of Appeal, certifies that a matter of general public importance is involved. The applicant having moved the Court under Article 163(4)(b), his appeal does not involve the interpretation or application of the Constitution and, therefore, is not an appeal that arises as a matter of right, but one that requires leave. Such leave can only be granted if his intended appeal is certified as a matter of general public importance as required under Article 163 (4)(b) of the Constitution, and this is what we must address.
11. In Hermanus Phillipus Steyn v Giovanni Gneccchi Ruscone [2013] eKLR, the Supreme Court considered Article 163(4)(b) of the Constitution, and laid down the following principles for determining whether a matter is of general public importance:
- “[60] In this context, it is plain to us that a matter meriting certification as one of general public importance, if it is one of law, requires a demonstration that a substantial point of law is involved, the determination of which has a bearing on the public interest. Such a point of law, in view of the significance attributed to it, must have been raised in the Court or Courts below. Where the said point of law arises on account of any contradictory decisions of the Courts below, the Supreme Court may either resolve the question, or remit it to the Court of Appeal with appropriate directions. In summary, we would state the governing principles as follows:
  - i. for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed



on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;

- ii. where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;
- iii. such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;
- iv. where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;
- v. mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of the Constitution;
- vi. the intending applicant has an obligation to identify and concisely set out the specific elements of “general public importance” which he or she attributes to the matter for which certification is sought;
- vii. determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.” (Emphasis added)

12. From the foregoing, it is clear that in order for the applicant’s motion for certification to succeed, he must demonstrate to this Court that the intended appeal raises substantial points of law whose determination will have a significant bearing on the public interest. Secondly, the applicant must satisfy this Court that substantial questions of law arose and were addressed by the High Court and this Court. Thirdly, the applicant must identify and concisely set out the specific elements of general public importance which he attributes to the matter for which certification is sought.

13. In this case, the dispute between the applicant and the respondents concerned the distribution of the estate of the deceased, and exclusion from the estate of the properties that were allegedly given out by the deceased in his lifetime. In the High Court judgment, the issue was whether the applicant had proved that the respondents had intermeddled with the estate of the deceased by disposing of properties belonging to the deceased, that ought to be distributed to the deceased’s beneficiaries. In applying section 45 of the Law of Succession Act, the learned Judge of the High Court stated inter alia;

“... a reading of the law reveals that there are properties which the deceased cannot freely dispose of during his lifetime, and in respect of which his interest has been determined by his death; such property does not form part of the free property of the deceased. Also, if a deceased person has during his lifetime sold, transferred, disposed or in any manner given out his properties, either in exchange of consideration or as *gifts inter vivos*, such gifts or properties whether transfer had been registered or not, do not form part of the deceased’s



estate. In fact, the Law of Succession in my view protects and preserves transactions made by the deceased during his lifetime.”

14. The question for determination by the learned Judge was whether the respondents intermeddled with the deceased’s estate by disposing of the deceased’s free property, or whether the properties disposed of were no longer the deceased’s free property as they had already been disposed of by the deceased. The learned Judge addressed the evidence that was before him in light of the law as above quoted, and applying the evidence before him, came to the conclusion that the applicant had failed to prove his assertions that the respondents had fraudulently transferred properties which were part of the deceased’s estate.
15. An examination of the grounds of appeal that the applicant canvassed before this Court as paraphrased and reproduced at paragraph 5 above, shows that the appeal was clearly limited to the law and facts relating to the succession dispute that was before the learned Judge on the issue of intermeddling with the estate of the deceased.
16. Upon considering the appeal and the contending submissions, and analyzing the evidence that was before the High Court, this Court stated:
  - “ 30. On the threshold for proof of allegation for intermeddling on a deceased person’s estate by any person, the provision of law that fell for consideration and application by the trial judge at the trial and now before this Court on appeal, was and still is section 45(1) of the Act. It provides....
  31. The record is explicit that the judge properly appreciated this fact and took into consideration both foreign and local jurisprudence on a threshold for sustaining a plea of intermeddling in a deceased’s person’s estate. Of primary consideration by the trial judge was the decision of a court of coordinate jurisdiction in the case of *Gitau & 2 Others v Wandayi & 5 others*....
  34. We find no misapprehension or misapplication of the law on intermeddling. The position taken by Tanui J in the *Gitau & 2 others v Wandayi & 5 Others* case (*supra*), is the correct threshold to be applied by a court addressing a complaint of alleged intermeddling in a deceased person’s estate and which we find from the record the judge properly appreciated and applied.”
17. Regarding the issue of expert evidence, this Court was satisfied that the learned Judge analysed the evidence and gave cogent reasons as to why he discounted the expert testimony given by the applicant’s witness. The Court came to the conclusion that the High Court properly balanced the scales of justice, and analyzed the facts before it, and there was therefore no justification to interfere with the exercise of its discretion with regard to the evidence of the expert witness.
18. We are of the view that the questions that the applicant intends to raise before the Supreme Court regarding whether the respondents have intermeddled with the deceased’s estate in light of section 45(1), (2)(a) & (b) of the *Law of Succession Act*, relates to the specific circumstances that were before the learned Judge and not a general interpretation of the law. These circumstances and the law were properly addressed by the High Court and this Court. In any case, the applicant has not demonstrated that there are any contradictory decisions of the Court involving the interpretation of section 45(1), (2)(a) & (b) of the *Law of Succession Act* as to warrant the intervention of the Supreme Court.



19. The questions regarding an intermeddling crime, and the issue of the evidence of a government forensic document examiner, are not general issues that go beyond the facts that were before the High Court, or that would have a bearing on the public interest
20. In addition, the applicant has not identified or concisely set out the specific elements of general public importance which he attributes to the matter for which certification is sought. It is evident that all the applicant seeks is to have a second bite of the cherry by re-arguing the same issues that were argued before this Court. We find that the applicant has not met the threshold for certification as set out in Article 163(4)(b) of the Constitution and the ensuing principles set out in the case of Hermanus Phillipus Steyn v Giovanni Gneccchi- Ruscone (*supra*).
21. For these reasons, we decline to certify the applicant's intended appeal to the Supreme Court as one involving matters of general public importance. His prayer for stay of execution of the ruling of the High Court having been anchored on the intended appeal, also fails. In any case, as was stated by this Court in Dickson Muricho Muriuki v Timothy Kagondou Muruiki & 6 others [2013] eKLR, the jurisdiction provided under Rule 5(2)(b) of the Court of Appeal Rules, 2010, for a grant of a stay of execution is not applicable for a matter where the Court of Appeal has issued its final judgment and there is an intended appeal to the Supreme Court. Therefore, this court has no powers under Rule 5(2)(b) of the Court of Appeal Rules, to grant a stay pending the hearing of the intended appeal in the Supreme Court.
22. The applicant's motion is therefore dismissed. This being a matter involving a family dispute, we shall make no order as to costs.

**DATED AND DELIVERED AT NAIROBI ON THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2023.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**ASIKE MAKHANDIA**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

