



**Sakwa & another v Sakwa & another (Civil Appeal (Application)
E369 of 2020) [2023] KECA 679 (KLR) (6 April 2023) (Ruling)**

Neutral citation: [2023] KECA 679 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E369 OF 2020
HM OKWENGU, F SICHALE & J MOHAMMED, JJA
APRIL 6, 2023**

BETWEEN

CHARLES TEMBA SAKWA. 1ST APPLICANT

FRANCIS AMULIOTO SAKWA 2ND APPLICANT

AND

ANNE KABEKA SAKWA 1ST RESPONDENT

RUTH AMIMO MUHAKA 2ND RESPONDENT

(Being an application for stay of execution under Rule 5(2) (b) of the Court of Appeal Rules pending the lodging, hearing and determination of the intended appeal from the ruling of the High Court of Kenya (Family Division) at Nairobi (Machelule, J.) dated 14th October, 2020 in Succession Cause No. 4 of 2007)

RULING

Background

1. By a Notice of Motion dated November 25, 2020 Charles Temba Sakwa and Francis Amulioto Sakwa, (the applicants) seek orders in the main:
 - a. That this Court do grant the applicants leave to appeal against the ruling/order of the High Court (Machelule, J - as he then was) dated October 14, 2020;
 - b. That this Court do grant a stay of execution of the impugned ruling/order and any other subsequent orders thereto pending the hearing and determination of the intended appeal;
 - c. That this Court do restrain Anne Kabeka Sakwa (the 1st respondent) or any other administrator of the Estate of Hosea Sakwa Silunya (deceased) from inter-meddling in whatsoever manner with the said Estate pending the hearing and determination of the intended appeal;



- d. That the costs of the application be provided for. Anne Kabeka Sakwa and Ruth Amimo Muhaka are the 1st and 2nd respondents respectively.
2. A brief background to the application is that the applicants are co-administrators of the Estate of Hosea Sakwa Silunya (deceased) together with Anne Kabeka Sakwa (the 1st respondent) and Ruth Amimo Muhaka (the 2nd respondent). The deceased died intestate on February 1, 2006 and was survived by sixteen (16) adult children. The 16 adult children of the deceased are Warren Omongo Hosea Sakwa, Monica Ngota Silunya, Davis Museka Hosea, Ruth Amino Muhaka (the 2nd respondent), Charles Tembe Sakwa, (the 1st applicant), Lorna Awinja Sakwa, Francis Amuliotto Sakwa (the 2nd applicant), Patrick Ndoli Sakwa, Hellen Aluo Sakwa, Simon Silunya Sakwa, Jenifer Anindo Sakwa, Jessy Mutahi Sakwa, Felista Omito Sakwa, Anne Kabera Sakwa (the 1st respondent), Elizabeth Lumwenyi Sakwa and Lilian Kavenyi Kingola.
- The Grant of Letters of Administration was issued on April 9, 2008 to Warren Omongo Hosea Sakwa, Charles Temba Sakwa, Francis Amuliotto Sakwa and Patrick Ndoli Sakwa.
3. Subsequently, the earlier grant was revoked by the court and a fresh grant was issued in the names of the applicants and the 1st and 2nd respondents. The beneficiaries of the Estate are yet to agree on the best mode of distributing the Estate and whilst the respondent and some of the beneficiaries are in favour of partial confirmation of grant and subsequent sale of some of the Estate's commercial properties, the applicants were in favour of a full confirmation of grant.
4. The 1st respondent herein filed an application in the High Court dated July 24, 2020 brought under Section 47 of the *Law of Succession Act* and rule 73 of the *Probate and Administration Rules*. Ruth Amimo Muhaka joined the application which was supported by all other beneficiaries except the applicants. The application sought that the High Court partially confirms the grant to allow three (3) of the properties in the estate to be sold and the proceeds shared equally between the beneficiaries. The three (3) properties LR No 36/111/10 Garage Eastleigh, Nairobi, LR No 36/VII/346 New Pumwani Estate, Nairobi; and LR No 36/VII/149 New Pumwani Estate, Nairobi. Each beneficiary would therefore get 1/16th share. The 1st respondent deponed in the application that they had found ready buyers for the 3 properties comprising part of the Estate of the deceased.
5. The second prayer in the application was that the applicants be removed as administrators of the estate of the deceased as they were intermeddling in the estate by, inter alia collecting rent and failing to account, laying claim to the properties forming part of the estate; and refusing to participate in the intended sale. The applicants had also refused to surrender the original title documents and log books as ordered by consent on November 26, 2019. The 1st respondent sought that the Deputy Registrar of the High Court be authorized to sign all agreements, mutations, transfers and other instruments relating to the estate of the deceased.
6. The 1st applicant opposed the application and stated that in compliance with the Court Order of November 26, 2019, LR No 36/111/3 was sold to clear the debts and bills; that he opposed any partial confirmation at this stage of the process; that he had surrendered the title documents and log books to his advocates M/s Susan Juma Ngang for onward transmission to the Court; and that he was opposed to the prayer that he be removed as an administrator of the estate of the deceased.
7. The 2nd applicant also opposed the application. He stated that he had surrendered the title documents to properties relating to the estate to his advocates; and that the deceased had put him in possession of LR No 36/VII/346 which he had improved by constructing extra rental and commercial units. He denied that he had intermeddled with any estate property and that he was collecting rent from the suit properties.



8. In its ruling delivered on October 14, 2020, the Court allowed the 1st respondent's application and ordered partial confirmation of the grant and directed that the three (3) suit properties be sold and the proceeds thereof be shared amongst all the beneficiaries of the estate.
9. The learned Judge stated as follows: -
 - "19. I allow the partial confirmation of the grant issued to the respondents, the applicant and Ruth Amimo Muhaka on May 8, 2019 in respect of LR No 36/III/10 Garage Eastleigh, Nairobi; LR No 36/VII/346 New Pumwani Estate, Nairobi; and LR No 36/VII/149 New Pumwani Estate, Nairobi. Each of the properties shall be sold to the buyer already identified at the specified price, and the proceeds shared equally among the sixteen (16) beneficiaries.
 20. The respondents shall within 7 days sign all the necessary documents of sale and transfer, failing which the Deputy Registrar of this Court shall sign on their behalf.
 21. I found the respondents guilty of intermeddling and deserving to be removed as administrators. However, under section 47 of the Act and rule 73 of the Probate and Administration Rules and in bid to allow for the final distribution of the estate, I will allow them to continue to participate in the administration of the estate.
 22. I direct the applicant and the other beneficiaries do file a response to the application for confirmation dated October 28, 2019 by the Respondents within 30 days from today. The application shall be mentioned on December 7, 2020 to give direction on its hearing.
 23. The respondents shall pay the costs of this application".
10. Aggrieved by that decision, the applicants filed the instant application seeking inter alia orders of stay of execution of the ruling and orders of the High Court (Muchelule, J as he then was) dated October 14, 2020 based on the grounds *inter alia*:
 - a. that the summons dated July 24, 2020 which gave rise to the ruling of October 14, 2020 in the High Court (Muchelule, J, as he then was) did not contain any consent and/or documents executed by all the beneficiaries of the estate giving their consent to the partial confirmation of grant and/or sale of the three suit properties aforesaid;
 - b. that the ruling/order of October 14, 2020 forced and/or coerced the applicants to execute Sale Agreements with respect to the sale of the suit properties within seven (7) days from the date of the said ruling without having been given an opportunity to determine how the purchase price and other terms of the contract were arrived at;
 - c. that the High Court failed to take into consideration that there were no special circumstances that warranted a partial confirmation of Grant or sale of the suit properties;
 - d. that the High Court erred in law and in fact by failing to take into consideration the fact that the Estate of the deceased had just recently disposed of another commercial property, being LR No 36/36/VIII/3 whole purchase price had not been fully paid and which would have been adequate to cater for any contingency faced by the Estate;



- e. that the High Court failed to take into consideration the interests of tenants occupying the subject properties and who had binding tenancy agreements with the Estate of the deceased;
 - f. that the High Court erred in its decision by failing to note that the Sale Agreements which the applicants had been ordered to execute were anchored or premised on an impugned consent order given on April 30, 2020 which had already been set aside by the Superior Court by consent of the parties earlier on September 28, 2020;
 - g. that there was no evidence adduced by the respondent that the applicants had inter-meddled with the Estate; and
 - h. that Section 82 (b) (ii) of the *Law of Succession Act* bars the selling of any immovable property of the Estate before confirmation of grant.
11. The 2nd respondent who is the 3rd administrator of the Estate of the deceased opposed the application and filed a replying affidavit. She averred inter alia that the applicants have failed to inform the Court that she and the 1st respondent applied for revocation of the grant after the former administrators: failed to confirm the Estate after six months as provided by law; proceeded to inter-meddle and enrich themselves with proceeds from the Estate to the exclusion of the other beneficiaries; failed to give a true account to the rest of the beneficiaries of the financial state of the Estate of her late father; that her father's Estate is yet to be distributed; and that the applicants are and have always been the authors of the disagreements since the succession process began.
 12. The 2nd respondent further averred that there are special circumstances warranting partial confirmation, the same being that the estate was long overdue for confirmation as the letters of Grant were issued way back in 2007; that the other beneficiaries were not benefiting fully from the Estate since the applicants were inter- meddling with the Estate for their own selfish ends; that some of the Estate debts had not been paid putting the Estate in jeopardy; that most of the beneficiaries depend on the proceeds from the Estate to pay their bills, which proceeds have not been shared equally since the applicants had put themselves in charge of the Estate; that it is also in the best interest to have the Estate partially confirmed since there were interested purchasers who were offering an amount higher than the market price for the properties; and that the applicants herein are in total disagreement with the partial confirmation as they have an interest in the three (3) properties in question.
 13. The 2nd respondent further averred that the applicants will not suffer any prejudice if the suit properties are sold as the sale proceeds will be shared in the ratio of 1:16 as proposed in the summons for confirmation filed by the applicants; and that this court is urged to put into consideration the fact that this matter was instituted in 2007 without any positive results; that the filing of the instant application is a delay tactic employed by the applicants to further delay the process to the detriment of the Estate and other beneficiaries who have endured the long delay.
 14. It was the 2nd respondent's further averment that the application has been overtaken by events as the transfer of the suit properties has already been effected. Further, that the sale agreements in respect of the suit properties have already been executed and the transfer process commenced. That the transfers are ongoing save in respect of LR No 36/VII/346 located at California area New Pumwani which is complete. Ms Muhaka attached a copy of a certificate of postal search in respect of LR No 36/VII/346 indicating that the registered proprietor as at December 15, 2020 is Ibgaro Realtors Limited.
 15. The 1st respondent opposed the application and filed a replying affidavit. She associated herself with the submissions of the 2nd respondent. She averred inter alia that the applicants vide an application dated March 20, 2020 rooted for a partial confirmation of the grant; that there has previously been a



sale of an asset forming part of the estate of the deceased which was sold for Kshs 85 million which amount was shared equally between the 16 beneficiaries; that the application has been overtaken by events as the suit properties have already been sold and ownership changed; and that the applicants will not suffer prejudice as they will receive their share of the sale proceeds.

Submissions by counsel

16. The application was heard by way of submissions with oral highlights. Parties rehashed the issues raised in the application and their respective affidavits.

Determination

17. We have considered the application, the grounds in support thereof, the replying affidavit, the submissions, the authorities cited and the law. The applicants herein seek inter alia leave to appeal against the ruling/order of the High Court and a stay of execution of ruling/order issued by the high Court pending the hearing and determination of the intended appeal. We shall first deal with the applicants' application for leave to appeal against the ruling/order of the High Court (Muchelule, J - as he then was) dated October 14, 2020.
18. The application before us relates to a succession matter. There is a long line of authorities in which it has been held consistently that no appeal lies to this Court in succession matters except with leave. In *Rboda Wairimu Karanja & Another Vs Mary Wangui Karanja & Another* [2014] eKLR, this Court was explicit that:

“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...

We make two points from the foregoing analysis. One, a court's jurisdiction flows from either the Constitution or statute or both. See Article 164 (3) of the Constitution and section 3 of the Appellate Jurisdiction Act. It cannot be assumed or donated by parties or arrogated by the court itself. Jurisdiction is everything and if a court does not have it, it downs tools. These are well-established principles. The other point we make is the right of access to justice, now elaborately articulated in Article 48 of the Constitution requiring all state organs, of which courts are, to ensure access to justice for all persons. Bearing in mind that duty and applying the provisions of section 47 of the Law of Succession Act and Rule 47 of the Probate and Administration Rules, the High Court will, in exercise of its jurisdiction under the former grant leave to any party aggrieved by its decision to challenge it on appeal to this Court...

We think we have said enough to demonstrate 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. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration. We think this is a good practice that ought to be



retained in order to promote finality and expedition in the determination of probate and administration disputes.” [Emphasis supplied].

19. In *John Mwita Murimi & 2 Others vs Mwikabe Chacha Mwita & Another* [2019] eKLR this Court held:

"10. 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. (See also in *Re Estate of Mbiyu Koinange (Deceased)* [2015] eKLR; HCC Succession Cause No 527 of 1981).

20. Further, in *James Mithia Gichembu vs Lucia Muthoni Silas & Another* [2021] eKLR, this Court stated:

“The record does not show that the applicant sought and obtained leave of the High Court or this Court to initiate these proceedings. That being the case, the application is inept and incompetent.”

21. Rule 41(1) of this *Court’s Rules* provides that:

"41. In a civil matter
(1)
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."

22. Accordingly, in succession matters, leave must first be sought from the High Court and only sought from this Court if the High Court declines to grant leave. From the record, the applicants are seeking to appeal against the ruling of the High Court made in exercise of its original jurisdiction in a succession matter. In accordance with the aforementioned decisions and Rule 41(1) of the *Court Rules*, such leave can only be granted by this Court if the applicants satisfies this Court that leave to appeal was sought from the High Court, but declined. The applicants herein have not demonstrated that they sought leave to



appeal from the High Court, or that the High Court declined to grant such leave. Accordingly, there is no basis for the applicants to approach this Court for leave to appeal against the Ruling of the High Court dated October 14, 2020. Having so found, it is evident that we have no jurisdiction to deal with the instant application and we must down our tools before interrogating the merits or otherwise of the application before us.

23. The upshot is that the application dated November 25, 2020 is incompetent and is accordingly dismissed. This being a family matter, the order that commends itself to us is that each party bears its own costs.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF APRIL, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

