



**Dhadialla v Chaudhri (Sued as the Executor of the Estate of Gurdip Kaur Sagoo) & 2 others
(Civil Appeal (Application) E309 of 2021) [2023] KECA 583 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KECA 583 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E309 OF 2021
DK MUSINGA, HA OMONDI & KI LAIBUTA, JJA
MAY 26, 2023**

BETWEEN

HARVINDER KAUR DHADIALLA APPLICANT

AND

**MOHAMED MUNIR CHAUDHRI (SUED AS THE EXECUTOR OF THE
ESTATE OF GURDIP KAUR SAGOO) 1ST RESPONDENT**

AVTAR KAUR SAGOO 2ND RESPONDENT

JASWINDER KAUR SAGOO 3RD RESPONDENT

(Being an application to strike out the notice of appeal dated 28th May 2021, the amended notice of appeal dated 31st May 2021 and the record of appeal dated 10th June 2021 and being an application for leave to appeal against the Ruling and Orders of the High Court at Nairobi (Thande, J.) delivered on 21st May 2021 in Succession Cause No. 386 of 2018)

RULING

1. Before this Court are three separate applications. The first in time is a Notice of Motion dated June 21, 2021 brought by the respondents pursuant to the provisions of rules 39, 42, 43, 84 and 87(1) (h) (i) of the *Court of Appeal Rules, 2010*. The respondents seek orders to strike out the applicant's notice of appeal dated May 28, 2021, the amended notice of appeal dated May 31, 2021 and the record of appeal dated June 10, 2021 with costs.
2. The second in time is a Notice of Motion dated January 20, 2022 brought by the applicant under the provisions of rule 39(b) of the Court of Appeal Rules, 2010. The applicant seeks leave to appeal against the Ruling and Orders of the High Court at Nairobi (Thande, J) delivered on May 21, 2021 in Succession Cause No 386 of 2018. The third application is a Notice of Motion by the applicant dated January 20, 2022 brought under the provisions of rule 5 (2)(b) of the Rules of this Court. It seeks stay of execution of the aforesaid ruling. At the hearing of these applications, counsel present addressed the



Court on the applications to strike out the notice of appeal, the amended notice of appeal, the record of appeal as well as the application seeking leave to appeal to this Court. Counsel did not, for good reason, address us on the application seeking orders of stay.

3. The brief background to the applications is that they all relate to the estate of one Gurdip Kaur Sagoo (deceased), who died on October 27, 2015. The deceased left behind a will appointing the applicant and the 1st respondent as joint executors thereof. The deceased devised her net estate to Manjit Kaur Sagoo, Avtar Kaur Sagoo and Jaswinder Kaur Sagoo (the 2nd and 3rd respondents), who were her daughters in law. Vide Summons dated December 6, 2019 the applicant, invoking the provisions of section 26 of the Law of Succession Act, sought for orders that reasonable provision be made to her as a dependant of the deceased out of the deceased's net estate.
4. The trial court, vide a ruling dated May 21, 2021, dismissed the application with no orders as to costs. It is this ruling that set the stage for the applications herein.
5. In the Notice of Motion dated June 21, 2021, it is argued by the respondents that there is no automatic right of appeal to this Court in respect of a decision delivered by the High Court in a Succession matter. The grounds in support of the application as set out on the face thereof and in the affidavit in support sworn by Mohamed Munir Chaudhri are that the ruling by the High Court was delivered on May 21, 2021; and that the applicant filed a notice of appeal on May 28, 2021, which was later amended on May 31, 2021, and that the applicant filed a notice of appeal on May 28, 2021, which was later amended on May 31, 2021, and thereafter filed a record of appeal on June 10, 2021. Their argument is that the applicant did not seek leave within the period of 14 days as set out under rule 39(b) of the Court of Appeal Rules, 2010 and that, therefore, the notice of appeal and the amended notice of appeal filed herein are incompetent. By dint of the notices of appeal being incompetent, the record of appeal filed is manifestly incurable and a nullity altogether, they contended. It is on this basis that the Court is asked to strike out the said notices of appeal and the record of appeal with costs.
6. In her Notice of Motion dated January 20, 2022 which in its very nature is a response to the application dated June 21, 2021, the applicant denies that the notices of appeal and the record of appeal are incompetent. She contends in her application and affidavit in support that, after delivery of the ruling dated May 21, 2021, she timeously filed a notice of appeal on May 28, 2021, which she amended on May 31, 2021. She further argues that, vide an application dated June 2, 2021, she sought leave of the High Court to lodge an appeal before this Court as per the requirements under rule 39(b) of the Rules of this Court. The application was dismissed by the High Court vide a ruling delivered on December 17, 2021 on grounds that the court lacked jurisdiction to grant leave once a notice of appeal is filed.
7. It is contended that the Succession Act and the Probate and Administration Rules do not require or make provision for leave to appeal against an adjudication that conclusively determines the rights of the parties with regard to all or any matters in controversy in the suit. Further, that there is a split in judicial opinion on whether the applicant requires leave to appeal against the ruling, which was a final determination on the issues before the trial court.
8. Lastly, it is stated that there has been no delay in filing the application for leave; that not prejudice will be suffered by the respondents should the orders sought be granted; and that it is in the interests of justice that the instant application be heard as a matter of urgency and that the orders sought therein be granted.
9. At the hearing of the applications, learned counsel Mr. Bruno appeared for the respondents while learned counsel Mr. Gachuhi was present for the applicant. Mr Bruno reiterated that in succession



matters there is no right of appeal to this Court without leave of court. He submitted that, the ruling of the High Court having been delivered on May 21, 2021, the applicant had 14 days to seek leave to appeal against the said decision, which timeline lapsed on June 4, 2021. Counsel stated that the provisions of rule 39 of the Rules of this Court are mandatory. Reliance was placed on the decision of this Court in *Rhoda Wairimu Karanja & Another vs Mary Wangui Karanja & Another* [2014] eKLR where the Court held, *inter alia*, that:

“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.”

10. We were urged to find that since leave was not sought within 14 days of the ruling of the High Court, the notices of appeal as well as the record are incompetent and should be struck out with costs.
11. On his part, Mr Gachuhi submitted that the notices of appeal were filed within the timelines contemplated under the Rules of this Court and, that they are therefore properly on the Court’s record. Counsel submitted that a proper reading of rule 39(b) is that an application should be made within 14 days of the impugned decision; and that the rule does not contemplate the grant of leave within 14 days of the impugned decision. It is submitted that the ruling refusing leave was delivered on December 17, 2021, whereas the instant application was filed on January 21, 2022. According to counsel’s computation of time, the application was filed within 14 days, excluding the Court’s vacation days and that therefore, it was within time. Counsel sought to distinguish the facts in this case from those in the decisions cited by the respondents and noted that, in those decisions, an application for leave was either not made at all, or that the High Court had not dismissed an application for leave.
12. It is further contended that the filing of an application for leave does not suspend the period within which one ought to file the record of appeal as per rule 82 of the Court of Appeal Rules, 2010. According to counsel, under rule 4 of this Court’s Rules, an order can be made before or after the event and, therefore, the record of appeal is not incompetent as argued by the respondents. Counsel added that the provisions of sections 3A and 3B of the *Appellate Jurisdiction Act* favour the granting of leave as sought.
13. We have carefully perused the record, submissions by counsel and considered the applicable law. The applications before us are brought pursuant to, *inter alia*, rule 39 of the Court of Appeal Rules, 2010. Rule 39 is worded as follows:

“39. In Civil matters

a. ...;

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.” [Emphasis added].

14. It is trite law that, in succession matters, there is no automatic right of appeal to this Court without leave (see *Rhoda Wairimu Karanja & Another vs Mary Wangui Karanja & Another* (*supra*) and *John Mwita Murimi & 2 Others vs Mwikabe Chacha Mwita & Another* [2019] eKLR).



15. The issue in contention by the parties is whether the applicant sought leave to appeal at all, or within the stipulated timeline. The ruling giving rise to the appeal herein was delivered on May 21, 2021. The notice of appeal was filed on May 28, 2021 and subsequently amended on May 31, 2021. The notices of appeal were therefore filed within the 14 days' period as contemplated under rule 75 of the Court of Appeal Rules, 2010. The applicant sought leave to appeal to this Court which was declined by the High Court vide a ruling dated December 17, 2021. It is that ruling that precipitated the filing of the application for leave under the provisions of rule 39(b).
16. Pursuant to the provisions of rule 39(b), the applicant was required to file her application for leave within 14 days from December 17, 2021. However, during this period, the Court went on its Christmas recess. We take judicial notice that the recess commenced on Tuesday, December 21, 2021, and terminated on Wednesday, January 12, 2022, both days inclusive. Therefore, pursuant to the provisions of rule 3(e) of the Rules of this Court which provides that "...the period of the Christmas vacation shall not be reckoned in the computation of time", the period between December 21, 2021 and January 12, 2022 cannot be reckoned in the computation of time under rule 39(b). It follows, therefore, that the application for leave was filed within the stipulated timeline of 14 days. We are therefore unable to agree with the argument by the respondents that the Notice of Motion dated January 20, 2022 was filed out of time. In this connection, nothing turns on the respondents' preliminary objection dated January 28, 2022, which sought to have the instant application dismissed for want of leave.
17. The provisions of rule 39 contemplate the filing of the application for leave within 14 days of the impugned ruling or refusal of leave. It does not contemplate the obtaining of leave within 14 days as submitted by the respondents. Similarly, with regard to the provisions of rule 82 on the institution of appeals, the filing of an application for leave does not suspend time or bar the lodging of the record of appeal. Where a proper notice of appeal is on record, leave can always be obtained pursuant to the provisions of rule 4 of the Rules of this Court. We therefore decline the invitation to strike out the record of appeal dated June 10, 2021.
18. In the upshot, we find that the respondents' Notice of Motion dated June 21, 2016, which seeks to strike out the notices of appeal and the record of appeal, is without merit and is hereby dismissed. The applicant's Notice of Motion dated January 20, 2022 is merited and is hereby allowed as prayed. We order that the costs of these applications be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY MAY, 2023.

D K MUSINGA, (P)

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JUDGE OF APPEAL

H A OMONDI

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JUDGE OF APPEAL

DR K I LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed



DEPUTY REGISTRAR

