



**Okea & 3 others v Ogola (Civil Appeal (Application)  
259 of 2019) [2022] KECA 411 (KLR) (4 March 2022) (Ruling)**

Neutral citation: [2022] KECA 411 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL (APPLICATION) 259 OF 2019  
F SICHALE, J MOHAMMED & HM OKWENGU, JJA  
MARCH 4, 2022**

**BETWEEN**

**FLORENCE MURUNGA OKEA ..... 1<sup>ST</sup> APPLICANT  
ALOYCE OBUNGA ..... 2<sup>ND</sup> APPLICANT  
ABDINELI ADAN KALIICHA ..... 3<sup>RD</sup> APPLICANT  
MOHAMED HERI ISAAC ABDULAI ..... 4<sup>TH</sup> APPLICANT**

**AND**

**WILLIAM OUKO OGOLA ..... RESPONDENT**

*(An application to strike out the record of appeal in Civil Appeal No 259 of 2019, lodged on 14th November 2019, filed against the ruling of the High Court of Kenya at Migori (Mrima, J.))*

**RULING**

**Background**

1. The notice of motion dated 22nd November, 2019 is brought pursuant to Rules 1(2), 42, 43, 84 & 85 of the *Court of Appeal Rules* (this Court's Rules). Florence Murunga Okea, Aloyce Obunga, Abdineli Adan Kaliicha and Mohamed Heri Isaac Abdulai, (the applicants), seek orders in the main: that this Court strike out the record of appeal filed by and/or on behalf of William Ouko Ogola, (the respondent), vide Court of Appeal Civil Appeal No. 259 of 2019; and that consequent thereto, order the appeal be dismissed.
2. The application is based on grounds inter alia: that no appeal lies from a decision of the High Court made in exercise of its original jurisdiction in a succession dispute; that the respondent was required by law to first obtain leave to appeal to this Court; and that without such leave to appeal, this Court has no jurisdiction to hear and determine the appeal, and the appeal filed is therefore incompetent.



3. The substance of the appeal arises out of a dispute that arose between the parties when the 1st and 2nd applicants, who are the administrators of the estate of the late Elisha Okea Ogola (deceased), took out letters of administration in respect of the deceased's estate. The grant of representation to that estate was granted in Migori High Court Succession Cause No 95 of 2015. The respondent was aggrieved with the confirmation of the grant, and filed an application seeking to alter the distribution set forth by the administrators on the basis that two of the properties contained in the schedule of properties belonged to his father, the late Daniel Ogola Sigeru. This application was dismissed by the High Court (Mrima, J.) for lack of merit which prompted the respondent to file the record of appeal that is the subject of the instant application. The applicants were served with the impugned record of appeal on 20th November 2019, which prompted them to file the instant application.
4. The respondent opposed the application by way of a replying affidavit sworn on 29th April, 2020. In that affidavit, the respondent set out the chronology of the dispute between him and the applicants, and also set out the issues for determination in the appeal. With respect to the prayers for striking out the record of appeal, the respondent averred that striking out of the appeal is not the most appropriate remedy, and that this Court has a responsibility vested under Article 159 of the Constitution to administer justice without undue regard to procedural technicalities. He therefore urged us to dismiss the application, and instead allow the appeal to be heard on merit.
5. The application was canvassed by way of written submissions. The applicants filed their submissions while the respondent did not file submissions to advance his position. Parties who have expressed themselves as interested parties also filed written submissions.

### **Submissions**

6. The applicants submitted that pursuant to Section 50 of the Law of Succession Act, the decision of the High Court in exercise of its original jurisdiction is final; that no automatic right of appeal arises and any aggrieved party has no automatic right of appeal and is obliged to seek for and obtain leave; that to the extent that no appeal lies without leave of the court, the ensuing appeal is invalid; that jurisdiction is a central, and determinative question and where none has been obtained, the court is obligated to down its tools at the earliest opportunity; and that failure to obtain leave is a jurisdictional question and the same cannot be saved by reliance on the provisions of Article 159(2) of the

### **Constitution.**

7. Patrick Sarota Ogola, Juliata Ongote Orimba and Job Oginga Ogola (the Interested Parties) submitted that the respondent is their brother; that the respondent filed the record of appeal which is the subject of the application to strike out; that the instant application is intended to defeat justice; that the appeal is merited as the respondent was one of the parties left out of Succession Cause No. Migori 14 of 1994; and that it is in the interest of justice for the appeal to be heard on merit. The Interested Parties urged that the instant application be dismissed.

### **Determination**

8. The instant application is brought under Rule 84 of this Court's Rules which provides that:

“A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the Notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.



Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of the service of the notice of appeal or record of appeal as the case may be.”

9. We have considered the application to strike out the record of appeal. Under Rule 84 of this Court’s Rules, an application to strike out a record of appeal must be filed and lodged within 30 days of service of the record. We note that the record of appeal was filed on 14th November, 2019 and served on counsel for the applicants on 20th November, 2019, while the instant application was filed on 27th November, 2019. The instant application was therefore filed within 30 days of service of the record of appeal. The respondent has not refuted the submission that the instant application complies with Rule 84 of this Court’s Rules. Further, there is no evidence on record that leave of this Court was obtained to institute the appeal.

10. This Court in *Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another [2014]* 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. 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.”

See: *John Mwita Murimi & 2 others v Mwikabe Chacha Mwita & another [2019] eKLR*.

11. The requirement for leave to appeal is an essential step prior to filing an appeal. It is rightly pointed out by the applicants that the respondent did not seek leave, and that fact was not countered, or even explained by the respondents.

12. In the instant application, we are satisfied that since there was no leave sought, then the appeal must be struck out.

13. The upshot is that the instant application to strike out the record of appeal has merit. We allow the notice of motion dated 22nd November, 2019 with the result that the record of appeal filed in Civil Appeal No.259 of 2019 be and is hereby struck out with costs to the applicants.

**DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2022.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**F. SICHALE**

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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**

