



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, ASIKE-MAKHANDIA & MURGOR, JJ.A)

CIVIL APPLICATION NO. 8 OF 2020

BETWEEN

ANDREW MUCIRI MURIUKI.....APPLICANT

AND

NANCY WAGUAMA KAREITHI RESPONDENT

(Application to strike out Notices of Appeal from the ruling of the High Court of Kenya at Kerugoya (L. W Gitari J.,) dated 20th December 2019

In

H.C.C. SUCCESSION CAUSE NO. 2of 2019)

RULING OF THE COURT

On 21st January 2020, NANCY WAGUAMA KAREITHI (“the applicant”) filed the instant notice of motion said to be brought under **Rule 84** of the Court of Appeal Rules (“the rules”). The applicant is seeking to strike out the notice of appeal filed by **ANDREW MUCIRI MURIUKI**, (“the respondent”) on 23rd December 2019 on the grounds that the respondent has not indicated whether she lodged the notice of appeal with the Registrar of the trial court as required since the copy served on him does not have the signature of the said Registrar as required by rule 75 of the rules. Further that the notice of appeal does not indicate whether the respondent intends to appeal against the whole or part of the judgment and finally, that no leave of court was sought and obtained either from the trial or this Court to institute the appeal as there is no automatic right of appeal to this Court arising from a decision of a High Court in succession causes.

The application is supported by the affidavit of the applicant sworn on 21st January 2020 which gives the brief highlight of the succession dispute before the High Court between the parties. However we need not go into that background.

What we have before us is an application under **Rule 84** of the rules which provides as follows;-

“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.”

In this case, the applicant wishes to have the notice of appeal struck out on the grounds that it was not evident that the same was lodged in the trial court and signed by the Registrar as required, nor does it indicate that the appeal is against the whole or part of the judgment. Secondly, whether this court can entertain an appeal from a succession cause emanating from the decision of the High Court without leave having been sought and obtained therefrom and or this Court by the respondent.

The answer to first ground is found in **rule 75 (1) and (3)** of the rules. In summary they provide that any person who wishes to appeal to this court must first file a notice of appeal with the Registrar of the trial court and such notice must indicate whether the appeal shall be against the whole or part of the of the judgment. These provisions are couched in mandatory terms. A close scrutiny of the notice of appeal filed does

show that it was filed with the Registrar of the trial court as the signature of the Registrar is missing. The respondent has not countered this fact at all. In the absence of such signature the only available conclusion is that it was not filed with the Registrar as required. Further the notice is silent on whether the appeal is against the whole or part of the judgment which is also a violation of the law.

On the second ground, it is clear that the respondent did not obtain leave of the High Court as required in terms of **Rule 39 (b)** of the rules so as to mount the appeal. The said leave is supposed to be obtained 14 days from the date of the ruling being appealed against. The appeal is out of a judgment in a succession cause. There is no automatic right of appeal from such matters to this Court. The appellant was thus required to first obtain leave from the trial or this Court before lodging the appeal. The appellant did not do so. Without such leave there is no legal basis for the appeal. As was correctly held in the case of; **Rhoda Wairimu Kioi & John Kioi Karanja v Mary Wangui Karanja** and **Salome Njeri Karanja**, CA Civil App. NAI 69 of 2004;

“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. So, what is our determination in this application? We have found that the application was presented out of time; that the applicant lacked capacity to bring it at the time he did; that leave of the High Court in succession matters is necessary in the former’s exercise of its original jurisdiction; and that where application for leave has been rejected by the High Court, it can be made to this court.”

The instant application is on all fours with the above authority and we so find. In the result the application is merited and we allow it on both grounds with the consequence that the notice of appeal dated and filed herein on 23rd December 2019 is struck out for being incompetent with costs to the applicant.

Dated and delivered at Nairobi this 19th day of March, 2021.

M. K. KOOME

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR