



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KARANJA & OKWENGU, J.J.A)

KISUMU CIVIL APPLICATION NO. 10 OF 2020

BETWEEN

ERASTO ODHIAMBO MUGA.....APPLICANT

AND

ESTER AJWANG NYANGURE.....1ST RESPONDENT

ERIC ODHIAMBO NYANGURE.....2ND RESPONDENT

ALICE ANYANGO ODHIAMBO.....3RD RESPONDENT

(An application for leave to appeal against the Ruling and Order of the High Court of Kenya at Kisumu (D.S. Majanja, J.) dated and delivered on 30th June, 2016

in

H.C. Succ. Cause No. 796 of 2010)

RULING OF THE COURT

1. **Erasto Odhiambo Muga** through the firm of Bruce Odeny & Co. Advocates, has moved this Court by way of Notice of Motion dated 25th January, 2020 under **Section 7** of the Appellate Jurisdiction Act and **Rule 4** of the Court of Appeal Rules. **Section 7** deals with the power of the High Court to extend the time for giving notice of intention to appeal from a judgment of the High Court, for making an application for leave to appeal, or for a certificate that the case is fit for appeal. That Rule has no applicability in this Court.

2. **Rule 4** Court of Appeal Rules which is cited by the applicant confers on this Court's jurisdiction to extend time. This Rule does not give this Court jurisdiction to grant leave where such leave is a prerequisite for filing an appeal before this Court.

3. What then does the applicant want from us? The first prayer in the notice of motion is for leave to file an appeal against the Ruling of D. S. Majanja dated 30th June, 2016 in **Succession Cause No. 796 of 2020**. The second prayer is that upon the said leave being granted this Court to deem the Notice of Appeal filed on 8th July, 2016 as dully filed and served. It would appear that the second prayer is for extension of time to file the Notice of Appeal out of time since it ought to be filed after leave is granted. We have no hesitation in saying at this early stage that the second prayer is supposed to be made as a single Judge application and not before a full bench of three Judges. In regard to such applications, this Court has hitherto expressed itself as follows in **Riccardo Fanelli & 2 Others vs. Frigieri Graziano (2015) eKLR.**

Before me is yet another ominous motion on notice in which the applicants are seeking in the same application, reliefs which can only be granted by a single judge, as well as other reliefs which must be sought before the full court. This undesirable practice that is fast taking root in Malindi and Mombasa has no basis in the rules of procedure, encourages wastage of time in the form of unnecessary objections and is otherwise a devise for avoiding payment of the prescribed court fees for applications before a single judge, and those before the full court. We have previously decried the practice in **CHRISTOPHER IDDI MOTO & 15 OTHERS V. CHIRIBA NYAMBU BARUA & ANOTHER, CA NO. 43 OF 2014 (UR 38/14) and **FEISAL MOHAMED ALI V. REPUBLIC, CR AP.NO. 2 OF 2015 (UR1/15)** and hope that it shall cease forthwith.**

For the record applications for extension of time under Rule 4 of the Court of Appeal Rules are, by virtual of the provisions of rule 53 (1) to be heard and determined in the first instance by a single judge. Such an application comes to the full court under rule 55 only by way of reference from the decision of the single judge. (Kathurima I’noti JA)

We re-echo those sentiments and state that prayer 2 is not properly before Court.

4. On the question of leave to appeal, we note that the applicant seeks to appeal from a judgment in a succession matter. Leave is therefore a prerequisite which the applicant seems to be well aware of. In its decision in **Rhoda Wairimu Karanja and John Kioi Karanja vs. Mary Wangui Karanja and Salome Njeri Karanja, [2014] eKLR**, this Court pronounced itself as follows:-

“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.”

5. Under **Rule 39** of this Court’s Rules which is the applicable rule here, the applicant ought to have applied for leave to appeal within 14 days from the date of the decision he intended to appeal against. He did not do so. He is coming to this Court for the said leave four years down the line in this omnibus application. Our view of the matter is that he ought to have moved the court under **Rule 4** to extend time for him to apply for leave to appeal. It is only after such extension is granted that the Court can consider the merits of his application for leave. Indeed, his second prayer which we have already found is improperly before the court was not for extension of time to file the application for leave but for extension to file and serve the notice of appeal itself.

6. We do not have a competent application before us which we can determine on its merits. The entire application is therefore bad in law and we dismiss it with no order as to costs.

Dated and delivered at Nairobi this 23rd day of October, 2020.

W. OUKO, (P)

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR