



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, KIAGE & OTIENO-ODEK, JJA)

CIVIL APPEAL (APPLICATION) No. 93 of 2018

BETWEEN

JOHN MWITA MURIMI.....1ST APPLICANT

JOSEPH MWITA MURIMI.....2ND APPLICANT

NYAMOHANDA MARWA MWITA.....3RD APPLICANT

AND

MWIKABE CHACHA MWITA.....1ST RESPONDENT

JULIUS MAGIGE MURIGIMI.....2ND RESPONDENT

(Being an application to strike out the Record of Appeal in Kisumu

Civil Appeal No. 93 of 2018 filed against the Ruling of the High Court of Kenya

at Migori (A. C. Mrima, J.) delivered on 11th October 2017

in

Migori HCCC No. 440 of 2015)

RULING OF THE COURT

1. On 11th October 2017, the trial court sitting at Migori delivered a judgment revoking and annulling letters of administration granted in relation to the Estate of Chacha Mwita Murimi and the Estate of Murimi Mwita Murimi. Upon delivery of the ruling, the respondents were aggrieved and a Notice of Appeal was filed on 15th October 2017. The Record of Appeal was served upon the applicants on 1st August 2018. It is alleged that the impugned ruling arose from a Succession Cause and the respondents herein never sought leave of the High Court to institute the appeal, file and serve the Record of Appeal in this matter. That in succession matters, no right of appeal without leave, ensues automatically.
2. Aggrieved by the filing and service of the notice and record of appeal prior to obtaining leave of the court, the applicants herein filed a Notice of Motion dated 9th August 2018 seeking an order to strike out the record of appeal. The Motion is supported by an affidavit deposed by learned counsel Mr. Joseph Mboya Oguttu.
3. The grounds in support of the application as stated on the face of the Motion and in the supporting affidavit are that the dispute in this matter is a succession dispute; that no right of appeal arises or attaches to the decision of the High Court without leave of the court; that the respondents herein neither sought nor obtained leave of the High Court to file and lodge the appeal in this matter; that since leave to appeal was not sought, the instant appeal is an abuse of court process and should be struck out.
4. At the hearing of the instant appeal, learned counsel Ms Ochwal appeared for the applicants and learned counsel Mr. J.O. Soire appeared for the respondents.

5. Counsel for the applicant submitted that the application to strike out the record of appeal is properly before this Court pursuant to **Rule 84 of the Rules of this Court**. That the applicant was served with the record of appeal on 1st August 2018 and the instant application was lodged in court on 14th August 2018 and served on the respondents on 20th August 2018. That the present application was filed and served within 30 days of service of the record of appeal as required under Rule 84 of the Rules of this Court. The consequently, the applicant has complied with rule 84 of the rules of this Court.

6. The applicant submitted that this Court in **Rhoda Wairimu Karanja & another – v- Mary Wangui Karanja & another [2014] eKLR**, stated:

...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.....

7. The applicant further cited the decision of this Court in **Josephine Wambui Wanyoike – v- Margaret Wanjari Kamau & another [2013] eKLR**, to buttress the submission that under the Law of Succession Act, there is no automatic right of appeal without leave of the court. Guided by the decisions of this Court counsel submitted that the instant appeal was incompetent and not properly before the Court. On the issue of costs, it was submitted costs follow the event.

8. In opposing the instant application, the respondent in their written submissions urged this Court to take judicial notice that numerous cases have been filed, heard and determined by this Court and its predecessor in matters involving the Succession Act. Counsel cited the decision of this Court in **Makhangu – v- Kibwana [1996] EA; (1995-1998) 1 EA 168** to support the submission.

9. We have considered the application to strike out the record of appeal. Under Rule 84 of the Rules of this Court, an application to strike out a record of appeal must be filed and lodged within 30 days of service of the record. In this matter, the applicant has demonstrated to our satisfaction that the instant application was 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 the Rules of this Court. Further, there is no evidence on record that leave of the High Court or this Court was obtained to institute the appeal. We re-affirm the decisions of this Court in **Rhoda Wairimu Karanja & another – v- Mary Wangui Karanja & another [2014] eKLR** and **Josephine Wambui Wanyoike – v- Margaret Wanjari Kamau & another [2013] eKLR**, where it was clearly stated that in succession matters, there is no automatic right of appeal without leave of court.

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**).

11. In the instant matter, we are satisfied that no leave of the court was obtained to file the instant appeal. The present application to strike out the record of appeal has merit. We allow the Notice of Motion dated 9th August 2018 with the result that the record of appeal filed in Civil Appeal No. 93 of 2018 be and is hereby struck out with costs to the applicant.

Dated and Delivered at Kisumu this 31st day of July, 2019

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. KIAGE

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR