



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: SICHALE J.A (IN CHAMBERS)

CIVIL APPLICATION NO. 387 OF 2018

BETWEEN

**KHADIJA SHARIFF OMAR .....1<sup>ST</sup> APPLICANT**

**KAMAL SHARIFF OMAR..... 2<sup>ND</sup> APPLICANT**

AND

**MOHAMED SHARIFF .....RESPONDENT**

*(An application to enlarge time to file an appeal against the Ruling of the*

*High Court of Kenya at Nairobi (R.E Ougo, J) dated 26<sup>th</sup> February 2015*

IN

**H.C Succession Cause No. 11 of 2009)**

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RULING

The applicants, **Khadija Shariff Omar** and her son **Kamal Shariff Omar** in a motion filed on **21<sup>st</sup> December, 2018** are seeking orders for extension of time to file an appeal against the decision of **Ougo, J** delivered on **26<sup>th</sup> February, 2015** and leave to file and serve their memorandum of appeal out of time.

According to the 1<sup>st</sup> applicants’ supporting affidavit sworn on **20<sup>th</sup> December, 2018**, the letters of administration intestate were granted to the applicants on **4<sup>th</sup> May, 2009** and confirmed on **3<sup>rd</sup> May, 2010**. Upon application by **Mohamed Shariff** (the respondent herein), the grant of letters of administration was revoked by the ruling of **Ougo, J**. delivered on **26<sup>th</sup> February, 2015**. Dissatisfied with the decision, the applicants intended to appeal against the decision and a notice of appeal was lodged on **17<sup>th</sup> April, 2015**. However, the notice was never served upon the respondent. In fact, the letter bespeaking the proceedings dated **10<sup>th</sup> April, 2015** was also never copied to the respondent.

The appeal was never filed and the applicants blamed the High Court registry for failing to supply the typed proceedings timeously. By **Civil Application No. 251 of 2017**, the applicants sought this court’s indulgence to file the intended appeal out of time. However, the applicants soon realised the omission to serve the respondent with the notice of appeal and the application was withdrawn on **25<sup>th</sup> April, 2018**. By another application, **Civil Application No. 160 of 2018**, the applicants sought leave to serve the notice of appeal upon the respondent out of time which was granted by **Githinji J.A** in his ruling dated **29<sup>th</sup> November 2018**.

The applicants thereafter failed to serve the memorandum of appeal within time and have thus brought this application. The applicants depose that it is in the interest of justice for the Court to allow the application.

Opposing the application, the respondent filed a replying affidavit sworn on **25<sup>th</sup> February, 2019** deposing that the applicants had failed to

serve upon him the letter bespeaking the proceedings. Moreover, that the applicants had failed to satisfactorily explain the inordinate delay of four (4) years from **26<sup>th</sup> February, 2015** when the impugned ruling was delivered. The respondent also deposed that he would be prejudiced should the court allow the application as he would be denied the fruits of the impugned ruling.

Appearing before me, **Ms. Too** for the applicants explained that the omission to serve the letter bespeaking the proceedings upon the respondent was inadvertent and not intentional. Further, that the delay in filing the intended appeal was occasioned by the High Court in not supplying the typed proceedings in good time.

Counsel submitted that the applicants are still aggrieved with the ruling of **Ougo J.** and are desirous of pursuing the intended appeal. Counsel therefore asked for extension of time to file the appeal out of time.

The application was opposed by **Mr. L. Hassan** for the respondent who reiterated the contents of the respondent's affidavit. In addition, counsel submitted that the application was fatally defective as the applicants did not have a right of appeal as the matter arises from the Law of Succession. Secondly, counsel explained that the applicants had not met the conditions allowing exercise of this Court's discretion in their favour. Thirdly, counsel was concerned that the applicants were making piecemeal applications to this court. To begin with the applicants ought to have filed an application to file the intended appeal out of time and not just the notice of appeal. Finally, counsel was of the view that the delay was inordinate and the application should be dismissed with costs.

In a brief reply, counsel for the applicants affirmed that the applicants had a right of appeal to this Court.

I have anxiously considered the motion. As is often stated, jurisdiction is everything and if I have no jurisdiction to grant the leave sought, then it follows that I have no jurisdiction to extend time as sought by the applicants. Firstly, it is not disputed that the dispute herein relates to succession of the deceased's property.

In **Hafswa Omar Abdalla Taib & 2 others vrs. Swaleh Abdalla Taib [2015] eKLR**, this Court rendered itself as follows:

**“In this case the appellate jurisdiction in respect of Succession Causes has been donated by Section 50 of the Law of Succession Act. From this provision, it is clear that decisions from the magistrates' courts in Succession Causes are appealable to the High Court; whose decision on such an appeal is final. However, the decision of the Kadhi's court are appealable to the High Court; and a party dissatisfied with the decision of the High Court on appeal can appeal further to this Court but only with leave of the High Court and in respect only on points of Muslim law. However, there is no mention of an appeal to this Court from the decision of the High Court made in exercise of its original jurisdiction.**

Indeed even section 47 of the same Act makes no mention of an appeal to the Court of Appeal from the decision of the High Court made in the exercise of its original jurisdiction. It is trite that where a right of appeal is not expressly provided for by statute or the statute is silent, then a party wishing to proceed further by way of appeal should seek leave for such an undertaking from the court whose decision he seeks to impugn by way of further appeal or from the appellate court. To our mind we have no doubt at all that an appeal lies to this Court from the decision of the High Court in Succession Causes in its original jurisdiction. However, that must be with leave of the High Court. This proposition was first propounded by this Court differently constituted almost 18 years ago in the case of **Makhangu vs. Kibwana [1996-1998] I E.A 168**. In a nutshell the court held that an appeal does lie to this Court from the decision of High Court in Succession Causes, that under section 47 of the law of Succession Act, the High Court has jurisdiction on hearing a Succession Cause to pronounce decrees or orders; that any order or decree made under this section is appealable under section 66 of the Civil Procedure Act, either as a matter of right if it falls within the ambit of section 75 of the Civil Procedure Act or by leave of the Court if it did not. This decision has reigned supreme and we are not aware of any other decision to the contrary. If anything, there have been a plethora of subsequent appeals to this Court in Succession Causes but only after leave was duly obtained from the High Court whose decision is being appealed. See for instance **Kaboi vs. Kaboi & Others [2003] E.A 472**, **Francis Gachoki Murage vs. Juliana Wainoi Kinyua & another, Civil Appeal (Application) No. 139 of 2009 (UR)** and **Rhoda Wairimu Karanja vs. Mary Wangui Karanja & Another [2014] eKLR**.

*What runs through all these decisions is that whereas this Court has jurisdiction to entertain appeals in Succession Causes from the High Court in its original jurisdiction that right is not automatic. Where there is no automatic right of appeal, it behoves the aggrieved party wishing to appeal to seek and obtain leave to do so from the High Court and the granting of leave is a discretionary power. This is how this Court delivered itself on this question in the case of Francis Gachoi (supra): “We have considered this issue of whether this appeal lies with considerable anxiety. First, leave was never sought in the High Court. The practice has always been where there is no automatic right of appeal an aggrieved party wishing to appeal is enjoined to seek leave. Granting of leave is within the discretion of a judge ...”*

And in the case of Rhoda Wairimu Karanja (supra), this Court reiterated thus:-

*“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 ...”*

**We wholly endorse these sentiments.”**

Simply put, the orders sought by the applicant of extension of time can only be granted where the Court has jurisdiction to grant the orders sought. The law does not allow me to grant orders where I do not have jurisdiction. The dispute herein was a succession matter. Section 75 of the Civil Procedure Act (CPA) and Order 43 of the Civil Procedure Rules (CPR) provides instances of when one can file an appeal as of right. In the absence of an automatic right of appeal, then leave must first be sought. Order 43 Rule 3 provides:

***“An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made; or within 14 days from the date of such order.”***

Outside section 47 of the Law of Succession Act, that Act does not provide for leave to appeal to this Court.

It is in view of the above consideration that I have come to the conclusion that the motion herein is bereft of merit. It is hereby dismissed with costs to the respondent.

***Dated and Delivered at Nairobi this 11th Day of October, 2019.***

**F. SICHALE**

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**JUDGE OF APPEAL**

**I certify that this is a**

**true copy of the original.**

**DEPUTY REGISTRAR**