



**IN THE COURT OF
APPEAL
AT NAIROBI
(CORAM: KIHARA KARIUKI (PCA), OUKO & GATEMBU, J.J.A.)**

**CIVIL APPLICATION NO. NAI 231 OF 2010 (UR
25/2014)**

BETWEEN

JOHN NDUNGU WAINAINA & 2 OTHERS APPLICANTS

AND

MARY NJERI KIMUYU RESPONDENT

(Being an application to strike out a Notice of Appeal from the judgment and order of the High Court of Kenya at Nairobi (Rawal, J.) dated 24th November, 2009 in H.C. Succ. Cause No.1725 of 1997)

**RULING OF THE
COURT**

Rawal, J. (as she then was) rendered a judgment in **High Court Succession Cause No.1725 of 1997, In the Matter of the Estate of Mugure Gachanja** on 24th November, 2009 and ordered that the estate comprising the parcel of land known as Title No. **Githunguri/Kimathi/127** be sub-divided equally and distributed between the applicants and the respondent; and that the resultant two parcels be registered as such. Aggrieved, the respondent filed a notice of appeal on 15th December 2009. Nearly one year later on 7th October 2010 when the instant application was instituted the appeal had not been filed. In the application the applicants have asked the Court to strike out the notice of appeal with costs because the order from which the respondent seeks to appeal is only appealable with leave of the court which leave has never been obtained, rendering the notice of appeal incompetent.

The application was not opposed as the firm of **Njoroge Baiya & Company Advocates** representing the respondent, although duly served with hearing notice did not attend Court when the application came up for hearing nor had any affidavit been filed in opposition to the application.

Mr Aswani, learned counsel for the applicants relying on **Makhangu v Kibwana (1995-1998) I EA 175, Kiboi v Kiboi & others (2003) 2 EA 472** and **Karani v Waruguru & Another (2006) I EA 92** urged us to find that without leave to appeal having been granted by the High Court or this Court, the decision

intended to be challenged being a probate dispute, the notice of appeal filed herein is of no effect and is for striking out.

The application is expressed to be brought under **Rule 80** instead of **Rule 84** of the Court of Appeal Rules where an application by any person affected by an appeal may, either before or after the institution of the appeal, apply for the striking out of the notice or the appeal, as the case may be, on, among other grounds, that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

It is the applicants' contention that leave which is a mandatory requirement before lodging an appeal to this Court from the decision of the High Court in Probate and Administration matters has not been obtained and therefore the notice of appeal is incompetent. Apart from the three authorities cited by Mr Aswani which were decided before the promulgation of the 2010 Constitution, this Court in more recent cases has reiterated that appeals arising from the decision of the High Court in probate and administration matters can only be brought with leave of this Court or of the High Court. See **In the Matter of the Estate of Omar Abdalla Taiba (Deceased) Hafswa Omar Taib & others v Swaleh Abdalla Taib Civil Appeal No. Mld22 of 2014** and **Rhoda Wairimu Karanja v Mary Wangui Karanja, Civil Application No. Nai 69 of 2014.**

The respondent has not demonstrated that she has obtained leave to challenge to this Court the decision of the High Court delivered on 24th November, 2009. In the result this application succeeds and the notice of appeal filed on 15th December, 2009 is struck out with costs.

Dated and delivered at Nairobi this 8th day of May 2015.

P. KIHARA KARIUKI, (PCA)

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR