



IN THE COURT OF APPEAL OF KENYA

AT NYERI

Civil Appli 259 of 2005

WANGU NJAGI APPLICANT

AND

JAMES MWAI RESPONDENT

(Application for leave to file record of appeal out of time in an intended appeal from a Judgment of the High Court of Kenya at Embu (Lenaola, J.) dated 13th April, 2005

in

H.C.C.A. NO. 50 OF 2001)

RULING

Although the matter before me is one of the run-of-the-mill applications for extension of time under **rule 4** of this court's rules, learned Counsel for the respondent, Mr. Morris Njage, has raised a fundamental objection to it, which I must deal with *in limine*. The objection made by Mr. Njage is that the intended appeal is against the decision of the superior court, made in exercise of its appellate jurisdiction in a Succession matter, which decision is not appealable by dint of **section 50** of the **Law of Succession Act Cap. 160**. In his view, leave to appeal would therefore be required but none was obtained and therefore the application for extension of time is either premature or incompetent.

The genesis of the dispute is not clear because the relevant documents and proceedings thereon have not been made available to me. All that is before me are the proceedings and judgment of the superior court (Lenaola, J.) in H.C.C.A. NO. 50/01. From those records, the following facts are apparent:-

The applicant herein **Wangu Njagi** (*Wangu*) and the respondent **James Mwai** (*Mwai*) are the children of one **Gichuki Kimunya** (deceased) who died in 1970 leaving three sons and six daughters, two of whom were unmarried. He also left a piece of agricultural land as part of his estate. A grant of Letters of Administration of the deceased's estate was issued to Mwai and Wangu jointly. A dispute however arose in the course of administration of the estate and it went before Kerugoya Principal Magistrate in **Succession Cause No. 146/99**. Orders were made in that Cause on **13th July, 2001** that the married daughters of the deceased were entitled to inherit the deceased's land. Mwai was dissatisfied with that order and so appealed to the Superior Court in **H.C.C.A. No. 50/01**. Lenaola, J. reversed the decision on **13th April, 2005**. It is against that decision that Wangu intends to appeal, but Mr. Njage contends is not

appealable as of right. Learned Counsel for the applicant, Mr. Magee had little to say on the objection raised but left it to my decision.

In support of his submissions Mr. Njage cited two decisions: Makhangu v. Kibwana [1995-98] 1 EA 175, a decision of the full Court, and Kaboi v. Kaboi & Others [2003] 2 EA 472, a decision of a single Judge of the Court. In the former case, the Court held:-

“Under section 47 of the Succession Act (Chapter 160), the High Court had jurisdiction on hearing any application to pronounce decrees or orders. Any order made under this section was appealable under section 66 of the Civil Procedure Act either as of right if it fell within the ambit of section 75 of the Civil Procedure Act or by leave of the court if it did not.”

In my view, **section 66** and **75** of the Civil Procedure Act provide for appeals to the Court of Appeal from decrees and orders of the High Court in its original jurisdiction and are not relevant for purposes of this application, since the order intended to be challenged was issued by the Court in its appellate jurisdiction. The relevant Section would be **Section 72(1)** of the *Civil Procedure Act* which provides:-

“72. (1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely-

- (a) the decision being contrary to law or to some usage having the force of law;***
- (b) the decision having failed to determine some material issue of law or usage having the force of law;***
- (c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.”-***

Emphasis is added.

The underlined emphasis takes me to **Section 50(1)** of the Succession Act which provides:-

“50 (1) An appeal shall lie to the High Court in respect of any order or decree made by a resident magistrate in respect of any estate and the decision of the High Court thereon shall be final.”-

Emphasis is added.

So that, the decision of the superior court in this matter was final and is not appealable. I see no provision that leave to appeal may be sought or granted. In the event, I would agree with Mr. Njage, for different reasons, that the application before me is incompetent and I would be acting in vain if I granted the orders sought. I would strike it out and now do so, with costs to the respondent.

Dated and delivered at Nyeri this 12th day of May, 2006.

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR