



REPUBLIC OF KENYA



KENYA LAW
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Karingi v Nyaga (Civil Appeal 43 of 2019) [2025] KEHC 1418 (KLR) (30 January 2025) (Ruling)

Neutral citation: [2025] KEHC 1418 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 43 OF 2019
RM MWONGO, J
JANUARY 30, 2025**

BETWEEN

JAMES MWANGI KARINGI APPELLANT

AND

ONESMAS NJIRU NYAGA RESPONDENT

RULING

The Application

1. Following an appeal from the trial court, this court issued judgment on 6th May 2024. The appellant filed an application dated 18th June 2024 under certificate of urgency, essentially seeking orders stay of execution of the said judgment and decree, in particular stay is sought against:
 1. any or all consequential orders emanating therefrom pending the inter-parties hearing of this application;
 2. any or all consequential orders emanating therefrom pending the hearing and determination of this application;
 3. any or all consequential orders emanating therefrom pending hearing and determination of the appeal;The application also seeks that the costs of the application be provided for.
2. The application is premised on grounds that he is aggrieved by the said judgment upholding the decision of the trial court delivered on 31st May 2019 by Hon. G.K. Odhiambo. He has urged that the intended appeal raises triable issues with overwhelming chances of success. He is apprehensive that if the orders sought are not granted, the respondent will move to execute, thus causing him to suffer substantial loss and rendering the intended appeal nugatory.



3. Through the applicant's supporting affidavit, he produced a copy of the Notice of Appeal dated 08th May 2024, a letter to the Deputy Registrar requesting for certified copies of proceedings together with a payment receipt for both documents. He deposed that it is paramount that the court does grant the orders prayed so as to safeguard his right of appeal to the Court of Appeal.
4. The applicant has challenged the entirety of the judgment of this court and he deposed that no prejudice will be suffered by the respondent if the orders are granted. He has drawn the court's attention to its unfettered jurisdiction to unconditionally allow the application so as to give life to his intended appeal, lest he suffers great prejudice. The applicant further deposed that the mode of distribution of the estate of the deceased, as upheld by this court, benefits some beneficiaries more than others, thus causing suffering.
5. Although the application was duly served upon the respondent, he did not file any reply.

Parties Submissions

6. The applicant submitted that he has already filed a Memorandum of Appeal before the Court of Appeal and the same is awaiting directions before that court. It was his submission that the orders for stay of execution are necessary because the respondent has been unjustly enriched through the mode of distribution upheld by the court, to the detriment of the other beneficiaries of the estate.
7. The applicant relies on the following authorities: *Butt v Rent Restriction Tribunal* [1979] KECA 22 (KLR) which holds that an order of stay of execution may be given at the court's discretion, while balancing the rights of the parties. He also relies on *Reliance Bank v Norlake Investment* (2002)1 EA 227 and *RWW v EKW* [2019] KEHC 6523 (KLR) as to its position that stay orders must be granted to pre-empt an appeal being rendered nugatory due to loss of the subject matter. He urged the court to allow the application in the spirit of Article 25 (c) of *the Constitution*.
8. The respondent submitted that if the court allows the application, the High Court will be sitting on appeal in its own decision. Moreover, that the intended appeal does not fall within the tenets of section 50(1) of the *Law of Succession Act* which provides that the decision of this court is only appealable upon granting of leave to do so. He termed the application as a non-starter and he urged the court to dismiss it. He placed reliance on the case of *Wangu Njagi v James Mwai* [2006] KECA 241 (KLR) where the Court of Appeal held that the decision of the superior court is final and not appealable on account of Sec 50(1)LSA.

Issues for Determination

9. The core issue for determination is whether an order for stay of execution may be granted pending the intended appeal, which is a second appeal.
10. It is important to note that this matter involves a succession appeal governed by the *Law of Succession Act*. The stay is sought pending appeal to the Court of Appeal in this succession matter. The parties litigated before the Magistrate's court and the High Court, underpinned by the *Law of Succession Act*. Section 50 LSA provides as follows:

- “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.



2) An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi's Court in respect of the estate of a deceased Muslim and with prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.”

11. The Act is clear that an appeal in the High Court is final. However, if the order or decree appealed against is from the Kadhi's Court in respect of the estate of a deceased Muslim on a point of Muslim law, prior leave to appeal ought to be obtained to appeal to the Court of Appeal. In that light, absent leave, there is no right of a second appeal to the Court of Appeal.
12. There is no specific procedure for appeal to the Court of Appeal. However, the High Court is granted unlimited power to entertain any application and determine any dispute under the Act. Further, Rule 49 Probate and Administration Rules provides for applications not otherwise provided for, and Rule 73 of the PAR also saves the inherent powers of the court to make orders necessary for the ends of justice.
13. In addition, the procedure for seeking such leave is also provided for under Rule 39 of the Court of Appeal Rules.
14. The applicant is disgruntled with the decision of this court delivered on 06th May 2024 through which the trial Magistrate's distribution of the estate was upheld. He has preferred an appeal against the same at the Court of Appeal, without seeking the relevant leave to appeal. Through his supporting affidavit, he has produced a copy of the Notice of Appeal dated 08th May 2024 to the Court of Appeal and he now seeks stay of execution pending that appeal. In his submissions, he has intimated that he has also filed a memorandum of appeal before the Court of Appeal.
15. For an application as to whether the court should grant stay of execution, guidance is found at Order 42 Rule 6(2) of the Civil Procedure Rules which sets out the parameters for consideration. It states:

“(2) No order for stay of execution shall be made under subrule (1) unless—

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

16. Stay of execution is to be granted pending an appeal which is properly and duly filed. That is to say, when a party cannot appeal as of right, the pre-requisites (in this case, leave) have to be met before it can be termed as a valid or proper appeal to be determined on merit. In the case of *Nicholas Stephen Okaka & Charity Njoki Muigai v Alfred Waga Wesonga* [2022] KEHC 1123 (KLR), the court held that:

“The court, in *RWW v EKW* [2019] KEHC 6523 (KLR) considered the purpose of a stay of execution order pending appeal, in the following words: “The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application



for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.””

17. Regardless, this court should determine whether the requirements of granting stay have been met. As to whether there is delay in filing the application, the impugned judgment was delivered on 06th May 2024 and the application was filed on 20th June 2024. In my view the application was filed promptly and without unreasonable delay. Secondly is whether there is validity in the argument that the applicant will suffer substantial loss if the orders are denied. Substantial loss, from his perspective, is loss of the subject matter (through execution by the respondent) such that the appeal will be rendered nugatory. The applicant argued that if the orders are denied, the respondent will proceed to execute by giving life to the orders distributing the estate. Thus, once the estate is distributed, there will be no basis for the intended appeal.
18. This argument takes us back to the issue as to whether the appeal (if any) lies before the Court of Appeal without the relevant leave. The decision of the High Court herein is held as final in light of Section 50(1) of the *Law of Succession Act*. Therefore, there is no detriment to be suffered by the applicant since he has improperly approached the Court of Appeal as the decision of this court stands final at this point in time.
19. This position is supported by the Court of Appeal decisions as follows:
 - a. In *Rhoda Wairimu Karanja & another v. Mary Wangui Karanja & another* [2014] eKLR, where Musinga, Ouko & Gatembu, JJ.A. opined on section 50 LSA thus: “But section 47 of the *Law of Succession Act* makes no mention of an appeal to the Court of Appeal from the decision of the High Court made in the exercise of the latter’s original jurisdiction. Decisions on this point have been varied both in the High Court and in this Court. The holding in the leading case of *Makhangu vs. Kibwana* [1996-1998] 1 EA 168 (Cockar, CJ, Kwach and Shah, JJ.A), which has been cited invariably in almost all the subsequent decisions is to the effect that an appeal does lie to the Court of Appeal from the decision of the High Court in probate matters; that under section 47 of the *Law of Succession Act*, the High Court has jurisdiction on hearing a matter 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 Rules or by leave of the Court if it did not. It has been said in criticism of this decision that the *Law of Succession Act* is a complete code with its own rules and that there would be no justification to import into it provisions of the *Civil Procedure Act* and Rules unless expressly permitted under Rule 63 of the Probate and Administration Rules. In short, and speaking generally, the practice alluded to by their Lordships in the above passage, is that where there is no automatic right of appeal an aggrieved party wishing to appeal must seek leave to do so and the granting of leave is a discretionary power. 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 the probate and administration dispute. So what is our decision in this application...leave of the High Court to appeal to this Court in succession matters is necessary in the former’s exercise of its original jurisdiction.”



- b. In *Daniel Gicheru Kingori & 2 others v Wambugu* (supra) the Court of Appeal (Mativo JA), opined as follows on section 50 LSA: “My reading of the law and decided cases leaves me with no doubt that there is no automatic right of appeal from the judgments/decrees and orders made by the High Court in succession matters. On the other hand, there is absence of a positive provision in the act stipulating that the judgment, decree and order made by the High Court are final. In the absence of a clear provision to that effect, I do not agree that the intention of the Parliament was to make the judgment, decree or order of the High Court as final. If that was the intention, then Parliament could have stipulated expressly.”
- c. In *John Mwita Murimi & 2 others v Mwikabe Chacha Mwita & another* [2019] eKLR the Court of Appeal (Makhandia, Kiage & Otieno-Odek, JJ.A.) stated: “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-vs Kibwana* [1996] EA cited by the respondent was succinctly considered by this Court in *Rhoda Wairimu Karanja & another vs 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 it 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). 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.” In *Hafswa Omar Abdalla Taib & 2 others v 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 ...”

20. On the basis of these authorities, it would be unfair to deny the respondent his right to enjoy the fruits of his judgment by allowing a stay, since he has a right to execute. This means that since the judgment of this court on an appeal is held as final with no automatic right of appeal, the respondent has a right to execute and such execution is lawful. It was so held in James Wangalwa & Another v. Agnes Naliaka Cheseto [2012] eKLR.
21. As to whether or not the appeal is arguable is immaterial at this point since the same has not been properly filed in the first place. This court need not go any further on this issue since it will defeat the purpose for granting stay of execution.
22. The present application therefore lacks merit, and is hereby dismissed.
23. This being a family matter, no order is made as to costs.
24. Orders accordingly.

DATED AND DELIVERED VIRTUALLY AT KERUGOYA COURT THIS 30TH DAY OF JANUARY 2025

R. MWONGO

JUDGE

Delivered in the presence of:

1. Kwamboka for Applicant/Appellant
2. Priscilla Wangari for the Respondent
3. Francis, Court Assistant

