



**In re Estate of M'Mugwika M'Marete alias Stephen Marete (Deceased) (Succession Cause 692 of 2023) [2024] KEHC 779 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 779 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
SUCCESSION CAUSE 692 OF 2023**

**EM MURIITHI, J**

**JANUARY 31, 2024**

**IN THE MATTER OF THE ESTATE OF M'MUGWIKA  
M'MARETE ALIAS STEPHEN MARETE (DECEASED)**

**ANASTACIA B. K. ANAMPIU.....PETITIONER**

**VERSUS**

**MARY GACERI MARETE.....1ST PROTESTOR**

**SUSAN KANANU MARETE.....2ND PROTESTOR**

**SERAH KAIRUTHI MARETE.....3RD PROTESTOR**

**RULING**

1. By Summons under certificate of urgency dated 20<sup>th</sup> June 2023, brought under Article 159(2)(d) of *the Constitution*, Section 7 of the *Appellate Jurisdiction Act* and all other enabling provisions of the law, the Protestors seek that:
  1. Spent
  2. The Honourable Court do extend time to the Protestors for giving notice of appeal from the judgment by Hon. A. Mabeya dated 29<sup>th</sup> November, 2018.
  3. The Protestors be allowed to file the Notice of Appeal within 14 days of the order of court or any other period as the court may direct.
  4. The Honourable Court be pleased to issue any other orders in the interest of justice.
  5. The costs of this application be provided for.”
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Susan Kananu Marete, the 2<sup>nd</sup> Protestor herein sworn on even date. Following the dismissal of their application for review of the judgment of the court dated 29/11/2018, she now wishes to appeal against it to the Court of Appeal, but since the 14 days within which she were required



to do so have lapsed, she seeks leave. She verily believes that she has an arguable appeal with high probability of success, and the Petitioner will not be prejudiced in any way if the application, which has been brought without unreasonable delay in the circumstances, is allowed.

3. The 2<sup>nd</sup> Protestor swore a supplementary affidavit on 26/9/2023 in support on her application.
4. The Petitioner, Anastacia B.K Anampiu, opposed the application through her replying affidavit sworn on 29/6/2023. She accuses the Protestors of indolence, by bringing this application 4 years since the delivery of the impugned judgment. In her view, the present application is a dishonest and a vain attempt to live the clock as the Protestors are forum shopping and blatantly abusing the process of this court. She urges the court to dismiss the application with costs as the attached memorandum of appeal raises no triable issues at all.

### **Analysis and Determination**

5. The singular issue for determination is whether leave to appeal out of time, and the related question whether leave to appeal, should be granted.
6. The applicant relies of the provisions of the Article 159 of *the Constitution* and section 7 of the Appellate Court Act. Section 7 of the Appellate Court Act provides as follow:

“Power of High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”

7. There is under section 50 of the *Law of Succession Act* clearly no automatic right of appeal to the Court of Appeal. However, as was held the Court of Appeal in Rhoda Wairimu Karanja & Another v Mary Wangui Karanja & Another (2014) eKLR:

“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 merits serious consideration. We think this is good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes.”

8. This Court would readily accept the observation of the Court in Karanja v. Karanja, supra, after discussing examples of succession famous disputes in history that –

“We do not think the framers of section 50 of the *Law of Succession Act* intended to limit appeals to this Court and allowing decisions of the Kadhis Courts be challenged up to this Court. Succession, (read family), disputes are the most acrimonious kind of litigation all over the world, in the past and today. Starting with the oft-narrated story of the dispute between Baroness, Cecily Bonville who became the wealthiest heiress in England in 1501 when she was less than 1 year old after all her male relatives were slain in the battle for the



English throne - the Wars of the Roses [1455-1487] and her son and heir, Thomas Grey over Cecily's right to remain the sole executrix of her late husband's estate after remarriage to a man many years her junior. King Henry VII and the entire royal council had to intervene to quell the acrimony.

Likewise, the fictitious story by Charles Dickens in Bleak House of a family dispute over inheritance in England in which the estate was depleted in a litigation which lasted several years. Virginia Wamboi Otieno (supra), is a well-known local example.

In view of these and given the adversarial nature of litigation in our system of justice, it would be unconscionable to allow as final the decision of a single judge, and limit the right of appeal to the High Court, especially now when the court hierarchy has been opened by the creation of the Supreme Court as an apex court.”

Leave to appeal should, therefore, normally be granted where there are serious questions to be put before the appellate court.

9. This position was reiterated by the Court of Appeal in John Mwitwa Murimi & 2 Others v Mwikabe Chacha Mwitwa & Another [2019] eKLR, citing Karanja v. Karanja, supra, that:

“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.

.... 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).”

10. Pursuant to the impugned judgment of 29/11/2018, the Protestors, 4 years later on 10/2/2022, with a view of obtaining a favourable outcome, moved this court for review of the said decision, which was refused by the ruling of 28/3/2023. Even after this Court in its said ruling had pointed the way to the Protestors by way of an appeal against the impugned judgment, the 2<sup>nd</sup> Protestor waited for 3 months to file this application.
11. This Court does not, however, find this delay as inordinate. The applicant. As regards the delay from the time of judgement in 2018, the applicant explained by her grounds of the application and affidavit in support that she had sought to challenge the judgment of 29/11/2018 by application for review dated 9/2/2022 which the court dismissed by ruling of 28/3/2023 where “the court made a determination that they ought to have appealed against the judgment of the Court.”
12. However, with respect, the applicant has not sought leave to appeal; only extension of time is sought in its prayers Nos. 2 and 3. Without leave to appeal granted, the question of extension of time to lodge a notice of appeal is of no avail. However, the applicant has in paragraph 9 of the supporting affidavit sworn on 20/6/2023 adverted to the requirement of leave to appeal before filing the intended appeal to the Court of Appeal, and this Court will deem it as expressly sought.



13. This court has looked at the draft Memorandum of Appeal attached to the application and, with respect, it takes the view that the 2<sup>nd</sup> Protestor has demonstrated prima facie a serious question, set out at paragraph 3 thereof, to be put for determination by the Court of Appeal, namely, whether -

“ 3. The learned judge in the superior court erred in law and fact in distributing the estate equally to all beneficiaries despite coming to the conclusion that the petitioner/administrator had been gifted vide LR No. 1494/Ruiriri/Rwarera Adjudication section.”

14. The Court notes that the serious question to be put before the Court of Appeal, or arguable case/ point as it is sometimes called, need not be one that must eventually succeed. On the test in *Karanja v. Karanja*, supra, the Court does grant leave to appeal.

15. In terms of Order 50 rule 6 of the Civil Procedure Rules, which applies to succession proceedings by virtue of section 63 of the *Law of Succession Act*, on extension of time, costs follow the event:

“Power to enlarge time [Order 50, rule 6.]

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

16. The appeal, to the Court of Appeal ought to have been filed by a Notice of Appeal within fourteen (14) days in terms of Rule 75 (2) of the Court of Appeal Rules as follows:

“75. Notice of appeal

1. Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.
2. Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”

17. The applicant must, therefore, in terms of Order 50 rule 6 of the Civil procedure Rules pay the costs of this application for extension of time to be agreed or taxed in default of agreement.

## Orders

18. Accordingly, for the reasons set out above, the applicant’s application dated 20/6/2023 is allowed in following terms:

1. The Protestors/applicants are granted leave of court to appeal from the Judgment of the Court herein dated 29<sup>th</sup> November 2018.
2. The Protestors/applicants shall file and serve the Notice of Appeal within the next seven (7) days.



3. The Protestors/applicants shall file the Record of Appeal within sixty (60) days.
4. In default of the terms in orders (2) and (3) above, the leave to appeal herein granted shall lapse and be of no effect.
19. The Protestors/applicants shall pay to the Petitioner/respondent the costs of this application for leave and extension of time to file appeal out of time to be agreed or taxed in default of agreement.
20. File closed.

Order accordingly.

**DATED AND DELIVERED THIS 31<sup>ST</sup> DAY OF JANUARY, 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

**APPEARANCES:**

Mr. Ashaba for Mutuma J. for Protestors/Applicants.

Ms. Kerubo for the Petitioner.

