



**In re Estate of M'Ikenda Kathumbi alias Ikenda Bururia (Deceased) (Succession Cause 688 of 2015) [2024] KEHC 379 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 379 (KLR)

*(FORMERLY MERU HC SUCC. NO 460 OF 2013)*

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
SUCCESSION CAUSE 688 OF 2015**

**LW GITARI, J**

**JANUARY 25, 2024**

**IN THE MATTER OF THE ESTATE OF M'IKENDA  
KATHUMBI ALIAS IKENDA BURURIA (DECEASED)**

**IN THE MATTER OF**

**ALBERT MBAKA IRAMBU ..... RESPONDENT**

**RULING**

1. Before this court is the application dated 3<sup>rd</sup> March, 2023 seeking the following orders:
  - a. That the application be certified urgent deserving to be heard on priority bases for the exparte orders and that service be dispensed with in the first instance.
  - b. That pending hearing and determination of this application there be a stay of execution and/ or implementation of the judgment delivered hereof on 24<sup>th</sup> January, 2023.
  - c. That the Applicant be granted leave by this Honourable Court to appeal to the Court of Appeal Nyeri against the judgment of this Honourable Court delivered on 24<sup>th</sup> January, 2023.
  - d. That the costs of this application be provided for.
2. The Application is premised on the grounds on the face of it and it is supported by the affidavit sworn on the same 3<sup>rd</sup> March, 2023 by the 1<sup>st</sup> Applicant/Intended Appellant on her own behalf and on behalf of the 2<sup>nd</sup> to 4<sup>th</sup> Applicants/Intended Appellants. The 1<sup>st</sup> Appellant depones that the Applicants/Intended Appellants desires to seek another opinion in the Court of Appeal regarding the issues raised in this cause. The Applicant thus prays for the application to be allowed.
3. The application is opposed by the Replying Affidavit of the Respondent sworn on 13<sup>th</sup> June, 2023. The Respondent depones that there is no prima facie case to merit the Applicants' intended appeal. That the Respondent and his other siblings stand to suffer prejudice if the intended appeal is allowed.



According to him, the instant appeal has been made in bad faith and it is only meant to stop and prevent the Respondent from enjoying fruits of his successful judgment. Further, that the Applicants never sought leave of the court for extension of time before filing the instant application. That as such, it is only fair for the present application to be dismissed with costs.

4. The application was canvassed by way of written submissions. The Applicants filed their submissions on 6<sup>th</sup> October, 2023 while the Respondent filed his submission on 11<sup>th</sup> October, 2023.
5. It was the Applicants' submission that they were greatly aggrieved by the imminent consequence and/or implication of the judgment delivered by this Court on 24<sup>th</sup> January, 2023. That the Applicants are now desirous to seek the opinion of the Court of Appeal and that since there is no automatic right of appeal to the Court of Appeal from a probate court, it is requisite and in the interest of justice for the present application to be allowed as prayed.
6. On behalf of the Respondent, it was submitted that the instant application is only meant to limit the Respondent's right to immediate realization of the fruits of the judgment of this Court dated 24<sup>th</sup> January, 2023. That the Applicants have failed to establish factors that show that the execution of the impugned judgment will create a state of affairs that will irreparably affect or negate the very essence of the intended appeal. Further, that the Applicants have failed to disclose a prima facie case that meets the threshold required for the grant of leave to appeal that they seek from this Court.

#### **Issues for determination**

7. Prayers no. 1 and 2 in the instant Applicant are now spent and what is pending determination at this stage is the prayer for leave for the Applicants to appeal to the Court of Appeal.

#### **Analysis**

8. The present application is expressed to have been brought under the provisions of Rules 49 and 73 of the *Probate and Administration Rules* which provide as follows:

“49. A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit.”

“73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

9. The *Law of Succession Act* (Cap 160 of the Laws of Kenya) is silent on the right of appeal from the High Court to the Court of Appeal in succession matters. Thus, where a party intends to appeal against a decision of this court in a succession matter where the court was exercising its original jurisdiction, the leave of this Court is required. [See: *Peter Wahome Kimotho v. Josphine Mwiyeria Mwanu* [2014]eKLR and *John Mwita Murimi & 2 others v. Mwikabe Chacha Mwita & another* [2019]eKLR]
10. In granting or refusing the leave prayed for, the considerations that this Court should take into account for were laid out in the case of *Rhoda Wairimu Karanja & Another v. Mary Wangui Karanja & Another* [2014]eKLR where the Court of Appeal held that:

“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.



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. [Emphasis added]

11. Guided by the above authority, it follows that leave to appeal should normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration by the Court of Appeal. In addition, Article 48 of *the Constitution* requires this court to uphold a party's right to access justice. This right, in my view, includes the right of a party to appeal to the Court of Appeal if that is the necessary forum to seek for justice in the circumstances. Hence, the exercise of the discretion in granting leave to appeal in succession causes, should be underpinned by the right of appeal provided in *the Constitution*.
12. In this present case, the Applicants contend that they stand to suffer great prejudice, irreparable loss, and damages unless the leave to appeal to the Court of Appeal is granted. The Applicants have however not demonstrated how they stand to suffer any loss. On the other hand, the Respondent contends that the implementation of the grant as per the impugned judgment will not cause any displacement of the Applicants from their respective homes. That each of the beneficiaries of in occupation of the estate property and each of them are utilizing their own portion.
13. I have considered the instant application seeking leave to appeal to the Court of appeal, the rival affidavits in support and in opposition of the application as well as the respective submissions by the parties herein. It is good practice for courts to promote finality and expedition in the determination of probate and administration disputes and this Court has been reminded by the Respondent that this cause has been before it for over 9 years. However, the Applicants in this case have a constitutional right to appeal and leave of this Court is required for them to exercise this right. In the circumstances of this case, it is therefore my view the instant application is merited only to the extent that the Applicants should be granted leave to appeal and to file their intended appeal.

### **Conclusion**

14. From the foregoing, it is my view that the application dated 3<sup>rd</sup> March, 2023 has merits.

I order that:-

1. Leave to appeal to the Court of Appeal is granted.
2. The appeal shall be filed within 14 days.
3. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 25<sup>TH</sup> DAY OF JANUARY, 2024.**

**L.W. GITARI**

**JUDGE**

