



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of M'Mbui M'Imanyara (Deceased) (Succession Cause 454 of 2008) [2024] KEHC 3777 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3777 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
SUCCESSION CAUSE 454 OF 2008  
EM MURIITHI, J  
MARCH 20, 2024**

**IN THE MATTER OF THE ESTATE OF M'MBUI M'IMANYARA (DECEASED)**

**BETWEEN**

**STANLEY GITONGA MBIJIWE ..... APPLICANT**

**AND**

**CHARLES MBIJIWE MBUI ..... RESPONDENT**

**RULING**

1. By a notice of motion under certificate of urgency dated 11<sup>th</sup> May 2023, brought under section 7 of the [Appellate Jurisdiction Act](#) and Rule 59 of the Court of Appeal Rules, the Applicant seeks that:
  1. Spent
  2. This Honourable court do grant the Applicant leave to Appeal the decision of learned justice Muriithi delivered on 16/03/2023 out of time.
  3. This Honourable court be pleased to stay the execution of the Ruling/decision of learned justice Muriithi delivered on 16<sup>th</sup> March, 2023 and all other consequential orders pending the hearing and determination of this application inter-partes.
  4. This Honourable court be pleased to stay the execution of the judgment of justice Muriithi delivered on 16<sup>th</sup> March, 2023 and all other consequential orders pending the hearing and determination of the Applicant's appeal.
  5. Costs of this application be provided for.
2. The grounds upon which the application is premised are set out on the face of it and supported by an affidavit sworn by the Applicant on even date. He avers that the court vide its ruling of 16/3/2023 dismissed his application and went on to distribute the estate as per his co-petitioner's wishes. It is not



in dispute that the deceased herein transferred 1500 tea bushes to him in 1988, and he has been utilizing them since then without any objection. He was greatly aggrieved by the impugned ruling and wishes to lodge his arguable appeal with chances of success in the Court of Appeal, and unless the orders sought are granted, he stands to suffer irreparable damage. He undertakes to expeditiously prosecute the intended appeal in a timely manner, so as not to prejudice the Respondent.

3. The Respondent opposed the application vide grounds of opposition dated 2/6/2023 that, “The present application is in fact seeking stay of execution of the ruling delivered on 16<sup>th</sup> March 2023, but veiled as an application for extension of time for giving notice of intention to appeal out of time. An Application for stay of judgment/ruling can only be made at the Court of Appeal under Rule 5 (2) of the Court of Appeal Rules; The superior court has no jurisdiction to entertain the present application as couched since it is now functus officio; The administration of the estate is at an advanced state yet the Applicant has not proposed to offer any security for costs, which is an indicator that the present application is only purposed to frustrate the conclusion of administration of the estate.”

### **Submissions**

4. The Applicant urges that before appealing against a decision of the High Court in Succession matters, it is necessary to seek leave, and cites *Mary Wangui Karanja & Another v Rhoda Wairimu Karanja & Another* (2014) eKLR, *Peter Wahome Kimotho v Josephine Mwiyeria Mwanu* (2014) eKLR and *John Mwita & 2 others v Mwikabe Chacha Mwita & Another* (2019) eKLR. He urges the court to exercise its inherent jurisdiction under Rule 73 of the Probate and Administration Rules to meet the ends of justice.
5. The Respondent did not file any submissions.

### **Analysis and Determination**

6. The twin issues for determination are whether leave to appeal out of time and stay of execution should be issued.
7. The Respondent’s contention that the court is functus officio is unfounded. Section 7 of the Appellate Court Act expressly grants the High Court power to extend time as follows:

“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.”

8. 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 by 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.”

9. This Court would readily accept the observation of the Court in *Karanja v. Karanja*, supra, 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...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.”
10. Leave to appeal should, therefore, normally be granted where there are serious questions to be put before the Appellate Court. Indeed, the Counsel for the Respondent properly did not oppose the grant of leave.
11. The impugned ruling was made on 16/3/2023 while the instant application was filed on 15/5/2023. This Court does not find this delay as inordinate.
12. This court has looked at the draft Memorandum of Appeal attached to the application and, with respect, it takes the view that the Applicant has demonstrated prima facie a serious question, set out at ground 2 thereof, to be put for determination by the Court of Appeal. The Court notes that the serious question to be put before the Court of Appeal, or arguable case 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.
13. 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*, provides for power to enlarge time as follows:  

“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.”
14. 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:  

“(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.”
15. 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.
16. With respect, the trial court has the same jurisdiction to grant stay of execution as the appellate court to which the appeal is preferred in terms of Order 42 Rule 6 of the Civil Procedure Rules.



17. It is contended that allowing the application will frustrate the completion of the administration of the estate which is at an advanced stage. While that may be the case, the balance of convenience tilts in favour of granting stay in order to safeguard the substratum of the intended appeal. The question whether the court should grant a stay of execution pending hearing of the intended appeal must be answered in the affirmative to avoid resultant hardship as would be occasioned by a successful appeal requiring the reversal of all that may have been done in the meantime towards the distribution of the estate.

### **Orders**

18. Accordingly, for the reasons set out above, the Applicant's application dated 11/5/2023 is allowed in following terms:

1. The Applicant is granted leave to appeal to the Court to Appeal from the Ruling of the Court herein dated 16<sup>th</sup> March 2023.
2. The Applicant shall file and serve the Notice of Appeal within the next seven (7) days.
3. Stay of execution of the Ruling of 16<sup>th</sup> March 2023 is hereby granted.
4. The Applicant shall file the Record of Appeal within sixty (60) days.
5. In default of the terms in orders (2) and (4) above, the leave to appeal and stay of execution herein granted shall lapse and be of no effect.
6. The Applicant shall pay to the Respondent the costs of this application to be agreed or taxed in default of agreement.

Order accordingly.

**DATED AND DELIVERED THIS 20<sup>TH</sup> DAY OF MARCH, 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Appellant in person.

Mr. Kaumbi for the Respondent.

