



REPUBLIC OF KENYA



**Mwangi v Nganga & 2 others (Succession Cause 640 of 2004)
[2024] KEHC 3349 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3349 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 640 OF 2004
HI ONG'UDI, J
MARCH 20, 2024**

BETWEEN

JOHN WANYANGE MWANGI APPLICANT

AND

NORMAN NJUGUNA NGANGA 1ST RESPONDENT

LUCY WANGUI CHEGE 2ND RESPONDENT

GRACE WANJIRU WAWERU 3RD RESPONDENT

RULING

1. In the Summons dated 19th July 2023 by the applicant herein being the 2nd administrator of the estate, prays for the following orders;
 - i. Spent.
 - ii. That this honourable court be pleased to stay execution of the entire judgment delivered on 30th March 2023 pending hearing and determination of the appellant's intended appeal to the Court of Appeal.
 - iii. That applicant/intended appellant be granted leave to appeal to the Court of Appeal against the judgment delivered on 30th March, 2023.
 - iv. That this honourable court be pleased to make and further orders as it may deem just and reasonable.
 - v. That costs of this application.
2. The application is based on the grounds thereof and the affidavit of the applicant sworn on even date. He deposed that in the judgment delivered on 30th March, 2023, this honourable court granted the administrators 30 days to come up with a clear list of the twenty beneficiaries, deceased assets and clear



modes of distribution. Being dissatisfied with the said decision he filed a notice of appeal in the Court of Appeal and requested for copies of judgment and proceedings to enable him institute the said appeal. However, the same were yet to be supplied.

3. The applicant went on to depose that he had an arguable appeal and it was in the interest of justice that he be granted leave to file the same. Further, that if stay orders were not granted and the implementation of the judgment goes ahead he would suffer substantial loss and incase of success of the intended appeal the same would be rendered nugatory. He added that the application herein had been brought timeously and in good faith.
4. In response to the summons, the 1st and 2nd respondents who are the 1st and 3rd administrators of the estate, filed grounds of opposition dated 2nd October 2023. They stated that there was no appeal, that the said summons had no merit and was an abuse of the court process.
5. The 3rd respondent who is the 4th administrator of the estate responded to the summons by filing a replying affidavit sworn on 11th October 2023. She averred that the application herein was bad in law, made in bad faith, inept, lacked merit, an afterthought and amounted to an abuse of the court process. She added that no sufficient reasons had been advanced to warrant grant of the orders sought herein and that she would be prejudiced if the said application was allowed. She urged the court to dismiss the same with costs.
6. The application was canvassed by way of written submissions.

The Applicants submissions

7. The applicant's submissions were filed by Frank Mwangi & company advocates and are dated 30th January, 2024. Counsel identified two issues for determination.
8. On the first issue on whether the applicant should be granted leave to appeal to the Court of Appeal against the judgment delivered on 30th March 2023, counsel submitted that under section 50 of the Law of Succession there was no automatic right of appeal to the Court of Appeal except with leave of this court. The court's attention was drawn to the cases of Rhoda Wairimu Karanja & Another v Mary Wangui Karanja & Another [2014] eKLR and Ngurumani Ltd v Jan Bonde Nielson & 2 Other Court of Appeal No. 77 of 2012.
9. On the second issue on whether the court should grant stay of execution against the judgment delivered on the 30th March 2023 pending hearing and determination of the intended appeal, counsel submitted that the applicant would suffer substantial loss unless the orders of stay are granted. He added that incase of success, the appeal would be rendered nugatory as the assets of the deceased shall have been sold to third parties.
10. Counsel went on to submit that this being a succession matter dealing with preservation of the estate of the deceased mostly immovable properties there is no need of security. He cited the case of Re Estate of Mbarak Awadh Salom (Deceased) [2021] eKLR where the court held as follows:

“ This being a matter touching on preservation of land which is subject of an appeal, I find that it was not necessary neither is there need for the appellants to furnish security as a condition for stay pending appeal”

The 1st and 3rd Respondents submissions

11. The said submissions were filed by Moses N. Siagi & company advocates and are dated 23rd January, 2024. Counsel submitted that in the absence of a pending appeal, there was no basis in law for the



judgment dated 30th March to be stayed. Further, that there could never be any explanation by the applicant for failure to file his appeal within legal timelines since proceedings were ready for collection in the year 2022.

12. Counsel went on to submit that substantial loss could only be suffered by the beneficiaries and not the applicant. He urged the court to dismiss the application with costs.

The 3rd Respondent's submissions

13. The said submissions were filed by Gekong'a & company advocates and are dated 14th December, 2023. Counsel submitted that judgment was delivered on 30th March 2023 and the instant application was filed on 19th July 2023. Further, that the applicant had not given the court a proper reason why there was delay in bringing the appeal to warrant granting of leave to file the intended appeal out of time. He added that there was delay on the part of the applicant in bringing the instant application.
14. Counsel went on to submit that the intended appeal had no merit since the trial court exercised its discretion judicially and the applicant had not put forth any sufficient reason that would warrant the appellate court to disturb its decision. He added that the 3rd respondent would be greatly prejudiced if the instant application is allowed as the same was a delaying tactic and aimed at denying the beneficiaries to the estate the opportunity to enjoy the fruit of their judgment.
15. He placed reliance on the case of *Paul Musili Wambua v Attorney General & 2 Others* [2015] eKLR, where the court held as follows;

“It is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general, the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

16. Additionally, the court's attention was drawn to Order 42 rule 6 (2) (a), the cases of *Re Estate of Wanga Ole Oiyie* [2022] eKLR and *James Wangalwa & Another v Agnes Niliaka Cheseto* [2012] eKLR. In conclusion, counsel submitted that the application herein lacked merit and he urged the court to dismiss it with costs.

Analysis and Determination

17. I have considered the application, affidavits and rivalry submissions by the parties herein. In my opinion the issues arising for determination are as follows: -
 - i. Whether leave sought to appeal out of time is merited
 - ii. Whether execution of the judgment delivered on 21st September 2023 should be stayed pending the intended appeal.
18. The Court of Appeal in the case of *Francis Gachoki Murage v Juliana Waindi Kinyua & another* Civil Appeal No. 139 of 2009 held thus:

“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. In this case, the appellant is appealing against an order of distribution of the deceased estate. That order is capable of execution as a decree of the court; thus following the dicta in the *Makhangu v Kibwana* [1996-1998] 1 E.A 168 case, the appellant can be said to have an automatic right of appeal.”

19. In the case of *Rhoda Wairimu Kioi & Ano v Mary Wangui Karanja & Another* (supra), the Court of Appeal stated:

“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 its original jurisdiction with the leave of the High Court or where the application for leave is refused, leave with 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 probate and administration disputes....that leave of the High Court in succession matters is necessary in the former’s exercise of its original jurisdiction and that where that application for leave has been rejected by the High Court, it can be made to this Court.”

20. The courts have analyzed the above cited authorities and applied the same and the unanimous conclusion is that indeed, there is need and indeed legal requirement that appeals from the High Court to the Court of Appeal in succession causes lie with the leave of the High Court. Such leave, as was held in the *Rhoda Kioi* case (supra) was desirable for purposes of expeditious disposal of succession causes in order to bring disputes to an end and allow families to settle.

21. Moreover, if the high court declines to grant the leave sought by an applicant then he/she will be at liberty to seek for the same in the appellate court. In *John Mwita Murimi & 2 Others v Mwikabe Chacha Mwita & Another* [2019] eKLR, the Court of Appeal re-affirmed this position by holding as follows:

“...Under the *Law of Succession Act*, there is no express automatic right of appeal 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...” (sic)

22. In the instant case, the intended appeal arises from the decision of this court as to who are the beneficiaries and the mode of distribution of the deceased’s estate. In my opinion, the beneficiary who is aggrieved has a right to appeal, which is however not automatic. I have perused the draft Memorandum of Appeal and noted that it has raised substantive points of law for consideration by the Court of Appeal. The respondents will not suffer any prejudice and it is in the interest of all the parties that the dispute is brought to an end expeditiously. Section 47 of the *Law of Succession Act* empowers this court to make such orders as may be just and expedient. Therefore, I opine that the applicant should be given an opportunity to pursue the appeal.

23. Lastly, on the issue as to whether execution of the Judgment delivered on 21st September 2023 should be stayed pending appeal, it is clear that the objective of stay of execution is to prevent substantial loss from befalling the applicants; ordinarily, it is to prevent the appeal from being rendered nugatory. Such is a lawful and reasonable reason to limit the respondents right to immediate realization of the fruits of judgment. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR: -

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant



as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

24. The applicant herein has stated that he will suffer substantial loss if the stay is not granted and the appeal would be rendered nugatory as the assets of the deceased shall have been sold to third parties. The 1st and 2nd respondents on their part argued that substantial loss could only be suffered by the beneficiaries and not the applicant. The 3rd respondent on the other hand, argued that she would be greatly prejudiced if the instant application was allowed as the same was a delaying tactic and aimed at denying the beneficiaries to the estate the opportunity to enjoy the fruit of their judgment.
25. The court in its Judgment gave the four administrators (the Applicant included) 30 days within which to file a clear list of the twenty beneficiaries, the deceased's assets and a clear mode of distribution. This was on 30th March, 2023. I have perused the record and do not see any compliance with this order. Instead we have the present application and the one dated 3rd July, 2023.
26. In view of the issues the Applicant intends to raise in his Appeal in the Court of Appeal, I find it prudent that the order for stay of execution sought be allowed to enable him ventilate his grievances in the higher court.
27. However, for purposes of expediting the process, I will limit the period of stay. The application dated 19th July 2023 is therefore granted and the following orders made:
 - i. Leave is granted to the Applicant to file an Appeal against the Judgment delivered on 30th March, 2023. The same should be filed within 14 days.
 - ii. There shall be stay of execution of the Judgment delivered on 30th March, 2023 limited to 90 days. If there be any need for extension the same be sought from the Court of Appeal.
 - iii. Costs in the cause.
28. Orders accordingly

DELIVERED, DATED AND SIGNED THIS 20TH DAY OF MARCH, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI
JUDGE

