



**In re Estate of Sarastino M'chabari Mukabi alias Chabari Ukabii (Deceased)
(Succession Cause 58 of 2016) [2024] KEHC 6611 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6611 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
SUCCESSION CAUSE 58 OF 2016**

LW GITARI, J

MAY 24, 2024

**IN THE MATTER OF THE ESTATE OF THE LATE SARASTINO
M'CHABARI MUKABI ALIAS CHABARI UKABII (DECEASED)**

BETWEEN

JOHN NJERU MBARE APPLICANT

AND

MARGARET KARIMI CELESTINO RESPONDENT

RULING

1. There has been several applications by the applicant. It is important to list these applications
 1. Summons dated 11/1/2021 and filed in court on 12/1/2021. The applicant was seeking an order that the respondent be ordered to file the accounts of the estate. The ruling on the application was delivered on 24/6/2021.
 2. The applicant then filed a summons dated 13/10/2021. The applicant was seeking various orders main ones being rejection of account and that the appointment of the Executrix of the estate be suspended. The court gave directions that the summons be canvassed by way of written submissions. However before the court could give its ruling the applicant filed a summons dated 28/2/2022 and effectively so to speak arrested the ruling.
 3. Summons dated 28/2/2022, it was filed under a certificate of urgency. It was a summons for revocation of grant. To this application a Pre-liminary Objection was raised by the respondent mainly on the ground that the summons was 'res judicata'. It was based on the ground that a similar application was filed on 14/2/2019 and the same was heard and dismissed on 1/7/2019, vide a ruling by Justice Limo. I did give a ruling on Pre-liminary Objection and ruled that the summons was indeed res judicata.



4. On 13/4/2023, the court gave a date for a ruling in the application dated 12/2/2021. The ruling was to be delivered on 8/6/2023. Before the court could deliver its ruling, the applicant filed a Notice of Motion dated 6/6/2023. As a result of this back and forth by the applicant in filing multiple applications, this court in some situations wrote two rulings due to the confusion created. Be that as it may the present ruling relates to the Notice of Motion dated 6/6/2023 filed by Mutua Eboso & Company Advocates. The Motion is brought under Article 50(1), Article 164(3) of the Constitution 2010, Jurisdiction Act (sic) Rule 73 P & A Rules and all other enabling provisions of the law. It seeks orders that –
 1. That the Honourable Court be pleased to grant leave to the firm of Mutua Eboso & Co. Advocates to come on record and the same being granted, Counsel be deemed to be properly on record the applicant/Intended Appellant herein.
 2. That this Honourable Court be pleased to grant leave to the Applicant/Intended Appellant to appeal its ruling of 13th April 2023 to the Court of Appeal.
 3. That pending the filing of the Intended Appeal to the Court of Appeal by the Applicant/Intended Appellant this Honourable court be pleased to issue Inhibition Orders inhibiting all dealings on the deceased estate L.R. No. Karingani/Ndagani/655 and/or any of its subdivisions thereof (if any).
 4. That upon grant of orders (2) and (3) above this Honourable court restrains the respondent from trespassing into, interfering and or further interfering with the Applicant/Intended Appellant occupation and us of L.R No.Karingani/Ndagani/655.
2. The application is based the following grounds:-
 1. In a ruling delivered on 13 April, this Honourable Court struck out Applicant’s summons for revocation or annulment of grant dated 28 February 2022 in limine.
 2. As the record will reflect, the said ruling was founded on the erroneous position that the Applicant’s summons for revocation was res judicata despite the court noting that the previous application for revocation dated 14th March 2019 had been filed by one George Munene Mbare and not; John Njeru Mare, the Applicant/Intended Appellant herein.
 3. In dismissing the application for summons for revocation, this honourable court condemned the Applicant unheard as the new forensic evidence sought to be adduced the summons for revocation was not previously available to the Applicant at the time of propounding of the will even with exercise of due diligence.
 4. The question of validity of the will goes to the root of probate proceedings and therefore where the validity of a will is challenged, it is only just and fair that the court gives a fair consideration of the evidence in support of the application seeking to impeach the will.
 5. The Applicant/Intended Appellant is greatly aggrieved by the said ruling and prays for another opinion from the Court of Appeal.
 6. There is no automatic right of appeal from the decisions of the High Court to the Court of Appeal on Probate and Administration matters and hence leave is mandatory before the appeal is filed.



7. That the Applicant/Intended Appellant has an arguable appeal as more so demonstrated on the grounds herein and on the supporting affidavit of John Njeru Mbare.
 8. It is the interest of justice that the Applicant/Intended Appellant be granted leave by this honourable court to appeal against this honorable court's ruling delivered on 13th April 2023 and all consequential orders.
 9. The Appellant undertakes to expeditiously prosecute the intended appeal in a timely manner so as not to prejudice the Respondent.
 10. The Respondent has threatened to take possession and/or to commence execution of the certificate of the confirmed grant made to the Respondent on 14th February 2019.
 11. The Applicant/Intended Appellant is currently in possession and actual occupation of the contested parcel and land L.R. No. Karingani/Ndagani/655.
 12. The Respondent stands to suffer no loss and/or damage if the orders sought are granted.
3. The application is supported by the affidavit of John Njeru Mbare sworn on 6/6/2023. The contention by the applicant is that he was condemned unheard in the ruling dated 13/4/2023 as he is not the one who had filed the summons for revocation of grant. That is where the validity of the Will is challenged the court ought to give a fair consideration of the evidence in support thereof. He further depones that his appeal is arguable and has overwhelming chances of success and urges the court to grant the prayer for conservatory orders so as to preserve the substratum of the intended appeal and unless the same is granted the appeal will be rendered nugatory. He prays that the application be allowed.
 4. The Motion was seeking one main prayer that the applicant be granted leave to appeal to the Court of Appeal against this court's ruling of 13/4/2023. It was also seeking an order that the court issues an inhibition Order inhibiting all dealings on the deceased's estate, LR Karingani/Ndagani/655. It also seeks orders restraining the respondent from trespassing on the said land parcel. The Notice of Motion was opposed by the respondent Margaret Karimi Celestino vide a replying affidavit sworn on 9/6/2023. Her contention is that the right of appeal from the High Court to the Court of Appeal is not automatic and that one has to meet various conditions before such leave is granted and that the applicant has to demonstrate that there are other weight issues requiring further serious judicial consideration and interrogation by the Court of Appeal. The respondent further avers that the applicant has not demonstrated the issues he wishes to appeal against the said Ruling. The respondent further argues that the applicant has not disclosed the reasons for asking the court to issue an inhibition order on the deceased's estate LR Karingani/Ndagani/655 and the sub-divisions thereof. She contends that the applicant is a beneficiary of the said Land Parcel as his resultant parcel is LR. No. Karingani/Ndagani/8787. That it is not true that the applicant was using the said land parcel solely.
 5. The respondent further deposes that the deceased's Will which the applicant is raising issues with had many other properties. That the Land Parcel No. Karingani/Ndagani/655 does not exist as it was distributed to the beneficiaries, sub-divided and several title deeds issued including the one for the applicant. The Respondent further depones that the applicant was a party to the proceedings on the validity of the Will of the deceased, Judgment was delivered on 13/12/2018, the applicant did appeal and the intended appeal is time barred. The respondent has urged the court to find that litigation must come to an end and dismiss the application.
 6. I have considered the application. The application was not argued as the parties did not file their submission as directed by the court. The issue which arises for determination is whether this court should grant the appellant leave to appeal.



Analysis and determination:

7. This is a succession matter which is governed by the *Law of Succession Act* (Cap 160 Laws of Kenya) Section 50 of the said *Act* provides for appeals to the High Court. The Section provides: -

“(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 Kadhis’ Court in respect of the estate of a deceased Muslim and, with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.”

The Section gives the High Court jurisdiction to entertain appeals from the Resident Magistrates’ Courts and the Khadis’ Courts.

8. With respect to the decisions from the Resident Magistrates’ Courts, the decision of the High Court is final. However, with respect to the decisions of the High Court from the Kadhi’s court, an Appeal lies to the Court of Appeal in respect of any point of Muslim Law. There is no provision under the *Law of Succession Act* with regard to appeals of decision of the High Court made in its original jurisdiction to the Court of Appeal. The Act is silent on the filing of appeals from decisions made by the High Court to the Court of Appeal where it heard and determined the matter which was filed in the High Court by a party as the first part of call. The applicant relies on Article 164(3) of the *Constitution* which provides:-

“(3) The Court of Appeal has jurisdiction to hear appeals from—

(a) the High Court; and

(b) any other court or tribunal as prescribed by an Act of Parliament.”

This Article gives the Court of Appeal Jurisdiction to hear and determine appeals from the High Court.

8. The applicant has also relied on Rule 73 of the *Probate and Administration Rules*’ which provides for the saving of the inherent powers of the court. It states that nothing in the 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 the abuse of court process.

9. The *Law of Succession Act* is silent on leave to appeal. It is my view that since there is no provision on filing appeal from succession matter filed and determined by the High Court. The intention of Parliament was that an appeal shall lie to the Court of Appeal as of right and a party need not seek leave to the Court of Appeal and the High Court need not to give such leave. It means that the right of a party to appeal from the decision High Court sitting in its original jurisdiction is unfettered by the requirement to seek leave. Article 50(1) of the *Constitution* provides as follows:-

“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

10. The applicant also seeks an order restraining the respondent from trespassing into, interfering with the applicant’s occupation of Land Parcel No.Karingani/Ndagani/655 pending hearing and issue an inhibition on the said parcel of land and the sub-divisions thereof if any.



11. The leading authority for the grant of injunctions is the case of *Griella v Cassman Brown & Co.* (1973) E.A 358. For the court to grant an injunction, the party must demonstrate that he has a prima facie case with chances of success. Secondly the party must demonstrate that he is likely to suffer irreparable loss or damage. See also the case of *Bernir Investments Ltd v Commissioner General & Another* (2010) eKLR, where these requirements have been elaborated.
12. It is not in dispute that the Land Parcel No. Karingani/Ndagani/655 no longer exists as respondent has demonstrated that the said parcel of land was sub-divided in 2020 and the beneficiaries were issued with title deeds. This is demonstrated by annexure MKC-1 showing that the land was sub-divided into parcels of No.8785-8790 and the applicant's title deed is Karingani/Ndagani/8787. The applicant has not shown that he has a prima facie case with chances of success as the parcel of land does not exist. Secondly, the resultant sub-division were allocated to other persons who were not parties in this application.
13. The applicant had cited Article 164 of the Constitution. Article 164(3) of the Constitution provides:-
The Court of Appeal has jurisdiction to hear appeal from;*
 - a. High Court and
 - b. Any other court of Tribunal as prescribed by an Act of Parliament.”

As observed above there is no requirement of leave where the appeal is against decisions of the High Court exercising its original jurisdiction. A party is at liberty to appeal.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 24TH DAY OF MAY 2024.

L.W. GITARI

JUDGE

24/5/2024

