



REPUBLIC OF KENYA



In re Estate of Hezron Bernard Wamunga (Deceased) (Succession Cause 1813 of 1999) [2004] KEHC 2431 (KLR) (Family) (31 March 2004) (Ruling)

IN THE MATTER OF THE ESTATE OF HEZRON BERNARD WAMUNGA (DECEASED) [2004] eKLR

Neutral citation: [2004] KEHC 2431 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

SUCCESSION CAUSE 1813 OF 1999

MK KOOME, J

MARCH 31, 2004

RULING

1. The application before me is dated 9th February 2004 brought by the objector. The application is brought under the section 3(1) of the Civil Procedure Rules, Section 50 of the *law of Succession Act* and Rules 67 and 73 of the *Probate and Administration Rules*.
2. The applicant seeks for leave to appeal against the judgment and orders of this Honourable court made on 5th December 2003. Secondly the applicant is seeking for leave to file such Appeal out of time. The application is supported by an affidavit of the objector sworn on 9th February 2004 and also premised on the grounds raised in the summons, the gist of which can be summarized in the following:
 - 1) The objector is dissatisfied with the judgment of this court decreed on 5th December 2003 and wishes to appeal.
 - 2) That leave of the court is required for such appeal as the decision of the High court therefore is final in Succession matters
3. The application was opposed by the respondent on two grounds:
 - 1) That there is inordinate delay in bringing the application.
 - 2) There is no provision for appeal in Succession matters as Section 53 of the law of Succession clearly provides that the decision of the High Court shall be final.
4. Section 47 of the *Law of Succession* gives the High Court jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient. Hence, the High Court has jurisdiction to hear matters filed directly in addition to appeals. This matter was filed in the High Court as the Court of first instance. Cap 160 is a specialized and complete with its own rules of procedure. The Act regulates all the proceedings and provides for



procedures to be followed. Rule 63 (1) of the P & A rules provide the sections of the Civil Procedure that are applicable under the Succession Act are provided. The provision of

5. the Civil Procedure that deal with appeals are not provided for. I have however come across a decision of the Court of Appeal in Civil Appeal No 84 of 1995 Margaret Makhangu John v David John Kibwana (unreported) where the Court of Appeal had this to say:

“The position here, however, is that the appeal is from a order and not a decree. But in our view the use of the two words “decree”

and “orders” in section 47 of the Act (that is Cap 160) is significant. Had a word such as “decision” or “adjudication” been used in place of those two distinct words then clearly the High court’s decision or adjudication would have been non - appealable altogether. The effect of the case of word “decree” as Hancox J. A (as he then was) very correctly pointed out in the Income Tax decision (supra) was that the discretion of the High Court was appealable as of right under Section 66 of the Civil Procedure Act”

6. The effect of this case which is binding upon this court is that if what emanates from the High Court is a decree in its original jurisdiction in a Succession Cause, the decree is appealable as of right.
7. Reference can be made of Commissioner of Income Tax v Ramesh K. Menon 1982 – 1988 I KAR 695. Another reference can also be made of Civil Application No NAI 115 of 2000 George Itotia Nganga v Mary Wanjiku Kimaru (unreported) a ruling of A.B. Shah JA (as he then was) who reiterated the dictum in the Margaret Makhangu Case.
8. The upshot of the above is that a judgment of the High Court whose outcome is a decree, the decree is appealable as of right and therefore there is no need for the leave of this court in this regard.
9. The applicant has had a right of Appeal all along and this court does not have to give what the applicant has already.
10. The applicant is also seeking for leave to file an appeal out of time. I am of the humble view that the said leave to file an appeal out of time in the Court of Appeal should be sought in the Court of Appeal.

This is the ruling of this court.

Each party to bear their own costs.

RULING READ ON 31ST MARCH 2004.

MARTHA KOOME

JUDGE

