



REPUBLIC OF KENYA



**Obange & another v Oganyo & 4 others (Civil Appeal E033 of 2021)
[2022] KEHC 14401 (KLR) (25 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14401 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E033 OF 2021
RE ABURILI, J
OCTOBER 25, 2022**

BETWEEN

BENTER OGOLA OBANGE 1ST APPELLANT

AUSTINE JUMA AOL 2ND APPELLANT

AND

WALTER OWAGA OGANYO 1ST RESPONDENT

PETER OLANGO OGANYO 2ND RESPONDENT

ROSE AKINYI OMWARE 3RD RESPONDENT

MARK JUMA OKWADHA 4TH RESPONDENT

EUNICE ATIENO AWUOR 5TH RESPONDENT

(An application for leave to appeal to the Court of Appeal from the judgment of the High Court rendered on 26/4/2022 in Succession Matters in exercise of its appellate jurisdiction)

RULING

RULING ON LEAVE TO APPEAL

The application

1. On April 26, 2022, this Court delivered judgment in this appeal which arose from the Magistrate's Court in Succession matters, revoking the grant which was issue to the appellants herein and ordering that a fresh grant be sought, wherein all identified bonafide beneficiaries of the deceased Aol Misudia shall be included as beneficiaries. The Court also identified the dependants of the deceased who had been left out of the estate.



The Applicants' Case

2. Vide the application dated September 27, 2022, the appellants/applicants herein Benter Ogola Obanga and Austine Aol seek from this court leave to appeal to the Court of Appeal the judgment of this Court rendered on April 26, 2022. They also pray for stay of execution of the decree or judgment pending appeal and that costs to abide the outcome of the appeal. The grounds upon which the application is predicted are that the applicants wish to seek the opinion of another court and that there is no automatic right of appeal from the decisions from this Court to the Court of Appeal in succession Matters hence leave must be obtained first.
3. Further, that the applicants have an arguable appeal as shown by a draft memorandum of appeal and that it is in the interest of justice that leave sought be granted. The applicants also undertake to expeditiously prosecute the intended appeal in a timely manner so as not to prejudice the Respondents.
4. The application is supported by the affidavit sworn by Austine Juma Aol the 2nd appellant/applicant wherein he reiterates the grounds and adds that if the judgment of this Court is executed, the applicants who are the deceased's rightful beneficiaries will be disadvantaged and will suffer irreparable damage.

The Respondent's Case

5. The application is opposed by the Respondents who filed an affidavit in Reply sworn by Walter Owaga Oganyo, the 1st Respondent, on behalf of and authority of his co-Respondents.
6. On the prayer for stay of Execution, it is deposed in contention that there is no sufficient cause shown; that there is no prima facie arguable appeal; that the applicants have intermeddled with the estate of the deceased by purporting to sell the land and put into possession some named persons; and that it is those purchasers who are pushing for the challenge of Judgment of this court as interlopers, invaders and trespassers having no legitimate grievance.
7. It is further contended that the Orders sought will prejudice the Respondents' interests and that the Respondents have taken steps by setting in motion, with participation of the applicants, the process of petitioning for fresh grant but that the applicants have refused to cooperate and or attend joint meetings. That there are no substantial questions of law to be adjudicated upon by the Court of Appeal except questions of fact which cannot be entertained in a second appeal.
8. It is further deposed that leave to appeal to the Court of Appeal can only be granted when this Court is exercising original jurisdiction in succession proceedings, not appellate jurisdiction as is the case herein.
9. The respondents further contend that they have no intention of subdividing or transferring the estate land without due process and that the applicants have not offered any security for due performance of decree and that this application is encouraged by the fact that the Respondents were not ordered to pay costs of the proceedings.

The Applicant's Submissions

10. The application was argued orally with both parties' counsel relying on the affidavits for and against the application. The applicant also filed brief submissions and annexed authorities including the cases of *Rhoda Wairimu Karanja & Another v Mary Wangui Karanja & Another*[2014]; *John Mwita Murimi & 2 Others v Mukaba Chacha Mwita & Another* [2019]eKLR; and *The estate of Joey Thaara Ruria Succession Cause No 23/2018*.



11. The applicants' Counsel argued that Sections 47 of the *Law of Succession Act*, Rule 73 of *Probate and Administration Rules*, Rules 5(2)(b) 3(a)(b) of the *Appellate Jurisdiction Act* and Articles 159 (2)(a)(b) (d) & (e) and 164(3)(a) of the *Constitution* donate jurisdiction to this Court to grant leave to appeal to the Court of Appeal in succession matters from the decision of this Court. The applicant also cited this court's decision and other decisions in matters stay of execution of judgment or decree pending appeal in *Paul Makatu & Another v Quadrant Services [2016]eKLR*.

The Respondents' Submissions

12. On the part of the Respondents, it was submitted by Mr Nyamori Advocate wholly relying on the replying affidavit and arguing that the right of appeal in succession matters is in the discretion of the court. That the authorities supplied by the applicants' counsel affirm this position as they refer to matters which the High Court was exercising original jurisdiction and not appellate jurisdiction as is in the present case.
13. It was submitted that it is important to balance rights of each party, being, the right of appeal and the right to enjoy the fruits of a judgment. Mr Nyamori further submitted that the applicants are frivolous and that the lower Court and this Court properly revoked the grant. Further, that the estate has no administrator hence a new petition should be filed as directed by this court but that the applicants have refused to cooperate.
14. On the prayer for stay, it was submitted that it is not merited. Counsel prayed for costs arguing that the Respondents have spent money right from the lower Court to this Court in an estate where the deceased died in 1959 yet his estate cannot be distributed.

Analysis and Determination

15. I have considered the application which seeks stay of execution and leave to appeal to the Court of Appeal in Succession proceedings and the vehement opposition thereto.
16. The main issue for determination is whether the applicants are entitled to the orders sought for stay and for leave to appeal from this Court to the Court of Appeal in succession matters where this court is exercising appellate jurisdiction from an appeal arising from the Magistrate's Court.
17. I will commence with the question of whether the applicants are entitled to leave of this Court to appeal to the Court of Appeal as the outcome of this question will determine whether the Court should grant stay of execution of this court's judgment which is sought to be challenged.
18. Section 50 of the *Law of Succession Act* Cap 160 Laws of Kenya provides that:
 - '50(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 shall be final.
 - (2) An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi's 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.'
19. The above Section 50(1) of the *Law of Succession Act* is clear and it needs no further elaboration. It speaks to the finality to the proceedings in succession matters from the Magistrate's court to the High Court on appeal. Literally speaking, no appeal lies to the Court of Appeal from the High Court in succession matters where the High Court is exercising its appellate jurisdiction in matters emanating from the Magistrate's Court. However, an appeal lies to the Court of Appeal from a decision of the



High Court where it is exercising appellate jurisdiction in an appeal from the Kadhi's Courts and that appeal shall lie with leave of the High Court on matters Muslim law only.

20. This legal position is supported by many decisions of the High Court and of the Court of Appeal. However, there are conflicting positions on the same issue and hence, the need for this court to bring out those different positions before reaching its determination.
21. In *Julius Kamau Kithaka Vs Waruguru Kithaka Nyaga & 2 Others [2013]eKLR*, the Court of Appeal stated as follows, regarding appeals from the High Court to the Court of Appeal in succession matters:

' It is trite law that where any proceedings are governed by a Special Act of Parliament, like in this case, the *Law of Succession Act* must be strictly construed and applied. Therefore, what is in the *Law of Succession Act* is what was intended to be therein in the manner and extend it is there. What is not therein expressly is what was intended not to be there by the Legislature. I find that the applicant in this case was not required to seek leave to appeal from the High Court.'
22. In the *Rhoda Wairimu Karanja & Another Vs Mary Wangui Karanja & Another* decision, the Court of Appeal was dealing with the question of whether an appeal would lie to the Court of Appeal from the decision of the High Court exercising original jurisdiction and it held, as has been held in several other cases, that as there is no specific provision or automatic right of appeal provided for in law, a party would only appeal to the Court of Appeal from the High Court exercising original jurisdiction in Succession matters with leave of the High Court and where such leave is declined, then with leave of the Court of Appeal. The Court of Appeal in the *Rhoda Wairimu* case (supra) was also clear that the law was intended to promote finality and expedition in the determination of probate and administration disputes.
23. That situation is completely different from this case where this court has exercised appellate jurisdiction and where Section 50(1) of the *Law of Succession Act* is very clear that an appeal from the Magistrates court to this court is final.
24. The Court of Appeal in *Josephine Wambui Wanyoike Vs Margaret Wanjiru Kamau [2013]eKLR*, held that the *Law of Succession Act* is a self-sufficient Act of Parliament with its own substantive law and Rules of Procedure.
25. In the instant case, unlike in the various decisions relied on by the applicants where the leave to appeal to the Court of Appeal was being sought because the law does not specifically provide for such appeal to the Court of Appeal where the High Court has exercised original jurisdiction, the law provides for finality of the decision of this Court on appeal from the Magistrates' Court.
26. In *Hafswa Omar Abdalla Taib & 2 Others v Swaleh Abdalla Taib [2015]eKLR*, the Court of Appeal stated as follows:

' Unfortunately for the parties and despite their industry in ventilating the issue of goodwill, the determination of the appeal will disappoint them as it turns on the question of jurisdiction; that is, whether this court has jurisdiction to entertain this appeal in the first place. We appreciate that it is an issue that was not raised by any of the parties. However, it is an issue of law that has long been settled and the parties and indeed their teams are deemed to know. Accordingly, this court can suo moto raise and determine the same. Time and again it has been stated that jurisdiction is everything and if a court has no such jurisdiction, it must down its tools immediately. The Supreme court has held in several of its authorities



that a court's jurisdiction flows from the Constitution, statute, precedent or both. Such jurisdiction cannot be assumed or donated by the parties or by the fiat of the court.

In this case, the appellate jurisdiction in respect of succession causes has been donated by Section 50 (1) of the Laws of Succession Act. From this provision, it is clear that decisions from the magistrate's courts in succession causes are appellable to the High Court; whose decision on such an appeal is final.

However, the decision of the Kadhi's court are appellable to the High Court; and a party dissatisfied with the decision of the High Court on appeal can appeal further to this court (Court of Appeal) but only with leave of the High Court and in respect only on points of Muslim Law.

However, there is no mention of an appeal to this court from the decision of the High Court made in exercise of its original jurisdiction. Indeed, even Section 47 of the same Act makes no mention of an appeal to the Court of Appeal from the decision of the High Court made in the exercise of its original jurisdiction.

It is trite that where a right of appeal is not expressly provided for by the statute or the statute is silent, then a party wishing to proceed further by way of appeal should seek leave for such an undertaking from the court whose decision he seeks to impugn by way of further appeal or from the appellate court. To our mind we have no doubt at all that an appeal lies to this court from the decision of the High court in succession causes in its original jurisdiction. However, that must be with leave of the High court.

We are not however oblivious to the fact that currently, Article 164(3) of the Constitution of Kenya confers directly jurisdiction in the Court of Appeal to hear appeals from the High Court and from any court or tribunal if such an appeal is prescribed by an Act of Parliament.

This court in the case of Equity Bank Ltd v West Link MBO Ltd, (App No 78/2011) considered the purport of the said Article and concluded and rightly so in our view that it did not confer unlimited right of appeal to this court which could not be restricted by statute. To hold otherwise could certainly have far reaching consequences that may affect the administration of justice generally and the functions of this court.'

27. From the above decision of the superior Court and which binds this Court, it is clear that the applicants herein cannot carta blanche, invoke the provisions of Article 164 of the Constitution and Section 47 of the Law of Succession Act or Article 48 of the Constitution or Rule 73 of the Probate and Administration Rules and claim that they are entitled to an appeal and or with leave of this Court.
28. The decision is categorical that an appeal to the Court of Appeal with leave of this court is only available where the High Court is exercising original jurisdiction or appellate jurisdiction from appeal emanating from the Kadhi's courts. An appeal from the Magistrate's court to this court is final meaning, an appeal to the Court of Appeal is clearly restricted by Section 50(1) of the Law of Succession Act such that the High Court has no jurisdiction to stretch the right thereof by granting leave to appeal to the Court of Appeal. That decision of the Court of Appeal is clear to me as day and night. In other words, according to the above decisions, where the statute clearly restricts the right of appeal, no leave to appeal can be granted.



29. A similar situation arose in [*Alexander Dismas Kosegi Vs Grace Chebor Muhena & Another and Jacob Buhangi Elaki & 16 Others \(Interested parties\)*](#) [2020]eKLR in Eldoret HC Civil Appeal No 74 of 2017 where the learned Judge clearly stated that:

' This appeal arose from the decision of the Senior Resident Magistrate at Kapsabet in Kapsabet Succession Cause No 1 of 2012. Accordingly, and as correctly pointed by counsel for the Respondent, no second appeal to the Court of Appeal would arise therefrom, for Section 50(1) of the [*Law of Succession Act*](#) is explicit that:

'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.'

30. Therefore, despite the applicant herein citing Section 47 of the [*Law of Succession Act*](#) which empowers this court to make such orders as may be just and expedient and that the applicant should be given the opportunity to pursue the appeal to the Court of Appeal, from the above decisions, that opportunity is restricted by statute at Section 50(1) of the ([*Law of Succession Act*](#)) and it appears that this Court cannot exercise jurisdiction that it is devoid of if it opens up Section 50(1) of the [*Law of Succession Act*](#) to grant leave to appeal when there is express restriction to a second appeal being preferred from the judgment of this Court on Appeal from the Magistrates court.

31. I also observe that in some persuasive decisions of the High Court, (See [*Re Estate of Gachoki Ruoya*](#) [2020]eKLR) the Court held that there was a right of appeal to the Court of Appeal under section 50(1) of the [*Law of Succession Act*](#), with leave of this Court and the Court applied some decisions of the Court of Appeal where the latter court was referring to its jurisdiction to entertain appeals from the High Court in Succession matters where the High Court was exercising original jurisdiction.

32. I have restated above that the Court of Appeal was clear in the various of its decisions that it has jurisdiction to hear appeals from the High Court in succession matters yes but only in succession causes from the High Court exercising its original jurisdiction, which right is nonetheless not automatic, not that the Court of Appeal has jurisdiction in respect of matters where the High Court was exercising appellate jurisdiction (See *Kaboi v Kaboi & Others (2018) EA 472*; Francis Gachoki Murage v Juliana Wainoi Kinyua & Another, Civil App No 139/2009 and Rhoda Wairimu Karanja v Mary Wangui Karanja (supra) all cited in Malindi Court of Appeal CA No 22/2014 Hafswa Omar Abdalla Taib & 2 Others v Swaleh Abdalla Taib (supra).

33. I say so because even in the Rhoda Wairimu case (supra), the Court of Appeal expressly stated as follows:

'We reiterate that Section 50 of the [*Law of Succession Act*](#) is clear that decisions from the Magistrates' courts are appealable to the High Court and the decision of the High Court is final.

Decisions of the Kadhi's court on the other hand are appealable first to the High Court and only with leave and in respect of points of Muslim Law, to the Court of Appeal.'

34. The Court of Appeal in Rhoda Wairimu (supra) case went further and cited Articles 64(1) of the former Constitution and 164 (3) of the current Constitution and Section 3 (1) of the [*Appellate Jurisdiction Act*](#) and emphasized that:

' The distinction should be clear; that today the [*Constitution*](#) directly confers jurisdiction in the Court of Appeal to hear appeals from the High Court and from any Court or tribunal if such appeal to any court or tribunal is prescribed by an Act of Parliament. See Equity



Bank Ltd Vs West Link MBO Ltd, CAPP No 78 of 2011. Like the five Judge Bench in the Equity case, observed, Obiter, we do not think, that Articles 164(3) confers unlimited right of appeal which cannot be restricted by statute because that can have for reaching consequences which may affect the administration of justice generally and the function of the court.'

35. Nonetheless, and notwithstanding the above holdings from the various decisions of Court of Appeal, Indeed, the above decision of Rhoda Wairimu has been stated to be long winding and vexing. I agree that there appear to be some parts of the decision that are contradictory. The Court finally, after saying enough to demonstrate that under the Law of Succession Act that 'where 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 this court that leave of the High Court to appeal to this court in succession matters is necessary in the former's exercise of its original jurisdiction; and that where the application for leave has been rejected by the High Court, it can be made to this court'; in Jacob Kinyua Kigano v Tabitha Njoki Kigano & Another [2014] eKLR, the Court of Appeal (Visram, Koome & Odek JJA) delivered a judgment in a second appeal from the High Court which arose from the Principal Magistrate's Court at Kerugoya. In the said Appeal, the Respondent raised the issue of competency of the appeal in view of Section 50(1) of the Law of Succession Act on the finality of a first appeal at the High Court in succession matters. The Court of Appeal stated as follows at paragraphs 8, 9 and 10 of that judgment, although they dismissed the appeal for want of merit on account that it raised matters of fact in a second appeal, which the Court of Appeal could not intervene as the appellants had the opportunity to raise and have those matters of fact ventilated before the Magistrate's Court and the High Court on a first appeal:

- ' (8) We think the first issue for us to consider is whether there is a competent appeal before us. This is because jurisdiction to hear an appeal is essential; it is everything, as without it a court is supposed to down its tools. See the case of Motor Vessel 'SS Lillian', [1989] KLR 1 in which this Court succinctly set out the principles and context for determination of jurisdiction. Nyarangi, JA stated, inter alia:

'Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction'.

The above decision was in the recent past restated by the Supreme Court In the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of the Constitution, Constitutional Application No 2 of 2011 as follows:-

'The Lillian 'S' case [1989] KLR 1] establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity'.

- (9) The issue of whether there is an automatic right of appeal of orders and decrees of the High Court to the Court of appeal in Probate and Administration matters has been a vexing one because of the provisions of Section 50 (1) which provides:-



'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.'

Incidentally the Court of Appeal in another appeal involving the same parties; Margret Makhangu John vs David John Kibwana (unreported) Civil Appeal No 84 of 1995. In this earlier ruling the Judges of Appeal distinguished the words 'decree' and 'orders' when they stated as follows:-

'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 use of the word 'decree' as Hancox J A (as he then was) very correctly pointed out in the Income Tax decision was that the decision of the High Court was appealable as of right under Section 66 of the Civil Procedure Act'.

10. 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 the 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, case, the appellant can be said to have an automatic right of appeal. Also we have taken note of the fact that the appeal is against a judgment that was rendered by the High Court in March, 2012, under the Constitution of Kenya 2010. That being the case the provisions of Article 164 (1) of the Constitution, the Court of Appeal has jurisdiction to hear appeals from the High Court. This is an appeal from an order or decree from the High Court.'

36. The above paragraphs echo what the same Court of Appeal found in Rhoda Wairimu Karanja case later on in November 2014 after a lot of anxiety on the part of the Court, citing the Francis Gachoki case and stating as follows:

' We make two points from the foregoing analysis. One, a court's jurisdiction flows from either the Constitution or statute or both. See Article 164 (3) of the Constitution and section 3 of the Appellate Jurisdiction Act. It cannot be assumed or donated by parties or arrogated by the court itself. Jurisdiction is everything and if a court does not have it, it downs tools. These are well-established principles. The other point we make is the right of access to justice, now elaborately articulated in Article 48 of the Constitution requiring all state organs, of which courts are, to ensure access to justice for all persons. Bearing in mind that duty and applying the provisions of section 47 of the Law of Succession Act and Rule 47 of the Probate and Administration Rules, the High Court will, in exercise of its jurisdiction under the former grant leave to any party aggrieved by its decision to challenge it on appeal to this Court.

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. Starting with the oft-narrated story of the dispute between Baroness, Cecily Bonville who became the wealthiest heiress in England in 1501 when she was less than 1 year old after all her male relatives were slain in the battle for the English throne - the Wars of the Roses [1455-1487] and her son and heir, Thomas Grey over Cecily's right to remain the sole executrix of her late husband's estate after remarriage to a man many years her junior. King Henry VII and the entire royal council had to intervene to quell the acrimony.

Likewise, the fictitious story by Charles Dickens in Bleak House of a family dispute over inheritance in England in which the estate was depleted in a litigation which lasted several years. Virginia Wamboi Otieno (supra), is a well-known local example.

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. 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.”[emphasis added]

37. Very recently in *Khadijah Shariff Omar & Another Vs Mohammed Sharif [2019]eKLR* decided on October 11, 2019 (Ruling) Sichale JA, cited Hafswa Omar Abdalla Taib & 2 Others Vs Swaleh Abdalla Taib (supra) and Rhoda Wairimu Karanja (supra) extensively and anxiously. The learned Judge had this to say on jurisdiction and departing from the earlier decisions on the appellability of a second appeal to the Court of Appeal in Succession matters which originated from the Magistrate's Court:

' In Hafswa Omar Abdalla Taib & 2 others vrs Swaleh Abdalla Taib [2015] eKLR, this Court rendered itself as follows:

'In this case the appellate jurisdiction in respect of Succession Causes has been donated by Section 50 of the *Law of Succession Act*. From this provision, it is clear that decisions from the magistrates' courts in Succession Causes are appealable to the High Court; whose decision on such an appeal is final. However, the decision of the Kadhi's court are appealable to the High Court; and a party dissatisfied with the decision of the High Court on appeal can appeal further to this Court but only with leave of the High Court and in respect only on points of Muslim law. However, there is no mention of an appeal to this Court from the decision of the High Court made in exercise of its original jurisdiction.

Indeed even section 47 of the same Act makes no mention of an appeal to the Court of Appeal from the decision of the High Court made in the exercise of its original jurisdiction. It is trite that where a right of appeal is not expressly provided for by statute or the statute is silent, then a party wishing to proceed further by way of appeal should seek leave for such an undertaking from the court whose decision he seeks to impugn by way of further appeal or from the appellate court. To our mind we have no doubt at all that an appeal lies to this Court from the decision of the High Court in Succession Causes in its original jurisdiction. However, that must be with leave of the High Court. This proposition was



first propounded by this Court differently constituted almost 18 years ago in the case of *Makhangu vs Kibwana* [1996-1998] I EA 168. In a nutshell the court held that an appeal does lie to this Court from the decision of High Court in Succession Causes, that under section 47 of the *Law of Succession Act*, the High Court has jurisdiction on hearing a Succession Cause to pronounce decrees or orders; that any order or decree made under this section is appealable under section 66 of the *Civil Procedure Act*, either as a matter of right if it falls within the ambit of section 75 of the *Civil Procedure Act* or by leave of the Court if it did not. This decision has reigned supreme and we are not aware of any other decision to the contrary. If anything, there have been a plethora of subsequent appeals to this Court in Succession Causes but only after leave was duly obtained from the High Court whose decision is being appealed. See for instance *Kaboi vs Kaboi & Others* [2003] EA 472, *Francis Gachoki Murage vs Juliana Wainoi Kinyua & another*, Civil Appeal (Application) No 139 of 2009 (UR) and *Rhoda Wairimu Karanja vs Mary Wangui Karanja & Another* [2014] eKLR.

What runs through all these decisions is that whereas this Court has jurisdiction to entertain appeals in Succession Causes from the High Court in its original jurisdiction that right is not automatic. Where there is no automatic right of appeal, it behoves the aggrieved party wishing to appeal to seek and obtain leave to do so from the High Court and the granting of leave is a discretionary power. This is how this Court delivered itself on this question in the case of *Francis Gachoi* (supra): '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 off a judge.'

And in the case of *Rhoda Wairimu Karanja* (supra), this Court reiterated thus:-

'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. 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.'

We wholly endorse these sentiments.'

Simply put, the orders sought by the applicant of extension of time can only be granted where the Court has jurisdiction to grant the orders sought. The law does not allow me to grant orders where I do not have jurisdiction. The dispute herein was a succession matter. Section 75 of the *Civil Procedure Act* (CPA) and Order 43 of the *Civil Procedure Rules* (CPR) provides instances of when one can file an appeal as of right. In the absence of an automatic right of appeal, then leave must first be sought. Order 43 Rule 3 provides:

'An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made; or within 14 days from the date of such order.'

Outside section 47 of the *Law of Succession Act*, that Act does not provide for leave to appeal to this Court.



It is in view of the above consideration that I have come to the conclusion that the motion herein is bereft of merit. It is hereby dismissed with costs to the respondent.

38. In a latter case of *Johnstone Ombima Okwaro & Another Vs Dorcas Okwaro & 2 Others* [2019]eKLR - Makhandia, Kiage and Odek JJA decided on November 21, 2019, in the three Judge Bench Court of Appeal and stated as follows after citing various past decisions of the Court:

' Earlier on in the case of *Julius Kamau Kithaka v Waruguru Kithaka Nyaga & 2 Others* (2013) eKLR, this Court observed:

'It is trite law that where any proceedings are governed by a special act of parliament like in this case, the *Law of Succession Act*, the provisions of such an Act must be strictly construed and applied...therefore what is in the *Law of Succession Act* is what was intended to be therein in the manner it is there. What is not therein expressly is what was intended not to be there by the legislature.'

'In the instant application, we are persuaded to go along with the latter school of thought. In any event the two authorities are later in time, than the other authority. 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.'

39. In the above decision, the Court of Appeal was silent on whether such leave was available even where the appeal as intended is a second appeal to the Court of Appeal.

40. In the earlier decision of *Francis Gachoki Murage Vs Juliana Wainoi Kinyua & Another* [2010]eKLR, RSC Omollo; DKS Aganya and Alnashir Visram JJA on April 26, 2010 the Court of Appeal was categorical that Section 50(1) of the *Law of Succession Act* specifically deprives the court of jurisdiction to hear appeals under that section. They cited Section 3(1) of the AJA; Articles 64(1) of the former Constitution and Article 164(3) of the *Constitution* and they were also clear that in *Kaboi Vs Kaboi* and *Makhangu Vs Kibwana* cases, cited by the applicant are cases where the High Court was exercising its original jurisdiction and not appellate jurisdiction hence the cases were irrelevant to the issue at hand which touched on an intended second appeal.

41. From the above citations, I can't agree more that the Court of Appeal has not settled this issue of whether appeals lie to the Court of Appeal from the High Court exercising appellate jurisdiction from the Magistrate's Court under section 50(1) of the *Law of Succession Act* in view of the conflicting decisions from that Court, despite Article 164(3) of the *Constitution* being couched in the same way as Section 3(1) of the *Appellate Jurisdiction Act* and Articles 64 (1) of the former Constitution in so far as conferment of jurisdiction by the *Constitution* and statute is concerned.

42. What emerges from the above decisions is a conflicting set of determinations from the Court of Appeal with lack of clarity as to whether the judgment and decree of the magistrate's court is appealable from the High Court to the Court of Appeal with leave of the High Court or not. See also the case of *Julius Kamau Kithaka v Waruguru Kithaka Nyaga & 2 Others* [2013]eKLR where Otieno Odek JA stated as follows:

' I have anxiously considered the application, the affidavits on record and submissions by counsel and the law. I am of the view that it is crucial to consider at this juncture whether the applicant was required to have obtained leave to appeal from the High Court under Section



50 of the Law of Succession Act; and if so what is the consequence of the failure to obtain such leave. Section 50 of the Law of Succession Act provides:-

'50 (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 Kadhi's Court in respect of the estate of the deceased Muslim and with prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.'

The intended appeal herein is in respect of the decision of the High Court dismissing the applicant's application for revocation of grant. In my view what was before the High Court was not an appeal from the decision of the magistrate's court but an application for revocation of grant which clearly does not fall within the provisions of Section 50 of the Law of Succession Act. There is no provision in the Law of Succession Act which required the applicant herein to obtain leave to appeal against the decision of the High Court dismissing the application for revocation. It is trite law that where any proceedings are governed by a special Act of Parliament, like in this case, the Law of Succession Act, the provisions of such an Act must be strictly construed and applied. See Josephine Wambui Wanyoike -vs- Margaret Wanjira Kamau & another – Civil Appeal No 279 of 2003 & H Adongo & Others -vs- Savings and Loan Society (Kenya) Ltd- Civil Appeal No, 22 of 1987. Therefore, what is in the Law of Succession Act is what was intended to be therein in the manner and extent it is there. What is not therein expressly is what was intended not to be there by the legislator. I find that the applicant in this case was not required to seek leave to appeal from the High Court.'

43. The question, therefore, is, what position should this Court take? In view of the conflicting determinations above, I would invoke the provisions of Article 48 of the Constitution of the right to access justice and Article 50(1) of the Constitution on the right to a fair hearing and to have any dispute that can be resolved by application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body, and find that there is such right of appeal to the Court of appeal under section 50(1) of the Law of Succession Act but only with leave of the High Court.

44. For the above reasons, I now proceed and deliberate on the merits of the application for leave to appeal to the Court of Appeal as sought by the Appellants/ applicants herein. Leave to appeal is in the discretion of the Court and the above decisions that I have extensively referred to say so. However, since discretion must be exercised judiciously and not whimsically or capriciously, I must set out the principles applicable. The provisions of section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules do not provide for the time frame within an appeal may be filed or such leave to appeal may be sought. However, there can be no time infinitum. It is expected that a party who has the intention of seeking a second opinion from another higher court acts with alacrity and files such appeal or application for leave to appeal within reasonable time for consideration so that the decision that is intended to be impugned is not executed before such leave is sought.



45. The Court of Appeal –Karanja, Vishram and Koome JJ A in the case of *Africa Merchant Assurance Company v Kenya Power & Lighting Company Limited [2018] eKLR* stated as follows in an application for leave to appeal to the Supreme Court from the Court of Appeal:

' In point of fact, there is no provision limiting the time frame within which an application for certification, such as in this case, should be filed. The Supreme Court had the opportunity to address its mind on that issue in *Teachers Service Commission vs Simon P Kamau & 19 others [2015] eKLR* as follows:

'The Court of Appeal in its Ruling, correctly noted that there is no time- limit within which to apply for the certification of a matter as one 'of general public importance.'

20. Be that as it may, such an application should be filed within reasonable time in line with Article 259(8) of the *Constitution* which stipulates:

'If a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as an occasion arises.'

As to what amounts to unreasonable delay is to be determined with regard to the peculiar circumstances of each case.'

46. Therefore, on the merits of the application beforehand, this court observes that the judgment sought to be impugned was delivered on April 26, 2022. This application was filed on September 29, 2022, five months and four days after the judgment and decree of this Court. There is no explanation given in the affidavit sworn by the 2nd appellant/applicant, who did not even say that he had the authority of the 1st appellant to swear the affidavit on her behalf or in the submissions for the over 5 months delay. In my view, the delay is inordinate and unreasonable as no explanation has been given to the satisfaction of this court for the Court to exercise discretion in favor of the applicants.

47. I borrow the words of my sister judge Njoki Mwangi J in *Transtrade Services Limited v Sudi Salim Said & Salim Said (Suing as the Administrators Ad Litem of the Estate of Said Salim Said [2021]e KLR* where she stated as follows in an application for extension of time where discretion of the court is invoked:

- ' 31. It is this Court's finding that the applicant has not even in the least attempted to explain the three months' delay in the filing of the present application. In the said circumstances, this Court concludes that the delay is inordinate, thus inexcusable. In the case of *Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 others supra*), the Supreme Court held that-

'Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it'

32. The rules of equity dictate that equity only aids the vigilant and not the indolent. In the absence of evidence as to the steps and/or efforts undertaken towards successfully lodging an appeal within the given time prescribed by law, this Court is not persuaded by the applicant's explanation that its former



Advocates on record failed to act on its instructions to file the appeal in good time and that it should not be punished for its Counsel's mistake. That in itself does not qualify as a satisfactory explanation or otherwise as to what occasioned the delay in lodging an appeal in good time.

33. This Court therefore finds that the applicant is guilty of laches and that the unexplained three months is inordinate, thus inexcusable.'
48. Albeit the application before the learned Judge was for leave to appeal out of time, the same principles of equity apply that equity aids the vigilant and not the indolent. Further, that delay defeats equity. This is in line with the constitutional dictates under Article 159(2) (b) that justice shall not be delayed.
49. On the whole, I find and hold that the applicants have brought this application with inordinate delay which has not been explained. They are therefore not entitled to the orders sought.
50. Onto the other aspect of whether the intended appeal is arguable, this is a point that is normally argued before the Court of Appeal under Rule 5(b) of the *Court of Appeal Rules*. However, this being an intended second appeal, this court must satisfy itself that there are points of law which the applicant intends to canvass before the superior court and which this Court can also learn its mistakes from.
51. I have perused the draft intended Memorandum of Appeal. It raises purely matters of fact which the magistrate's Court and this Court have addressed. Although the starting sentences in the draft memorandum of appeal state that the High Court grossly misdirected itself both in law and fact, there are no points of law raised. All are factual matters which were settled by this Court which had the opportunity to peruse the original Petition for grant filed before the lower court by the applicants herein wherein I found as a matter of fact that the appellants lied to court regarding their filial relationship to the deceased Aol Misudia and even lied that there were no other survivors/dependants or beneficiaries yet in cross examination, they admitted that that was not the case.
52. For the above reasons, I find and hold that even if this court had the jurisdiction to grant leave to the applicants to file a second appeal, the application for leave was brought with unexplained inordinate delay which translate to an afterthought and secondly, that no points of law have been identified in the draft Memorandum of appeal for consideration by the second Appellate Court.
53. Accordingly, I find the application dated September 27, 2022 to be devoid of any merit. It is hereby dismissed. The parties hereto to file fresh Petition for grant as directed by this Court, listing all bona fide beneficiaries of the estate of the late Aol Migudia. I order that each party do bear their own costs.
54. This file is accordingly closed. I so order.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 25TH DAY OF OCTOBER, 2022

R.E. ABURILI

JUDGE

