

REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION APPEAL NO. E006 OF 2025

ROSE WARUGURU GICHIRA.....1ST
APPELLANT

BRIGITE KOENIG.....2ND
APPELLANT

VRS

BETH CYNTHIANYAWIRA MWEMA
RESPONDENT

JUDGMENT

1. This Appeal arises from the Ruling of Hon. Kaimenyi Kanyiri Principal Magistrate delivered on 05.03.2025 in Karatina magistrates' court succession cause number 96 of 2017. The applicant sought for the following orders:

- i. The Honourable Court do order Beth Cynthia nyawira Mwema to produce for good record and account detailed stamen of accounts and affairs of the estate up to and until the date of such order.
- ii. Beth Cynthia Nyawira Mwema be ordered to distribute the estate of the deceased as per the Certificate of Confirmations of Grant and to renew within six months the lease of property known as Plot No. 12391/2 which has since expired.

- iii. That upon renewal of the expired lease, Beth Cynthia Nyawira Mwema be ordered transfer the share of the property to the applicants within 30 days and to complete the administration of the deceased's estate within 120 days from the date thereof.
 - iv. That in default of (1), (2) and (3) above, the Grant of Letters of Administration Intestate made herein on 28th September 2017 and confirmed on 17th March 2021 be revoked, and the applicant be appointed administrators of the estate of the deceased herein.
 - v. That cost be in the cause.
 2. The application was based on the fact that the grant has not been transmitted within 6 months from 17.03.2021. Further that the applicant had not filed accounts from when the grant was issued on 28.09.2017.
 3. The Appellants maintained that there was an obligation under section 83 (e) and (g) of the Succession Act. The said sections provided as follows:
 - (e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(g) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

4. They stated that the Respondent had not completed giving an accurate inventory and transmission.
5. The grant was confirmed on 17.3.2021. The appellants were granted plot numbers 15335/4 and the respondent and two other beneficiaries were to get a share. Subsequently the impugned application was filed and served. The court set 25.2.2025 for Ruling/Directions. The ruling was read on 5.03.2025.
6. The court stated that the grant is largely completed. It is not the duty of the court to superintend to the distribution on the ground. The court held that it is thus *functus officio*.
7. The court found, rather paradoxically that transmission is not governed by the succession act. Transmission is under the land legislation and not under the succession rule at all. The court declined jurisdiction. It is not necessary to set out the

grounds of appeal herein. The court will proceed to analysis and subsume submissions.

Analysis

8. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held by as follows;-

.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.

9. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not

have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

10. The issue before me for determination is whether the court had jurisdiction to determine the said application and if so, whether the application is merited. the question of jurisdiction has been litigated and settled. In Owners of the Motor Vessel Lillian S v Caltex Oil (Kenya) Ltd [1989] eKLR, Nyarangi JA, as he then was stated as doth:

With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I

part with this aspect of the appeal, I refer to the following passage which will show that what

I have already said is consistent with authority: By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.

11. The supreme court has dealt with jurisdiction. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the supreme court stated as doth: -

This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant)*, Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the

jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

12. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists.

13. The questions raised were squarely within the purview of succession act. the court has a duty to deal with issues arising from death and eventual transmission of the estate. other than the prerequisites of section 83, of the Succession Act, the long title of the succession act provides as follows:

An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons; and for purposes connected therewith and incidental thereto

14. Consequently, the administration of the estates of the deceased persons is governed by the succession act. indeed section 2(10 provides of universal application of the act.

(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.

15. It is thus cavalier to send the appellants to the land court for a matter squarely within the jurisdiction of the court. Failure to conclude transmission is a ground for revocation. The same applies to failure to render accounts. section 76 of the succession Act provides as follows:

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) ...

(b) ...

(c) ...

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) ...

16. Sections 83 (e) and (g) and (i) of the Succession Act. provides as follows:

(e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(g) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate

inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.

17. The respondent was thus under duty to complete the administration of the estate in respect of all matters other than continuing trusts. The court has power to require that the administrator render a true inventory and complete succession. This has not been done 4 years later. It is more tragic that some property stands at risk of being lost due to none renewal of a lease. Consequently, it is abundantly succinct that the application was merited. It ought to have been allowed.

18. Before I depart, I need to briefly address the oft-invoked 'mantra' that courts sometimes rely on to eschew jurisdiction that they, in fact, possess. The Supreme Court of Kenya in *Raila Odinga -Vs- Iebc & 3 Others* Petition No. 5 Of 2013 cited with approval the following passage from *The Origins of the Functus Officio Doctrine with*

Specific Reference to its Application in Administrative Law by Daniel Malan Pretorious:-

...The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker...

It is a legal and constitutional obligation of any court, from the basic-level to the highest level, to preserve and protect the *adjudicatory forum of governance*, and to uphold decorum and integrity in the scheme of justice-delivery. It follows that the court's jurisdiction, in oversight of the question of conscientious and dignified management of the judicial process, and in safeguarding the scheme of the rendering of justice, will not be exhausted until the court is satisfied and it declares as much ...

19. The power to seek revocation of the Grants and for this court to revoke a Grant is stipulated in the first part of section 76 of the Law of Succession Act as doth:

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion.

20. The net effect is that the court had jurisdiction to determine the matter. Further, I agree that there is a delay in the matter. The court may not determine questions related to ELC. However, an administrator who sits on her laurels and waits for the other beneficiaries to petition another court does not understand her role. The only way to deal with is to remove such an administrator and replace her with people who can. Consequently, the respondent is removed as an administrator and replaced with the appellants. The appellants should be able to complete transmission within 6 months and take steps including requisite renewal of leases to protect the property of the estate. an administrator who cannot perform their duties

21. The court was not *functus officio*. The court ought to have exercised jurisdiction it had. There was no question

regarding environment and land court that was presented before the court. Transmission is not a question regarding involving occupation and title to land. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the supreme court stated as doth:

This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

22. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists. The succession court has duty to babysit the entire process until completion of transfer. *Functus officio* does not occur when

there are processes remaining to be concluded. The appeal is therefore allowed.

23. The next question is costs. Costs are generally discretionally. However, the discretion is not arbitrary. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

"It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

24. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows:

18. It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the

suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.

22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

25. The appellants are entitled to costs of the appeal. Costs of Ksh 45,000/= shall suffice. Each party shall bear its own costs in respect of the application in the lower court.

Determination

22. In the upshot, I make the following Orders:

- (i) The Appeal is allowed, and ruling of Hon. Kaimenyi Kanyiri Principal Magistrate delivered on 05.03.2025 in Karatina magistrates' court succession cause number 96 of 2017 is set aside. In lieu thereof the said application is allowed in terms of prayer 4.
- (ii) Consequence upon the foregoing the grant issued to the Respondent is revoked and the respondent is removed as an administrator. In her place, a new grant is issued and confirmed in the names of the appellants as new administrators.
- (iii) The appellants are entitled to costs of the appeal of Ksh 45,000/=.
- (iv) Each party shall bear its own costs in respect of the application in the lower court.
- (v) Transmission be completed within 6 months.
- (vi) This file is closed.

DELIVERED, DATED, and SIGNED at Nyeri, Virtually on this **18th** day of **November 2025**. Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the presence of: -

MS Obura for he Appellant

No appearance for the Respondents

Court clerk: Michael