

**IN THE COURT OF  
APPEAL AT NAKURU**

**(CORAM: WARSAME, MATIVO & GACHOKA,**

**JJ.A.) CIVIL APPEAL NO. E004 OF 2021**

**BETWEEN**

**SUE ROBERTS.....1<sup>ST</sup>**  
**APPELLANT CAROLINE WHITNEY.....**  
**2<sup>ND</sup> APPELLANT**

**AND**

**LEWIS PARSARE.....1<sup>ST</sup>**  
**RESPONDENT JOHNSON PARSARE.....**  
**.....2<sup>ND</sup> RESPONDENT**  
**JONES PARSARE.....3<sup>RD</sup>**  
**RESPONDENT HENRY**  
**PARSARE.....4<sup>TH</sup> RESPONDENT**  
**MOSES PARSARE.....5<sup>TH</sup>**  
**RESPONDENT SAMSON PARSARE.....**  
**6<sup>TH</sup> RESPONDENT**

*(An appeal from the orders of the High Court of Kenya at  
Kabarnet (Joel Ngugi, J.) issued on 20<sup>th</sup> November 2020*

*in*

***Succession Cause No. 3 of 2019)***

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**JUDGMENT OF THE COURT**

1. **William Godfrey Garth Roberts** ("the deceased") died intestate, survived by his widow, **Sue Roberts** (the 1<sup>st</sup> appellant), and his daughter, **Caroline Whitney** (the 2<sup>nd</sup> appellant).

2. On 11<sup>th</sup> April 2019, the Pasare brothers: Lewis Parsare, Johnson Parsare, Jones Parsare, Henry Parsare, Moses Parsare, and

Samson Parsare (the respondents) filed a citation against the deceased's estate to accept or refuse letters of administration intestate in Succession Cause No. 3 of 2019.

3. The respondents' case was that they were creditors of the deceased's estate and victims of fraud perpetrated by the deceased. They averred that some members of their family who were registered as proprietors of the land in trust for the Parsare family, sold to the deceased 3.6 hectares of land parcel BARINGO/KOKWA ISLAND/14. However, the deceased had fraudulently caused a title for the entire parcel measuring approximately 11.32 hectares to be transferred and registered in his name.
4. The appellants filed a Preliminary Objection dated 24<sup>th</sup> February 2020. The grounds of objection were, in summary: first, that the citation was defective in form and substance and misleading as to the respondents' relationship to the deceased, contrary to Section 72 of the Interpretation and General Provisions Act; second, that the respondents had no discernible interest in the deceased's estate sufficient to ground a citation under Section 66 of the Law of Succession Act, none of them being a surviving spouse, a beneficiary

entitled on intestacy, the Public Trustee, or

a qualifying creditor under that provision; third, that the respondents had failed to properly invoke the court's jurisdiction under the Probate and Administration Rules, that procedure being mandatory and not a mere technicality; and fourth, that any claim founded on the 1995 sale agreement or the alleged fraud was in any event time-barred under the Limitation of Actions Act, the relevant limitation periods having long expired.

5. The respondents filed a further application dated 6<sup>th</sup> July 2020, brought under Article 159(2)(d) of the Constitution and Section 47 of the Law of Succession Act. That application was, in substance, an attempt by the respondents to cure the jurisdictional deficiencies identified in the Preliminary Objection and to persuade the court to exercise its discretion to entertain the citation notwithstanding those deficiencies. The appellants filed a replying affidavit opposing the application.
6. The matter proceeded before Hon. Justice Edward Muriithi, who directed that the Preliminary Objection and the respondents' application be heard by way of written

submissions. Submissions were duly filed by both sides. On 28<sup>th</sup> July 2020, the learned judge directed that the respondents' application dated 6<sup>th</sup> July 2020 and the citation be held in abeyance, further

directing that by 22nd September 2020 counsel for the appellants was to have taken instructions on the filing of a petition for grant of probate.

7. When the matter was mentioned on 22<sup>nd</sup> September 2020, counsel for the appellants informed the court that a petition for the administration of the estate had been filed, being Succession Cause No. 13 of 2020; the very step which the respondents' citation had sought to compel.
8. On 20<sup>th</sup> November 2020, the matter came before Hon. Justice Joel Ngugi (as he was then). Counsel appeared for the respondents; there was no appearance for the appellants. The learned judge made the following order:

***"In view of the fact that Succession Cause No. 13 has now been filed, this matter will be marked as settled and file closed. No orders as to costs."***

9. It is against the costs limb of that order; specifically, the failure to award costs to the appellants that the present appeal is brought.
10. The appeal came up for hearing on 2<sup>nd</sup> February 2026 before this Court. Learned counsel Mr. Mwenesi appeared for the appellants and Ms. Kirui appeared for the respondents. Mr.

Mwenesi

confirmed that the appellants' written submissions dated 11<sup>th</sup> October 2024 had been filed as directed by the Court, and he relied entirely on those submissions. Ms. Kirui informed the Court that the respondents had filed written submissions dated 8<sup>th</sup> March 2021 together with a corresponding list of authorities. We note, however, that no such submissions or list of authorities appear on the record before us. Both counsel gave brief oral highlights of their respective positions.

11. On behalf of the appellants, Mr. Mwenesi submitted that the sole grievance underlying the appeal was that the learned judge had marked the matter as settled and closed the file with no order as to costs, without recording any reasons for that departure from the general principle that costs follow the cause, and without giving any consideration to the submissions and Preliminary Objection that the appellants had diligently filed. He maintained that it was precisely those documents, and not the mere filing of Succession Cause No. 13 of 2020 that had exposed the fundamental deficiencies in the citation and ultimately caused the respondents to abandon it. Counsel asserted that here a party withdraws or discontinues proceedings, costs ordinarily fall to the opposing

party.

12. Reliance was placed on the decision of this Court in **Supermarine Handling Services Ltd v Kenya Revenue Authority, Civil Appeal No. 85 of 2006 [2010] eKLR**, in which this Court, drawing on the earlier authority of **Devram Manji Daltani v Danda [1949] 16 EACA 35**, which affirmed that a successful litigant may only be deprived of costs where his own conduct led to the litigation, and that where a court makes no order as to costs without giving reasons, the appellate court is entitled to interfere.
13. On the preliminary question raised by this Court as to whether leave to appeal was required in a succession matter, Mr. Mwenesi maintained that the appellants were entitled to come directly to this Court.
14. For the respondents, Ms. Kirui submitted that Section 27 of the Civil Procedure Act vests in the court an unfettered discretion on the question of costs and that the learned judge had properly exercised that discretion. She contended that the object of the citation had been fully achieved and upon its filing, the appellants had proceeded to institute Succession Cause No. 13 of 2020, thus rendering the citation spent. She

emphasised that it was this achievement of the citation's purpose that informed

the court's decision to mark the matter as settled with no order as to costs.

15. Although both counsel addressed this Court on the merits of the costs order made by the learned judge on 20<sup>th</sup> November 2020, we consider it necessary to first resolve a preliminary but fundamental question that goes to the very jurisdiction of this Court to entertain the appeal: whether the appellants were required to obtain leave before lodging this appeal, and whether, in the absence of such leave, the appeal is competent.

16. It is now firmly settled by a long and consistent line of authority from this Court that there is no automatic right of appeal in succession matters from the High Court exercising its original jurisdiction. An aggrieved party who seeks to challenge such a decision before this Court must first obtain leave either from the High Court itself, or, where that court refuses, from this Court. This principle was authoritatively stated in **Rhoda Wairimu Karanja & Another v Mary Wangui Karanja & Another [2014] eKLR**, where this Court held as follows:

***"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."***

17. That position has since been consistently reaffirmed. In **John Mwita Murimi & 2 Others v Mwikabe Chacha Mwita & Another [2019] eKLR**, this Court struck out a record of appeal filed in a succession cause without leave, re-affirming that there is no automatic right of appeal in such matters. In **Francis Macharia Karanja & 6 Others v Virginia Muthoni Karanja [2020] eKLR**, this Court struck out a further appeal on the same ground and took the opportunity to reaffirm that on a question of jurisdiction, the Court is entitled to raise the issue and act upon it on its own motion, even where neither party has thought fit to do so; a position it had earlier endorsed in **Hafswa Omar Abdalla Taib & 2 Others v Swaleh Abdalla Taib [2015] eKLR**.

18. We are alive to the argument briefly advanced by the

appellants, that they are entitled to come  
directly to this Court. We

understand that argument to be grounded, at least implicitly, in Article 164(3) of the Constitution of Kenya, 2010, which confers upon this Court jurisdiction to hear and determine appeals from the High Court. We do not dispute that the Constitution opens the door to appeals in succession matters from the High Court to this Court. That much was acknowledged in *Rhoda Wairimu Karanja*(supra). What the Constitution does not do is dispense with the procedural requirement of leave. The requirement of leave is not a technical barrier erected to deny litigants access to justice; it is a considered practice designed to promote finality and expeditious resolution of succession disputes, which by their very nature affect families, estates, and beneficiaries awaiting certainty. The abolition of that requirement would be a matter for the legislature, and it has not seen fit to intervene.

19. Turning to the facts of this appeal, the order appealed against was made by the High Court in the exercise of its original succession jurisdiction under the Law of Succession Act. It is common ground, and the record is plain, that the appellants neither sought nor obtained leave of the High Court to appeal

to this Court. The appellants belief that they could come directly to this Court, does not constitute a legal basis for dispensing with

a requirement that this Court has consistently held to be imperative.

20. An appeal filed without leave in a succession matter is incompetent from its inception. It does not vest jurisdiction in this Court, however meritorious the grounds of appeal may appear to be. The requirement of leave is not a mere formality but a substantive jurisdictional gateway.

21. We wish to add, in fairness to the appellants, that we have noted the substance of their grievance, that is, whether a judge exercising succession jurisdiction must, under the proviso to Section 27 of the Civil Procedure Act, furnish reasons for departing from the costs-follow-the-cause principle and whether the learned judge's order of 20<sup>th</sup> November 2020 meets that standard. These are questions that may well merit judicial consideration in an appropriate case. However, the merits of the intended appeal, however arguable they may be, cannot confer jurisdiction upon a court that does not have it. Jurisdiction either exists or it does not. It cannot be acquired by implication, agreement of the parties, by the passage of time, or by the apparent strength of the grounds of appeal. In the circumstances, we are unable

to reach the merits.

22. For all the foregoing reasons, we find that this appeal is incompetent and that this Court has no jurisdiction to entertain it. The appeal is accordingly struck out. Taking into account that this is a matter arising from a family estate, and that the leave requirement, though well-established, is an area that continues to generate genuine uncertainty among litigants, we make no order as to costs.

**Dated and delivered at Nakuru this 25<sup>th</sup> day of March, 2026.**

**M. WARSAME**

.....  
**JUDGE OF**

**APPEAL J.**

**MATIVO**

.....  
**JUDGE OF APPEAL**

**M. GACHOKA, C.Arb, FCIArb.**

.....  
**JUDGE OF APPEAL**

*I certify that this is  
a true copy of the  
original.*

**Signed \_**

**DEPUTY**

**REGISTRAR**