Machuka & another v Nyangute & another (Civil Appeal 166 of 2019) [2025] KECA 538 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KECA 538 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 166 OF 2019

HM OKWENGU, SG KAIRU & HA OMONDI, JJA

MARCH 21, 2025

BETWEEN

GLADYS KEMUNTO MACHUKA ..... 1ST APPELLANT

SAMWEL MBAKA BOSIRE ..... 2ND APPELLANT

AND

CHARLES MBAKA NYANGUTE ..... 1ST RESPONDENT

DAVID OGEGA NYAKWAMA ..... 2ND RESPONDENT

(Appeal from the Ruling of the High Court of Kenya at Kisii (Majanja, J) dated 28th May, 2019 in Kisii H.C. Case No. 253 of 2013)

JUDGMENT

1. This appeal arises from a ruling which was delivered by the High Court (Majanja, J), in a summons for revocation of grant brought under Section 76 of the *Law of Succession Act*. The summons was lodged by Charles Mbaka Nyangute (Charles) and David Ogega Nyakwama (David), who are now the respondents in this appeal.

2. The respondents had sought to have letters of administration which had been issued to the appellants, Gladys Kemunto Machuka (Gladys) and Samwel Mbaka Bosire (Samwel), for the Estate of Momanyi Mbaka (deceased), and the grant confirming the letters of administration, revoked. The summons was anchored on the grounds that Gladys and Samuel obtained the letters and confirmation of the grant by failing to reveal material information. This included leaving out beneficiaries and purchasers interested in the estate such as Charles, who claimed to be the sole beneficiary of the estate of Maragia Maroro, a son to the deceased.

3. In her response to the summons, Gladys maintained that the letters of administration were properly issued, and that Charles is not entitled to the estate of the deceased as his father Nyangute Maroro who

was a son to the deceased was given land by the deceased in Tanzania where he was buried when he died and David Ogega Nyakwama is a total stranger to the estate of the deceased. Gladys claimed that the objection was an abuse of the process of the Court.

4. The objection was heard through oral evidence. Charles and David both testified in support of the revocation. Their evidence was that Charles' father, the late Nyangute Maroro (Nyangute) and the late Maragia Maroro (Maragia), were sons to the deceased; that Maragia is the father to Gladys; that the deceased had divided his land which is the only asset in his estate between his two sons, Nyangute and Maragia; that Nyangute left his portion to David to take care of as Nyangute and his family were living in Tanzania; and that David remained on the land from 1985 to 2013, when Nyangute died and David was chased away by Gladys.

5. Gladys was the only witness who testified opposing the summons for revocation. Her evidence was that her father Maragia is the only successor of the estate of the deceased; that her father being dead, she was the one entitled to the estate of the deceased; that although she had heard of relatives living in Tanzania, she never knew Charles and only came to know him during the court proceedings; and that Charles never came to see them when her parents were alive.

6. As for David, Gladys explained that she knew him as a person from the village but there was no relationship; that before his death, the deceased had sold part of the land to some purchasers including Isack Basweti Bosire, one Ombogo, and Mary Kemunto Ratemo, who is the area Chief.

7. Upon considering the evidence, the learned Judge found that the deceased having died on 28th November, 1980, before the Law of Succession came into force, his estate was governed by the Gusii Customary Law, according to which the deceased's estate devolved to his two sons, Maragia and Nyangute. The learned Judge found that there was no evidence in support of the contention by Gladys that the deceased gave Nyangute another parcel of land in Tanzania, and that the allegation was contradicted by Nyangute having left David in possession of his portion of the deceased's land for about twenty- eight years. In addition, the learned Judge found that David had no interest in the estate as he was only using the land as a licensee.

8. Further, that in applying for letters of administration and confirmation of the grant, Gladys and Samwel did not reveal that the deceased had another son, Nyangute, who was also entitled to the estate. The learned Judge therefore revoked the letters of administration and confirmation of the grant and directed that afresh grant do issue to Gladys and Charles, and that any of them be at liberty to file an application for confirmation of the grant within thirty days. The learned Judge further directed that the purchasers and other persons resident on the deceased's land, remain in possession and occupation until the summons of confirmation of grant is finalized.

9. Gladys and Samwel being dissatisfied with the ruling, lodged an appeal in which they raised three grounds. First, that the learned Judge erred in law and fact, in revoking the grant that was validly issued to the petitioners; secondly, that the learned Judge erred in law and in fact, in holding that the objector (Charles) was entitled to the estate as a beneficiary without any proof; and thirdly, that the trial Judge erred in law when he ordered for a joint grant in a flawed process.

10. The appellants filed written submissions through their advocate Asati Anyona & Company Advocates. It was submitted that Gladys is the daughter to Maragia and one of the petitioners; that she listed all the beneficiaries in the petition; that at the time of the death of the deceased only Maragia was left on the disputed land; and that although Nyangute, the other son is alleged to have lived and died while domicile in Tanzania, no death certificate was produced by Charles.

11. Further, that although Charles was alleged to have been born in Tanzania and had stayed and worked in Tanzania all his life, the estate in issue is that of the deceased and Charles never even attended his funeral nor did he know him even before his death; that although Charles alleged that David had been given authority to take care of the disputed land, David claimed to have purchased the land and produced an agreement. Gladys therefore contended that the learned Judge erred in revoking the grant and ordering that a new grant be issued in the name of Charles and Gladys; and that Charles could only inherit the deceased's estate through his father, Nyangute who was son to the deceased.

12. Gladys maintained that Charles was a stranger in the cause, that he is a Tanzanian who had not renounced his citizenship, and he cannot therefore be allowed to acquire property without following the law. The Court was therefore urged to allow the appeal and re- instate the grant which was revoked.

13. The respondents also filed written submissions through their advocate, Bosire Gichana & Company Advocates. The respondents opposed the appeal on the grounds that no appeal lies to the Court of Appeal in a succession matter as a matter of right; that leave to appeal from the superior court is mandatory as the source of jurisdiction of the court stems from the leave to appeal. The respondents relied on *Rhoda Wairimu Kioi, John Kioi Karanja v Mary Wangui Karanja & Salome Njeri Karanja* - CA Civil Appeal Nai. 69 of 2004, in which the Court held that there is no express automatic right of appeal from the decision of the High Court exercising original jurisdiction. It was argued that the Court has no jurisdiction to hear and determine an appeal unless leave was granted. The Court was therefore urged to strike out the appeal.

14. In addition, it was argued that the appeal lacks merit, because under Section 76 of the *Law of Succession Act*, the Court has power to revoke a grant of its own motion where the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case. It was submitted that the petitioners failed to disclose that the deceased had other beneficiaries and the appellant had proved that the deceased had another son, Nyangute, who was not disclosed.

15. As regards the failure to produce the death certificate for Nyangute, it was argued that that was not an issue in the objection proceedings. The respondents relied on Section 29(a) of the *Law of Succession Act*, arguing that Charles being the biological son of the deceased was entitled as a dependent of the deceased. It was argued that the learned Judge had the jurisdiction to entertain the application and took into account all relevant matters, and that his decision was well founded and the appeal should be dismissed.

16. This being a first appeal, our duty as a first appellate court is to analyze, re-evaluate, make our own findings, and come to our own conclusion bearing in mind that we did not have the advantage of seeing or assessing the demeanor of the witnesses. (See *Selle & Associates Motor Boat Company* [1968] EA 123 at page 126.)

17. Having considered the evidence that was adduced before the trial court, we find it clear that the deceased had two sons, Nyangute and Maragia, and that Nyangute resided in Tanzania with his family. It is also apparent from the evidence that the deceased's land parcel which was the only asset in the estate, was used partly by the family of Maragia and partly by David until David was thrown out after the death of Nyangute. Gladys and Charles are each claiming their respective shares of the deceased's estate as grandchildren of the deceased through Maragia and Nyangute respectively, who were sons of the deceased.

18. In applying for letters of administration to the estate of the deceased, it is clear that Gladys left out the name of Nyangute and or his beneficiaries. She contended that Nyangute was not entitled to inherit the deceased because he had been given another parcel of land in Tanzania. She also contended that

Charles was not eligible to inherit the deceased because he is a foreigner, being a Tanzanian, and that Charles did not produce the death certificate to prove the death of Nyangute.

19. Charles and David raised an issue regarding the jurisdiction of the Court to hear this appeal, contending that the appeal was improperly before the Court, no leave to appeal having been given either by the High Court or this Court. The issue of a right of appeal in appeals emanating from the High Court sitting as an original court in succession matters, is a pertinent issue that has been addressed severally by this Court. This is because whereas Section 50 of the *Law of Succession Act* gives a right of appeal in decisions from the Magistrates Courts or the Kadhis Court to the High Court, there is no similar provision in regard to a right of appeal to this Court in regard to decisions from the High Court sitting as an original court.

20. In *Peter Wahome Kimothe v Josphine Mwiyeria Mwanu* [2014] KECA 74 KLR, (delivered on 6th May, 2014), this Court (Visram, Koome & Maraga, JJA), addressed the issue as follows:

> " 14. There is no provision for appeals from the High Court to the Court of Appeal. What are provided for are appeals from lower courts to the High Court. That is why Mr. Gikonyo argued that it was necessary for the appellant to seek leave of the Court as there was no automatic right of appeal. We must state that this is clearly a grey area as it may also be argued that Section 66 of the *Civil Procedure Act* is not automatically imported into the *Law of Succession Act*. There is also a thin line to be drawn as to whether the order appealed against was a decree or a mere dismissal order that did not amount to a decree. This is because upon the dismissal of the application for revocation, the grant was confirmed thereby resulting into a decree. Be that as it may, this appeal was filed in 2011 after the *Constitution of Kenya* 2010 that gives the Court of Appeal jurisdiction to hear appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament, was operational. Under the *Constitution*, all matters from the High Court are appealable to the Court of Appeal. We therefore find that this appeal is competently before us."

21. In *Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another* [2014] KECA 255, (delivered on14th November, 2014), this Court (Musinga, Ouko & Gatembu, JJA) addressed the issue as follows:

> " The holding in the leading case of *Makhangu v Kibwana* [1996-1998] 1 EA 168 (Cockar, CJ, Kwach and Shah, JJA), which has been cited invariably in almost all the subsequent decisions is to the effect that an appeal does lie to the Court of Appeal from the decision of the High Court in probate matters; that under section 47 of the *Law of Succession Act*, the High Court has jurisdiction on hearing a matter 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 Rules or by leave of the court if it did not. It has been said in criticism of this decision that the *Law of Succession Act* is a complete code with its own rules and that there would be no justification to import into it provisions of the *Civil Procedure Act* or Rules unless expressly permitted under Rule 63 of the *Probate and Administration Rules*. This criticism, notwithstanding, as we have noted the case has not been departed from and has been widely used as a basis of giving a party a right to appeal to this court as demonstrated in the following decisions of this Court, among many others, *Kaboi v. Kaboi & Others* [2003] EA 472. *Jacob Kinyua Kigano v. Tabitha Njoki Kigano & Solomon Machere Munge* Civil Appeal No. 37

of 2013 and *Francis Gachoki Murage v. Juliana Wainoi Kinyua & Another*, Civil Appeal (Application) No. 139 of 2009. There is similarly a long line of High Court cases which have been decided along the same line, relying on the decision of *Mukhangu* (*supra*). We need only to quote this Court's (Visram, Koome & Odek, JJA) recent decision in *Francis Gachoki* (*supra*) where the Court said as follows:-

> "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."

In short, and speaking generally, the practice alluded to by their Lordships in the above passage, is that where there is no automatic right of appeal an aggrieved party wishing to appeal must seek leave to do so and the granting of leave is a discretionary power. It cannot therefore be correct to maintain that no appeal in succession causes lies to the Court of Appeal.

.....

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 Limited v West Link MBO Limited*, Civil Application No. 78 of 2011. Like the five Judge bench in the Equity case, observed, obiter, we do not think, that Article 164 (3) confers unlimited right of appeal which cannot be restricted by statute because that can have far reaching consequences which may affect the administration of justice generally and the function of the court.

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.

.....

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."

22. In *Joyce Bochere Nyamweya v Gemima Nyaboke Nyamweya & Paul Nyamweya* [2016] KECA 569, this Court (Koome, Musinga & Gatembu, JJA) stated:

> " We have considered the instant application with considerable anxiety as the appeal raises a serious point of law, nay perhaps the interpretation of Article 164 (3) of the *Constitution* regarding the Court of Appeals' jurisdiction over first appeals from the High Court on succession matters. Do appeals in succession matter require leave of the High Court? It is obvious from decided cases; there are two schools on this aspect, one as postulated in the case of;- *Rhoda Wambui Kioi* (*supra*) that appeals require leave of the High Court and the other school holds all decisions from the High Court are appealable unless provided otherwise by statute. See the case of; *Peter Wahome Kimotho v Josphine Mwinyeria Mwanu* Civil Appeal No. 52 of 2011 Nyeri (unreported). This Court was considering the same issue on whether or not an appeal lies with leave...."

23. We have deliberately quoted the above decisions extensively in order to appreciate the debate regarding the right of appeal to this court in succession matters, and the varying opinions. In our view, considering the relevant provisions of the law, and the above authorities, the Rhoda Wairimu Karanja decision puts the matter into its proper perspective as the provisions of the *Law of Succession Act*, should not be inconsistent with the *Constitution*, and must therefore be interpreted in a way that advances the purposes, values and principles of the *Constitution*. Therefore, the absence of a provision in the *Law of Succession Act* for appeals originating from the High Court to this Court does not completely exclude such appeals from this Court. In accordance with the general purport of Article 164(3) of the *Constitution*, the Court has jurisdiction to hear such appeals from the High Court. However, the right of appeal in such matters is circumscribed to the extent that it is not an automatic right. There must be leave to appeal given either by the High Court or this Court. In this case, no leave to appeal was sought either from this Court or the High Court. Therefore, the appeal before us is incompetent, as the appellants have not properly invoked the jurisdiction of the Court.

24. As was stated by Nyarangi, JA, in *Owners of the Motor Vessel "Lilian S". v Caltex Oil (Kenya) Limited* [1989] KLR 1:

> " ... 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."

25. The respondents ought to have raised the issue of jurisdiction as a preliminary issue under Rule 86 of the *Court of Appeal Rules*. That Rule empowers the Court to strike out the notice of appeal or the appeal where either no appeal lies or some essential step in the proceeding has not been taken, but that Section requires that the respondent moves the Court within thirty days of the service of the notice of appeal. Having failed to move the Court within the stated period, the respondents only raised the issue at the hearing of the appeal.

26. Our finding that the appeal is incompetent because the appellants did not obtain leave to appeal is sufficient to dispose of this matter at this stage, as we ought to down our tools, since we have no jurisdiction to proceed further. Be that as it may, since we have heard the full appeal, we proceed to add that under Section 76 of the *Law of Succession Act*:

> " A grant of representation whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an interested party of its own motion:
>
> a. that the proceedings to obtain the grant were defective in substance;
>
> b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
>
> c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
>
> d. that the person to whom the grant was made has failed after due notice and without reasonable cause either; ...
>
> e. that the grant has become useless and inoperative through subsequent circumstances."

27. The summons for revocation of the grant, that was filed by Charles and David, was anchored on Section 76(b) of the *Law of Succession Act*, as it was alleged that the petitioners gave false information that they were son and daughter of the deceased and also concealed information by failing to reveal that the deceased had another son Nyangute Maroro apart from Maragia Maroro whose name was given, and that in addition, the petitioners failed to include Charles Mbaka Nyangute as a beneficiary of the deceased's estate. Therefore, the issue that arises is whether the respondents established that the grant which was issued to Gladys and Samwel was obtained fraudulently by making a false statement or concealment of some material facts.

28. The appellants conceded that they did not include Nyangute or Charles in the petition, and even in the application for confirmation of the grant. Gladys tried to justify the omission by claiming that Nyangute had been given another parcel of land in Tanzania by the deceased, but this was neither proved nor would it justify the exclusion of Nyangute. If Nyangute had no interest in the estate, he should, if alive, have signed an appropriate renouncement of his right to the estate. Nor does the fact that Charles is a Tanzanian justify his exclusion from the estate. It is clear that there was concealment of material information, and therefore, the learned Judge was right in revoking the letters of administration and confirmation of the grant.

29. The upshot of the above is that we uphold the judgment of the High Court, as the appeal is incompetent and has no merit. It is accordingly dismissed with costs.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF MARCH, 2025.

HANNAH OKWENGU

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JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR