**M'Inkanatha v Kaberia (Civil Appeal 22 of 2019)**
**[2025] KECA 1429 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1429 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NYERI**

**CIVIL APPEAL 22 OF 2019**

**W KARANJA, J MOHAMMED & LK KIMARU, JJA**

**JULY 31, 2025**

**BETWEEN**

**KITHURE M'INKANATHA ..... APPELLANT**

**AND**

**ZAKAYO KABERIA ..... RESPONDENT**

***(Being Appeal from the judgement of the High Court at Meru (A.Ong'injo, J.) dated and delivered on 29th November 2018 in HC Succession Cause No. 143 of 2005)***

## JUDGMENT

1. Kithure M'Inkanatha, the appellant herein, is dissatisfied with the judgment of the High Court at Meru dated 29th November 2018 whereby the court appointed both the appellant and the respondent as administrators of the estate of Elijah M'Ikanatha Baithaki (deceased), and ordered that a certificate of confirmation of grant be issued distributing 2.6 acres of LR No Ithima/Ntunene/20 to the respondent and the balance thereof to the appellant.

2. Aggrieved, the appellant filed his memorandum of appeal, in which he raises five grounds of appeal. He faults the learned Judge for, inter alia, erring in law and in fact: in deciding the administration of the deceased's estate contrary to the *Law of Succession Act*; in awarding a stranger to the deceased equal shares of the deceased's estate with the deceased's son; in inferring trust where none was proved by the respondent; in failing to find that the respondent did not qualify to be a beneficiary of the deceased and in deciding the whole case against the weight of evidence.

3. In summary, the deceased M'Ikanatha Baithaki died on 8th November 1999 domiciled at Kirindara and according to Form P & A 5 left behind the following survivors: Kithure M'Inkanatha - son; Nkoroi M'Inkanatha - Daughter and Mukawamuthara M'Inkanatha - Daughter.

4. The appellant, Kithure M'Inkanatha petitioned for Letters of Administration in Maua Principal Magistrate's Court Succession Cause No. 12 of 2000 to which the respondent, Zakayo Kaberia

objected by an affidavit sworn on 17th July 2001 for reasons that the appellant was a cousin to the respondent and nephew to the deceased and that the deceased held part of the land in trust of him.

5. From the record before us, the matter originated from the Magistrate's court where the original grant of letters of administration was issued. An application for confirmation of the Grant was filed and the same was listed for hearing, but was adjourned severally. It would appear, from the scanty proceedings, that an objection to the confirmation was filed, and after several adjournments, it was heard before the High Court. The transition from the Principal Magistrate's Court to the High Court is not clear. What is clear from the proceedings, however, is that what was heard before the High Court was the objection. There is, therefore, an overlap in the matter and it is not clear whether the High Court heard the matter in its original jurisdiction or not as the process giving rise to the objection proceedings emanated from the subordinate court. We did not see any order transferring the matter from the subordinate court to the High Court.

6. At the trial court, the evidence of the respondent was that his grandfather, M'Lintari, was the brother of the deceased and that the respondent's witnesses including a senior chief confirmed that the deceased gathered and consolidated his land together with his late brother's land and registered it in his name. It was also the evidence of the respondent's witness that the mother to the respondent remained in the land belonging to her father all along even after the deceased registered it in his name and when she died her body was buried in the said parcel of land.

7. The respondent contended that L.R./Ithima/Ntunene/20 which is 2.06 acres should be shared by the appellant and her sisters as agreed. The Assistant Chief of Kirindara wrote a letter dated 8th July 2003 to that effect while the Chief of Ntunene location also wrote a letter dated 1st July 2005 to that effect.

8. PW5 and PW6, the Senior Chief and the Assistant Chief of Kirindara, respectively, testified that they issued instructions saying that the mother of the respondent was the only heir to her father's estate and, therefore, the portion of land due to the respondent's grandfather which ought to have gone to the deceased mother of the respondent should automatically be inherited by the respondent.

9. Upon hearing the matter, the High Court delivered a judgment on 29th November, 2018 in which it found that the respondent's claim was genuine and that the evidence in his favour overwhelmed the appellant's mere and selfish denials. The learned Judge appointed both the appellant and the respondent as administrators of the estate of Elijah M'Ikanatha Baithaki (deceased) and ordered that a certificate of confirmation should issue distributing 2.6 acres of LR No Ithima/Ntunene/20 to the respondent and the balance to the appellant.

10. This appeal was virtually heard with learned counsel Mr. Kimathi Kiara and Mr. Haron Gitonga appearing for the appellant and the respondent, respectively. Counsel for the appellant had filed submissions dated 6th December 2022 which he sought to rely on. As for the respondent, Mr. Gitonga had filed submissions dated 1st February 2023 which he also sought to rely on.

11. Mr. Gitonga submitted that the present appeal was bad in law, lacked merit and was an abuse of the court process and ought to be dismissed. Counsel pointed out that no leave was sought prior to the lodging of the appeal hence this Court lacked jurisdiction to entertain the appeal. Finally, counsel submitted that the learned Judge properly appreciated the evidence and the issues for determination prior to arriving at a conclusion, which was sound. Counsel urged us to dismiss this appeal.

12. In response, the appellant submitted that after the judgment they applied for stay of execution which was granted and that in the same breath they assumed that leave to appeal had been granted. He urged the Court to allow the appeal on merits.

13. It would, therefore, appear that counsel for the respondent conceded that leave was necessary before moving this Court on appeal.

14. As the issue on leave challenges the jurisdiction of this Court, the same should be determined first.

15. This Court and the Supreme Court have previously emphasized that a Court seized of a matter only exercises jurisdiction as is donated to it by *the Constitution* or statute or both. The Court must not assume jurisdiction by fiat or at the behest of litigants. In Samuel Kamau Macharia & another -vs- Kenya Commercial Bank Limited & 2 others [2012] eKLR, the Supreme Court affirmed as much in the following terms:

> "A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings... 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."

16. The origin of this succession matter was the subordinate court pursuant to section 47 of the *Law of Succession Act*. As stated earlier, it is not clear whether the High Court in dealing with the matter was exercising its original or appellate jurisdiction.

17. Section 50 of the *Law of Succession Act* provides thus:

> "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 a deceased Muslim and, with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal."

18. A plain reading of this section leaves no doubt that appeals from both the Magistrate's and Kadhi's courts are appealable to the High Court. Appeals to this Court are only permitted, with leave, in relation to those matters emanating from Kadhi's Court and only in respect of points of Muslim Law. Further, section 47 of the *Law of Succession Act* which provides for the original jurisdiction of the High Court is silent on any appeals to the Court of Appeal.

19. The *Law of Succession Act*, does not provide for appeals, from decisions of the High Court, in exercise of its appellate jurisdiction, on appeals from the Magistrates' Courts, and, in fact, states, at section 50(1), that the decisions of the High Court on appeal are final. However, it is now settled, by such decisions as Makhangu - vs- Kibwana [1996-1998] 1 EA 168 (Cockar CJ, Kwach & Shah, JJA) Rhoda Wairimu Karanja & another -vs- Mary Wangui Karanja & another [2014] eKLR (Musinga, Ouko & Gatembu, JJA) and Sophia Salim Gathiaka & another -vs- Mariam Mbuve Abdalla & 9 others [2016] eKLR (Mwilu, Azangalala & Kantai, JJA), that an appeal lies from a decision of the High Court, sitting as an appellate court, to the Court of Appeal. Whether the appeal is as of right, or leave is required, is still unsettled. Therefore, to be on the safe side, it would be prudent to obtain leave.

20. To this end, we are persuaded by the holding of this Court in John Mwita Murimi & 2 others -vs- Mwikabe Chacha Mwita & another [2019] eKLR that:

> " It is not in dispute that the impugned ruling in this matter arises from a succession cause and the respondents did not obtain leave to appeal. The decision in Makhangu -v- Kibwana [1996] EA cited by the respondent was succinctly considered by this Court in Rhoda Wairimu Karanja & another -v- Mary Wangui Karanja & another [2014] eKLR. In analyzing the Makhangu decision (supra), this Court held 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."

21. It is our conclusion that leave to appeal was a pre-requisite in the present appeal. We note that the same was not obtained prior to filing of this appeal and the grant of stay orders by the High Court did not translate to leave to appeal as understood/misunderstood by the appellant's counsel. Consequently, we find that this Court lacks the requisite jurisdiction to hear and determine this appeal. For the stated reason, this appeal is struck out with costs to the respondent.

**DATED AND DELIVERED AT NYERI THIS 31ST DAY OF JULY 2025.**

**W. KARANJA**

**.....**

**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

**.....**

**JUDGE OF APPEAL**

**L. KIMARU**

**.....**

**JUDGE OF APPEAL**

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

**SIGNED**

**DEPUTY REGISTRAR**