**Nkoliai v Ololparaki & 2 others (Civil Appeal 63 of 2019)**
**[2023] KECA 1228 (KLR) (6 October 2023) (Judgment)**

Neutral citation: [2023] KECA 1228 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAKURU**

**CIVIL APPEAL 63 OF 2019**

**FA OCHIENG, LA ACHODE & WK KORIR, JJA**

**OCTOBER 6, 2023**

**BETWEEN**

**TALENG'O NKOLIAI ..... APPELLANT**

**AND**

**SAMUEL TAISWA OLOLPARAKI ..... 1ST RESPONDENT**

**SIMON LEPARAKWO PARAKI ..... 2ND RESPONDENT**

**ICHAEL OLOINYEIYE PARAKI ..... 3RD RESPONDENT**

***(Being Appeal from the Ruling of the High Court at Narok (J.M. Bwonwong'a, J.) dated and delivered on 29th January 2019 in HC Succession Cause No. 9 of 2018)***

## JUDGMENT

1. Taleng'o Nkoliai, the appellant herein, is dissatisfied with the ruling of the High Court which dismissed his Application for revocation of a grant issued to the 1st respondent, Samuel Taiswa Ololparaki, and the 1st respondent's mother, Kiramatisho Enolooparaki, on March 6, 2009 in Kilgoris Principal Magistrate's Court Succession Cause No 2 of 2008. In his Memorandum of Appeal, he raises six grounds of appeal which we condense as follows: that the learned Judge considered extraneous matters as opposed to legal issues and facts; that the learned Judge erred in failing to find that failure to disclose material facts was a fatal error; that the learned Judge took into account irrelevant factors hence arriving at an erroneous finding; that the learned Judge erred in finding that the suit property belonged to the deceased who was survived by two wives; and, that the learned Judge erred in assuming jurisdiction over trust. The appellant sought to have his appeal allowed and the certificate of grant issued to the 1st respondent and the 1st respondent's mother revoked. He also prayed for the costs of the appeal.

2. In summary, on May 9, 2018, the appellant herein took out summons for revocation of the grant issued to the 1st respondent and his mother by the Principal Magistrate's Court at Kilgoris. The appellant's

summons for revocation was on the grounds that the grant was obtained fraudulently by making false statements thereby leaving or concealing relevant information regarding other beneficiaries and that the Principal Magistrate's Court lacked jurisdiction to entertain the succession cause altogether. The summons for revocation was opposed *vide* a Replying Affidavit of the 3rd respondent, Michael Oloinyeiye Paraki, and the matter proceeded to full hearing with the appellant calling three witnesses while the respondents called four witnesses.

3. Upon hearing the application, the High Court delivered a Ruling on January 29, 2019 in which it found that it had jurisdiction to hear the matter as it concerned revocation of a grant and was not an environmental dispute or a dispute concerning use and occupation of land. The Judge further held that the administrators properly identified the beneficiaries as per section 38 of the *Law of Succession Act* and consequently shared out the estate in terms of that section hence the procedural requirements of the law were complied with. In making these findings, the Court also pointed out that the family members had consented to the manner in which the estate was distributed and that no one from that family objected to the mode of distribution. The trial court finally ordered that parties bear their own costs of the proceedings.

4. This appeal was virtually heard on June 14, 2023 with Mr Opondo holding brief for Leina Morintat for the appellant and Mr O.M. Otieno appearing for the respondents. Counsel for the appellant had filed Submissions dated June 12, 2023 which he sought to rely on. As for the respondents, Mr Otieno indicated that the appellant's Submissions had been served upon him on the morning of the hearing but he was ready to respond orally to the appellant's Written Submissions. In his submissions, Mr Opondo reiterated the grounds of appeal as enumerated in the Memorandum of Appeal. He urged that failure to disclose material facts to the succession court was fatal to the grant and that the learned Judge ought to have allowed the appellant's Application for the revocation of the grant on that ground. According to counsel, it was immaterial whether those not disclosed would eventually benefit or not but rather, that the mandatory participation of all beneficiaries had not been achieved. In response to the argument by counsel for the respondent that failure to obtain leave before filing the appeal was fatal to the appeal, counsel was of the view that this Court has unlimited appellate jurisdiction and leave was not required before filing an appeal. Mr Opondo concluded by urging us to allow this appeal.

5. In response, Mr Otieno 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 of the High Court properly appreciated the evidence and issues prior to arriving at a sound conclusion. Counsel urged us to dismiss this appeal.

6. Although the grant sought to be revoked was issued by a magistrate, the application for revocation was handled by the High Court in its original jurisdiction. This being the case, our mandate as a first appellate court transcends both issues of law and fact as per rule 31(1)(a) of the *Court of Appeal Rules, 2022*. As a first appellate court, we are to independently re-consider the facts vis-à- vis the applicable law and legal principles and arrive at our own independent conclusion – see *Abok James Odera & Associates vs John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR.

7. Upon reviewing the Memorandum of Appeal, the Submissions by counsel and the record, this appeal raises two issues for determination, namely, whether leave to appeal was required; and whether the appellant established a case before the High Court for the revocation of the grant issued with respect to the estate of the deceased Letuk Nkoliai Oloolparaki.

8. The issue as to whether leave was required for the present appeal to subsist is one that borders on questioning the jurisdiction of this Court. 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."

9. In succession cases, like the one before us, appellate jurisdiction is governed by section 50 of the *Law of Succession Act* which provides thus:

> "50. Appeals to High Court
>
> 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 a deceased Muslim and, with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal."

10. 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 does not provide for any appeals to the Court of Appeal.

11. It is without doubt that the *Law of Succession Act* is silent on whether an appeal would lie to this Court. We also appreciate that the *Law of Succession Act* came into force prior to the 2010 *Constitution*. Post 2010, article 164(3) of the *Constitution* clothes this Court with jurisdiction to hear appeals emanating from the High Court. The interpretation and application of this constitutional provision in as far as appeals to this Court in succession matters are concerned has seen the emergence of two different schools of thought. While some benches have held that leave to appeal is a mandatory pre-requisite before an appeal can be lodged in this Court, others have held that such leave is not mandatory as article 164(3) of the *Constitution* provides for the right of appeal. The decisions in *Rhoda Wairimu Karanja & another vs. Mary Wangui Karanja & another* [2014] eKLR and *Julius Kamau Kithaka vs Waruguru Kithaka Nyaga & 2 others* [2013] eKLR are examples of the divergent views on this subject.

12. In our view, this is an appeal from an Application for revocation of a grant which was heard by the High Court exercising its original jurisdiction. The *Law of Succession Act* provides for no express right of appeal in such a matter. This then brings into play the competing interests between article 163(4) of the

*Constitution*, section 3(1) and (2) of the *Appellate Jurisdiction Act*, and the *Law of Succession Act*. The *Law of Succession Act* provides for no right of appeal to this Court while section 3(1) of the *Appellate Jurisdiction Act* limits appeals to this Court from the High Court as prescribed by an Act of Parliament. Article 164(3) of the *Constitution* on the other hand clothes this Court with the jurisdiction to hear and determine appeals emanating from the High Court or any other court or tribunal as prescribed by an Act of Parliament.

13. This Court in *Equity Bank Limited v West Link Mbo Limited* [2013] eKLR considered the import of article 164(3) of the *Constitution* and stated thus (per M'Inoti, JA):

> " This is not to suggest that, by dint of art 164(3) all and sundry decisions of the High Court are appealable to the Court of Appeal. A holistic and purposive reading of Constitution, particularly the right to access justice (in this context "appellate justice" (article 48)) the right to fair hearing (article 50), judicial authority (article 159) and article 164(3) itself would accommodate limitation of what is appealable, if the limitation satisfies the requirements of article 24 of the *Constitution*. I certainly do not subscribe to the view that all limitations on the right of appeal set by statutes that antedate the *Constitution* are saved lock, stock and barrel by clause 7 of the sixth schedule of the *Constitution*."

14. Considering the same question in the same judgment, Musinga, JA stated that:

> "I do not think that it was the intention of the drafters of the *Constitution* to fling open the doors of this Court to all manner of decisions from the High Court. That would unnecessarily clog the Court system. A filtering mechanism to control matters that go to an appellate Court is necessary."

15. We agree with the reasoning of the learned Judges as reproduced above in as far as the interpretation of jurisdiction of this Court as granted in article 164(3) of the *Constitution* is concerned. In our view, the fact that section 50 of the *Law of Succession Act* predates the *Constitution of Kenya, 2010* , the same ought to be interpreted in a manner that conforms and lives to the objects of the *Constitution*. It follows then that whereas article 164(3) of the *Constitution* provides for the right of appeal to this Court, section 3 of the *Appellate Jurisdiction Act* gives room for the Legislature to enact other complimentary legislations to oversee the implementation of the right to appeal in the various distinct realms of disputes such as civil, family and probate, bankruptcy and company law.

16. As we have already stated, the *Law of Succession Act* is silent on the right of appeal from a decision of the High Court in exercise of its original jurisdiction. Nevertheless, article 48 of the *Constitution* on the right to access justice; 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, article 164(3) of the *tConstitution* on the right of appeal would provide a solution to this grey area. However, in recognition of the need to filter matters that come to this Court for consideration, the requirement for leave, just as is provided for in respect to appeals on Muslim law under section 50(2) of the *Law of Succession Act*, ought to be called to play in appeals emanating from the High Court. Whereas a litigant in a succession matter should not be denied the right of appeal, such a right ought to be subjected to scrutiny in order to justify the expenditure of the limited resources on the matter. 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."

17. 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. Consequently, this Court lacks the requisite jurisdiction to hear and determine this appeal. For the stated reason, this appeal is struck out.

18. Having said that, even if we were to consider the appeal on merit, the outcome would be a dismissal. We say so for two reasons. First, the appellant herein lodged an application for revocation nearly ten years from the time the grant was confirmed in March 2009. No explanation was tendered by the applicant for the inordinate delay in bringing the action. We appreciate that as stated by this Court in *Benson Champu Kaparewo vs. Rabeca Chepkuto Kiperenge* [2019] eKLR, section 76 of the *Law of Succession Act* does not provide timelines for lodging an application for revocation of grant, however, a party seeking to lodge such an application should at least declare when they got to know of the existing grant and reasons, if any, which occasioned the late filing of the application. The appellant herein filed Kisii ELC Suit No. 251 of 2013 laying claim to the parcel of land which is subject of these succession proceedings. He must have known of the existence of the present grant by the time of filing the suit or soon thereafter. He, however, failed to disclose what barred him from taking out summons for revocation at that time and why he had to wait until 2018 to lodge his application. Succession proceedings by their nature are meant to unlock property held in the name of a deceased person for the use of the beneficiaries. Estates of deceased persons should therefore not be subjected to unending litigation. A person who wishes to contest a grant should step forward as soon as they learn of the grant.

19. Second, that upon considering the evidence on record, the alleged material non-disclosure on the part of the 1st respondent and his mother was not material as to warrant revocation of the grant. Just like the High Court, we find credible the evidence of the 1st respondent who testified as DW2 that the appellant herein did not have claim over the property in question as interest in the said land transferred to the 1st respondent's mother upon the death of the deceased. The evidence of DW1 Kiptang Olenaponga who was a member of the area land adjudication committee supported the 1st respondent's claim and was credible in as far as the ownership of the land in question was concerned. Further, the appellant claimed, without any supporting evidence, that he was acting in the interest of the sisters to the 1st respondent. This claim could not be substantiated as none of the said sisters was called to affirm their alleged grievances with the manner in which the administrators distributed the estate. This failure weighed on the backdrop of section 107 of the *Evidence Act* was detrimental to the appellant's case. The appellant failed to prove the grounds for revocation as raised in his application. It is our view therefore that the learned Judge correctly rejected the appellant's summons for the revocation of the grant issued to the 1st respondent and this matter.

20. On the issue of costs, we take note of the conduct of the appellant in taking out the summons for revocation, lodging the present appeal as well as the long period of time between the confirmation of

grant in 2009 and the time of taking out the summons for revocation in 2018. In our view, this is a case where costs must follow the event despite the litigants being family members. The appellant shall therefore bear the costs of this appeal.

21. The upshot of the foregoing is that this appeal is hereby struck out with costs to the respondents. It is so ordered.

**DATED AND DELIVERED AT NAKURU THIS 6TH DAY OF OCTOBER, 2023**

**F. OCHIENG**

**.....**

**JUDGE OF APPEAL**

**L. ACHODE**

**.....**

**JUDGE OF APPEAL**

**W. KORIR**

**.....**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**