



**Dada v Dada & 3 others (Civil Appeal E090 of 2021)
[2023] KECA 1318 (KLR) (10 November 2023) (Judgment)**

Neutral citation: [2023] KECA 1318 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E090 OF 2021
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
NOVEMBER 10, 2023**

BETWEEN

SAKINABHAI SULEIMAN KASSAM DADA APPELLANT

AND

LATIFA SULEIMAN KASSAM DADA 1ST RESPONDENT

ZAINAB SULEIMAN KASSAM DADA 2ND RESPONDENT

KHATOONISHA SULEIMAN KASSAM DADA 3RD RESPONDENT

FATIMA SULEIMAN KASSAM DADA 4TH RESPONDENT

(Being an Appeal against part of the ruling and orders of the Honourable Lady Justice M. Thande dated 17th February, 2021 and delivered by the Honourable Justice J. N. Onyiego at Mombasa on 5th March, 2021 in High Court Succession Cause No. 255 of 2001)

Decisions made under the Succession Act are not subject to leave requirements prescribed by the Civil Procedure Rules unless expressly provided.

The case involved a succession dispute where the trial court ordered partial distribution of the deceased's estate before a full accounting of investments made using estate assets. The petitioners argued that the distribution was premature and that the valuation of the estate property, separate from subsequent developments, was necessary for equitable distribution. The Court of Appeal upheld the need for transparency in estate administration, finding that accounts and property valuation were essential to ensure compliance with the Law of Succession Act and fairness among beneficiaries.

Reported by John Ribia

Law of Succession – appeals – appeals to the Court of Appeal – procedural law – requirement for leave under the Civil Procedure Rules – applicability of requirement to disputes arising from the Law of Succession Act - whether the requirement for leave to appeal to the Court of Appeal under Order 43 of the Civil Procedure Rules applied to decisions made under the Law of Succession Act, which were not governed by the Civil Procedure Rules



- whether subjecting decisions under the Law of Succession Act to the leave requirement under the Civil Procedure Rules caused injustice or contradicted the purposive interpretation of the Constitution - whether failure to seek leave to appeal to the Court of Appeal within the prescribed time rendered the appeal invalid - whether the Law of Succession Rules took precedence where inconsistencies between the procedural frameworks of the Law of Succession Rules, the Civil Procedure Rules, and the Court of Appeal Rules created ambiguity regarding the requirements for leave to appeal, timelines for filing, and the applicable procedural standards in succession matters - Law of Succession Act (cap 160) section 47; Court of Appeal Rules, 2022 (cap 9 Sub Leg) rule 86; Civil Procedure Act (cap 21) section 66; Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 43; Constitution articles 20(2),(3); 48, 50; 15(2)(d), (e); 163(4); 262(7); Constitution (repealed) section 64(1).

Law of Succession – estate accounts – distributions from funds from an estate – requirement to account before distribution - whether the trial court prematurely ordered the distribution of funds from the estate without a full accounting of the investments made using estate assets - Law of Succession Act (cap 160) section 47.

Law of Succession – valuation – valuation of estate property - whether the valuation of the estate property, distinct from subsequent developments, was required to ensure equitable distribution among beneficiaries and compliance with the Law of Succession Act - Law of Succession Act (cap 160) section 47.

Brief facts

The case arose from a succession dispute concerning the partial distribution of a deceased's estate. The trial court had ordered the distribution of funds from the estate without fully accounting for investments made using estate assets. Beneficiaries argued that the distribution was premature, lacked transparency, and failed to adhere to the Law of Succession Act. They further contended that the valuation of the estate property, distinct from developments on it, was necessary for equitable distribution. The trial court's decision prompted an appeal, focusing on whether proper procedures were followed and whether leave to appeal was required under conflicting procedural rules.

Issues

- i. Whether the requirement for leave to appeal to the Court of Appeal under order 43 of the Civil Procedure Rules applied to decisions made under the Law of Succession Act, which were not governed by the Civil Procedure Rules.
- ii. Whether subjecting decisions under the Law of Succession Act to the requirement to seek leave before filing an appeal to the Court of Appeal under the Civil Procedure Rules contradicted the purposive interpretation of the Constitution.
- iii. Whether failure to seek leave to appeal to the Court of Appeal within the prescribed time rendered the appeal invalid.
- iv. Whether the Law of Succession Rules took precedence where inconsistencies between the procedural frameworks of the Law of Succession Rules, the Civil Procedure Rules, and the Court of Appeal Rules created ambiguity regarding the requirements for leave to appeal, timelines for filing, and the applicable procedural standards in succession matters.
- v. Whether the trial court prematurely ordered the distribution of funds from the estate without a full accounting of the investments made using estate assets.
- vi. Whether the valuation of the estate property, distinct from subsequent developments, was required to ensure equitable distribution among beneficiaries and compliance with the Law of Succession Act.

Held

1. Jurisdiction was an issue that has to be determined *in limine* (at the threshold) since if a court had no jurisdiction in a matter it could not take further steps in the matter. A court's jurisdiction flowed from either the Constitution or legislation or both. Thus, a court of law could only exercise jurisdiction as conferred by the Constitution or other written law. It could not arrogate to itself jurisdiction exceeding that which was conferred upon it by law.



2. Where the law provided that an appeal only lay with leave, the failure to seek and obtain leave deprived the court of jurisdiction to entertain the appeal. A court of law could only exercise jurisdiction as conferred by the Constitution or other written law.
3. The jurisdiction of the Court of Appeal was derived from article 163(4) of the Constitution to determine appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament. The position must be contradistinguished from section 64(1) of the repealed Constitution which had jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law.
4. The Court of Appeal under the 2010 constitutional regime had the jurisdiction to entertain appeals from the High Court, unless there existed a law restricting or limiting that jurisdiction. The prevailing pre- 2020 jurisprudence was that since jurisdictional mandate of the court was restricted to matters in which the law conferred jurisdiction on the court, unless there was a specific legal provision expressly conferring jurisdiction to the court, the court had no jurisdiction. The law was not quite settled.
5. The requirement for leave to appeal to the Court of Appeal was prescribed in order 43 of the Civil Procedure Rules which provided for orders from which an appeal lay as of right and those from which leave was required. However, that order applied to orders made under the rules. Since decisions made under the Law of Succession Act were not orders made under the Civil Procedure Rules, order 43 did not apply to such decision in so far as the requirement for leave to appeal was concerned.
6. Subjecting the decisions made under the Law of Succession Act to the requirement of leave under the Civil Procedure Act was likely to cause injustice and defeat the objective of seeking leave as set out above. Since decision under the Law of Succession Act were not made pursuant to the Civil Procedure Act and rules made thereunder, the argument that since there was no express right of appeal provided by the Law of Succession Act, even an application for leave to appeal may not be sought since it was not one of those decisions for which leave to appeal was permissible under the Civil Procedure Act would run counter the purposive interpretation of article 163(4) of the Constitution. The court must adopt an interpretation which did not impose a forced and strained interpretation of the provisions of the Law of Succession Act leading to a result which seems contrary to the constitutional provisions and principles and common sense on one hand and on the other hand, one which did no violence to the language used and yet furthers the true intention of the Legislature and the Rules Committee.
7. Where it was alleged that leave to appeal ought to have been sought and obtained but was not so sought, it would follow that no appeal lay and that was an issue that fell squarely within the ambit of rule 86 of the Court of Appeal Rules. The proviso to rule 86 required that in those circumstances an application for striking out ought to be made within 30 days of service of the Notice or Record of Appeal. The proviso to the rule was introduced by the 2010 version of the Court of Appeal Rules and its rationale was that the provisions of the proviso to rule 80 of the Court of Appeal Rules were applicable to both the Notice of Appeal and the appeal and that must be plainly so from the logic of it, although the wording could have been, expressly, better put.
8. The starting point was the mischief that the amendment of the rule was intended to address and that was the practice by parties, either by design, negligence or pure inaction, waiting for days, months or even years until the very minute when the appeal was called out for hearing, only to seek the striking out of either the Notice of Appeal or the appeal or both. If a person affected by an appeal chose to strike out the Notice of Appeal or the appeal or either of them, they were free to do so under the amended rule, but only within 30 days of service thereof; if it was an application in respect of the Notice of Appeal, then the challenge should be made within 30 days of service thereof and if it was the appeal itself, the same limitation applied. The appellant did not require the leave of the court to file the instant appeal.
9. Being the first appeal, the first appellate was to reconsider the evidence, evaluate it and draw its own conclusion of facts and law. The first appellate court would only depart from the findings by the trial



- court if they were not based on evidence on record; where the trial court was shown to have acted on wrong principles of law.
10. Where the estate of a deceased person had been distributed to the beneficiaries and each beneficiary had been given his or her share of the estate, further developments or improvements of the respective shares of the beneficiaries whether individually or collectively, could no longer be subject of distribution as if the property was part of the estate of the deceased. However, where there was no distribution but the estate property was invested, the proceeds of that investment formed part of the estate of the deceased since the administrators as trustees of the estate were properly within their mandate to invest the property in a manner that improves the value of the estate. At the trial court, the learned Judge found that there was no transparency in the management of the estate of the deceased and that the material before the court was inadequate to establish how the estate was administered and whether it was administered in accordance with the wishes of the deceased.
 11. The court was not satisfied that the estate of the deceased had been distributed. In those circumstances it cannot be said that the trial court erred in her decision directing that accounts be taken. None of the beneficiaries stand to be prejudiced as the accounts, if properly presented would reveal who had been fully paid and whether or not the investments in the flats ought to inure to the benefit of all the beneficiaries or to only a few who ploughed their entitlements into the said developments.
 12. The plot on which the flats were constructed belonged to the estate and hence the need to undertake the valuation of the plot separate from the developments. The trial court having expressed reservations as to the manner in which the estate was administered ought not to have partly distributed the estate at that point in time by ordering that the executrix distributes of Kshs 14,846,797.00 and that Kshs 6,279,159 be shared amongst the beneficiaries in accordance with the will of the deceased. It would have been more prudent that the partial distribution be kept in abeyance pending the rendering of the account in which event the matter would be clearer for the purposes of final distribution.
 13. The court upheld the decision of the trial court save that the Court of Appeal set aside the order directing the executrix to distribute of Kshs 14,846,797.00 and that Kshs 6,279,159.00 be shared amongst the beneficiaries in accordance with the will of the deceased.

Appeal partly allowed; no order as to costs.

Citations

Cases

Kenya

1. *Equity Bank Limited v West Link Mbo Limited* Civil Application 78 of 2011; [2013] KECA 320 (KLR) - (Mentioned)
2. *Gitau, Samuel Njora & 2 others v Maria Wangari Gathere & 2 others* Civil Application 48 of 2020; [2021] KECA 677 (KLR) - (Explained)
3. *Josephine Wambui Wanyoike v Margaret Wanjira Kamau & Mercy Njeri Wanyoike* Civil Appeal 279 of 2003; [2013] KECA 443 (KLR) - (Mentioned)
4. *Karanja, Rhoda Wairimu & another v Mary Wangui Karanja & another* Civil Application 69 of 2014; [2014] KECA 255 (KLR) - (Explained)
5. *Kimotho, Peter Wahome v Josephine Mwiyeria Mwanu* Civil Appeal 52 of 2011; [2014] KECA 74 (KLR) - (Mentioned)
6. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR); [2012] 3 KLR 199 - (Applied)
7. *Matiba v Moi* Civil Application 241 of 1993; [1993] KECA 1 (KLR) - (Explained)
8. *Mohamed, Mahmoud Jabane v Highstone Butty Tongoi Olenja* Civil Appeal 2 of 1985; [1986] KECA 21 (KLR) - (Applied)
9. *Murimi, John Mwita & 2 others v Mwikabe Chacha Mwita & another* Civil Appeal 93 of 2018; [2019] KECA 422 (KLR) - (Mentioned)



10. *Muvake, Peter Nyaga v Joseph Mutunga* Civil Application 86 of 2015; [2015] KECA 475 (KLR) - (Explained)
11. *Okebe, David Ojwang & 11 others v South Nyanza Sugar Company Limited & 2 others* Civil Appeal (Application) 139 of 2008; [2009] KECA 441 (KLR) - (Explained)
12. *Salasia, Sarah Achieng v Fred MO & 2 others* Civil Application 188 of 2004; [2005] KECA 346 (KLR) - (Explained)

Regional Court

1. *Mbogo & another v Shah* [1968] EA 93 — (Applied)
2. *Rene Dol v Official Receiver of Uganda* [1954] 21(1) EACA 116 — (Applied)
3. *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 — (Explained)

Statutes

Kenya

1. Civil Procedure Act (cap 21) section 66 — (Interpreted)
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 43 — (Interpreted)
3. Constitution of Kenya articles 20(2),(3); 48, 50; 159 (2)(d), (e); 163(4); 262 (7) — (Interpreted)
4. Constitution of Kenya (Repealed) section 64(1) — (Interpreted)
5. Court of Appeal Rules, 2010 (cap 9 Sub Leg) rule 80 — (Interpreted)
6. Court of Appeal Rules, 2022 (cap 9 Sub Leg) rule 86 — (Interpreted)
7. Law of Succession Act (cap 160) section 47 — (Interpreted)

Advocates

Mr Hamisi h/b for Mr Karega for the appellant.

Mr Asige for the respondent.

JUDGMENT

1. The deceased herein, Suleiman Kassim Dada died testate on October 14, 2001 leaving behind a widow by the name Sakinabhai S Kassim Dada, sons Hussein, Mohamed, Iqbal and Daughters, Latifa, Fatuma, Saida Said, Yasmin and Khatunisa. Vide a will dated September 3, 2002, the deceased appointed his wife (widow) as the executrix. The grant was issued September 3, 2002 and was confirmed on March 3, 2003 with orders that the estate was to be distributed in accordance with the will.
2. According to the will, the deceased expressed his wishes as follows;
 1. To Sakinabai and Yasmin 2/3, undivided share of Mombasa/Block/XV/101 (Plot 101) constituting of two storey building.
 2. In the event of Yasmin's death, her share was to go to her surviving siblings
 3. To Mohamed his 9/21, share in plot No 3763/VI/MN Portreiz
 4. To all his children, Popat bothers milling business
 5. Plot No 570/1/III/MN Mtwapa to be sold. 1/3 of the proceeds to be placed in a trust fund to assist family, relatives, friends and persons in need for welfare and education purposes. The fund was to be dissolved after 15 years whereupon the proceeds to be divided amongst his children.
 6. 2/3 proceeds of sale to be divided amongst his children.



7. To his children, all funds in his bank accounts after payment of all debts, funeral and testamentary expenses
 8. The deceased's sons were to get double of what daughters got. The deceased also appointed Mohamed, Latifa, Saida and Zainab as trustees for Yasmin who is of unsound mind.
3. Pursuant to the said confirmation of grant and sale of Mtwapa property, 5 beneficiaries namely, Khatunisa, Saida, Mohamed, Yasmin and Hussen agreed to develop 16 apartments above the existing shops and apartments on plot No Mombasa/Block XV/101. The apartments were to be divided to each beneficiary according to their contribution.
 4. At some point, the executrix sought to be discharged from the role of executorship as in her opinion she had fully completed the distribution of the estate. However, some beneficiaries sought some orders directing the executrix to give a full and accurate statement of accounts in respect of the estate. The court directed the executrix to submit an accurate and full statement of accounts a fact which she did comply with but disputed by some beneficiaries. The court then appointed the firm of Ambale & Company Certified Public Accountants to audit the estate and an audit report was filed on September 13, 2019. Parties were directed to file submissions on the contentious issues which were broken down as follows;
 1. The amount contributed by 5 beneficiaries for the construction of flats on Plot No 101.
 2. The existence of Kshs 14,632,597 held in fixed deposit account
 3. Ksh 6,279,159 in Barclays Bank UK
 4. Popat brothers, milling business.
 5. Yasmin's shares
 5. In her ruling, the learned judge found that since the construction of flats on Plot No 101 was done from the proceeds of the sale of the Mtwapa property, which itself was owned by the deceased, it was not possible to separate the flats developed on Plot 101 from the estate of the deceased. As regards the sum of Kshs 14,632,597 held in fixed deposits, the learned Judge found that such deposits existed being the proceeds from the sale of the Mtwapa property as found by the audit report. Accordingly, she found that there was no mistake in disclosing the same and directed that the same be distributed in accordance with the Will of the deceased which was that it be divided in accordance with the proportions set out in the Will. Regarding the sum of Kshs 6,279,159/- in Barclays Bank, UK, the court found that there was no explanation from the executrix why the same had not been distributed. Further, there were no details about the alleged losses that led to the purported closure of Popat Brothers, the milling business. As regards the share of Yasmin, who was of unsound mind and for whose estate two trustees were appointed, Mohamed, Latifa, Said and Zainab, who were pulling in different directions, the court found that it was necessary that the Executrix gives account of how Yasmin's share had been dealt with.
 6. In the end, the court found that there was no transparency in the management of the estate of the deceased and that the material before the court was inadequate to establish how the estate was administered and whether it was administered in accordance with the wishes of the deceased. Notwithstanding her age and literacy level, the court found that the Executrix was in a fiduciary position hence was responsible to the court and to the beneficiaries to produce in court accounts showing her dealings with the estate to the satisfaction of the court. In her view, the learned Judge found that the accounts produced fell short and that further evidence was needed to be adduced to enable the court arrive at a just decision. Having considered respective parties' submissions, the court delivered its ruling on March 5, 2021 directing as follows;



- a. the executrix shall forthwith distribute of Ksh 14,846,797 and Kshs 6,279,159 shall be shared amongst the beneficiaries in accordance with the will of the deceased.
 - b. this matter shall be mentioned on March 16, 2021 for directions on the taking of viva voce evidence.
 - i. From the executrix on the administration of the estate
 - ii. On the cost of construction of the plots on Mombasa /Block XV/101 and contribution of each of the 5 beneficiaries
 - iii. On the operations of Popat brothers milling business
 - iv. Yasmin's shares
 - v. From the executor funds in the fixed accounts.
7. We heard this appeal on the court's virtual platform on July 4, 2023 during which learned counsel, Mr Hamisi held brief for Mr Karega for the appellant while Mr Asige for the respondent. Both counsel relied on their written submissions and made oral submissions on the jurisdictional issue of whether leave was required to appeal and whether it was sought and obtained.
 8. On behalf of the appellant it was submitted that the issues that were to be determined by the learned Judge were whether the Kshs 14,846,279 and the apartments built on Plot No Mombasa/Block XV/101 form part of the estate of the Deceased; and whether the learned judge exercised her discretion judiciously in giving final distribution orders in respect of the sum of KShs 14,846,279 and KShs 6,279,159 before the further evidence to be adduced through *viva voce* hearing as directed by the court.
 9. According to the appellant, the alleged Kshs 14,846,279 and the apartments built on Plot No Mombasa/Block XV/101 do not form part of the estate of the deceased, and the learned Judge sitting as a probate court did not have power to deal with them. Consequently, it was wrong for the learned Judge to direct the executrix to distribute the Kshs 14,846,279 in accordance with the Will of the deceased and to find that the apartments formed part of the estate. It was submitted that Mtwapa farm was sold and the proceeds thereof distributed in accordance with the will of the deceased; that upon distribution, the proceeds of sale ceased to be part of the estate; that some of the beneficiaries took out their money from the deposit account while others agreed to contribute their shares to a common project; that if subsequently the beneficiaries were to individually agree to contribute their shares to a common project, that common project would not form part of the estate and would not be governed by the *Law of Succession Act*; that any dispute emanating from the common project would be purely civil or commercial in nature and not one to be resolved by the probate court.
 10. It was therefore submitted that the Kshs 14,846,279.00 alleged to have been earned as interest on the fixed deposits and the apartments would be personal investments of only some of the beneficiaries; that the purported interest does not form part of the estate and is not governed by the will of the deceased; that similarly, the apartments are not succession properties and do not form part of the estate, a fact that was expressly admitted by the respondents; and that the probate court does not have jurisdiction over these two (2) assets. Any dispute concerning those investments concerns only the individuals who invested in them and the proper forum to determine such issues is the commercial court.
 11. It was submitted that in this regard, it was an injudicious exercise of discretion for the learned Judge to direct that the said investments be distributed in accordance with the Will of the deceased. The decision of the learned Judge, it was contended, was not only wrong but also manifestly unfair because distributing the investments according to the Will would unjustly enrich those who did not contribute



- anything towards the investments at the expense of those who did. If on the other hand the distribution of the investments is prorated according to the amount of individual contributions (as suggested by the respondents, it was submitted that this would be contrary to the mode of distribution contained in the will of the deceased.
12. As to the Kshs 6,279,159.00 allegedly lying in a foreign account, the existence of this amount was one of the hotly contested issues. It was submitted that the said amount was already distributed to the beneficiaries according to the Will of the deceased and the same was duly acknowledged by the respondents. It was further submitted that the learned judge correctly noted that the issues surrounding the existence of the alleged Kshs 14,846,279.00 the alleged Kshs 6,279,159.00, the apartments, the contributions made by each beneficiary, the amounts received by each beneficiary so far and generally the administration of the estate are all hotly contested and unclear to the court and that even the audited reports filed in the case fell short, and that the only way for the court to arrive at a just decision was through further evidence to be given viva voce. Notwithstanding that position, it was submitted that the learned Judge proceeded to make substantive findings and distribution orders in respect of the same items that she had called for further evidence. It was in respect of this that the Appellant contended that the exercise of discretion by the Judge was plainly wrong and injudicious because it did put the judicial system at the risk of embarrassment since it is possible that upon hearing of the further evidence viva voce, there is a reasonable likelihood that the court will not find anything wrong in the manner the estate was administered. We were therefore urged to allow the appeal.
 13. Before us, it was submitted by Mr Hamisi that the decisions cited by the respondent did not conform with the current constitutional dispensation particularly articles 20(2) and (3), 48, 50 159(2)D, 159(2)E and 262(7) of the *Constitution*. The decisions alluded to were: *Mwita Murimi and 2 Others vs Mwakibebe Chacha Mwita & another* [2019] eKLR, in which this court citing *Rboda Wairiu Karanja and another v Mary Wangui Karanja* [2014] eKLR held that in succession matters there is no automatic right of appeal without leave of the court; the decision of Nambuye, JA in *Samuel Njora Gitau & 2 others* [2021] eKLR to the effect that no appeal lies to this court in succession matters unless with leave; and *Peter Nyaga Murake v Joseph Mutunga* [2015] eKLR where this court held that without leave of the High Court, the applicant was not entitled to give notice of appeal where leave is necessary; . According to the appellant, article 164(3) changes the previous legal position in section 64(1) of the retired *Constitution* where the jurisdiction of this court flowed from statute as opposed to the *Constitution*. In those circumstances, one had to identify a legal provision permitting one to appeal. However, under the current constitutional regime, this court's jurisdiction flows from the *Constitution* itself and decisions of the High Court are appealable to the Court of Appeal as a matter of right unless there is a statute that expressly limits that constitutional right. In this case it was submitted that there is no statute that restricts the right of appeal in succession matters from the High Court to this court. In support of his submissions, learned counsel relied on the case of *Peter Wahome Kimotho vs Josephine Mwiyeria Mwana* [2014] eKLR and *Equity Bank Limited v Westlink MBO Limited* [2013] eKLR.
 14. On behalf of the respondents, it was submitted that the appeal arose from the decision of the High Court in exercise of its jurisdiction under section 47 of the *Law of Succession Act* and therefore leave ought to have been sought and granted. It was therefore contended that without leave to appeal, this court has no jurisdiction to entertain the appeal. In this regard reliance was placed on *Mwita Murimi and 2 Others vs Mwakibebe Chacha Mwita & another* [2019] eKLR, *Rboda Wairiu Karanja & another v Mary Wangui Karanja* [2014] eKLR and *Josephine Wambui Wanyoike v Margaret Wanjari Kamau & another* [2013] eKLR. The respondent also cited *Peter Nyaga Murake v Joseph Mutunga* [2015] eKLR.
 15. Based on the forgoing, we were urged to strike out the appeal with costs.



Analysis and Determination

16. We have considered the evidence on record, the written and oral submissions by and on behalf of the parties to this appeal and the authorities cited.
17. Before dealing with the merits of the appeal, the first issue for determination in this appeal is the issue of jurisdiction arising from the determination as to whether an appeal lies as of right in matters arising from succession proceedings. Jurisdiction, as it has been held, is an issue that has to be determined in limine since if a court has no jurisdiction in a matter it cannot take further steps in the matter. The Supreme Court in the case of *Samuel Kamau Macharia v Kenya Commercial Bank & 2 others*, Civil Appl No 2 of 2011, observed that:

“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 is conferred upon it by law. We agree with counsel 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.”
18. We must however, stress that where the law provides that an appeal only lies with leave, the failure to seek and obtain leave deprives this court of jurisdiction to entertain the appeal. That must be so since, as held in the above decision, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law.
19. The jurisdiction of this court is derived from article 163(4) of the *Constitution* which provides that:
 - (3) The Court of Appeal has jurisdiction to hear appeals from—
 - a. the High Court; and
 - b. any other court or tribunal as prescribed by an Act of Parliament.
20. This position must be contradistinguished from section 64(1) of the retired *Constitution* which was to the effect that:

There shall be a Court of Appeal which shall be a superior court of record, and which shall have such jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law.
21. It is therefore clear that this court, under the current constitutional regime has the jurisdiction to entertain appeals from the High Court, unless there exist a law restricting or limiting that jurisdiction. The prevailing pre- 2020 jurisprudence was that since jurisdictional mandate of this court was restricted to matters in which the law conferred jurisdiction on this court, unless there was a specific legal provision expressly conferring jurisdiction to this court, this court had no jurisdiction. But even then, the law was not quite settled. For example, this court (Omolo, JA) in *Matiba v Moi* Civil Application No Nai 241 of 1993; [2008] 1 KLR 525 took the view that since there was no written law forbidding an appeal from the High Court to the Court of Appeal, an appeal in this case would lie to this court and that an appeal lies from every decision of the High Court to the Court of Appeal unless otherwise expressly provided by the *Civil Procedure Act*.



22. The requirement for leave to appeal to this court is prescribed in order 43 of the Civil Procedure Rules which provides for orders from which an appeal lies as of right and those from which leave is required. However, that order applies to “orders made under these rules”. Since decisions made under the Law of Succession Act are not orders made under the Civil Procedure Rules, order 43 does not apply to such decision in so far as the requirement for leave to appeal is concerned. The predecessor of this court, the East African Court of Appeal, in *Rene Dol v Official Receiver of Uganda* [1954] 21(1) EACA 116 had occasion to deal with the rationale for the requirement for leave and stated that:

“The general purpose of requiring leave to appeal from some orders is to restrict appeals from minor procedural questions which do not go to the root of the litigation or determine finally the substantive rights of the parties. An order of this kind is clearly of quite a different nature. It is a final determination of substantive rights and may involve very large sums of money. On principle one would expect that an appeal should lie as of right. I think the right of appeal under section 222 of the Companies Ordinance is not subject to leave.”

23. In our view, subjecting the decisions made under the Law of Succession Act to the requirement of leave under the Civil Procedure Act is likely to cause injustice and defeat the objective of seeking leave set out above. Since decision under the Law of Succession Act are not made pursuant to the Civil Procedure Act and rules made thereunder, it may be argued that since there is no express right of appeal provided by the Law of Succession Act, even an application for leave to appeal may not be sought since it is not one of those decisions for which leave to appeal is permissible under the Civil Procedure Act. Such an interpretation, in our view, would run counter the purposive interpretation of article 163(4) of the Constitution. As held in *Rene Dol vs Official Receiver of Uganda* we must adopt an interpretation which does not impose a forced and strained interpretation of the provisions of the Law of Succession Act leading to a result which seems contrary to the constitutional provisions and principles and common sense on one hand and on the other hand, one which does no violence to the language used and yet furthers the true intention of the Legislature and the Rules Committee.

24. We associate ourselves with the decision of this court in Peter Wahome Kimotho v Josephne Mwiyeria Mwana [2014] eKLR where it was held that:

“Matters of succession are governed by the Law of Succession Act which is a complete code with its own rules of procedure known as the Probate and Administration Rules. The only provisions of the Civil Procedure Rules applicable to proceedings under the Law of Succession are those that are specifically imported under the provisions of rule 63 of the Probate and Administration Rules... 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.”



25. In any case, where it is alleged that leave to appeal ought to have been sought and obtained but was not so sought, it would follow that no appeal lies and that is an issue that falls squarely within the ambit of rule 86 of the Rules of this court. The proviso to that rule requires that in those circumstances an application for striking out ought to be made within 30 days of service of the notice or record of appeal. The proviso to the rule was introduced by the 2010 version of the Court of Appeal Rules and its rationale was explained by this court in David Ojwang Okebe & 10 others vs South Nyanza Sugar Company Limited Civil Appeal (Application) No 139 of 2008 [2009] KLR 310 where the court, citing with approval its decision in Sarah Achieng Salasia v Fred Muchira O & 2 others Civil Application No Nai 188 of 2004 [2005] 2 EA 270; [2005] 1 KLR 762, expressed itself as hereunder:

“The provisions of the proviso to rule 80 of the Court of Appeal rules are applicable to both the notice of appeal and the appeal and this must be plainly so from the logic of it, although the wording could have been, expressly, better put. The starting point is the mischief that the amendment of the rule was intended to address and that was the practice by parties, either by design, negligence or pure inaction, waiting for days, months or even years until the very minute when the appeal is called out for hearing, only to seek the striking out of either the notice of appeal or the appeal or both. If a person affected by an appeal chooses to strike out the notice of appeal or the appeal or either of them, they are free to do so under the amended rule, but only within 30 days of service thereof; if it is an application in respect of the notice of appeal, then the challenge should be made within 30 days of service thereof and if it is the appeal itself, the same limitation applies.”

26. It is therefore our view and we hold that the appellant did not require the leave of the court to file this appeal.
27. This being the first appeal, it behoves us, as was held in Selle & another v Associated Motor Boat Co Ltd & others [1968] EA 123, to reconsider the evidence, evaluate it and draw our own conclusion of facts and law, and we will only depart from the findings by the trial court if they were not based on evidence on record; where the said court is shown to have acted on wrong principles of law as was held in Jabane vs Olenja [1968] KLR 661, or where its discretion was exercised injudiciously as held in Mbogo & another v Shah [1968] EA 93.
28. We agree with the appellant that where the estate of a deceased person has been distributed to the beneficiaries and each beneficiary has been given his or her share of the estate, further developments or improvements of the respective shares of the beneficiaries whether individually or collectively, in our view, can no longer be subject of distribution as if the property was still part of the estate of the deceased. However, where there is no distribution but the estate property is invested, the proceeds of that investment still forms part of the estate of the deceased since the administrators as trustees of the estate are properly within their mandate to invest the property in a manner that improves the value of the estate. In this case, the learned judge found that there was no transparency in the management of the estate of the deceased and that the material before the court was inadequate to establish how the estate was administered and whether it was administered in accordance with the wishes of the deceased. It is therefore clear that the learned Judge was not satisfied that the estate of the deceased had been distributed. In those circumstances it cannot be said that the learned judge erred in her decision directing that accounts be taken. In our view, none of the beneficiaries stand to be prejudiced as the accounts, if properly presented would reveal who has been fully paid and whether or not the investments in the flats ought to inure to the benefit of all the beneficiaries or to only a few who ploughed their entitlements into the said developments.



- 29. Our position is informed by the fact that the plot on which the flats were constructed belonged to the estate and hence the need to undertake the valuation of the said plot separate from the developments
- 30. We however agree that the learned judge having expressed reservations as to the manner in which the estate was administered ought not to have partly distributed the estate at that point in time by ordering that the executrix distributes of Kshs 14,846,797.00 and that Kshs 6,279,159 be shared amongst the beneficiaries in accordance with the will of the deceased. In our view, it would have been more prudent that the partial distribution be kept in abeyance pending the rendering of the account in which event the matter would be clearer for the purposes of final distribution.
- 31. In the premises, we uphold the decision of the learned trial Judge save that we set aside the order directing the executrix to distribute of Kshs 14,846,797.00 and that Kshs 6,279,159.00 be shared amongst the beneficiaries in accordance with the will of the deceased. To that extent only does this appeal succeed.
- 32. As the dispute is a family dispute we make no order as to the costs of this appeal.
- 33. It is so ordered

DATED AND DELIVERED AT MOMBASA THIS 10TH DAY OF NOVEMBER, 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

DEPUTY REGISTRAR

