



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of RBC (Civil Appeal 117 of 2019)  
[2023] KECA 1553 (KLR) (15 December 2023) (Judgment)**

Neutral citation: [2023] KECA 1553 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPEAL 117 OF 2019  
F SICHALE, FA OCHIENG & LA ACHODE, JJA  
DECEMBER 15, 2023  
IN RE ESTATE OF RBC**

**BETWEEN**

RWC ..... 1<sup>ST</sup> APPELLANT  
BKC ..... 2<sup>ND</sup> APPELLANT

**AND**

JWK ..... 1<sup>ST</sup> RESPONDENT  
MK ..... 2<sup>ND</sup> RESPONDENT

*(Being an Appeal from the Ruling and Orders of the High Court  
of Kenya at Eldoret (H.A Omondi J (as she then was) dated 10th  
April 2019 In Eldoret High Court Succession Cause No. 121 of 2011)*

**JUDGMENT**

1. RWC and BKC (the appellants herein), have filed this appeal against the ruling and orders of H A Omondi J (as she then was), dated April 10, 2019.
2. The appeal arises from Eldoret High Court Succession Cause No 121 of 2011, in which the appellants had petitioned for grant of letters of administration intestate in respect of the estate of RBC (deceased).
3. Subsequent thereafter, the 1<sup>st</sup> respondent (M) filed a notice of objection to making of Grant dated November 22, 2011, contending that he had been excluded and yet he was a beneficiary of the estate by virtue of being a son of the deceased. On April 4, 2012, the 2<sup>nd</sup> respondent (J) equally filed an objection to the making of grant on the grounds *inter alia* that the appellants had left out some of the beneficiaries of the estate and especially the 2<sup>nd</sup> respondent. It was her contention that she was married to the deceased.



4. On November 8, 2018, the appellant and Jacinta entered into a consent before Omondi J in the following terms;

“The objection to making of a grant dated April 4, 2012 and filed by JWK and found (sic) on April 20, 2012 and all the attached affidavits and testimonies and documents filed and tendered by 2<sup>nd</sup> objector be and are hereby withdrawn”

5. On November 27, 2018, M filed a notice of motion application seeking an order to vary and or set aside the proceedings and consequential orders issued thereto on November 8, 2018. He sought the following prayers: -

1. That this matter be certified as urgent and service be dispensed with in the first instance.
2. That this Honourable court be pleased to vary and or set aside the proceedings and consequential orders issued thereto on the November 8, 2018 in respect to succession cause No 121 of 2011.
3. That this Honourable court be pleased to withdraw, vary and/or set aside the orders withdrawing the 1<sup>st</sup> objector’s objection and answer the petition for grant with respect to succession cause No 121 of 2011.
4. That this Honourable court be pleased to withdraw, expunge and or strike out the notice of withdrawal of answer and cross-application dated October 19, 2018.
5. That this Honourable court be pleased to set aside the consent entered into the 1<sup>st</sup> and 2<sup>nd</sup> petitioner’s and the objector herein.
6. That this Honourable court be pleased to issue inhibition orders with respect to High View Plot No LR Nairobi Block xx/xxx as well as other properties in the names of the deceased.
7. That this Honourable court be pleased to order for the provision of burnt ashes to RBC (deceased) by the 1<sup>st</sup> and 2<sup>nd</sup> petitioners remains for purpose of collecting DNA samples to be used in the ascertaining of the biological connection with the objector herein and or in the alternative this honourable court be pleased to order the 2<sup>nd</sup> petitioner to provide samples to be used and or compared with the samples taken from the 2<sup>nd</sup> objector herein in a sibling DNA testing.
8. That upon the issuance of orders varying and or setting aside the proceedings as well as the consequential order thereto the same be deemed to be order of stay of execution of the orders issued on the November 8, 2018 either obtained through the consent or otherwise.
9. That this Honourable court be pleased to order the 1<sup>st</sup> and 2<sup>nd</sup> petitioners herein to render an account of all the assets while providing certified copies of bank statements of the deceased multiple bank accounts held in ABC Bank Account No xxxx-Eldoret Branch, Barclays Bank Account No xxxx(sterling),Barclays Bank account No 2074- 1xxx Sterling, Barclays bank



account No xxxx Sterling and Barclays Bank Account No xxxx dollars as well as bank statements for the deceased company [Particulars Withheld] Creameries.

10. That any order that the court may deem fit and just to grant.
  11. That the cost of this application be provided for by the 1<sup>st</sup> and 2<sup>nd</sup> petitioners herein.
    - i. “The consent recorded herein be and is hereby set aside as it was entered into by misrepresentation.”
6. The motion was allowed by Omondi J, in a ruling delivered on April 10, 2019, in which the Judge made the following orders: -
1. The consent recorded herein be and is hereby set aside as it was entered into by misrepresentation,
  2. An order of inhibition do issue with regard to High View Estate Plot No LR Nairobi Block xx/xxx as well as properties in the names of the deceased for purposes of preserving the estate to the effect that no transfer, lease, sale or any alienation should take place pending determination of this case,
  3. The 1<sup>st</sup> and 2<sup>nd</sup> petitioner do render an account of all the assets, and provide bank statements in relation to the deceased’s multiple bank accounts,
  4. It has not been clearly established why the release of burnt ashes is necessary, in my view the conduct of petitioners in attempting to bump off the applicant and even woo him with Kes I million is enough demonstration of their recognition that he has a stake in the estate,
  5. The costs of this application are awarded to the applicant.”
7. The appellants and Moses were both aggrieved by the aforesaid ruling and orders thus provoking the instant appeal *vide* a notice of appeal dated April 18, 2019 and a Notice of Cross Appeal dated 21<sup>st</sup> July 2020 respectively.
8. The appellants in the memorandum of appeal dated June 20, 2019, raised the following grounds of appeal:
1. That the learned judge erred in law and fact by negating a consent recorded by the parties without any evidence of fraud or misrepresentation and or mistake proven before her.
  2. That the learned judge erred in law and in fact in failing to notice that the orders sought by M/ objector were sought after the grant was confirmed and therefore, even if they were granted, they would remain orders granted in vain.
  3. That the learned judge erred in law and fact in failing to notice that 1<sup>st</sup> objector was represented in the proceedings throughout and had executed documents in the English language without any certificate of illiteracy including the application dated November 27, 2018 which gave rise to the ruling the subject matter of the appeal.
  4. That the learned judge erred in law and fact in setting aside a consent which was consistent with alternative dispute resolution promoted under Article 159 of the Constitution.
  5. That the learned judge erred in law and in fact in failing to notice the contradictions in the 1<sup>st</sup> objector/respondents application in that he was not accounting to the payment of Kes



1,000,000/= and Kes 350,000/= paid to him and his advocates pursuant to the settlement preceding the withdrawal of the objection and cross-petition.

6. That the learned judge erred in law and in fact in revoking the consent orders entered into between the appellants and the 2<sup>nd</sup> respondent yet the 1<sup>st</sup> objector/respondent was not a party to the consent orders.
  7. That the learned judge erred in law and in fact in unnecessarily uprooting and discarding a settlement of a matter that had been pending for eight (8) years by unfairly generalizing that the 1<sup>st</sup> objector respondent had been deceived.
  8. That the learned judge erred in law and in fact in granting the orders which stand in total contradiction and in direct conflict with the grant confirmed on November 27, 2018, before the application filed by the 1<sup>st</sup> objector/respondent was placed before the court on December 5, 2018.
  9. That the learned judge erred in law and in fact in failing to hold, find and/or appreciate that once the grant had been confirmed, the court could not competently issue orders without first receiving, considering and granting an application for revocation of the confirmed grant.
  10. That the learned (sic) erred in law and in fact in failing to find and hold that she had no jurisdiction to grant the orders sought after confirmation of grant in view of the provisions of section 30 of the *Law of Succession Act*, cap 160 of the Laws of Kenya.
  11. That on the overall, the learned judge erred in law and in fact in discrediting the orders made on November 8, 2018, in the personal presence of learned counsel for the 1<sup>st</sup> objector and the appellants and subsequently, by consent of counsel for the appellants and the 2<sup>nd</sup> objector/respondent.
  12. That the learned judge erred in law and in fact in awarding the 1<sup>st</sup> objector/respondent costs of the application yet it was a succession cause in which the 1<sup>st</sup> objector had received a settlement sum of Kes 1,000,000/= and Kes 350,000/= and for which he was not even required to account for.”
9. On the other hand, in his notice of cross appeal dated July 21, 2020, M faulted the learned judge for failing to order for a DNA from the remains of the late RBC for purposes of ascertaining the beneficiaries of the estate. The second ground of appeal regurgitates the first one and we will not rehash it.
  10. Subsequently, after filing of the appeal and the cross appeal, M filed a notice of preliminary objection dated July 13, 2021 contending that this court did not have jurisdiction to handle the appeal as no leave to appeal had been sought either from the High Court or this court prior to filing of the appeal. Consequently, we were urged to strike out the appeal.
  11. When the appeal came before us for plenary hearing on March 22, 2023, Mr Mwangi learned counsel appeared for the appellants whereas learned Counsel Mr Koome appeared for M. Mr Wainaina, in support of the appeal appeared for J and sought to rely on the submissions filed on behalf of the appellants. All the parties sought to rely on their respective written submissions which they briefly orally highlighted in court
  12. However, before making our determination on the merits or otherwise of the appeal, we propose to deal with the notice of preliminary objection filed by M, as it has been contended that this court does not have the jurisdiction to handle the instant appeal. It is trite law that jurisdiction is everything and it



must be raised at the earliest opportunity since a court without jurisdiction cannot take one more step and without it, the Court must down its tools. See the *Owners of the Motor Vessel Lilian 'S' v Caltex Oil Kenya Limited* [1989] KLR 1.

13. Turning to the preliminary objection, it was submitted on behalf of Moses that this matter emanates from a succession cause and that no leave was obtained prior to the filing of the instant appeal.
14. Consequently, it was submitted that the appeal herein was not only premature but had also been brought in clear disregard of the laid down procedures thus constituting an abuse of the court process.
15. On the other hand, it was submitted for the appellants that the appeal was properly before this court and that the court was well clothed with jurisdiction to hear and determine the same, as it was premised under order 43 (1) (x) as read together with order 45 rule 3 of the *Civil Procedure Rules 2010* as imported under rule 63 of the *Probate and Administration Rules*. The appellants asserted that pursuant to order 43 rule 1 (x) of the *Civil Procedure Rules*, an appeal lies as of right from order 45 rule 3 (an application for review), and that a party aggrieved by an order made under order 45 rule 3 has an automatic right of appeal to this court. For this proposition reliance was placed on the decision of *Julius Kamau Kithaka v Waruguru Kithaka Nyaga & 2 others* [2013] eKLR. Further, that under article 164 (3) of the *Constitution*, an appeal lies from the High Court to this court as of right hence no leave was required before the institution of the instant appeal.
16. It was further submitted that section 47 of the *Law of Succession Act* did not oust the jurisdiction of this court to hear an appeal from the High Court exercising its original jurisdiction and that an aggrieved party should not be deprived access to the to this court, unless such a bar is in clear words.
17. We have anxiously considered the preliminary objection, the rival submissions by the parties, the authorities cited and the law. It is indeed not in dispute that that there are two schools of thought from this court as to whether leave is a prerequisite before filing an appeal to this court in succession matters. One school of thought is that leave is a prerequisite before the institution of an appeal in a succession matter whilst the other has held the position that leave is not a prerequisite. The debate rages on. It is also common ground that the appellants did not seek leave before filing the instant appeal.
18. Be that as it may, it has been stated severally that succession matters are *sui generis* proceedings expressly governed by the *Law of Succession Act*, cap 160 of the Laws of Kenya. Indeed, the preamble to the Act provides thus;

“An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons;  
and for purposes connected therewith and incidental thereto.”

19. Section 47 of the *Law of Succession Act* which grants the High Court the jurisdiction to deal with succession matters provides as follows:

“47. Jurisdiction of High Court

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:

Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice”.



20. It is important to note that the said section makes no reference to the Court of Appeal. As alluded to earlier, succession matters are sui generis proceedings governed by the [Law of Succession Act](#). Rule 63 (1) of the [Probate and Administration Act](#) however imports some express provisions of the [Civil Procedure Rules](#) and [High Court \(Practice and Procedure Rules\)](#) to apply in succession matters. It provides:
- “ 63. Application of [Civil Procedure Rules](#) and [High Court \(Practice and procedures\) Rules](#):
- Save as is in the act or in these rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the [Civil Procedure Rules](#), namely order 5, rule 2 to 34 and orders 11, 16, 19, 26, 40, 45 and 50 (cap. 21, Sub Leg), together with the [High Court \(Practice and Procedure\) Rules](#) (cap 8, Sub Leg), shall apply so far as relevant to proceedings under these Rules.”
21. In the instant matter, Moses had in the High Court sought an order to vary and or set aside the proceedings and consequential orders issued on November 8, 2018. In essence therefore, Moses was seeking a review of the said orders pursuant to the provisions of order 45 rule 1 of the [Civil Procedure Act](#), which is one of the orders imported in the [Law of Succession Act](#) by Rule 63 (1) of the [Probate and Administration Act](#) (*supra*). In our view, an appeal from an order of review under order 45 rule 1 of the [Civil Procedure Act](#) lies as of right pursuant to the provisions of order 43 rule (1) (X) of the [Civil Procedure Act](#) which provides:
- “ 1. Appeals from orders [order 43, rule 1.]
- An appeal shall lie as of right from the following orders and rules under the provisions of section 75[1][h] of the [Act](#) –
- (x) Order 45, rule 3 (application for review)”.
22. From the circumstances of this case and in light of the fact that the appellants are appealing from a ruling in which the learned judge reviewed her orders of November 8, 2018, we are of the considered view that the instant appeal is competently before us and that leave was not necessary in an appeal from a review application, as it is one of the orders imported to apply in succession matters by rule 63 (1) of the [Probate and Administration Rules](#) (*supra*).
23. Further, M cannot be heard to fault the appellants for failing to obtain leave when he himself has filed a cross appeal without leave, a situation that we find to be preposterous as M cannot be allowed to blow hot and cold air at the same time. Consequently, we do find and hold that the instant appeal is competently and properly before us. Accordingly, the preliminary objection dated 13<sup>th</sup> July 2021, is hereby dismissed.
24. Turning to the merits or otherwise of the appeal, the appellants sought to argue grounds 1,2,4,6,8 9 and 10 together and submitted that there was no consent order between the appellants and M as M had made a unilateral decision to withdraw his notice of objection and the answer and cross petition and that as such, the learned judge committed a serious error when she ordered “setting aside of a consent when M was not a party.”
25. The learned judge was further faulted for setting aside the consent between the appellants and J for the reasons that neither the appellants nor J had made such an application; that there was no evidence of existence of any fraud or mistake between the appellants and J to warrant the attack by M on the consent between the appellants and J. It was further submitted that once a grant is confirmed as in the



present case, the court was *functus officio* and could only hear the application by M if the application was seeking revocation of the confirmed Grant.

26. Regarding grounds 3,5,7, 11 and 12, it was submitted that the learned judge unjustifiably re-opened a closed succession cause; made final findings of fact and granted orders otherwise not sought; that from the proceedings, it was clear that there was no prayer to have M recognized as a dependent or beneficiary of the estate and that in actual fact, and as stated earlier, M had withdrawn his objection, answer and cross petition.
27. On the other hand, it was submitted on behalf of M that there was proper justification in setting aside the consent entered between the appellants and J for the reasons inter alia that the property sought to be given out to J was not the free property of the appellants and the monies sought to be given out to J were the estate's finances and the consent was accordingly illegal and irregular.
28. On the cross-appeal, it was submitted that results of a DNA would have come in handy in clearing doubt in respect of what stake M had in the estate.
29. We have carefully considered the record, the grounds of appeal, the cross-appeal, the rival submissions by the parties, the responses thereto, the cited authorities and the law. This being a first appeal, our duty as stipulated under rule 31 of the rules of this court is to re-evaluate and consider afresh the evidence tendered before the trial court and come to our own conclusion. This duty was reiterated in *Abok James Odera t/a A J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR wherein this court pronounced itself as follows: -

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority v Kustron (Kenya Limited 2000 2EA 212.*”

30. Having carefully perused the record and the rival pleadings by the parties, it is evident that the proceedings of November 8, 2018, are at the heart of this appeal. Consequently, we have framed the following two main issues for our determination:
  1. Whether the learned judge erred in law and in fact by negating a consent recorded by the appellants and J without any evidence of fraud or misrepresentation and/or mistake proven before her.
  2. Whether the learned judge erred in law and fact in failing to note that the orders sought by M were sought after the grant was confirmed and therefore even if they were granted, they would remain orders granted in vain.
31. On the first issue, it is indeed not in dispute that on November 8, 2018, a consent was entered into between the appellants and Jacinta in presence of Moses's advocate. For ease of reference we shall reproduce what was recorded by the High Court; -

“8.11.18

Before Hon H A Omondi ‘J’ C/A; Ouma

Mr Muhoro for 1<sup>st</sup> Objector

Mr Mwangi with regard to 2<sup>nd</sup> Objector Order; By consent: -



- a. The objection to making of a grant dated April 4, 2012 and filed by JWK and found (sic) on 20.4.12 and all the attached affidavits and testimonies and documents filed and tendered by 2<sup>nd</sup> objector be and are hereby withdrawn.
- b. The objection proceedings are marked as settled on the following terms:
- c. Subject to confirmation of grant, the petitioners be and are hereby authorized by court to transfer to the 2<sup>nd</sup> objector JWK Title No Nairobi/Block xx/xxx registered in the name of the deceased in settlement of the objection's financial claims against the estate.
- d. (3) The 2<sup>nd</sup> objector shall bear all the costs of transfer and taxes attendant to transfer of the said property Title No Nairobi/Block xx/xxx.
- e. The objector's decisions that she is not a beneficiary or member of the deceased's family, but only a creditor thereof.
- f. The petitioners shall bear the 2<sup>nd</sup> objectors costs of the objection proceedings agreed at Kshs 200,000/- (Two hundred thousand only) and to be settled within 30 (thirty) days hereof.

Signed; Mr Mwangi

Signed; Mr Koech.” (Emphasis ours).

32. From the above excerpts of the proceedings, it is evident that the consent that was entered into was clearly between the appellants and J and M was nowhere in the picture. The instruction note by Moses dated September 30, 2018 and the notice of withdrawal of objection dated October 19, 2018 where M purportedly withdrew his notice of objection to the making of the grant are actions taken before the consent of November 8, 2018. As to whether the said notice was induced by misrepresentation, is a different issue altogether. It is also important to note that vide the application dated November 27, 2019, which has given rise to this appeal, Moses had sought inter alia an order that the court expunges and/or strikes out the notice of withdrawal, answer and cross petition dated October 19, 2018.
33. In our view, the appellants and J could not purport to enter into a consent to the exclusion of Moses and more particularly so, purport to transfer one of the properties of the Estate namely Nairobi/Block xx/xxx to Jacinta to the detriment of M had M not withdrawn his objection dated October 19, 2018. It follows therefore that at the time the appellant and J entered a consent on November 8, 2018 Moses was no longer a party in the proceedings, having withdrawn from the proceedings on October 19, 2018. Having ceased to be a party, M had no *locus* to challenge the consent arrived at by the two remaining parties.
34. In the case of *Board of Trustees National Social Security Fund v Micheal Mwalo* [2015] eKLR this Court set out the grounds on which a consent judgment/orders can be set aside as follows;
 

“The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.”

(emphasis ours).”



35. On our part we do not discern any fraudulent dealing or collusion between the appellant and J given the fact that M had opted out of the proceedings.
36. The learned judge was further faulted for failing to note that the orders sought by Moses were sought after the grant was confirmed and that as such, they remained orders in vain. It was submitted for the appellants that once a grant was confirmed like in the present case, the Court was *functus officio* and could only hear the application by Moses if the application was seeking revocation of the confirmed grant.
37. On the other hand, it was submitted on behalf of M that the grant had never been confirmed and that the appellants had acknowledged that they had filed an application for summons for confirmation of grant dated November 19, 2018 on November 26, 2018 which could not have been confirmed before the consent of November 8, 2018.
38. We have anxiously perused the record. The appellants filed summons for confirmation of grant dated November 19, 2018 on November 26, 2018. The record shows that on November 27, 2018, the learned judge recorded as follows:

“Court; I have considered the application there is reliable evidence on consent by all the beneficiaries, save for DM who is said to suffer from cerebral palsy and is incapable of executing documents. This is an old matter of the year 2011. The application is merited and the grant is confirmed as prayed.”

(Emphasis ours)

39. From the above proceedings, it would indeed appear that the grant was confirmed on November 27, 2018. The record again shows that when the parties appeared in court on February 25, 2019, Mr Mwangi for the petitioners urged the Court to inter alia “sign the grant.” It is thus not clear from the record if this was eventually done as the learned judge subsequently slated the matter for ruling of the application dated November 27, 2019, on April 2, 2019 which ruling was subsequently delivered on April 10, 2019, and is now the subject of this appeal.
40. In light of the above glaring inconsistencies, we are unable to make a definitive finding as to whether the grant had been confirmed or not. Suffice to state that in the application dated November 27, 2018, M had sought to reverse the withdrawal of his notice of objection. We note that prior to the withdrawal, Moses was paid Kes 1 million and Kes 350,000/ being lawyer’s fees. In our view, M having been represented by counsel, he is bound by the representations made by his counsel to withdraw the notice of objection and the cross-appeal upon the terms referred to above.

We find that the notice of withdrawal of answer and cross-petition dated October 19, 2018 were validly adopted as orders of the court.

41. Turning to the 1<sup>st</sup> respondent’s cross appeal, the learned judge was faulted for failing to order a DNA test for purposes of determining the beneficiaries of the estate. Firstly, we note that the proceedings herein commenced on or about February 15, 2012 and M all along did not seek an order for a DNA test until November 27, 2018, 6 years and 9 months down the line when he filed the motion seeking review of the orders issued on November 8, 2018.



42. The learned judge while declining an order for DNA held as follows:

“It has not been clearly established why the release of burnt ashes is necessary, in my view the conduct of petitioners in attempting to bump off the applicant and even woo him with Kshs 1 million is enough demonstration of their recognition that he has a stake in the estate.”

43. From the circumstances of this case, we are of the considered view that Moses having withdrawn his objection and the cross- appeal, we see no reason to order a DNA test. Suffice to state that the learned Judge found that the appellant recognized Moses as one who “...has a stake in the estate.” This finding was not challenged by the appellants on appeal. We shall say no more on this.

44. We think we have said enough to demonstrate that this appeal is for allowing and the cross appeal is for dismissal. Accordingly, the orders of April 10, 2019 are hereby set aside and the application filed by M dated November 27, 2018 stands dismissed.

45. This being a dispute touching on succession, we shall make no order as to costs. It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 15<sup>TH</sup> DAY OF DECEMBER, 2023.**

**F. SICHALE**

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**JUDGE OF APPEAL**

**F. OCHIENG**

.....

**JUDGE OF APPEAL**

**L. ACHODE**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

