IN THE COURT OF APPEAL

AT KISUMU

(CORAM: NAMBUYE, OKWENGU & SICHALE JJ.A.)

CIVIL APPEAL NO. 60 OF 2016

BETWEEN

YUNES KERUBO ORUTA.....1ST APPELLANT

DAVIN KWAMBOKA ORUTA.....2ND APPELLANT

AND

GEORGE KOMBO ORUTA.....1ST RESPONDENT

ROSE NYANCHAMA AENCHA.....2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the High of Kenya at Kisii

(Hon. C. B. Nagillah, J.) dated 3rd July 2015

in

Kisii Succession Cause No. 169 of 2013

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JUDGMENT OF THE COURT

The appeal initially filed by two appellants was prosecuted by the 1st appellant alone there having been no substitution for the 2nd appellant following her demise during the pendency of the hearing of the appeal. The appeal arises from the judgment and decree of the High Court of Kenya at Kisii (**Nagillah, J.**) delivered on 3rd July, 2015, in Kisii High Court, Succession Cause No. 169 of 2013.

The background of the appeal is that the succession proceedings resulting in this appeal relate to the estate of **Jameson Oruta Oroni** (the deceased) who died intestate on 17th October, 2003 domiciled in Kenya. On 8th February, 2005, the appellant in her capacity as the widow of the deceased successfully obtained a Limited Grant of Letters of Administration Ad Colligenda Bona in Migori Senior Resident Magistrate's Court Succession Cause No. 59 of 2004 to enable her file a Civil Suit to preserve the deceased's properties which according to her were in danger of being grabbed. She, however, never applied that grant for that purpose. Instead, she used it to transfer some of the deceased's estate properties into her names and those of third parties, prompting the 1st respondent, a son of both the deceased and appellant to take out a citation dated 29th June, 2012 directed at the appellant and two others for them to accept or refuse to take out a grant of representation to the deceased's estate. In it, the 1st respondent listed persons who survived the deceased as follows:-

a) Yunes Kerubo Oruta – Widow - 78 years old

b) Lameck Nyakundi Oruta – Son – 60 years old

c) George Kerubo Oruta – Son – 58 years old

d) Andrew Obinchu – son (deceased) – represented by the widow Rose Nyanchama Aencha

e) Lawrence Mauti – son – 54 years old

f) Tom Ogega – son- (Deceased) represented by Emily Nyaboke Ogega

The properties forming the intestate estate of the deceased were also listed as follows:

1) South Mugirango Bosinange/1423;

2) South Mugirango Bosinange/1418;

3) Kisii Town/Block II/49;

4) Nyaribari Chache/B/B/Boburia/2607;

5) Central Kitutu/Daraja Mbili/590;

6) Riosiri Market Plot Number 1;

7) Riosiri Market Plot Number 22;

8) Mwongori Settlement Scheme Land Parcel No. 18;

9) Central Kitutu/Daraja Mbili/590; and

10) Nyabigege Market Plot No. 15.

Assets forming part of the deceased's estate but which according to the 1st respondent had subsequently been transferred into the names of the appellant and third parties before issuance and confirmation of a grant of representation to the deceased's estate in favour of the appellant were listed as follows::

1) Mwongori Settlement Scheme Land Parcel No. 18;

2) Daraja Mbili/2617;

3) Daraja Mbili/2618;

4) Kisii Town/ Block II/49; and

5) South Mugirango Bosinange/1423.

The 1st respondent contended that he feared further intermeddling with the deceased's estate to the detriment of the beneficiaries legitimately entitled to benefit therefrom hence the request for the Court's intervention.

In response to the citation, the appellant filed a petition dated 29th April, 2013 for Letters of Administration intestate to the deceased's estate in the High Court of Kenya at Kisii in Succession Cause No. 169 of 2013. Beneficiaries were listed as hereunder:

a) Yunes Kerubo Oruta – Widow

b) Lameck Nyakundi Oruta – Son – USA Resident

c) George Kerubo Oruta – Son

d) Lawrence Mauti Oruta – son – USA – Resident

e) Rose Nyanchama Aencha w/o Andrew Obinchu (deceased) daughter in law

f) Davin Oruta Kwamboka – daughter

g) Emily Nyaboke Ogega w/o Tom Ogega (Deceased) daughter in law

h) Everlyne Moraa Oruta – Resident - United Kingdom

i) Mercy Nyaboke Oruta – Adopted daughter

j) Simon Ongoti Kerubo – Grandson

k) Nicholas Oroni Obinchu – grandson

l) Manuel Mauti Nyakundi – grandson

m) Michael Ogega Ogega – grandson

Assets forming the intestate estate of the deceased were given as follows:

a) Nyaribari Chache/B/B/Boburia/2607

b) Riosiri Market Plot No. 1

c) Riosiri Market Plot No. 22

While liabilities of the intestate estate of the deceased were given as follows:

a) National Bank of Kenya, Nakuru Branch – 4,500,000/=

b) David Oruta Kwamboka kshs. 2,000,000/= - paid debt

c) Yunes Kerubo Oruta – kshs. 1,800,000/=

In response to the appellant's petition, the 1st respondent simultaneously filed an answer to the petition, objection to the petition, and a petition by way of cross-application for a grant all dated 19th July, 2013 supported by affidavits together with annextures thereto. In these, he contended *inter alia* that the appellant was not a fit person and/or a proper person to whom the grant of representation to the deceased's estate herein could issue for disclosing only three (3) of the assets forming the properties of the deceased's intestate estate, inclusion in the petition of the deceased's grandsons as direct beneficiaries when they were not direct dependants of the deceased, using the Limited Grant Ad Colligenda Bona for purposes other than those for which it was applied for, and also that the appellant was only bent on wasting and/or cannibalizing the estate with a view of disinheriting all the other legitimate beneficiaries to the said estate. He, therefore, prayed for the nullification of the fraudulent and unlawful transfers alluded to above.

The appellant filed an Answer to 1st respondent's objection and cross-application for a grant, contending that as the only widow of the deceased she ranked higher in priority over the 1st respondent with regard to entitlement to a Grant of Letters of Administration intestate in terms of the prerequisites in **section 66** of the **Laws of Succession Act** (the **Act**), the list of beneficiaries provided by her in the petition complied with the prerequisites provided for in **section 51(2)(a)** of the **Act**, both the children and spouses of the deceased sons of the deceased namely **Andrew Obinchu Oruta** and **Tom Ogega Oruta** were rightly included as direct beneficiaries of the estate of the deceased, the 1st respondent though eligible for appointment as a legal representative was not suitable to be appointed administrator of the estate of the deceased as according to her he was only interested in championing his own selfish gains and interests.

She conceded that she had indeed obtained a Limited Grant of Letters of Administration from Migori Law Courts in Succession Cause No. 59 of 2005 purposely for collection and protection of the deceased's properties, a role performed diligently according to her. She denied the allegation of unlawfully and fraudulently intermeddling with the deceased's estate arguing that her sole intention in seeking the Limited Grant of Letters of Administration was for ensuring that the deceased's properties were reasonably and equitably distributed amongst beneficiaries of the deceasead's estate. She, therefore, prayed for the dismissal of the 1st respondent's objection to the petition and cross-application for petition asserting that both were actuated by 1st respondent's malice and greed.

The cause was canvassed through written submissions orally highlighted by learned counsel for the respective parties, at the conclusion of which the learned trial Judge having analyzed the record applied the threshold in the case of **Re Estate of John Musambayi Katumanga (deceased) [2014]eKLR** to the rival positions and rendered himself as follows:

> **"Therefore, in the instant case the inclusion of Simon Ongati Kombo, Nicholas Orani Obinchu, Manuel Mandi Nyakundi, and Michael Ogega Ogega was irregular, as such children, I suspect belonged to the deceased sons who are also deceased that is Andrew Obinchu and Tom Ogega. The said deceased sons are represented by their widows who are Rose Nyanchama Aencha and Emily Nyaboke Ogega who in accordance with the law of succession represent their deceased husbands and will therefore be entitled to the share which their deceased husbands would have benefited from the deceased estate. Thus by the inclusion of grandchildren of the deceased bearing in mind that the parents of the said grandchildren are also getting a share from the deceased's estate meant that some of the survivors of the deceased will get a bigger share of the deceased's estate than others without a justifiable reason, therefore, the grandchildren of the deceased in this case were not supposed to be listed as beneficiaries to the deceased's estate."**

We affirm this position as in our view the conclusion is well-founded both on the law and facts.

Turning to the mandate of the Court under **section 66** of the **Act**, the learned Judge construed this provision in light of the decision in the case of **Florence Imanti vs. Mwongera Mugambi Rintari & Another H.C Succession Cause No. 213 of 1997** and ruled as follows:

> **"Therefore in as much as the 1st petitioner is right in stating that as the wife of deceased she has a priority in administering the deceased's estates as opposed to the objectors who are children of the deceased, such a right is not unfettered as the final**

decision on who should administer the estate of the deceased still lies in the sole discretion of this Court as to whether or not the widow is capable of administering the estate of the deceased."

We also affirm this position as in our view it is a correct appreciation of the law.

On alleged intermeddling in the deceased's estate by the appellant, the learned Judge observed that in form P & A5 the appellant had declared only three assets as forming property of the intestate estate of the deceased, while three items were listed under liabilities owed by the estate. Three of these were allegedly owed to the appellant and another, while one other item was allegedly owed to National Bank Nakuru Branch, which information according to the learned Judge was contrary to the content of the Chief's letter which listed the deceased's properties as **South Mugirango Bosinange/1423** and **1418, Kisii Town/Block II/149, Mwongori Settlement Scheme Land parcel No. 18, Riosiri Market Plot Number 1**, **South Mugirango Central/Plot No. 1 and Central Kitutu/ Daraja Mbili/569** and **590**.

Further, that the uncontroverted position borne out by the content of the 1st respondent's objection and cross-application for a grant indicated explicitly that property **South Mugirango/Bosinange/1423** registered in the name of the deceased on 5th June, 1995 was later according to the certificate of search dated 6th February, 2009 transferred to the appellant on 29th November, 2005 and a title deed issued to her on 29th December, 2005 **Daraja Mbili/2617** was registered in the name of the appellant on 25th January, 2005 **Daraja Mbili/2618** was sold to one **Julius Omieri Nyambaka** on 11th April, 2005 and a title deed subsequently issued to him on 28th June, 2005 **Kisii Town/Block II/149** registered in the name of the deceased on 8th August, 1972 was transferred to the appellant on 6th June, 2005 and a certificate of lease issued to her on 23rd October, 2009. Lastly, that **Mwongori Settlement Scheme/28** was registered in the appellant's name on 13th June, 2004. On that account, the learned Judge concluded that the said properties were transferred to the appellant after the death of the deceased and in the absence of issuance and confirmation of valid Letters of Administration intestate to the deceased's estate in her favour to capacitate her execute the impugned transactions and on that account vitiated those transactions and declared them null and void and that in law they amounted to intermeddling in a deceased person's estate.

The learned Judge then construed **section 45** of the **Act** and upon distinguishing the circumstances prevailing in the case of the **Estate of Moffat Mariga Ngethe Succession Cause No. 1665 of 2008** with those prevailing in this appeal ruled as follows:

"The above scenario is a bit different from the instant case as a grant of letters of administration and confirmation of grant have not yet been issued to the petitioners. The petitioner specifically the 1st petitioner has just gone ahead to transmit deceased property to her name and even sell off part of the deceased property without obtaining a grant or even consent from her children."

On the totality of the above assessment and reasoning, the learned Judge dismissed appellants petition for grant, sustained the 1st respondent's objection and cross-application for grant and then granted orders as follows:

"a.The petition by Yunes Kerubo Oruta and Davina Oruta Kwamboka is hereby dismissed on grounds that the two are not fit and/or proper persons to whom a grant of representation may issue and have intermeddled in the estate.

b.The transfers effected since the death of Jameson Oruta Oroni on 17th October 2003 without a grant of representation are hereby declared null and void.

c. A prohibition of any dealing in the property standing in the name of Jameson Oruta Orori as at 17th October 2003.

d.The objector George Kombo Oruta can proceed and file for a petition for grant of letters of administration intestate in favour of the estate of Jameson Oruta Orori."

The appellant was aggrieved and is now before this Court on a first appeal raising nine (9) grounds of appeal that were condensed into four (4) thematic issues in her written submissions dated 17th August, 2020, namely:

1) Whether the appellant had intermeddled with the property of the deceased without taking out a grant;

2) Whether the Court has discretion under section 66 of the Law of Succession Act on who should administer the estate of the deceased;

3) Whether grandchildren can be included as beneficiaries/dependants of the deceased; and

4) Whether the trial judge exercised his jurisdiction properly.

The appeal was canvassed virtually through written submissions and legal authorities filed and relied upon by the respective parties in support of their opposing positions, and orally highlighted by learned counsel **Mr. Mikoya** for the appellant and **Mr. Nyaanga** for the respondents.

Supporting the appeal on the first thematic issue, the appellant relied on High Court decisions; **Re Estate of Husseinbhai Karimbhai Anjarwalla (Deceased) [2019]eKLR**, **Re the Estate of John Muhia Kalii (deceased) [2016]eKLR**, **John Kasyoki Kieti vs. Tabitha Nzivulu Kiveti and Another [2001]eKLR** and **Re Estate of Mohammed Saleh Said Sherman [Deceased] [2015]eKLR** and faulted the learned Judge for erroneously holding that the appellant had intermeddled with the deceased's estate using the limited grant issued to her on

8th February, 2005 when she gave a plausible reason for taking out the Limited Grant of Administration Ad Litem.

Relying on the case of **Re Estate of Husseinbhai Karimbhai Anjarwalla** [supra] the appellant submits that in her opinion **section 45** of the **Act** does not apply where the alleged intermeddler is the person who is lawfully entitled to deal with the affairs of the estate and since she fell into that category, it was erroneous for the learned Judge to rule that the impugned transactions amounted to intermeddling in the deceased's estate.

The appellant also relied on **Sections 66** as read with **sections 35, 36, 37, 38,** and **40** of the **Act**, the cases of **In the Matter of the Estate of Gamaliel Onyiengo [deceased] [2018] eKLR, In the Matter of an Application for Revocation for Vincent Ochieng Ngolo Succession Cause No. 106 of 2016**, and faulted the learned Judge for failing to properly appreciate that under **section 66** of the **Act,** the appellant as the surviving spouse of the deceased was the most suitable person to administer the deceased's estate especially when in her opinion the properties available for distribution to the legitimate beneficiaries of the deceased's estate were acquired by the deceased with her efforts.

Turning to the third issue, the appellant relied on **section 26** and **29** of the **Act** as construed and applied by the High Court in **Re Estate of John Musambayi Katumanga (deceased)** [supra] and faulted the learned Judge for holding that inclusion of grandchildren of the deceased as direct beneficiaries of the deceased's estate was irregular in the absence of any details provided by the 1st respondent as to how the named grandchildren were not entitled to benefit directly from the deceased's estate.

Relying on **sections 45** and **47** of the **Act**, **Rules 59** and **73** of the **Probate and Administration Rules** as construed and applied by the High Court in the case of **Re Katumo & Another [2003] 2 E. A 509**, the appellant faulted the learned Judge for allowing the 1st respondent to proceed and file a petition for a grant of representation to the deceased's estate as a sole applicant without taking into consideration interests of other beneficiaries of the estate of the deceased contrary to the Court's primary consideration when exercising its mandate under **section 66** of the **Act** namely, to ensure that ends of justice is met to all persons entitled to benefit from the deceased's estate.

On the totality of the above submissions, the appellant urged the Court to allow the appeal, set aside the impugned decision and substitute it with one that is compliant with the prerequisites stipulated for in **section 66** of the **Act**.

In rebuttal, the respondents opposed the appeal on four broad thematic issues namely, that:

a) The appeal before this Court is incompetent.

b) There was basis for the trial judge to find that the appellant intermeddled with the estate of the deceased.

c) The trial judge properly exercised his jurisdiction in granting its orders;

d) The trial judge considered all the evidence before it in delivering the impugned judgment.

Starting with the first broad issue, the respondents relied on the case of **Makhangu vs. Kibwana [1996 – 1998[1 E.A 168** as approved in **Rhoda Wairimu Kioi & John Kioi Karanja vs. Mary Wangui Karanja & Another [2014]eKLR** and submitted that the appeal as laid is incompetent for want of grant of leave to appeal to this Court either by the High Court or this Court. It should therefore be struck out.

Without prejudice to the above submissions and in support of the second issue, the respondents relied on **section 45** as read with **sections 79, 82,** and **83** of the **Act** and submitted that the appeal is not meritorious as in their opinion the learned Judge cannot be faulted for vitiating the impugned transactions as there was sufficient demonstration on the record that the appellant diverted the deceased's properties either to herself or third parties without being properly vested with authority to do so.

The respondents also relied on the High Court decisions in **Joseph Oginga Onyoni & 2 Others vs. Attorney General & 2 Others [2016]eKLR** citing with approval the case of **Troustik Union International & Another vs. Mbeyu & Another [1993]eKLR** and **Omari Kaburu vs. ICDC [2007]eKLR** for proposition that personal representatives derive their authority from the grant of representation they hold without which any action undertaken by them with regard to property forming the estate of a deceased person is *void abinitio*; in support of their submission that the learned Judge cannot be faulted for vitiating the impugned transactions involving properties **South Mugirango/ Bosinange/ 1423, Daraja Mbili/2617, Daraja Mbili/2618, Daraja Mbili/2615, Kisii Town/Block II/49,** and **Mwongori Settlement Scheme/18** as there was sufficient demonstration on the record that those properties were all registered in the names of the deceased as at the time of his demise, and were subsequently transferred either to the appellant or third parties after the death of the deceased without appellant being vested with authority under the **Act** to capacitate her to effect those impugned transfers which in their opinion amounted to intermeddling with the affairs of the deceased's estate in terms of **section 45** of the **Act** as correctly ruled by the learned Judge based on the undisputed documentary evidence on record as laid before the learned Judge.

The respondents also relied on the High Court case of **In the Matter of the Estate of Veronica Njoki Wakagoto [Deceased) [2013] eKLR** and submitted that the learned Judge cannot be faulted for vitiating the appellant's application for a grant of representation to the deceased's estate as that finding was well-founded on the appellant's failure to give a full inventory of the deceased's property as at the time of his death with the objective of concealing the fact of intermeddling in the deceased's estate subject of the impugned transactions which in their opinion was sufficient indication that the appellant was not a fit person to administer the estate of the deceased. Also relied on was **section 47** of the **Act** and **Rule 73** of the **Probate and Administration Rules** as construed and applied by this Court in the case of **Floris Piezzo & Another vs. Giancario Falasconi [2014]eKLR,** for submission that the trial court properly exercised its discretionary mandate to sustain the 1st respondent's cross-application and objection to the making of a grant to the appellant for ends of justice to be met to both parties; on **Rule 26(1)** and **(2)** of the Probate and Administration Rules as construed and applied by the High Court in the case of **In the Estate of Joshua**

Orwa Ojode [Deceased] Nairobi Succession Cause No. 2015 of 2012, for the submission that the 1st respondent as a son of a deceased was entitled to petition for Grant of Letters of Administration as rightly determined by the learned trial Judge; on **section 45** of the **Act** as construed and applied in the High Court case of **Gitau & 2 Others vs. Wandai & 2 Others [1989] KLR 231** for the proposition that persons who enter into sell agreements over estate property before a grant of representation has been obtained and confirmed in their favour, commit acts of intermeddling with the affairs of the estate of the deceased person; on the High Court cases of **Re Estate of John Gakunga Njoroge [2015] eKLR**; **In the Matter of the estate of Isaac Kaburu Marete [Deceased] Daniel Gituma Marete vs. Frankline Mutwiri [2017]eKLR;** and **Munyasya Mulili & 3 Others vs. Sammy Muteti Mulili [2017]eKLR** for proposition that any dealings with property forming an estate of a deceased person before issuance and confirmation of a grant in favour of a party purporting to execute such transactions are null and *void abinitio,* all in reiteration of the totality of their submission already highlighted above.

On liabilities allegedly owed by the deceased's estate, the respondent relied on **section 83** of the **Act** as construed and applied in the High Court case of **Paul Tono Pymto & Another vs. Giles Tarpin Lyonnet [2014] eKLR**, and submitted that the learned Judge rightly discounted alleged liabilities paid by the appellant on behalf of the estate of the deceased for her noncompliance with the prerequisites in **sections 79, 82** and **83** of the **Act.**

On the last issue, the respondents relied on **Sections 2(1)** of the **Act** and **section 107(1)** of the **Evidence Act**, **Cap 80 Laws of Kenya** and reiterated that the impugned judgment was well founded both on the law and facts and should therefore be sustained.

This is an appeal arising from the learned Judge's exercise of judicial discretion under **section 66** of the **Act** under which the Court's intervention had been invoked. The principles that guide the Court in the exercise of judicial discretion have been crystallized by law. See the case of **Githiaka vs. Nduriri [2004] 1 KLR 67**, where in **Ringera Ag. J.A** (as he then was) held *inter alia* that judicial discretion is to be exercised judiciously that is to say on sound reason rather than whim, caprice or sympathy.

The principles that guide this Court in the exercise of its mandate when confronted with allegations of improper exercise of judicial discretion by a trial court has also been crystalized by case law. We take it from the case of **United India Insurance Company Limited vs. East African Underwriters Kenya Ltd [1985] KLR 898** which we fully adopt. These are that we can only interfere with the exercise of that discretion if we are satisfied that the Judge misdirected herself in law, misapprehended the facts, took account of considerations which she should not have taken into account, failed to take into account a consideration of which she should have taken into account, or that her decision, albeit a discretionary one, is plainly wrong.

We have considered the above mandate in light of the rival positions herein.

The issues that fall for consideration are whether:

1) The appeal as laid is incompetent;

2) The learned Judge exercised his discretion injudiciously when he arrived at the impugned decision; and

3) What are the appropriate orders to be granted herein in light of the conclusions reached by the Court on the determination of issue numbers 1 and 2 above.

Starting with issue number 1, the respondents submission is that the appeal as laid is incompetent and does not warrant merit interrogation for want of jurisdiciton for appellant's failure to seek leave of either the High Court appealed from or this Court appealed to, to file the same. The position in law on matters of want of jurisdiction or otherwise and which we fully adopt is as was succinctly put by the Court in the case of **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989]eKLR**, wherein Nyarangi JA (as he then was) expressed himself on the issue as follows:

> ***"Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. .....:***
>
> > ***By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. ..... Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"***

The statutory limitations falling for our interrogation in the determination of this issue are **sections 47** and **50** of the **Law of Succession Act, Cap 160 Laws of Kenya**. **Section 47** provides as follows:

> ***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.

While **Section 50** on the other hand provides as follows:

> ***(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.***

Section 47 falls for our interrogation because it is the provision of law that donated jurisdiction to the High Court to conduct succession proceedings resulting in the appeal before us. **Section 50** has been cited for purposes of demonstrating that whereas there is clear provison for an automatic right of appeal in succession matters in proceedings emanating from the Subordinate and Kadhi Courts to the High Court finally, in matters arising from the Subordinate Court and thereafter to this Court on points of law only in matters emanating from Kadhis Courts. There is no equivalent automatic right of appeal to this court from decisions made by the High Court under the said **Act**.

When confronted with similar issue, the Court in the case of **Makhangu vs. Kibwana [1995 – 1998] 1 E.A 175 (CAK)** held *inter alia* as follows:

> **"Under section 47 of the Succession Act (Chapter 160, the High Court had jurisdiction on hearing any application to pronounce decrees or orders. Any order made under this section was appealable under section 66 of the Civil Procedure Act either as of right if it fell within the ambit of section 75 of the Civil Procedure Act or by leave of the Court if it did not."**

Section 66 of the **Civil Procedure Act** provides as follows:

> **"Except where otherwise expressly provided in this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie from the decrees or any part of decrees and from the orders of the High Court to the Court of Appeal."**

While **Section 75** of the same **Civil Procedure Act** provides *inter alia* as follows:

> **(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted**
>
> **.....**

We do not find it necessary to interrogate the applicability of those two sections in the circumstances of this appeal as the position taken by the Court, in the above **Makhangu vs. Kibwana** case [supra] and which we find purduent not only to highlight but also to adopt as the correct threshold for us to apply in the resolution of this issue, has been revisited and reviewed numerously by the Court. In the case of **Julius Kamau Kithaka vs. Waruguru Kithaka Nyaga & 2 Others [2013] eKLR** (**J. Otieno Odek, J.A** (as he then was)) expressed himself as follows:

> **"It is trite law that where any proceedings are governed by a special Act of Parliament, like in this case, the *Law of Succession Act,* the provisions of such an Act must be strictly construed and applied. See *Josephine Wambui Wanyoike -vs-Margaret Wanjira Kamau & another – Civil Appeal No. 279 of 2003* & *H. Adongo & Others -vs-Savings and Loan Society (Kenya) Ltd.- Civil Appeal No, 22 of 1987.* Therefore, what is in the *Law of Succession Act* is what was intended to be therein in the manner and extent it is there. What is not therein expressly is what was intended not to be there by the legislator."**

In **Rhoda Wairimu Karanja & Another vs. Mary Wangui Karanja and Another [2014]eKLR**, in which the decision in the **Makhangu** case [supra] was approved, the Court when similarly confronted with this issue expressed itself as follows:

> **"... section 47 of the Law of Succession Act makes no mention of an appeal to the Court of Appeal from the decision of the High Court made in the exercise of the latter's original jurisdiction. Decisions on this point have been varied both in the High Court and in this Court. The holding in the leading case of Makhangu vs. Kibwana [1996-1998] 1 EA 168 (Cockar, CJ, Kwach and Shah, JJ.A.), which has been cited invariably in almost all the subsequent decisions is to the effect that an appeal does lie to the Court of Appeal from the decision of the High Court in probate matters; that under section 47 of the Law of Succession Act, the High Court has jurisdiction on hearing a matter to pronounce decrees or orders; that any order or decree made under this section is appealable under section 66 of the Civil Procedure Act, either as a matter of right if it falls within the ambit of section 75 of the Civil Procedure Act or by leave of the Court if it did not. It has been said in criticism of this decision that the Law of Succession Act is a complete code with its own rules and that there would be no justification to import into it provisions of the Civil Procedure Act or Rules unless expressly permitted under Rule 63 of the Probate and Administration Rules. This criticism, notwithstanding, as we have noted the case has not been departed from and has been widely used as a basis of giving a party a right to appeal to this Court as demonstrated in the following decisions of this Court, among many others, Kaboi vs. Kaboi & Others [2003] EA 472. Jacob Kinyua Kigano vs. Tabitha Njoki Kigano & Solomon Machere Munge Civil Appeal No. 37 of 2013 and Francis Gachoki Murage vs. Juliana Wainoi Kinyua & Another, Civil Appeal (Application) No. 139 of 2009. There is similarly a long line of High Court cases which have been decided along the same line, relying on the decision of Mukhangu (supra). We need only to quote this Court's (Visram, Koome & Odek,**

JJ.A.) recent decision in Francis Gachoki (supra) where the Court said as follows:-

...

*In short, and speaking generally, the practice alluded to by their Lordships in the above passage, is that where there is no automatic right of appeal an aggrieved party wishing to appeal must seek leave to do so and the granting of leave is a discretionary power. It cannot therefore be correct to maintain that no appeal in succession causes lies to the Court of Appeal. There cannot be such a thing in law and moreso today. This is borne out both from the large number of appeals arising from succession causes decided by this Court over the years and from the language of **Article 164 (3)** of the 2010 Constitution which is in contrast with **Section 64 (1)** of the former Constitution and **Section 3 (1**) of the Appellate Jurisdiction Act.*

.....

We make two points from the foregoing analysis. One, a court's jurisdiction flows from either the Constitution or statute or both. See Article 164 (3) of the Constitution and section 3 of the Appellate Jurisdiction Act. It cannot be assumed or donated by parties or arrogated by the Court itself. Jurisdiction is everything and if a court does not have it, it downs tools. These are well-established principles. The other point we make is the right of access to justice, now elaborately articulated in Article 48 of the Constitution requiring all state organs, of which courts are, to ensure access to justice for all persons. Bearing in mind that duty and applying the provisions of section 47 of the Law of Succession Act and Rule 47 of the Probate and Administration Rules, the High Court will, in exercise of its jurisdiction under the former grant leave to any party aggrieved by its decision to challenge it on appeal to this Court."

The court has been consistent in reechoing the above position. See the case of **John Mwita Murimi & 2 Others vs. Mwikabe Chacha Mwita & Another [2019]eKLR** in which the Court categorically had this to say:

"9. ... there is no evidence on record that leave of the High Court or this Court was obtained to institute the appeal. We re-affirm the decisions of this Court in Rhoda Wairimu Karanja & Another -vs-Mary Wangui Karanja & Another [2014]eKLR and Josephine Wambui Wanyoike -vs- Margaret Wanjari Kamau & Another [2013] eKLR, where it was clearly stated that in succession matters, there is no automatic right of appeal without leave of court.

10. .... The decision in Makhangu –vs- Kibwana [1996] 1EA 175 (CAK) cited by the respondent was succinctly considered by this Court in Rhoda Wairimu Karanja & Another – vs- 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. (See also in Re Estate of Mbiyu Koinange (Deceased) [2015] eKLR; HCC Succession Cause No. 527 of 1981).

Further, in the case of **Francis Macharia Karanja & 6 Others vs. Virginia Muthoni Karanja [2020]eKLR, P. O. Kiage, J.A**, in a lead ruling expressed himself as follows:

"As I considered the record of this appeal and was on the verge of rendering my decision on it, a fundamental jurisdictional issue came to my attention. The same relates to the procedure to be invoked by an intended appellant before this Court can assume jurisdiction to hear succession matters. The issue goes to the heart of this Court's jurisdiction and as such must be dealt with before we get into the merits of the appeal, if at all. It is trite law that jurisdiction is everything. It therefore must be raised and addressed at the earliest since without it, the Court must down its tools as well elucidated in the famous dicta by Nyarangi, JA in THE OWNERS OF THE MOTOR VESSEL "LILLIAN S" VS. CALTEX OIL KENYA LTD [1989] KLR 1.

I appreciate that the respondents did not raise this issue. However, on crucial question of jurisdiction, the Court has authority to act on its own motion. It was so held by this Court in HAFSWA OMAR ABDALLA TAIB & 2 OTHERS V SWALEH ABDALLA TAIB [2015] eKLR;

"Unfortunately for the parties and despite their industry in ventilating the issue of goodwill, the determination of the appeal will disappoint them as it turns on the question of jurisdiction; that is, whether this Court has jurisdiction to entertain this appeal in the first place. We appreciate that it is an issue that was not raised by any of the parties. However, it is an issue of law that has long been settled and the parties and indeed their legal teams are deemed to know. Accordingly, this Court can suo moto raise and determine the same."

There is a long line of authorities in which it has been held consistently that no appeal lies to this Court in succession matters unless with leave. This was echoed in Rhoda Wairimu Karanja & Another vs. Mary Wangui Karanja & Another [2014] eKLR;

"We reiterate that section 50 of the Law of Succession Act is clear that decisions from the magistrate's courts are appealable to the High Court and the decision of the High Court is final. Decisions of the Kadhis Court, on the other hand are appealable first to the High Court and only with leave and in respect of point(s) of Muslim law, to the Court of Appeal. But section 47 of the Law of Succession Act makes no mention of an appeal to the Court of Appeal from the decision of the High Court made in the exercise of the latter's original jurisdiction."

In light of the above consistent enunciations by the Court, our hands are tied. We appreciate the undisputed position in this appeal that the deceased died on 17th October, 2003. To date beneficiarites to his estate are yet to enjoy their rightful entitlement of the said estate. The litigation which started way back on 8th February, 2005 when the appellant applied for a Limited Grant Ad Colligenda Bona to the deceased's estate has not been concluded yet. It is also our observation that issue of the incompetence of the appeal was not raised as a preliminary issue before the prosecution of the appeal but as part of submissions in opposition to the appeal. The appeal has already been heard and is now subject to this judgment. Some of the beneficiaries of the deceased's estate have since passed on without enjoying the fruits of their entitlements from the said estate notwithstanding that those fruits will be passed on to their legitimate dependants.

The widow is also of advanced age.

However, as variously enunciated above, a jurisdictional issue is a fundamental issue and has to be addressed by a Court confronted with it whether raised as an interlocutory issue or belated at the hearing of the appeal as was the case in the instant appeal or alternatively by the Court itself as was the case in the **Francis Macharia Karanja & 6 Others** case [supra]. The above being the crystalized position in law, we rule that, we have no jurisdiction to interrogate the merits of the appeal as it is incompetent as laid for want of leave to file the same granted by either the High Court appealed from or this Court appealed to pursuant to **section 47** of the **Act**. We, therefore, have no alternative but to down our tools which we hereby do.

In the result, the appeal is struck out as being incompetent. This being a family issue, we direct each party to bear own costs.

DATED and DELIVERED at NAIROBI this 19th day of February, 2021.

R. N. NAMBUYE

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR