



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: NAMBUYE, JA – IN CHAMBERS)

CIVIL APPLICATION NO. 68 OF 2020

BETWEEN

ISAAK ALIAZA.....APPLICANT/APPELLANT

AND

SAMUEL KISIAVUKI.....RESPONDENT

*(Being an application for leave to file an appeal out of time on the judgment of the High Court of Kenya (Hon. J. N. Njagi) dated 22nd May, 2020*

*in*

*Kakamega Succession Cause No. 326 of 1994*

\*\*\*\*\*

RULING OF THE COURT

Before me is a notice of motion dated 26th June, 2020 substantively under **Rules 4** of the **Court of Appeal Rules**, substantively seeking leave of the Court to file an appeal out of time against the whole of the judgment of **J. N. Njagi, J.** delivered on 22nd May, 2020; the notice of appeal annexed to the application to be treated as duly filed, together with an attendant order for costs.

It is supported by grounds on its body and a supporting affidavit sworn by **Isaak Aliaza**. It has not been opposed. It was canvassed through applicant's sole pleadings and written submissions without oral highlighting.

Supporting the application, the applicant contends that the substratum of the intended appeal is land parcel No. **Tiriki/Gisambai/1108** which he has been occupying and utilizing. It was subsequently subdivided into two equal portions by the respondent without his knowledge resulting in parcel numbers **Tiriki/ Gisambai/1852** and **53** respectively (the suit portions). The respondent sold **parcel No. 53** to a third party without applicant's knowledge prompting the unsuccessful objection proceedings filed by the applicant against the respondent in Kakamega High Court Succession Cause No. 326 of 1994. The third party who was sold land parcel Number **Tiriki/Gisambai/1853** (one of the suit portions) by the respondent filed Hamisi Senior Resident Magistrate's Court ELC Case No. 25 of 2018 (the ELC suit) (**Douglas Imbaiza vs. Isaak Aliaza**) seeking eviction of the applicant from the said suit portion, whose merit determination was put on hold to await the outcome of the succession cause proceedings. Now that the succession cause proceedings have been determined, the applicant is apprehensive that there is threat of progression of the ELC suit to his detriment if the third party were to succeed before his intended appeal is heard and determined.

It is further his contention that he is genuinely aggrieved by the decision of the succession proceedings and is desirous of pursuing his intended appellate process. The delay in initiating his intended appellate process was not deliberate. It was occasioned by reason of the delivery of the judgment on 22nd May, 2020 in his absence. He only came to learn of the delivery of the judgment on 19th June, 2020 through the respondent's advocate by which time, time for initiating the appellate process as of right had lapsed. His application is, therefore, meant to serve ends of justice to both parties especially when he has sufficiently demonstrated that the default to comply with the rules timeously was not due to any laxity or indolence on his part but on circumstances beyond his control as explained above and should therefore be excused and his application sustained.

To buttress the above submission, the applicant relies on the case of **Paul Musili Wambua vs. Attorney General & 2 Others [2015]eKLR** on principles that guide the Court in the exercise of its mandate under **Rule 4** of the **Courts' Rules**.

My invitation to intervene on behalf of the applicant has been invoked substantively under **Rule 4** of the **Rules** of the Court. Before I delve into the interrogation of the merits of the application, I find it not only prudent but also imperative for me to address a preliminary jurisdictional issue which has arisen in the cause of my appraisal of the record. It is now trite that jurisdiction is a fundamental issue and whenever raised either by the Court on its own motion or on application by a party it has to be determined first because in the event the court finds that it has no jurisdiction it has to down tools. See the case of **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989]eKLR**, wherein **Nyarangi J.A** (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"***

In light of the above exposition, I wish to reiterate that the position in law is therefore that a jurisdictional issue is a fundamental issue whether it is raised either by parties themselves or the Court *suo motu*, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter. See the case of **Francis Macharia Karanja & 6 Others vs. Virginia Muthoni Karanja [2020] eKLR**, shortly to be reverted to.

The jurisdictional issue noted *suo motu* arises from the fact that the intended appeal arises from succession proceedings and is, therefore, subject to **section 47** of the **Law of Succession Act (L.S.A)**. It provides:

***"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."***

Time and again this Court has succinctly stated that the above provision does not grant an automatic right of appeal to this Court from decisions of the High Court rendered in the exercise of its mandate under the said Act.

In the case of **Julius Kamau Kithaka vs. Waruguru Kithaka Nyaga & 2 Others [2013] eKLR** (J. Otieno Odek, J.A (as he then was)) when similarly confronted, 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**, the Court was explicit that:

***"... 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. ...."***

***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 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 reaffirm the decisions of this Court in Rhoda Wairimu Karanja & Another -vs-Mary Wangui Karanja & Another [2014]eKLR and Josephine Wambui Wanyoike -vs- Margaret Wanjira 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.”

The above being the correct position in law, the application herein is premature. The applicant has first of all to seek leave to appeal to this Court against the intended impugned decision either from the High Court as the Court appealed from or from this Court as the Court appealed to before seeking leave to file the intended appeal out of time under **Rule 4** of the **Court of Appeal Rules**.

In the result, the application is accordingly struck out as being premature for reasons given above, with no order as to costs.

**DATED and DELIVERED at NAIROBI this 5th day of March, 2021.**

**R. N. NAMBUYE**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**