



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, JA – IN CHAMBERS)

CIVIL APPLICATION NO. 48 OF 2020

SAMUEL NJORA GITAU.....1ST APPLICANT

SIMON GITAU MURICHU.....2ND APPLICANT

PAULINE GACHOKI NGUGI.....3RD APPLICANT

VERSUS

MARIA WANGARI GATHERE.....1ST RESPONDENT

JOHN KURIA WAGEMAMA.....2ND RESPONDENT

MARY NYAKINYUA MURICHU.....3RD RESPONDENT

(Being an application for extension of time to lodge and serve afresh the notice of appeal against the judgment of the High Court of Kenya at Kiambu (W. Musyoka, J.) dated 29th January, 2019 and delivered on 15th February, 2019 by (A. Ongeri, J.) in Nairobi Succession No. 2225 of 2008

RULING OF THE COURT

Before me is a Notice of Motion dated 18th February, 2020 under **Articles 47, 48 and 159 (2)(d)** of the **Constitution of Kenya 2010**, **sections 1A and 3A** of the **Civil Procedure Act, Cap 21**, Laws of Kenya, **Order 51, Rule 1** of the **Civil Procedure Rules, 2010** and **Rules 47, 53 and 75** of the **Court of Appeal Rules** and all other enabling provisions of law, substantively seeking leave of the Court to lodge the notice of appeal out of time, deem the notice of appeal as appropriately lodged and grant leave to serve afresh, the notice of appeal on the respondents.

The application is supported by grounds on its body and a supporting affidavit sworn by **Mary W. Muigai**, the applicants advocate, together with annexures thereto. It has not been opposed. It was canvassed virtually through the applicants' sole pleadings without oral highlighting.

Supporting the application, the applicants' advocate avers that applicants were aggrieved by the whole of the trial's court judgment signed at Kiambu on 29th January, 2019 and delivered at Nairobi on 15th February, 2019, but failed to lodge and serve the notice of appeal within the statutory timeline provided in the **Rules** of the Court occasioned by an oversight on the part of the applicants' advocate. It would therefore be a travesty of justice in the circumstances prevailing herein for the applicants to suffer prejudice for mistakes committed by their advocates.

My invitation to intervene on behalf of the applicants has been invoked under the numerous provisions of law cited above. **Sections 1A and 3A** of the **Civil Procedure Act** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010** do not fall for consideration in an application of this nature if presented before this Court. They are accordingly struck out. **Articles 47 and 48** of the **Kenya Constitution, 2010** relate to the entrenchment of the now constitutionally underpinned appellate right falling for consideration especially when it is undoubted that what applicants seek from the Court is for the Court to accord them the right to exercise this constitutionally accrued right of appeal. **Article 159(2)(d)** unclutches the Court from subservience to technicalities. **Rule 47** is merely a procedural rule for urgent applications and it requires no interrogation.

Rule 53 is also procedural and relates to applications that can be heard by a single judge such as the application under consideration. What

falls for consideration is **Rule 75(1)** and 2 as read with **Rule 77 (1)** of the Court's **Rules**. **Rule 75** provides as follows:

“75(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

2. Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.

Rule 77(1) on the other hand provides as follows:

77(1) An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal:

Provided that the Court may on application, which may be made ex parte, within seven days after lodging the notice of appeal, direct that service need not be effected on any person who took no part in the proceedings in the superior court.”

The prerequisites for a valid notice of appeal as provided for in the above rule is; it must be in writing, indicating whether the intention is to appeal against the whole or part of the decision, be lodged within fourteen (14) days of the date of the decision, be substantially in form D and served on the opposite party within seven (7) days of such lodging, procedural lapses, applicants concede not to have complied with.

The Court's mandate ought to have been invoked under **Rule 4** of the **Court of Appeal Rules**. It provides as follows:

“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

The principles that guide the court in the exercise of its mandate under the said Rule have been crystalized by the Court's own case law as restated by the Supreme Court of Kenya (**M.K. Ibrahim & S.C. Wanjala SCJJ**) in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2013]eKLR** as follows:- *extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court; whether there will be any prejudice suffered by the respondent of the extension is granted; whether the application has been brought without undue delay; and whether uncertain cases, like election petition, public interests should be a consideration for extending time.*

I have considered the record in light of the above threshold. The factors I am obligated in law to take into consideration in determining an application of this nature are as were restated by the Supreme Court of Kenya in the above Supreme Court case namely, the period of delay, reasons for delay, possibly the arguability of the intended appeal and any prejudice likely to be suffered by the respondent if the Court were to exercise its discretionary mandate in favour of the applicants. However, before I delve into the interrogation of the above factors,

I find it prudent to deal with a jurisdictional issue I have detected *suo motu* upon perusal of the record which goes to the core of the ruling and which I find prudent not to ignore as according to me, it is point of law touching on the jurisdiction of the Court to grant the relief sought, none opposition to the application notwithstanding. This is because the position in law and which is trite is that jurisdiction is everything. Without it, a court of law has no mandate to proceed with a matter. 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* as in the instant application, 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 Mwitwa Murimi & 2 Others vs. Mwikabe Chacha Mwitwa & 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.”

The above being the correct position in law, without the applicants demonstrating that they have complied with the above prerequisite, the Court has no alternative but to down its tools as 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 the reliefs set out above.

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 23RD DAY OF APRIL, 2021

R. N. NAMBUYE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR