IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, JA (IN CHAMBERS)

CIVIL APPLICATION NO. 41 OF 2020

BETWEEN

JOYCE WANGECHI RUGA.....APPLICANT

AND

HANNAH GATHONI RUGA.....RESPONDENT

(Being an application for stay of the ruling/order of the High Court of Kenya –

Family Division (A. Aroni, J.) dated 19th December, 2019

in

Nairobi HC Succession Cause No. 1292 of 2017)

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RULING

The Notice of Motion dated 14th February, 2020 came before the Court for hearing and determination on 2nd March, 2021.

It is brought under **sections 3A** and **3B** of the **Appellate Jurisdiction Act Cap 9** of the **Laws of Kenya** erroneously indicated as Cap 8 **Laws of Kenya**; **Rule 5(2)(b)** of the **Court of Appeal Rules** and all other enabling provisions of the law. Prayer 2 and 3 premised on **Rule 5(2)(b)** of the **Court of Appeal Rules** basically sought stay of execution of the intended impugned ruling delivered by **A. Aroni, J.** on 19th December, 2019 in Succession Cause No. 1292 of 2017.

Prayer 4 thereof falling for consideration in this ruling is as follows:

> **"That the applicant be granted leave to file an appeal against the whole ruling of the Hon. Lady Justice Ali Aroni delivered on 7th December, 2018 together with an attendant order for costs."**

Being cognizant of the nature of the proceedings giving rise to the intended appeal the Court gave directions as follows:

> **"1. This matter coming up before us today for virtual hearing of the Notice of Motion application dated 14th February, 2020 without oral highlighting and in the absence of the respective parties. The matter is taken out of today's hearing list. The Deputy Registrar is directed to place the matter before a single Judge for disposal of prayer 4 of the application seeking leave to file an appeal out of time before the rest of the prayers can be relisted before the Court for hearing and disposal.**
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> **2. Today costs in the application."**

It is pursuant to the above directions that prayer 4 has now been placed before me as a single Judge for hearing and disposal. Prayer 4 has been canvassed virtually through rival pleadings and written submissions in the absence of counsel for the respective parties and without oral highlighting.

A brief background to the application is that the applicant is a step daughter to the respondent. The litigation giving rise to the intended appeal was triggered by the death of **Ruga Gituku** father and husband to the respective parties herein. He died domiciled in Kenya on 3rd September, 2017, following which death, the applicant and one, **Grace Muthoni Ruga** and without the consent and or knowledge of the respondent petitioned for a grant of letters of representation to the estate of the deceased in Succession Cause No. 1292 of 2017 issued to them on 16th November, 2017. The respondent filed an application dated 19th March, 2018 seeking joinder as a co-administrator.

The application was opposed by the applicant and the then co-administrator, whose merit disposal resulted in the Letters of Administration Ad Colligenda Bona initially issued to the applicant and the then co-administrator on 16th November, 2017 being amended on 10th April, 2018 to remove the name of the then applicant's co-administrator and substituting it with that of the respondent herein paving the way for the succession proceedings to progress resulting in the intended impugned ruling of 19th December, 2019 in respect of which the applicant now seeks leave to appeal.

The proceedings herein having stemmed from succession proceedings any grievance arising from decisions made with regard thereto is subject to **section 47** of the **Law of Succession Act Cap 160** of the **Laws of Kenya (**the **Act)**. 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."**

It is trite that there is no automatic right of appeal to this court from decisions made by the High Court in litigations undertaken under the **Act**. This has succinctly been restated 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)) 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.**
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> **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. .....**
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> **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 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.**
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> **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**
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> **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).**

In light of the above expositions by the Court, there is no way the applicant can exercise her intended appellate right without first of all

seeking leave of Court. Prayer 4 of the application is therefore well laid.

I note that neither party in both of their rival pleadings and submissions have given serious address on this issue. Lack of such address on this issue by the respective parties is not perse fatal to prayer 4 under consideration. The approach I take in resolving this issue and which I fully adopt is that taken by **Kiage, J.A** in the case of **Francis Macharia Karanja & 6 Others vs. Virginia Muthoni Karanja [2020] eKLR**. In a lead ruling in the said case, the learned Judge of Appeal, expressed himself on this issue 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.**
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> **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 vs. Swaleh Abdalla Taib [2015] eKLR;**
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> > *"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."*
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> **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."**

In light of the above exposition, I am satisfied that I have mandate to consider the record as laid before me and rule either way. I therefore reecho the position taken by the Court numerously expressed above that a right of appeal arising from proceedings undertaken under the **Act** can only lie with the leave of either the High Court as the Court appealed from or this court as the Court appealed to. Second that issue of leave to appeal from proceedings undertaken under the **Act** being an issue of law may be raised either by a party to the proceedings or the Court *suo motu*. The above being the position in law, it is immaterial that neither party to the application under consideration has addressed the issue before me. The Court can address it *suo motu* which is the position I have taken in the disposal of the application under consideration.

Taking into consideration the issues in controversy intended to be taken up on appeal which undisputably arise from proceedings undertaken under the **Act** there is no way the applicant can exercise any appellate rights stemming from the intended impugned ruling without first of all obtaining leave to appeal either from the High Court or this Court. None was obtained from the High Court hence the request made by the applicant vide prayer 4 of the application under consideration.

In light of the totality of the assessment and reasoning highlighted above, I am satisfied that interests of justice herein would demand that prayer 4 sought in the application dated 14th February, 2020 be granted.

In the result, I make orders as follows:

1) Prayer 4 of the application dated 14th February, 2020 is granted as prayed.

2) The applicant has fourteen (14) days from the date of the delivery of the ruling to file and serve a notice of appeal and thereafter proceed according to law.

3) Costs of the application in the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 21ST OF MAY, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR