



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, MUSINGA & KIAGE, J.J.A.)

CIVIL APPLICATION NO. 397 OF 2019

BETWEEN

JAMES MITHIA GICHEMBU.....APPLICANT

AND

LUCIA MUTHONI SILAS.....1ST RESPONDENT

GEORGE GICHOMBO MUIGAI.....2ND RESPONDENT

{Being an application for stay of execution of the judgment/order of the High Court of Kenya

in Nairobi High Court Succession Cause No. 1903 of 2015 by Hon. Lady Justice Ali-Aroni

delivered on 17th October 2019.}

in

NAIROBI SUCCESSION CAUSE NO.1903BOF 2015

RULING OF THE COURT

The applicant has approached this Court under several rules of the s Court and the provisions of the Constitution being Rules 1(2) 4, 31, 39, 41, 42, 43, 47, 53 and 75 of the Court of Appeal Rules, Sections 3(2) 3A and 3B of the Appellate Jurisdiction Act and article 159 (2) of the Constitution. The applicant seeks in the main an order of stay of execution of the ruling and order of the High Court made on 17th October 2019. There is also an antecedent prayer for costs.

The grounds upon which the application is predicated is that the applicant has been excluded as a beneficiary of the deceased’s estate thus risks being disinherited. That he will suffer irreparable loss and damage if the orders sought are not granted.

The application is further supported by the affidavit sworn on the 20th December 2019 by the applicant in which he merely reiterates and expounds the grounds aforesaid but adds that the property risks being sold by those beneficiaries who have been awarded if stay is not granted by this Court.

In response to the application, the 1st Respondent filed a replying affidavit dated 23rd February, 2021 in which she opposed the motion for reasons:- that the same was incompetent, having been brought under the wrong rules of the Court, the applicant had not demonstrated whether his intended appeal was both arguable and the same would rendered nugatory should the order sought not be granted; that in any event the intended appeal is not arguable as the learned judge properly articulated the issues, the law applicable and exercised her discretion properly; that the applicant had not demonstrated that the trial court misdirected itself in the exercise of the discretion; that the current application was an afterthought; that the application if allowed will be quite prejudicial to her considering her age of 92 years and the long time this matter has taken in court since 2007; that in any event the appeal majorly concerns land which she only holds a life interest in thus there is no danger of her transferring the land

and as such the motion should fail. The 2nd respondent seems to have lost interest of participating in the matter.

Both the applicant and the 1st Respondent filed their written submissions dated 15th March, 2021 and 25th February, 2021 respectively with authorities which we have considered intensively.

We have considered the record in light of rival pleadings, authorities and submissions of learned counsel for the respective parties. However, before we delve into the merits of the application a brief background of the dispute is necessary. This was a succession matter in which the 1st Respondent was the petitioner, and the applicant and the 2nd Respondent were the objectors. The cause had earlier on proceeded in the Magistrates' Court but the file was later transferred to the High Court where again the same was at times referred for arbitration at the request of the applicant and the verdict of the negotiations was exactly what the 1st Respondent had proposed as regards distribution. Upon hearing the parties the trial court adopted the proposal on distribution by the 1st respondent though it provided that, the 1st Respondent would hold a life interest in the properties inherited by her. It is this ruling that necessitated the filing of the notice of appeal and the current motion.

Before we delve into the interrogation of the merits of the application, we find it not only prudent but also imperative for us to address a preliminary jurisdictional issue which has arisen in the course of our appraisal of the record and as raised by the respondent. 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 downs 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 cognizance 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 cognizance, 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"

Having carefully considered all elements in this we reiterate that this application should fail by all standards for reasons:-

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."

[PLEASE SEE also Section 50 of the Law of Succession Act which categorically states that the decision of the High Court in an appeal from the RM's court shall be final. See what sec.50(ii) says about appeal to the Court of Appeal. You may need to quote the section.]

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 the case of ***Rhoda Wairimu Karanja & Another vs. Mary Wangui Karanja & Another [2014]eKLR***, the Court was

candid and 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.....”

This Court has been consistent in re-echoing 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:

“... 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.. 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.

We 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 from the High Court acting in its original jurisdiction in succession matters unless with leave. This was echoed in **Rhoda Wairimu Karanja & Another vs. Mary Wangui Karanja & Another [2014] eKLR.**

The record does not show that the applicant sought and obtained leave of the High Court or this Court to initiate these proceedings. That being the case, the application is inept and incompetent. It is accordingly struck out with no order as to costs, this being a family dispute.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY, 2021.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this a true copy of the original.

Signed

DEPUTY REGISTRAR