IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, KIAGE & ODEK, JJ.A)

CIVIL APPEAL NO. 203 OF 2014

BETWEEN

FRANCIS MACHARIA KARANJA .....1ST APPELLANT

MARION WANGUI KARANJA .....2ND APPELLANT

CECILIA WANJIRU KARANJA.....3RD APPELLANT

ANN WANJIRA KARANJA .....4TH APPELLANT

JANE NJERI KARANJA .....5TH APPELLANT

JOSEPH MWANGI KARANJA.....6TH APPELLANT

DANIEL NGANGA KARANJA .....7TH APPELLANT

AND

VIRGINIA MUTHONI KARANJA.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (D.K. Maraga J (as he was then)), dated 14th November, 2011

in

Succession Cause No. 1440 of 2000)

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JUDGMENT OF KIAGE, J.A

Sebastian Karanja Macharia (deceased) died on 26th April 2000 at the Nairobi Hospital. He was survived by a former wife Marion Wangui (Marion) with 10 children, some of whom are the appellants herein, and his widow Virginia Muthoni Karanja, who had one child. He died testate pursuant to a will that was duly executed by him dated 6th June 1998, in which he appointed one

Joseph David Muturi (Joseph) as his executor. Pursuant to his legal obligation as an executor, the said **Joseph** applied for, via Succession Cause No. 1440 of 2000, and obtained a grant of probate dated 5th September 2000.

The dispute that led to the instant appeal is founded on an application by the appellants throuh the 1st appellant Francis Macharia Karanja (Francis) as the objector, under **Section 26** of the **Succession Act** for provision of reasonable dependence for himself, his siblings and his mother whilst challenging the validity of the will. The 1st appellant swore in his affidavit that he had already applied for letters of administration intestate in the Resident Magistrate's Court at Githunguri. He deposed that their household was not aware of the existence or authenticity of the will. Francis complained that the will bequeathed most of the property of the estate of the deceased to the respondent and her adopted son. He further deposed that their house deserved adequate provision as they were all dependants and their mother, Marion, did not get any settlement pursuant to the divorce.

Additionally, he proposed that Marion gets a life interest in Title No. Githunguri/Gathangari/758 and that his siblings should be given the

Wembly Shops and Garage on Plot No. 77 Limuru; Title No. Githunguri/Gathangari/756; all proceeds from Penum Shops on Plot No. 77 Limuru; motor vehicle registration numbers KKQ 463, KQL 267 and KPP 702; all monies in the deceased's; accounts and all the livestock to be shared equally.

The respondent opposed the application through her replying affidavit stating that the application as filed had not met the threshold as set out in **Section 26** of the **Succession Act** as construed with **Rule 45** of the **Probate and Administrative Rules**. Marion having separated from the deceased in 1971 and gotten a divorce in 1984, was not a widow as envisioned in **Section 29** of the **Act**. Moreover, the appellants unlawfully intermeddled and grabbed the deceased's movable assets upon his death.

She asserted that the appellants were misleading the court by giving a false picture of the estate of the deceased. In truth, Title No. Githunguri/Gathangari/756 was already sold to a third party long before the deceased died; the deceased's bank accounts only had a total of Kshs. 9,420.9 since the rest of it was utilized to pay his medical bills and other debts that had accrued from the estate; Githunguri/Gathangari/724 which was bequeathed to the appellants was 1.7 Ha, thus large enough to accommodate all the appellants; and that the only reason the value of Githunguri/Gathangari/758, measuring 1.32Ha was greater was because the matrimonial home was situated on it.

Joseph also swore an affidavit in opposition to the appellant's application and reiterated the respondent's averments.

D.K. Maraga J (as he was then) considered the pleadings and submissions before the court and delivered a judgment on 14th November 2011. He held that the application lacked merit as the appellants failed to demonstrate the need to be provided for more than the share bequeathed to them. He accordingly dismissed the application and ordered that the estate shall devolve as stated in the will.

The appellants were dissatisfied with the judgment and filed the instant appeal containing 7 grounds, which, condensed, are that the learned judge erred in law and in fact by;

a) Disinheriting the former wife.

b) Taking into account irrelevant considerations and misinterpreting the **Succession Act** (sic) thus arriving at an erroneous conclusion.

c) Failing to hold that the executor and the respondent had intermeddled with the estate.

During the hearing of the appeal, learned Counsel **Mrs Wambugu** appeared for the appellants, while learned Counsel **Mr Maina** held brief for **Mr Kamau** on record for the respondent. Both parties had filed written submissions which Counsel highlighted before us.

Mrs Wambugu submitted that the learned Judge misdirected himself by misinterpreting the import of the will. The testator did not give plots to the respondent for the benefit of the minor but rather to the respondent in her personal capacity. She insisted that since the learned Judge had declared the former wife a dependant, she ought to have been provided for. She concluded by stating that the respondent and the executor had intermeddled in the estate.

Mr Maina retorted that the validity of the will was never challenged and the appellants were trying to engage the Court to interfere with **Section 5** of The Law of **Succession Act** that provides for testamentary freedom. What was to be taken into consideration was the free estate of the deceased. The appellants were properly provided for. He urged the Court to dismiss the appeal with costs.

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 V 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 a recent appeal, this Court held in **JOHN MWITA MURIMI & 2 OTHERS V MWIKABE CHACHA MWITA & ANOTHER [2019] eKLR**;

> ***"10. It is not in dispute that the impugned ruling in this matter arises from a succession cause and the respondents did not obtain leave to appeal. The decision in Makhangu -v-Kibwana [1996] EA cited by the respondent was succinctly considered by this Court in Rhoda Wairimu Karanja & another – v- 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)."***

From the record, I am satisfied that the appellants did not seek leave from the High Court. Nor have they moved this Court for the same. It follows therefore that this appeal is incompetent and cannot be entertained, our jurisdiction not having been properly invoked. Only one fate awaits such an appeal and I would strike it out for incompetence.

I would make no orders as to costs as this is a family matter and the respondent did not raise the point on which the appeal has turned.

As Makhandia JA agrees, those shall be the orders of the Court.

This judgment is rendered under **Rule 32(3)** of the **Court of Appeal Rules**, Odek, JA having sadly died before its delivery.

DATED and delivered at Nairobi this 10th day of July, 2020.

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

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JUDGMENT OF ASIKE-MAKHANDIA, J.A

I have had the benefit of reading in draft the Judgment of Kiage, J.A. I wholly agree and concur with the contents. I have nothing useful to add.

Dated and delivered at Nairobi this 10th day of July, 2020

ASIKE-MAKHANDIA

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JUDGE OF APPEAL