IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MAKHANDIA & OUKO, JJA)

CIVIL APPEAL NO. 126 OF 2016

BETWEEN

ROSEMARY B. KOINANGE

(Suing as legal representative of the

Late Dr. Wilfred Koinange and also

in her Own personal capacity)**..........................1ST APPELLANT**

CKK ESTATES (1973) LTD.................................2ND APPELLANT

SAMUEL KARUGA KOINANGE..........................3RD APPELLANT

SUSAN NDUTA KOINANGE................................4TH APPELLANT

PETER WANDUGA KOINANGE..........................5TH APPELLANT

KAKOI DEVELOPMENT COMPANY LIMITED....6TH APPELLANT

AND

ISABELLA WANJIKU KARANJA......................1ST RESPONDENT

PETER MBUYU KARUGA.................................2ND RESPONDENT

WILLIAM KIHARA KARUGA.............................3RD RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya

at Nairobi (Kimaru, J) dated 22nd January, 2015

in

Succession Cause No. 998 of 2006 In the Matter of the Estate of Charles Karuga Koinange)

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JUDGMENT OF THE COURT

1. This is yet another high profile succession cause in which the beneficiaries of the estate are mired in the miasma of familial rancour. As recently as 24th November 2017, this Court made the following observation in the case of

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***Margaret Njeri Mbiyu vs. David Njunu Mbiyu Koinange & 13 Others* Civil**

Appeal No. 47 of 2016 (Consolidated with 50 and 56 of 2016) (UR):

> "***During his sojourn on this earth, the deceased acquired and accumulated massive wealth, particularly prime land in Kiambu, Nairobi, Nakuru and Mombasa counties, in all totalling to almost 6,000 acres worth billions of shillings. Unfortunately, that wealth has turned out to be the apple of discord in his family, as vividly demonstrated in this appeal and in the proceedings in the High Court that gave rise to it. Since his death intestate on 3rd September 1981, his family has known no peace, fighting acrimoniously over whom his dependants are, and their respective shares of the property. The litigation over his estate has spawned countless petitions, objections and applications for one relief or another, ultimately leading to this appeal. Even the deceased's grandchildren and third parties have joined the fray, staking all manner of claims to portions of the estate. There have been petitions for grants of representation; myriad applications for annulment of grants; for change and replacement of administrators; for cessation of intermeddling with the estate; for eviction of some of the children of the deceased from some of the properties; for disposal of properties of the estate; and for partial distribution of the estate, among others. Even criminal prosecutions, including for murder and attempted murder, have arisen from dealings in the estate. In those proceedings, widows and children of the deceased have, without any sense of irony, easily disowned persons who at one time or another they represented to the world to be their co-wives or siblings. Many of the beneficiaries and their dependants have passed on, not to mention that a substantial part of the estate has been dissipated in the litigation, which has been on-going for over 36 years. In a ruling dated 28th January 2005, one of the many judges to have dealt with the matter in the High Court, Koome, J. (as she then was) described the family litigation as "a classical theatre of the absurd." And as one of the learned counsel for the parties ruefully observed, the beneficiaries of the deceased seem to have been blessed in many ways, save in the realm of wisdom.***"

The deceased in that cause was the elder brother of the deceased in this matter and the observation seems to apply, *mutatis mutandis,* to this cause with equal force.

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2. There are 43 grounds listed in the memorandum of appeal which appear to be prolix, and on perusal turn out to be unduly repetitive. This Court has on numerous occasions drawn the attention of parties to the provisions of ***Rule 86*** of the **Court of Appeal Rules, 2010** on the proper contents of a memorandum of appeal and cautioned that a breach of the rule may attract a striking out order. We reiterate that caution. In the appellant's written submissions the grounds were reduced to eight and were further reduced to four broad issues at the oral hearing stage. Yet still, the appellants have expended considerable energy and space challenging the procedure adopted by the trial court, which is touted as a jurisdictional issue. But it seems to us that the kernel of the appeal remains whether the deceased died testate or intestate, which calls for a decision on the validity of the deceased's Will, and secondly, whether the shares of **2nd appellant** were part of the estate and therefore available for distribution. We also think the appellants have drifted tangentially to matters which did not strictly arise from the impugned Ruling of **Kimaru, J.** We shall examine those issues presently.

3. First, a short background to the appeal, if it can be so called, from three volumes running into more than 1000 pages, which will bring the issues into focus. The deceased was a former Provincial Commissioner who died 13 years ago on 20th February, 2004. In his lifetime he had acquired immense wealth in form of parcels of land spread over Nairobi, Embu, Thika, and Kiambaa in Kiambu;

motor vehicles; stocks and shares in no less than 15 public and private limited

liability companies; cash in several bank accounts; and moveable household properties; all valued at billions of shillings. He was polygamous but his first wife (Grace) died leaving behind six sons:- Dr. Wilfred Karuga **(Wilfred),** John Miringu **(John),** Paul Mbiyu **(Paul),** Leonard Kangethe **(Leonard),** William Kihara **(William),** and Ernest Ngugi **(Ernest)**. She also left behind four daughters:- Mary Wanjira **(Wanjira),** Marion Wambui **(Wambui),** Isabella Wanjiku **(Wanjiku)** and Rosemary Gachiku **(Gachiku).** In 1960, the deceased married the second wife, Mary Njoki **(Njoki)** with whom they bore one son, Peter Mbiyu **(Peter)** and one daughter, Jaine Wambui **(Jaine).** The deceased was thus survived by 12 children.

4. At some point in their marriage, Njoki and the deceased fell out and had an acrimonious divorce process, with numerous other cases along the way, but the decree for divorce was ultimately granted by the court on 8th March, 1994. It was followed by numerous other applications for sharing of moveable and immoveable properties under ***section 17*** of the **Married Women's Property Act, 1882**. In no mean measure the immense stress exerted by that litigation accelerated the deceased's health problems, as asserted in affidavits on record, and he died before it was concluded.

5. The deceased was said to have left a written Will through the Firm of M/s Kaplan & Stratton, Advocates, which was dated 16th June 1999. The Partners of that firm had been appointed as the

executors of the Will but they renounced the

appointment for reasons that are not clear but said to be uncertainty on *'the exact*

extent of the estate' and *'past experiences with disputed Estates'*. Initially, the family, led by Wilfred, the eldest son, believed the Will was authentic, except for reservations of a few members. They met and elected three among them: William, Paul and Peter, to petition for Letters of Administration with Will annexed and the grant was issued on 23rd November 2006. When the daughters got wind of it, they filed caveats and applied in February 2007, to have their interests taken care of under ***section 26*** of the **Law of Succession Act** (LSA), pleading that they were not aware of the extent or value of the estate, a share of which they were entitled to. The former wife, Njoki, went even further than filing caveats and in May 2007, sought to have the grant revoked under ***section 76*** of LSA for having been obtained fraudulently by concealing material facts, to wit, firstly, the fact that the 84 year-old deceased was suffering from Alzeimer's disease and was incapable of making or executing any Will; and secondly, that the properties mentioned in the Will were the subject matter of court proceedings at the time and could not therefore be devised or bequeathed. She produced medical reports from Drs. F.G. Njenga and S. Mwinzi to support the assertion of incapacity.

6. During the pendency of the various applications, the parties converged in court on 11th March, 2008, before **Onyancha, J.** and agreed on the appointment of William, Peter and Wanjira **(the administrators)** to be issued with the grant of letters of Administration *ad colligenda bona* in order to collect and preserve the

estate and save it from losses and waste. Other court skirmishes ensued until **11th**

November, 2010 when the Administrators were joined by all the daughters of the deceased, the rest of the sons, and Njoki to make a joint application seeking an injunction against Wilfred whom they accused of having taken control of, and intermeddled with, the estate. They particularly wanted to stop him from collecting rent from some property in Embu registered in the name of the **6th appellant** and to have him account for incomes derived from other registered companies like **Mecol Company Ltd, Geminia Insurance Co Ltd**, and some bank accounts. In turn, Wilfred opposed that application on the ground that limited liability companies were juristic persons separate from the deceased and could not form part of his estate. Only the shares held by the deceased would be amenable to inheritance. He hit back and filed his own application on **20th November, 2012** seeking revocation of the limited grant issued to the administrators, and further sought the appointment of a receiver manager instead. He maintained that the deceased had died testate, while the rest of the family were all insistent that the purported Will relied on by Wilfred was a nullity, and submitted a draft *'Deed of family arrangement'* for distribution of the estate.

7. The two applications fell before **Karanja, J.** (as she then was) for hearing and disposal. She appreciated that the applications were not for confirmation of grant or even proceedings for proving the Will and left these issues out for future contest. In her Ruling dated 23rd February, 2012, the learned Judge granted only one of the orders sought by the administrators for access to the deceased's bank

accounts with the Standard Chartered Bank, but otherwise dismissed their entire

application for want of merit. She also dismissed Wilfred's application. That would have been the end of the two matters before the learned Judge. However, in what must surely be *obiter dicta*, the Judge gave directions in an effort to chart the way forward, advising the parties to *'go back to the drawing boards'.*

8. In giving the directions, the learned judge reasoned as follows:-

> ***"The Interim Administrators herein or Dr. Koinange or indeed any other party can still move the court in the normal way for a full Grant of Probate (as per the Will) or Grant of Letters of Administration intestate as the case may be, and the court will deal with the same. Upon the full Grant being granted the Limited Grant will be surrendered pursuant to Rule 38 (2) and the present Administrators will then be required to account to the court for all the assets collected (which will address Dr. Koinange issue on accounts by the Interim Administrators). The parties should therefore now move with dispatch towards that direction as that in my view is the only way forward since we cannot have Interim Administrators indefinitely as they cannot distribute the properties which I believe is what each and every one of them is interested in. This court gives directions to the effect that the full Grant of Letters of Administration be applied for within 30 days from the date of this ruling. This is the only course which in my view will propel this matter forward."***

9. Taking the cue from Karanja, J., Wilfred petitioned for Letters of Administration with annexed Will dated 16th June, 1999. His petition was filed on 26th March, 2012 and he undertook to administer the estate in accordance with the deceased's Will. On 13th August, 2012, the administrators, joined by all the daughters, the rest of the sons and Njoki, filed an objection to the petition. They asserted that the administrators were lawfully appointed and had prepared a schedule for distribution of the estate which everybody except Wilfred was willing to sign;

that there were caveats and a pending application challenging the validity of the

Will; that orders had been made elsewhere that the deceased lacked legal capacity to make a Will; and that since Wilfred held a Power of Attorney from the deceased in respect of all his affairs and was the sole beneficiary of the alleged Will, it would be improper to give him the Grant. As fate would have it, Wilfred died a few months later on 27th August, 2012.

10. In addition to the objection, the administrators filed an answer to the petition and a cross petition for the full grant on 7th November, 2012. They presented the *'Draft Deed of Family Arrangement'* and *'Schedule of Distribution'* which the whole family, except Wilfred, had agreed on and which they hoped to effect faithfully upon confirmation of the grant. On 19th February 2014, they applied for confirmation of the grant issued on 11th March, 2008 and received support for it from the daughters and the rest of the sons. However, two of the sons, John and Ernest, subsequently pleaded ignorance of the details of the proposed distribution and rejected much of it in a subsequent affidavit sworn on 26th February, 2014. They particularly opposed the inclusion of Njoki and her children, Jaine and Peter, as beneficiaries in the estate.

11. On 12th February, 2013, the estate of Wilfred applied for substitution by his wife, Rosemary Bagenda **(Rosemary)** who was named as the sole executrix of his Will and was bequeathed his entire estate. Before then, the administrators had attempted to obtain an order for full grant of Letters of Administration before **Njagi, J.** but this was opposed and Njagi, J. gave a date for a Ruling to be

delivered on 11th December, 2012. As fate would have it, Njagi, J. left the Judiciary and no ruling was ever delivered.

12. The matter then came before **Kimaru, J.** on 20th March, 2013 when he made an order in the presence of counsel for the interim administrators that:

> ***"All beneficiaries attend court on 3rd May, 2013 with a view to concluding the issue of who the administrators shall be and the distribution of the estate."***

When counsel for the other parties appeared on 3rd May, 2013, a consent was recorded that:

"all parties to file their preferred mode of distribution of the estate by way of affidavits. All beneficiaries to attend court on 18th July, 2013 for distribution of the estate of the deceased by the court."

13. In compliance, Rosemary, through counsel, drew up and filed a lengthy affidavit sworn on 15th July, 2013, *"in support of a proposal for a preferred mode of distribution of the estate"* but clarified that it was without prejudice to an application she intended to file for review of the orders of 20th March and 3rd May, 2013. Her preference was for the hearing of Wilfred's petition and the administrators' cross petition to determine the validity of the deceased's Will. She proposed that the estate be distributed in accordance with the Will, noting that the *'Draft Deed of Arrangement'* included private companies like the 2nd appellant, Koba Waters Ltd, Mecol Ltd and 6th appellant, and some parcels of land as part of the deceased's estate when they were not. She disclosed in a subsequent affidavit that Wilfred had, before his death, transferred all the shares he held in the 2nd appellant totaling 14,999 to herself and their three

children. In further affidavits sworn on 26th February, 2014 and 27th March, 2014, she attacked the purported *'Deed of Arrangement'* as a fake which had not been agreed on by all family members and contained inaccurate information particularly on the bequests made by the deceased to all his children in his lifetime, and included what was strictly the property of the late Wilfred. She also protested the inclusion of Njoki as heir of the deceased.

14. Rosemary made good her intention and filed a summons for setting aside the orders of 20th March and 3rd May, 2013 which she said had been made in her absence. She sought an order that her name be substituted for her late husband's; that directions be given for prosecution of the petition and cross petition by way of affidavits and oral cross examination; and that the issue of distribution be considered after determination of the issue of testacy or intestacy.

15. Njoki also complied on 15th July, 2013 and filed a lengthy affidavit listing properties she claimed were jointly owned with the deceased but which she alleged Wilfred had intermeddled with and either alienated or appropriated to his own use. In a supplementary affidavit sworn on 25th February, 2014, she denied knowledge of any transfer of shares of the 2nd appellant where she is a shareholder/Director; disclosed various other properties which the late Wilfred had interfered with in abuse of the general power of attorney donated by the deceased; disclosed other properties which other children had improperly appropriated; and rejected the proposed distribution by the administrators, the

daughters and sons. Other filings were also made by the daughters who accused

the sons of hogging much of the estate to the prejudice of others and proposed equitable sharing.

16. There was substantial compliance with the orders of the court by the time the parties landed before Kimaru, J. again in February 2014. We may reproduce two of the crucial orders that followed:

"5/2/14

Coram: Kimaru, J

Lilian Court Clerk

Dr. Kuria for Mrs. Koinange

Mr. Muguku for the interim administrators

K. K. Njenga holding brief for Dr. Khaminwa for M. Njoki Karuga J. M. Njenga for John Miringu

Mrs. Ngetho for Isabel Wanjiru Karanja & Marion Wambui Kimamo for Susan Mugure Mbiyu

Muguku also acting for Leonard Kangethe, Ernest Ngugi, Jane Wambui and Rosemary Gichuki.

Mary Wanjere Karuga, Isabella Wanjiku, Susan Mugure Mbiyu, Rosemary Gachiku Mugo, Marion Wambui, Mary Njoki Karuga, Jane Wambui, Peter Mbiyu Koinange , William Kihara Karuga, John Miringu Karuga, Rosemary Koinange, Leonard Kangethe Karuga – Beneficiaries.

Order

Mr. Muguku is granted 10 days to file and serve an affidavit containing a list of all the

***properties owned by the deceased including any documentary evidence and their estimated values*. Distribution and other related issues shall be dealt with by the court on 27/2/2014 at 2.00 pm. All beneficiaries to be present. All the parties have leave to file their proposals. HCCC No. 3953/89 (O.S) and HCC Misc No. 120/2013 to be availed to this court.”**

17. Before the next order was made, Rosemary produced a sealed envelope which upon opening in the presence of all parties in court was found to be a letter written by the deceased on 8th May, 1975 purporting to be his last Will. It formed

one of the issues, thus:-

“27/2/2014

Coram Kimaru J

Pamela Court Clerk

Dr. Kamau Kuria for Mrs Rosemary Koinange widow to Dr. Wilfred Koinange (Legal Representative)

Dr. Khaminwa for Mrs. Mary Njoki Karuga (former wife of the deceased)

Ashford Muguku for the interim administrators

JM Njenga for two beneficiaries John Miringu and Ernest Ngugi Mrs. Ngetho for beneficiaries Isabella Karanja and Marion Wambui

Macharia holding brief for Kimamo for Susan Mugure Mbiyu Kimonda holding brief for Muturi Mwangi for Rosemary Gaciku and Jane Wambui.

Susan Nduta Koinange – daughter of Wilfred Koinange Mary Njoki Karuga – widow of the deceased Isabella Wanjiku Karanja – daughter

Susan Mugure Mbiyu – widow of Paul Mbiyu Koinange son of the deceased

Marion Wambui – daughter

Rosemary Mbagenda Koinange Widow of Wilfred Koinange Jane Wambui Kariuki – daughter Rosemary Gaciku Mugo – daughter

Mary Wanjiru Karuga – daughter

Peter Mbiyu Koinange – son

John Miringu Karuga – son

William Kihara Karuga – son

Ernest Ngugi Karuga – son

Leonard Kangethe Karuga – son

Order

<u>Isabella Wanjiku Karanja, William Kihara Karuga, Samuel Karuga Koinange and Peter Mbiyu Koinange are hereby appointed to be the administrators of the estate of the deceased.</u> The court shall determine the validity of the will of the deceased dated 16th June, 1999. The parties shall also address the court in regard to another will written by the deceased dated 8th May, 1975. The parties shall also make submission *(sic)* ***in regard to whether the transfer of the 14999 shares of CCK Estate Ltd to Dr. Wilfred Karuga Koinange in 1994 was valid and whether the said shares form part of the estate of the deceased. The parties shall also make submissions on the properties that were made by the***

deceased prior to his death and whether they should be upheld.

Written submissions to be filed and exchanged within 30 days.

Hearing on 26th/27th May, 2014.

KIMARU

JUDGE".

18.It is not clear what discussions informed the framing of the issues contained in the orders or whether there were any objections raised before they were made. What is clear is that the parties proceeded to file submissions on the framed issues and the longest of those were from Rosemary's counsel running into 115 pages. Indeed, Samuel Karuga Koinange **(Samuel),** Wilfred's son appointed as one of the administrators by consent, filed an application on 16th January, 2015 seeking a ***"partial confirmation of the grant issued herein on 27thFebruary, 2014."*** The grounds for that application were stated to be, *inter alia*: that the beneficiaries had agreed that pending determination of the issues framed on 27th February, 2014, partial confirmation may take place in respect of properties whose ownership is not in dispute.

19.On 22nd January, 2015, Kimaru, J. delivered the impugned Ruling in which he made the findings that the letter dated 5th May, 1975, as conceded by all parties, did not amount to a Will for want of witnesses as required under ***section 11(c)*** of the LSA; that due to Alzheimer's disease, the deceased lacked the mental capacity to make an elaborate Will running to nine (9) pages on 16th June, 1999 and therefore the Will was invalid; and that the deceased had no mental capacity in 1994 to transfer the shares of the 2nd appellant to Wilfred and it was Wilfred who

caused the said shares to be fraudulently transferred to himself with the aim, initially of frustrating the claim lodged by Njoki, but later with the aim of depriving his siblings of their inheritance of the parcel of land that the said shares represented. The transfer was a nullity and the shares reverted to the estate for distribution.

22.With those findings, the Court declared the estate of the deceased was to be administered as if the deceased died intestate, and would be distributed in accordance with the provisions of the LSA. Any claims about gifts made *inter vivos* would be established before the remainder of the estate of the deceased is distributed to the beneficiaries, but the parties were at liberty to file affidavits indicating their preferred mode of distribution for determination by the court. They were also not precluded from amicably agreeing as to the mode of distribution after taking into account the debts owed by the estate.

23.The findings and directions aggrieved Rosemary who filed a notice of appeal to challenge them.

Two other notices of appeal were also filed by 2nd appellant with four of its shareholders (Rosemary, and her three children), and by 6th appellant. The companies subsequently applied before Kimaru, J. to be enjoined as parties to the Succession Cause but their application was rejected on the ground that Limited liability companies have no interest in succession proceedings and that the application came too late in the day. At all events, it was observed, the estate of Wilfred was represented by Rosemary in the

Succession proceedings. An application for stay was also dismissed as it would

delay the distribution of the estate. The companies and the shareholders of 2nd appellant moved to this Court for leave to appeal and for stay of further proceedings, pending the intended appeal, and the application succeeded before **Visram, Sichale & Mohammed, JJ.A** on 16th March, 2016.

24. The 1st appellant, Rosemary and the estate of the late Wilfred, was represented before us, as it was before the High Court, by Senior counsel, **Dr. Gibson Kamau Kuria** instructed by the Firm of M/s Kamau Kuria & Company, Advocates; the 2nd to 6th appellants by **Mr. James Gitau Singh** assisted by **Ms. Gloria Biwot,** instructed by M/s LJA Associates; the 1st and 3rd respondents (Wanjiku and William) as well as 8 other beneficiaries by **Mr.**

Philip Murgor assisted by **Mr. George Ouma** instructed by M/s Murgor & Murgor Advocates; 2nd respondent (Peter) by **Mr. Ashford Mugwuku** instructed by M/s Ashfords & Company; 4th respondent (Njoki) by **Dr. John Khaminwa** instructed by M/s Khaminwa & Khaminwa Advocates; John Miringu and Ernest Ngugi by **Mr. J. M. Njenga** instructed by M/s J. M. Njenga & Company Advocates.

25. As stated at the beginning of this judgment, there are three main issues raised by the appellants which we must now return to in the following order:

i. ***Whether the procedure adopted by the trial court was proper.***
ii. ***Whether the deceased died testate or intestate.***
iii. ***Whether the shares of CKK Estates (1973) Ltd were part of the estate.***

26. The first ground is raised on the basis that the trial court totally ignored the

provisions of the LSA, ***Probate & Administration Rules*** (P&A) and the ***Civil***

Procedure Rules *(CPR)*; framed issues on matters that were not pleaded; considered unpleaded issues; and made orders against persons who were not parties to the Succession Cause in breach of rules of natural justice. Dr. Kuria referred to the orders made by the trial court on 20th March and 3rd May, 2013 for distribution of the estate of the deceased on the basis of affidavits of beneficiaries setting out their preferred mode of distribution and submitted that they were illegal. That is because there was on record, a *'Petition for grant of probate'* filed by the late Wilfred, an *'Objection'* filed by several beneficiaries*, 'Answer to the petition and a Cross petition'* filed by the respondents pursuant to the directions of Karanja, J. It was therefore incumbent on the trial court to follow ***Rules 15*** and ***17*** of the P&A to give directions on determination of the validity of the challenged Will through documentary and oral evidence tested in cross examination. He cited the cases of ***Ndolo vs. Ndolo [2008] 1 KLR 742*** and ***Mwangi & 3 Others vs Mwangi & 4 Others C A No. 213 of 1997 (UR)*** to emphasize the unfettered testamentary freedom to dispose of property under

section 5 of LSA, and why it must not be taken lightly.

27. Counsel further cited this Court's decision in ***Speaker of the National Assembly vs. James Njenga Karume [1992] eKLR 'that where there is clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed'*** to emphasize the importance of adherence to the prescribed rules and the folly of following

shortcuts. He also cited the cases of ***Nyutu Agrovet Limited vs. Airtel Networks***

Limited [2015] eKLR and ***City Chemist (Nrb) & Another vs. Oriental***

Commercial Bank Ltd, Civil Application No. Nai. 302 of 2008 (UR. 199/2008)

to the same effect on the application of the overriding objective of civil litigation under ***sections 3A*** and ***3B*** of the Appellate Jurisdiction Act.

28. As for delving into unpleaded issues, counsel faulted the trial court for rewriting the pleadings for

the parties and cited several authorities to emphasize that cases are decided on issues on record, parties are bound by their pleadings, and that a court should not decide on an issue raised by itself. According to counsel, the matter of shares of the 2nd appellant was not pleaded and there were no pleadings or particulars of fraud which the trial court purported to base its decision on. He characterized the infractions committed by the trial court as jurisdictional and cited the Supreme Court decision in ***Samuel Kamau Macharia***

& Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR

where it was stated:

> ***"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings."***

The case of ***Motor Vessel Lilian 'S' vs. Caltex Kenya Limited (1989) KLR 1*** was also relied on for support of the view that the Succession Court had no

jurisdiction to frame and deal with the issue of the shares of the 2nd appellant, which issue belonged to Company Law and the Civil courts.

29. Finally on the first issue, counsel contended that the appellant companies and their shareholders were not given an opportunity to be heard which was a cardinal principle of law. He cited the cases of ***Onyango Oloo vs. Attorney General [1986-1989] EA 456*** and ***De Souza vs. Tanga Town Council [1961] EA 377***, among others for emphasis that a decision made in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. The decision must be declared a no decision.

30. In all those submissions, Dr. Kuria was supported by Mr. Singh who added that Kimaru, J. should have followed the directions made earlier by Karanja, J., instead of descending into the arena of conflict and dragging in limited liability companies which had no problem with their shareholding.

31. Responding to the first issue, learned counsel for the administrators M/s Mugwuku and Murgor dismissed the claim that the proceedings conducted before Kimaru, J. were either informal, hijacked, irregular or conducted in the absence of the parties. According to them, all necessary parties, including the appellants, were present with their respective counsel and the record bears that out. They asserted that there was consensus on who the administrators to be issued with the full grant were, and there was a consent on the issues framed by the learned Judge for adjudication. In their view, the objections raised in this appeal are an

afterthought since no objections were raised before the trial court and indeed

there was compliance with the consent orders. Counsel further submitted that it was for the appellants to apply to be enjoined in the proceedings in good time if they had any interest in the estate of the deceased, but they did so belatedly.

32. Those submissions were supported by Dr. Khaminwa and Mr. Njenga who added that Kimaru, J. did not distribute the estate but merely dealt with preliminary issues agreed on by the parties; the challenge to procedure was outside the notice of appeal given which was in respect of the Ruling of Kimaru, J. only; there was no conflict between the directions given by Karanja, J. and the consents recorded by Kimaru, J.; directions on the Petition, Objection, Answer to the Petition, and Cross Petition were unnecessary since they were all compromised by consent of all beneficiaries; the issues framed arose from the pleadings and all counsel and the beneficiaries were aware of them, hence the extensive written submissions filed; and that there was some urgency in bringing the litigation to an end since some beneficiaries were aging, dying and sick, hence the agreed procedure on filing affidavit evidence and written submissions.

33. We have given due consideration to the first issue. Speaking for ourselves, we do not find the procedure adopted and the impugned ruling as mutually exclusive, since one was the result of the other, and both deserve reevaluation and reassessment on a first appeal. In a manner of speaking, the process is as important as the result. The plea by the respondents that we ignore the complaints on procedure is therefore rejected.

34. From the summary made above, it is clear to us that the procedure adopted by the trial court was, to say the least, untidy, and we are not surprised that it attracted the complaints that are made before us by the appellants. We are equally not surprised that the trial court was tempted to adopt the procedure. There was before him a Succession matter which had generated a lot of heat but no light for more than 5 years since its debut in court in 2006. The beneficiaries were old, sickly and

some had started dying. The property of the estate was wasting fast and appeared to be in shambles. The interim administrators initially agreed on by the family seemed to go nowhere with the collection and preservation of the estate. And so, the desire by the court to expedite the matter and oversee the distribution of the estate was, in our view, genuine and understandable.

35. However, it was incumbent on the trial court to follow the law on administration of estates as provided in the LSA, the P&A Rules and the applicable CPR Rules. In our view, neither ***section 47*** of LSA which confers jurisdiction on the High Court, nor ***Rule 73*** of the P&A which saves the inherent powers of the court, permit any court to become 'a bull in a china shop'. It has been said before that the inherent powers of the court are only resorted to when there are no clear provisions of the law. As Khamoni, J. stated, and we agree, ***In the matter of the***

Estate of Erastus Njoroge Gitau (deceased) Nairobi High Court Succession

Cause No. 1930 of 1997:-

> "***Rule 73 is to be used only in deserving cases where no specific provisions exist to deal with the situation in question. It is not an omnibus provision which allows the court to entertain all manner***

> ***of applications. Rule 73 only relates to gaps in the Law of Succession Act and the Probate and Administration Rules."***

36. When the matter first landed before the learned Judge on 20th March, 2013, there were outstanding matters on record, including:- Caveats registered by the daughters and Njoki; Njoki's application challenging the validity of the Will; Wilfred's Petition filed on 26th March, 2012; Objections thereto filed on 13th August, 2012; an Answer to the petition and a Cross Petition; a pending Ruling on directions for hearing of the matter in view of the death of Wilfred and Application for substitution of Wilfred's estate. Nothing was said about those matters before the order was made on that day summoning all beneficiaries to *"conclude the issue of administrators"* and the *"distribution of the estate."*

37. The court orders that followed concentrated on the filing of the preferred mode of distribution of the estate by the parties, until the consent orders reproduced above were recorded in February 2014. Before the consents were recorded, there were further pleadings filed including:- Application for substitution of Rosemary for Wilfred and his estate; application to set aside and review the court orders made on 20th March and 3rd May, 2013; application by the administrators

for the full grant of representation; Objections by John and Ernest to the inclusion of Njoki and her children in the estate of the deceased; and several extensive submissions expressing divergent views on distribution. Again, there is nothing explicit on the record said about those matters.

38. In our view, the *coup de grace* in form of **"Distribution of the estate"** as envisaged by the learned judge was not possible without clear determination of the issues raised in all the pleadings referred to above. Indeed the learned Judge came to that realization as he considered the impugned ruling when he stated thus:

> ***"When the parties made submission on the directions the court was to issue in regard to how the issues in dispute were to be resolved, it became apparent to the court that there were two main issues that had to be first canvassed before the court could proceed with the distribution of the properties that comprise the estate of the deceased."***

The court then proceeded to limit itself to the determination of the issue of validity of the Will(s) and the shares of CKK as ***"preliminary issues".***

39. With the clarity that there was no distribution of the estate, as correctly observed by Mr. Njenga and Mr. Mugwuku, and no consideration was made of the pleadings on record or the preferred modes of distribution filed by the parties, as stated by the trial court, it becomes unnecessary to consider the extensive submissions made by the appellants on the principles of law on unpleaded issues and the importance of adherence to the prescribed rules. The hearing and decision on those issues is still at large. Which begs the million dollar question: Was the consent recorded on 27th February, 2014 sufficient to give the trial court the jurisdiction to consider the issues framed? We think it was.

40. The law on unpleaded issues and parties being bound by their pleadings, as relates to this question, is amplified by a long line of authorities as correctly

illustrated by the appellants. But there is an equally long line of authorities unequivocally

asserting the power of a court to determine issues which the parties have not raised in their pleadings. They may allow the court to do so by consent, as stated, for example, in ***Chalicha FCS Ltd vs. Odhiambo & 9 Others*** ***[1987] KLR 182,*** that:

> ***"Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon, was a nullity."***

The decision of ***Odd Jobs vs. Mubia, [1970] EA 476***, may also apply where it was held that a court may base its decision on an unpleaded issue, if it appears during the trial that the issue was pursued and left for the court to determine.

41. We are satisfied in this case that the consent recorded on 27th February, 2014 was in the presence of all necessary parties and their legal advisors in the Succession cause. They agreed on the persons to whom the full grant of representation would be made and so the aspect of who the administrators would be was by consent resolved. There was no objection raised on the issues as framed for determination. Nay, there was compliance with it through the filing of submissions and the matter was thus left for the decision of the court. We uphold the consent and reject the appellant's plea that it is for setting aside. Which leads us to the second main issue relating to the deceased's Will.

42. The 1st appellant maintains that the deceased died testate for several reasons:- All the sons and daughters of the deceased initially acknowledged that there was a

Will and only changed their minds after Njoki made allegations that it was not valid; the law does not permit simultaneous approbation and reprobation; the onus was on anyone objecting to the Will to prove its invalidity first before shifting to the person propounding the Will; there was no cogent oral or documentary evidence presented by the objectors; the medical reports relied on said nothing about the mental capacity of the deceased at the time of making the Will; the possibility was not discounted that the deceased had lucid moments as confirmed by three letters in 1996 and 1998 from the deceased to his lawyers in respect of distribution of his property; and that all the legal requirements for a valid Will existed and there was no basis for rejecting it. The cases of ***In Re***

Estate of Gatuthu Njuguna (Deceased) ***[1998] eKLR,*** ***In Re: J N M (Deceased)*** ***[2005] eKLR***, ***Beth Wambui & Another vs. Gathoni Gikonyo & 3 Others*** ***[1988] eKLR*** ***Vaghella vs. Vaghella*** ***[1999] 2 EA 351***, among others, were cited in aid.

43. The counter arguments by the respondents may be summarized as follows: the rest of the family knew nothing about the Will until Wilfred disclosed it; Wilfred, as the eldest son had considerable and undue influence on the deceased and enjoyed a general 'Power of Attorney' in all his affairs since 1988; not all the children of the deceased trusted the authenticity of the Will; the children were entitled to challenge the Will after discovering evidence that it was questionable, the initial belief that it was genuine notwithstanding; a bundle of correspondence between Wilfred and the deceased's lawyers (Kaplan & Stratton) indicated that he

had full knowledge of the terms of the purported Will; the consent recorded and

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the order made by the court envisaged that the parties who relied on the validity of the Will, and those who objected to it, prove their respective contentions; no suggestion was made in the submissions by the only supporter of the Will (Wilfred) that there was any oral evidence in existence or any application made to produce such evidence; the onus of proving that the testator had capacity to make the Will was on the person propounding it before the burden shifts to the objector; where incapacity is proved, the onus shifts again on the person propounding the Will to prove that it was made after recovery or during a lucid interval; the objectors produced sufficient medical evidence, which was properly evaluated and accepted, in discharge of their burden of proof; the medical evidence was supported by observations made and recorded before another trial Judge (Githinji, J, as he then was) who found it necessary to issue orders for an appointment of a *guardian ad litem*; and that it would be pointless to return the matter to the Succession Court to determine the issue of the validity of the Will considering that the only beneficiary who had knowledge of its origin was himself deceased.

44. We have considered this issue in the manner of a retrial as we are obligated to do under ***Rule 29*** of the Rules of this Court, respecting as far as we can the findings of the trial court, but always aware that we are at liberty to interfere where such findings are based on no evidence or on a misapprehension of the evidence or the trial court is shown demonstrably to have acted on wrong principles in reaching

the finding. There was no oral evidence given in this matter and therefore no

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special advantage enjoyed by the trial court in assessing the credibility of any witness is not a limiting factor. The latitude for interference is thus wider. See

Mwanasokoni vs. Kenya Bus Services ***(1982-88) 1 KAR 870.***

45.**Part II** of the LSA in its 25 sections makes various provisions on **'WILLS'**. In this matter we are only concerned with the capacity to make a Will since there is no challenge on the formalities required under ***section 11***. ***Section 5 (1)*** underscores testamentary freedom by declaring thus:

> ***"...any person may dispose of all or any of his property in a manner he deems fit and a testator may change his mind at any time before his death as to how he intends that his property should be disposed of."***

The freedom is however not absolute since, amongst other things, the presumption of sanity may be challenged and the Will may be declared void if the making of it is caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, or has been adduced by mistake. See ***sections 5 (3), (4)*** and ***7***.

46.The essentials of testamentary capacity were laid out in the case of ***Banks vs. Goodfellow [1870] LR 5 QB 549*** as cited with approval in the Tanzanian Court of Appeal case of ***Vaghella vs. Vaghella [1999] 2 EA 351*** thus:

> ***"a testator shall understand the nature of the act and its effects, shall understand the extent of property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties-that no insane delusion shall influence his will in disposing property and***

> ***bring about a disposal of it which if the mind had been sound, would not have been made."***

47.Construing the issue of capacity, **Githinji, J.** in the case of ***In Re Estate of Gatuthu Njuguna (Deceased) [1998] eKLR*** stated:

> "***As regards the testators mental and physical capacity to make the will, the law presumes that the testator was of sound mind and the burden of proof that the testator was not of sound mind is upon the person alleging lack of sound mind, in this case, the applicant (S.5(3) and 5(4) of the L.S.A.). However paras 903 and 904 of Volume 17 of***

> ***Halsbury's Laws of England*** ***show that, where any dispute or doubt of sanity exists, the person propounding a will must establish and prove affirmatively the testators capacity and that where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during a lucid interval. The same treatise further shows that the issue of testators capacity is one of fact which can be proved by medical evidence, oral evidence of the witnesses who knew testator well or by circumstantial evidence and that the question of capacity is one of degree, the testators mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that, if the objector produces evidence which raises suspicion of the testators' capacity at the time of the execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity, he had discharged his burden of proof and the burden then shifts to the person setting up the will to satisfy the court that the testator had the necessary capacity."***

See also **Lenaola, J.** (as he then was) ***In Re Estate of G. K. Kirima (Deceased)***

[2013] eKLR citing with approval the case of ***In Broughton vs. Knight*** ***(1873)***

3 P and D 64, for the proposition that:-

> ***"the testator must have a memory to recall the several persons who may be fitting objects of the testator's bounty, and an understanding to comprehend their relationship to himself and their claims upon him so that he can decide whether or not to give each of them any part of his property by Will."***

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48. In the case before us, only documentary evidence is available for evaluation. Despite the complaint raised by Rosemary and the estate of Wilfred that an opportunity was not given for oral evidence to be adduced, we find this as an afterthought. As earlier observed, Rosemary and Wilfred's estate, and Wilfred himself before his death, had excellent legal representation in the person of Senior Counsel Dr. Kamau Kuria. We have already found that the consent recorded by the parties gave jurisdiction to the trial court to consider and determine the issue of validity of the deceased's Will. In 113 pages of written submissions filed before the trial court after the consent order, about half of it, 55 pages, (page 1277 to 1330) are devoted to the issue of the validity of the Will. There is extensive analysis of the medical evidence on record, affidavit evidence and the law on Wills. The appellant must have considered such analysis as sufficient for purposes of discharging the burden of proof reposed on the party propounding the Will as there was no effort made to tender oral evidence. It was a choice freely made. That is why we agree with the respondents that the claim of denial of opportunity to call oral evidence is belatedly made and is an afterthought.

49. The learned Judge considered the material before him and evaluated the medical evidence before him as follows:-

> ***"It was common ground that the deceased died of complications arising out of Alzheimer’s disease. The deceased’s death certificate indicates as much. From the proceedings, it was apparent that the deceased had been diagnosed as far back as 1993 with symptoms of the disease. Alzheimer’s disease, according to Dr. S.M.G.***

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> ***Mwinzi, a Consultant Neurologist who saw the deceased in January 1998 and later on 21st May 2001 is “a chronic progressive degenerative disorder of the brain that is incurable. It has totally impaired all the aspects of his (the deceased’s) cognitive function namely speech/language, memory, orientation, personality, judgement and abstract thought. This process of decline of cognitive function has been going for several years now and must adversely affected or influenced many of the decisions he has made in the last nine to ten years.” It was instructive that the deceased was taken for the medical examination by Dr. Wilfred Karuga Koinange (deceased) whose actions at the time are pertinent to these proceedings. The deceased had earlier been seen on 8th January 1993 by Dr. S.G. Gatere, a Consultant Psychiatrist who was more or less of the same opinion as Dr. Mwinzi. This is what the doctor said in his report:***
>
> > ***“1. Over the past three years or so, his physical health has gradually declined, and that this decline, has been characterized by stress related conditions including diabetes mellitus.***

2. ***Over the same period as mentioned in (1) above, signs and symptoms reminiscent of the exhaustion depression have been observed. These signs and symptoms have deteriorated rapidly in the year 1992.***

3. ***Continued indecision on the matter of divorce proceedings constitute a major source of stress for Mr. C.K. Koinange which helps to exacerbate both his diabetes and his anxieties leading to exhaustion depression.”***

50. Such evidence, in our view, discharged the onus of proof reposed on the objectors, as stated in the ***Estate of Gatuthu Njuguna case*** *(supra),* that is; '*evidence which raises suspicion of the testator's capacity at the time of the execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity'.* The 1st appellant submitted that the deceased could have made the Will during some lucid moment, but the

onus was on the 1st appellant to prove that. As explained in **William's Law Relating to Wills,** 4th Edition by C. H. Sherin & Barlow:-

"Lucid Interval – when a testator is shown to have been insane prior to the date of the will, it must be shown that the will was made during a lucid interval. Even a person of unsound mind so found could make a will during a lucid interval. To establish the existence of a lucid interval it is not necessary to prove complete mental recovery. It is sufficient if it is shown that the testator understands that he is making a testamentary disposition and what is required of him in making the disposition and that any delusion from which he is still suffering does not affect such disposition. A person may suffer from intermittent insanity and perhaps the burden of proving a lucid interval is then less than where it is sought to prove an isolated interval, but, once insanity is established, it is for the person setting up the lucid interval to prove the lucid interval and that the testamentary act was done during the interval".

51. We have re-examined the record and we are not satisfied that there was sufficient evidence in rebuttal of the incapacity proved by the objectors. In the result we, affirm the conclusion reached by the trial court as follows:

"Taking into consideration the totality of the evidence placed on record in regard to whether the deceased had the mental capacity to make the Will of 16th June 1999, this court has reached the irresistible conclusion that the deceased at the time suffered from Alzheimer's disease which is a degenerative brain disease that totally affects the cognitive functions of a person suffering from such disease. The medical reports of Dr. Gatere and Dr. Mwinzi are conclusive in that regard. If there was any doubt as to the state of mind of the deceased in 1999, that doubt was clarified when Githinji J (as he then was) observed the deceased in court. This was about four (4) months before the deceased was purported to have made the Will. Is it possible that the deceased mental situation improved sufficiently for him to make the Will on 16th June 1999? The answer to that question is in the negative. Being a degenerative disease, the condition of a person suffering from Alzheimer's disease worsens with time. This court therefore holds that the deceased lacked the mental capacity to make an elaborate

Will running to nine (9) pages. This court therefore holds that the Will purportedly made by the deceased on 16th June 1999 is invalid on account of the deceased's mental incapacity to make the same."

There was evidential basis for making those findings of fact and we have no reason to interfere. The deceased died intestate and his estate shall be administered accordingly under the Law of Succession Act and the Rules thereunder. We so hold.

52. The final issue is on 2nd appellant shares on which the trial court made the following findings:-

> ***"The deceased at the time (1994) lacked mental capacity to transfer the shares to anyone. It is instructive that the deceased, due to his deteriorating health condition decided on 7th October 1988 to confer upon Dr. Wilfred Karuga Koinanage (deceased) a general Power of Attorney to undertake his personal affairs on his behalf. Dr. Gatere's medical report clearly points to the deceased's mental condition at the time. Upon evaluating the evidence adduced (in form of affidavit evidence), this court formed the view that the transfer of the shares that were held by the deceased was effected with a view to frustrating the division of matrimonial property case that had been lodged by the 3rd Respondent (Njoki). At the time, the only shareholders of CKK Estate Limited were the deceased and the 3rd Respondent. The court wondered how the transfer of the said shares was achieved without the participation of the 3rd Respondent. The Applicant argued that this court lacked the requisite jurisdiction to deal with shares in a Limited liability company. The Applicant went ahead and submitted that the court with jurisdiction to determine whether the transfer of the said shares was legal or not is the Companies Court as envisaged by the Companies Act. That may be the case where the shareholders are alive....... Dr. Wilfred K. Koinange (deceased) caused the said***
>
> ***shares to be fraudulently transferred to himself with the aim, initially of frustrating the claim lodged by the 3rd Respondent, and later with the aim of depriving his siblings of their inheritance of the parcel of land that the said shares represented...... This court***
>
> ***therefore declares the transfer of the said shares to Dr. Wilfred Koinange (deceased) in 1994 to have been procured by fraud. The***

> ***said transfer is therefore nullified. The said shares shall revert to the estate of the deceased and shall be available for distribution."***

53. In view of what we shall say shortly, we shall not delve into those findings at any length. The biggest plank of the appellants' argument is that the Succession Court had no business plunging into the affairs of a juristic person since the affairs of such persons belong to Company law and civil courts, it was submitted. The other argument was that the shares of 2nd appellant were donated to Wilfred way back in 1994 as a gift *inter vivos* in tandem with other gifts made to the other children and his former wife. If he validly gifted other beneficiaries of his estate in his

lifetime, there is no reason to interfere with the shares, it was urged. The counter argument was, of course, that the trial court was not determining the ownership of the assets of the company and therefore, reference to the juristic personality of the company was not relevant; the only issue before the trial court was the shares held by the deceased in the company; the companies have no business, and are indeed mischievous, in filing this appeal since they were not parties to the Succession Cause; the shares of the deceased were fraudulently and illegally transferred by Wilfred to himself and therefore he could not validly pass any property in the shares to anyone else; and that the administrators were entitled to pursue Wilfred and his estate for recovery of all the losses occasioned by the fraudulent transfer.

54. There can be no argument that the shares of a deceased in a limited liability company are assets which the family has power to distribute in a Succession

Cause. The argument is rather that when there is a dispute on ownership of the shares, only a 'Companies Court'has jurisdiction to adjudicate. In this case, there is no dispute that the shares in the 2nd appellant were held by the deceased and Njoki at inception. It is averred that the deceased gifted his shareholding to Wilfred in 1994, but whether this was so is a matter the Succession court is capable of determining. If the court holds that the shares were gifted to Wilfred, just as other gifts were made to the other beneficiaries, that would be the end of the matter. If they were not, then they vest in the administrators who may engage with the company or companies under the relevant Company laws and Articles of Association to wrest them back to the estate.

55. In the ***Margaret Njeri Mbiyu*** ***case*** *(supra),* this Court examined **sections 75, 78** and **79** of the former Companies Act and stated:-

*"**Section 75, 78, and 79*** of that Act provided as follows:

> ***"75. The shares or other interest of any member in a company shall be movable property transferable in manner provided by the articles of the company."***
>
> **...**

78. ***A transfer of the share or other interest of a deceased member of a company made by his personal representative shall, although the personal representative is not himself a member of the company, be as valid as if he had been such a member at the time of the execution of the instrument of transfer.***

79. ***On the application of the transferor of any share or interest of a company, the company shall***

***enter in its register of members the name of the transferee in the same manner and subject to the same conditions as if the application for the entry were made by the transferee. (Emphasis added)*..................................**

The personal representative of the deceased has power to transfer the shares of the deceased as if it were the deceased himself and upon

transfer of the shares, the transferee is entitled to be registered in the register of members. What we are saying is that upon death of the shareholder, his shares vests in his personal representative, but contrary to what the learned judge stated, there is nothing in the Act to stop the personal representatives, if the articles of the company so provide, from transferring the shares to the deceased's nominee. (See Re Kahawa Sukari Ltd [2004] 2 EA 93).That is exactly what the administrators of the estate did in this case. In our view, the transfer of the shares to Eddah was neither arbitrary nor illegal. It had the full backing of the law. The learned judge, with respect, totally ignored the above provisions in holding that the Companies Act does not provide a mechanism of transfer of shares by way of nomination. The onus was upon the respondents who "had reservations" about the transfer of the shares to Eddah by the administrators of the Estate of the deceased, to prove that the articles of association of the company did not allow transfer of shares through nomination. In the absence of such evidence and in view of the glaring misreading of the provision of the Companies Act by the learned judge, there was no evidence upon which the learned judge could find that the transfer of shares to Eddah as the deceased's nominee was irregular, null and void."

56.We take the view, as there is *prima facie* supportive evidence on record, that there is a contestable case on whether the shares of the deceased in the 2nd appellant, and perhaps other companies, were properly transferred as gifts *inter vivos* by the deceased and a decision on this can only be arrived at on the basis of cogent evidence. The trial court made a passing remark on gifts made *inter vivos* stating that: ***"The parties who allege that such gifts were made will establish their respective cases before the remainder of the estate of the deceased is distributed to the beneficiaries."*** In our view, the shares of the 2nd appellant fell in that category and the trial court, with respect, acted in a precipitate manner in declaring the acquisition of the shares fraudulent and the deceased as having no

capacity to gift them out during his lifetime in 1994, to one of his children. We

would set aside that finding, with the result that the issue will be decided, if it arises, together with any protests that may arise in the course of confirmation of the grant under ***Rule 40 (6)*** of the P &

A rules.

57.In summary, this appeal partly succeeds and the following findings are made:

i. ***The procedure followed by the trial court was not proper but the consent recorded on 27th February, 2014 for determination of preliminary issues was valid.***

ii. ***The deceased died intestate and his estate shall be administered in accordance with the Law of Succession Act and the Probate and Administration Rules.***

iii. ***Isabella Wanjiku Karanja, William Kihara Karuga, Samuel Karuga Koinange and Peter Mbiyu Koinange are lawfully appointed as administrators of the estate of the deceased and shall be issued with the full grant of letters of administration.***

iv. ***The issue of the shares held by the deceased in the 2nd appellant, and any other limited liability companies, shall, if not agreed, be determined on available evidence during the administration of the estate in accordance with the law.***

As this is a family matter, each party shall bear its own costs of the appeal.

Dated and delivered at Nairobi this 15th day of December, 2017.

P. N. WAKI

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

....

JUDGE OF APPEAL

W. OUKO

....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR