**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)**

**CIVIL APPEAL NO.22 OF 2014**

**IN THE MATTER OF THE ESTATE OF OMAR ABDALLA TAIB (DECEASED)**

**HAFSWA OMAR ABDALLA TAIB**

**NAHIDA OMAR ABDALLA TAIB**

**HUSSEIN OMAR ABDALLA TAIB …….APPELLANTS**

**AND**

**SWALEH ABDALLA TAIB ……..……..RESPONDENT**

*(Being an appeal from the ruling and order of the High Court of Kenya at Mombasa (Odero, J.) dated 9th June, 2014*

*in*

*Mombasa H. C. Succession Cause No.103 of 2012)*

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**JUDGMENT OF THE COURT**

**Omar Abdalla Taib** "*deceased*" passed on intestate on 11th February, 2012. He was the father to **Hafswa Omar Abdalla Taib, Hussein Omar Abdalla Taib** and **Nahida Omar Abdalla Omar** "*appellants*". On 22nd March, 2012, the appellants petitioned the High Court at Mombasa for the grant of Letters of Administration intestate in respect of the estate of the deceased. The estate consisted of the following net assets; **LR No. Mombasa/Block XXXIII/1** and 50% shares in **Mombasa Cargo Tally Organisation** "*Company*" all valued at Kshs.7,000,000/- with the only liability being the hospital bill of Kshs.130,031/-. On 4th October, 2012 an interim grant of Letters of Administration intestate was issued to the appellants that was subsequently confirmed on 2nd May, 2013. In the confirmed grant, the appellants agreed to share equally the estate of the deceased.

In the meantime on 30th January, 2013, the appellants took out a summons pursuant to **section 45** of the Laws of Succession Act and **Rule 49** of the Probate and Administration Rules in the main seeking that one, **Swaleh Abdalla Taib** "*respondent*" and the company be prohibited from interfering and

intermeddling with the assets and shares of the estate of the deceased being 50% share of company; mandatory order directing the respondent and the company to make immediate payments to the appellants in respect of weekly allowances due to them from November, 2011; injunction against the respondent restraining him from withdrawing or making payments into the accounts held by the Company without their consent; that the said accounts held in all parts of the country and in all the bank branches including **account number 204686535** held in **Kenya Commercial Bank**, Treasury Square branch be frozen; the respondent be called upon to render an account for the sums collected from the company in default be condemned to criminal sanctions pursuant **section 45(2)** of the Law of Succession Act; and finally, that the Court be pleased to grant leave to the appellants to file Winding Up Proceedings against the company.

The basis for the application was that the respondent a paternal uncle to the appellants and a partner with the deceased in the company had been collecting monies on behalf of the company and spending it all on himself and yet he was entitled to only 50% thereof, the other 50% was meant for the appellants and that the respondent had declined to make weekly payments that the estate of the deceased was entitled to since the demise of the deceased despite constant reminders. Similarly he had been signing cheques and withdrawing monies from accounts without the knowledge and consent of the appellants. He had also been unilaterally collecting monies to the tune of Kshs.20,000,000/- annually without accounting to anybody. The appellants who solely depended on such income for their livelihood were now suffering as they lacked means of sustaining themselves. The respondent had refused to release the funds belonging to the appellants and had barred them from participating in the running of the affairs of the company.

In response, the respondent filed a Notice of Preliminary Objection as well as Replying Affidavit. The Preliminary Objection was to the effect that there was no pending suit against him hence the application was incompetent and bad in law. Secondly, that the grant of Letters of Administration had not yet been confirmed and hence the application to the extent that it sought to distribute the estate of the deceased was incompetent, leave alone, premature.

In his Replying Affidavit, the respondent denied having interfered with the deceased's estate; that the deceased collected all his dues during his lifetime, all monies earned was subject to expenditure and the shares could only be determined after taking into account the same. He denied spending the money will nilly; he had indeed suggested to the appellants whether they were willing to accept a weekly stipend but they never responded. He pointed out that it was in the best interest of all parties that the company continues running as closing or freezing accounts will seriously impact on the operations of the company. It was also contradictory on the part of the appellants to ask for weekly payment and at the same time seek the winding up of the company. Finally, he deponed that he had not interfered or intermeddled with the estate of the deceased.

On 28th August 2013, respective parties appeared before **Odero, J.** and recorded a consent in the main that the respondent do pay the estate of the deceased the sum of Kshs.6,349,471/- being the estate's total net share of profits, allowances and assets in the company. The cause was hereafter set down for mention on 18th October, 2013 with a view to recording a possible consent on the amount payable to the appellants as goodwill from the company. This was however not to be and on 18th December, 2013, Odero, J. directed parties to file written submissions on the question of goodwill. In compliance with this directive, parties filed their respective written submissions.

In a reserved ruling delivered on 9th June, 2014, Odero, J. dismissed the claim holding that:

> *"It is not sufficient for a party to simply claim goodwill. It must in the first place be demonstrated that such goodwill actually exists. It is upon the person who makes the claim that a business has goodwill to prove the existence of that goodwill. The applicants have not demonstrated the nature of the goodwill that attaches to the business. They have not provided particulars of the nature of the business undertaken by the partnership, details of its customership, or the nature of the reputation built up by the business over time. No audit or valuation report has been supplied to enable the court to assess the value of the goodwill if any. I find firstly that the existence of goodwill has not been proved and secondly, the value of such goodwill (if any) is not*

*ascertainable. For the above reasons I disallow this prayer for goodwill. Costs of this application to be met by the applicants …"*

It is this holding that sparked this appeal on 10 grounds. In summary, the appellants complained that the court erred in finding that the appellants had not demonstrated the nature of the goodwill attaching to the business; that the audit and valuation reports filed in court had proved the existence of such goodwill; the appellants had pleaded goodwill and tendered evidence in that regard but the same was not considered nor their submissions; the court also erred in basing its findings on the wrong premises and ignoring the appellant's evidence and exhibits; costs of the application should have been awarded to the appellants as opposed to the respondent; the ruling was wrong and unjust in principle and was not based on the proceedings before it. Finally, the appellants complained that in all the circumstances of the case, the findings of the court were unsupportable in law or on the evidence adduced.

At the hearing of the appeal on 11th February, 2015, parties elected to canvas it by way of written submissions. The respective submissions were subsequently filed which we have carefully read and considered.

In a nutshell, the appellants submitted that they had demonstrated the nature of the goodwill through audit reports and accounts for the years 2007-2012. Those documents clearly showed that the nature of the business was **Ship Chandlers** and had been running since 1963. Due to this length of time and good reputation built with its customers, the company had acquired goodwill over time. They submitted that goodwill establishes the proprietary interest or right to which the trade mark or name is used as a conduit. It is the attractive force which brings in customers; that goodwill has to be established by the proprietor of the registered trade mark. That goodwill could be established by the long usage of the trade mark. For all these propositions the appellants referred us to the cases of **Commissioner of Inland Revenue v Muther & Co Margarire Ltd (1901) AC 217, CDL Hotels International Ltd v Pontiac Marina Pty Ltd (2000) I LRC 243** and **Tripple Five Corporation v Ralt Disney Productions (1994) ABCA 120**. The appellants further submitted that the company had been established and its products had been distributed in the market in many countries. Over that period of time it had expended resources in promoting and advertising its products. Therein lay the goodwill and therefore the High Court erred in proceeding to find that there was no goodwill. There were audit reports filed from which the court would easily have calculated the goodwill. The court therefore erred when it held that there was no report to enable it access the goodwill. Though goodwill had not been specifically pleaded, it was brought in the mix through the court order made on 28th August 2013. Therefore the issue of goodwill was raised by the parties for determination of the court. The respondent could not now claim that the issue was never pleaded.

For the respondent, it was urged that the court did not err in dismissing the issue of goodwill because there was no prayer or pleading for the same, that the court's jurisdiction on an originating summons taken out by a partner is specifically limited to taking accounts, dissolution and winding up of the partnership and any other order would have amounted to the judge acting in excess of jurisdiction and thus irregular. This was supported by the case of **Kibutiri v Kibutiri (1983) KLR 62** cited to us by the respondent. The respondent further submitted that there was no evidence of goodwill tendered by the appellant nor was there evidence that the deceased had contributed to the acquisition of the same and if so to what extent. The joint accounts and audit was meant to ascertain the business profits for the purpose of sharing. Finally, the respondent submitted that the issue of goodwill was an afterthought.

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.

Time and again it has been stated that jurisdiction is everything and if a court has no such jurisdiction it must down its tools immediately. The supreme court has held in several of its authorities

that a court's jurisdiction flows from the Constitution, Statute, precedent or both. Such jurisdiction cannot be assumed or donated by the parties or by the fiat of court. In this case the appellate jurisdiction in respect of Succession Causes has been donated by **section 50** of the Law of Succession Act. From this provision, it is clear that decisions from the magistrates' courts in Succession Causes are appealable to the High Court; whose decision on such an appeal is final. However the decision of the Kadhi's court are appealable to the High Court; and a party dissatisfied with the decision of the High Court on appeal can appeal further to this Court but only with leave of the High Court and in respect only on points of muslim law. However, there is no mention of an appeal to this Court from the decision of the High Court made in exercise of its original jurisdiction. Indeed even **section 47** of the same Act makes no mention of an appeal to the Court of Appeal from the decision of the High Court made in the exercise of its original jurisdiction. It is trite that where a right of appeal is not expressly provided for by statute or the statute is silent, then a party wishing to proceed further by way of appeal should seek leave for such an undertaking from the court whose decision he seeks to impugn by way of further appeal or from the appellate court. To our mind we have no doubt at all that an appeal lies to this Court from the decision of the High Court in Succession Causes in its original jurisdiction. However, that must be with leave of the High Court. This proposition was first propounded by this Court differently constituted almost 18 years ago in the case of **Makhangu v Kibwana (1996-1998) I E.A. 168**. In a nutshell the court held that an appeal does lie to this Court from the decision of the High Court in Succession Causes, that under **section 47** of the Law of Succession Act, the High Court has jurisdiction on hearing a Succession Cause to pronounce decrees or orders; that any order or decree made under this section is appealable under **section 66** of the Civil Procedure Act, either as a matter of right if it falls within the ambit of **section 75** of the Civil Procedure Act or by leave of the Court if it did not. This decision has reigned supreme and we are not aware of any other decision to the contrary. If anything, there have been a plethora of subsequent appeals to this Court in Succession Causes but only after leave was duly obtained from the High Court whose decision is being appealed. See for instance **Kaboi v Kaboi & Others (2003) EA 472, Francis Gachoki Murage v Juliana Wainoi Kinyua & Another, Civil Appeal (Application) No.139 of 2009 (UR)** and **Rhoda Wairimu Karanja v Mary Wangui Karanja & Another (2014) eKLR.**

What runs through all these decisions is that whereas this Court has jurisdiction to entertain appeals in Succession Causes from the High Court in its original jurisdiction that right is not automatic. Where there is no automatic right of appeal, it behoves the aggrieved party wishing to appeal to seek and obtain leave to do so from the High Court and the granting of leave is a discretionary power. This is how this Court delivered itself on this question in the case of Francis Gachoi (supra):-

> *"We have considered this issue of whether this appeal lies with considerable anxiety. First, leave was never sought in the High Court. The practice has always been where there is no automatic right of appeal an aggrieved party wishing to appeal is enjoined to seek leave. Granting of leave is within the discretion of a judge …"*

And in the case of Rhoda Wairimu Karanja (supra), this Court reiterated thus:-

> *"We think we have said enough to demonstrate 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. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration. We think this is a good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes …"*

We wholly endorse these sentiments.

We are not however oblivious to the fact that currently **Article 164(3)** of the Constitution of Kenya confers directly jurisdiction in the Court of Appeal to hear appeals from the High Court and from any court or tribunal if such an appeal is prescribed by an Act of Parliament. This Court in the case of **Equity Bank Limited v West Link MBO Limited, Civil Application No.78 of 2011** considered the purport of the said **Article** and concluded and rightly so in our view that it did not confer unlimited right of appeal to

this Court which could not be restricted by statute. To hold otherwise could certainly have far reaching consequences that may affect the administration of justice generally and the functions of this Court.

In the final analysis, we have come to the inescapable conclusion that much as the appellants had a right of appeal to this Court, they could only do so by obtaining leave of the High Court or if it was refused from this Court. There is no evidence on record or before us that the appellants sought and obtained such leave either from the High Court or this Court. For that very reason, we deem this appeal as filed incompetent and accordingly strike it out with no order as to costs, since none of the parties canvassed the issue(s) that has been the determinant of this appeal.

**Dated and delivered at Mombasa this 12th day of March, 2015.**

**H. M. OKWENGU**

**…….……..**

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

**…….……..**

**JUDGE OF APPEAL**

**F. SICHALE**

**……..…….**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**