IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A.)

CIVIL APPEAL NO 37 OF 2013

BETWEEN

JACOB KINYUA KIGANO……..……..APPELLANT

-VS-

TABITHA NJOKI KIGANO……1ST RESPONDENT

SOLOMON MACHERE MUNGE……2ND RESPONDENT

(An appeal against the Judgement of the High Court of Kenya at Embu

(Ong'udi, J.) dated 1st March, 2012

in

H.C.C.A. No 83 of 2010)

****

JUDGEMENT OF THE COURT

[1] This is a second appeal concerning a succession dispute over the estate of the late Kagano Munge *(deceased)* who died intestate on the 10th day of July, 1997.

On 27th March, 2002, Tabitha Njoki Kagano *(1st respondent)* and Jacob Kinyua Kagano *(appellant)* while describing themselves as 1st widow and 1st son of the deceased, jointly petitioned for the grant of letters of administration before the Principal Magistrate's Court at Kerugoya. In the affidavit in support of the petition, the petitioners indicated that the deceased was survived by the following:

1. ***Tabitha Njoki Kagano (widow)***
2. ***Jacob Kinyua Kagano (son of 1st widow)***
3. ***Jamleck Simba Kagano (son)***
4. ***Francis Kiaji Kagano (son)***
5. ***Kanungu Kagano (son)***

[2] The grant of letters of administration was duly issued to the two petitioners on 28th May, 2002. On

31st January, 2002, the appellant applied for the confirmation of the grant without the 1st respondent. In that application the appellant added to the above list of survivors four other persons whom he described as daughters of the deceased as follows:-

1. ***Josphine Wakuthi Kagano***
2. ***Nancy Wanjira Kagano***
3. ***Irene Karioko Kagano***
4. ***Pauline Wamba Kagano***

The appellant proposed that the deceased only asset being ***Parcel No INOI/ THAITA/459,*** be shared equally between the appellant and the 1st respondent. There was no share designated for the other beneficiaries nor was the appellant proposing to hold his one half share for the benefit of the persons he introduced as his sisters.

[3] The proposed mode of distribution did not seem to augur well with the 1st respondent who immediately filed an affidavit of protest indicating that the appellant left out some beneficiaries of the deceased. The protest was fully heard by Mr. Onyiengo (PM) who ordered that one acre of the deceased parcel of land be given to Samson Machare Munge *(brother of the deceased)* and the remaining portion be share equally between the appellant and the 1st respondent. The 1st respondent was supposed to hold her share in trust for her children and for her own benefit. The 1st respondent was aggrieved by that decision and an appeal was filed before the High Court Embu challenging the mode of distribution.

[4] The appeal was heard by Ong'udi, J., after considering the issues that were canvased, the appeal was allowed, the mode of distribution ordered by the learned trial magistrate was set aside as the Judge made the following conclusions which we quote verbatim:-

"As I have stated above the estate is already one acre less as the joint administrators (appellant +respondent) already gave out one acre to the 2nd respondent who has sold it. That being the case- I hereby annul the confirmation (sic) and cancel the certificate of confirmation. I proceed to distribute the residue of the estate between the 2 houses as follows:-

1st house- Jacob Kinyua Kagano 1/3

2nd house- Tabitha Njoki's share for herself and her children is 2/3

I have put these fractions because I am not aware of what the exact acreage of the land is".

[5] This time round the appellant was dissatisfied with the above orders which must have provoked this second appeal. Although the appellant recited 7 grounds of appeal in his memorandum of appeal, during the hearing of the appeal, Mr. Wa Gathoni, learned counsel for the appellant combined all the arguments which boiled down to two issues; that was the Judge failed to consider the deceased was survived by two houses and the appellant's house had 4 sisters that were not provided for. According to counsel, if the daughters were left out and they happened to return to their father's land, it was the appellant who would be forced to provide for them from his 1/3 share. The second issue was in regard to the competency of the appeal which was also challenged on the grounds that under ***Section 50*** of the ***Law of Succession Act***, there is no provision for a second appeal. The decision of the High Court in respect of an order or decree made by a Magistrate is final. To this submission, counsel for the appellant argued that the jurisdiction to annul a grant is only vested in the High Court. Thus as far as the appeal is concerned, counsel submitted that the orders that revoked the grant were made by the High Court and in his view this was a first appeal for all practical purposes.

[6] On the part of the respondents, this appeal was vehemently opposed; Mr. Maina for the 1st respondent submitted that both courts below were of concurrent findings that the deceased was survived by two houses, the appellant was the only child from his house, while the 1st respondent, a surviving

widow represented the other house which had three children all together making 4 units who are to share 2/3 of the parcel of land while the appellant is entitled to 1/3 all by himself. If the learned Judge had strictly applied the provisions of Section 40 of the Law of Succession Act, the appellant would have been entitled to a smaller share as the property should have been divided among the 5 survivors whereby he would get 1/5th instead of the 1/3rd. the 1st respondent was comfortable with the share allocated to her and therefore did not cross appeal.

[7] On the competency of the appeal, Mr.Mugambi learned counsel for the 2nd respondent too opposed the appeal by associating himself with the submissions by Mr. Maina. He further submitted that the appellant had no *local standi* to present an appeal on behalf of the daughters. There was no authority demonstrated by the appellant that he was appointed by the alleged sisters to represent them. The entire evidence was clear that the deceased was survived by the appellant, one surviving widow and her three sons. On the competency of the appeal, counsel submitted that a second appeal does not lie from the decision of the High Court which is final. Counsel cited several cases especially ***Civil Appeal No 314 of 1996 Margret Makhangu John vs David John Kibwana (Executor),*** where the applicant's application for leave was struck out in the High Court. The applicant proceeded to apply for the same leave in the Court of Appeal but it was also dismissed. In dismissing the application the Judges of Appeal stated as follows:-

*"**This application must fail for the reason that the learned Judge of the superior court, Ang'awa, J. never heard and decided on the application for leave lodged by the applicant. What she did for the reason she gave and with which we have some misgivings was to strike it out for being merely defective. Rule 39 (b) of the Rules of this Court provides that where an application for leave to appeal has in the first instance to be made to the superior court, it must first be considered and refused as opposed to being struck out before an application for such leave may be made to this Court. In the result we decline to grant this application and order that it be dismissed with costs."***

[8] We think the first issue for us to consider is whether there is a competent appeal before us. This is because jurisdiction to hear an appeal is essential; it is everything, as without it a court is supposed to down its tools. See the case of ***Motor Vessel "SS Lillian", [1989] KLR 1*** in which this Court succinctly set out the principles and context for determination of jurisdiction. Nyarangi, J.A. stated, *inter alia*:

"Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

The above decision was in the recent past restated by the Supreme Court ***In the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of the Constitution,*** Constitutional Application No. 2 of 2011 as follows:-

"The Lillian 'S' case [1989] KLR 1] establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity".

[9] The issue of whether there is an automatic right of appeal of orders and decrees of the High Court to the Court of appeal in Probate and Administration matters has been a vexing one because of the provisions of ***Section 50 (1)*** which provides:-

"An appeal shall lie to the High Court in respect of any order or decree made by a resident magistrate in respect of any estate and the decision of the High Court thereon shall be final".

Incidentally the Court of Appeal in another appeal involving the same parties; ***Margret Makhangu John vs David John Kibwana (unreported) Civil Appeal No. 84 of 1995***. In this earlier ruling the Judges of Appeal distinguished the words *"decree"* and *"orders"* when they stated as follows:-

"The position here, however, is that the appeal is from a order and not a decree. But in our view the use of the two words "decree and "orders in Section 47 of the Act (that is Cap 160) is significant. Had a word such as "decision" or "adjudication" been used in place of those two distinct words then clearly the High Court's decision or adjudication would have been non-appealable altogether. The effect of use of the word "decree" as Hancox J. A (as he then was) very correctly pointed out in the Income Tax decision was that the decision of the High Court was appealable as of right under Section 66 of the Civil Procedure Act".

[10] 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. In this case the appellant is appealing against the order of distribution of the deceased estate. That order is capable of execution as a decree of the court; thus following the dicta in the ***Makhangu,*** case, the appellant can be said to have an automatic right of appeal. Also we have taken note of the fact that the appeal is against a judgment that was rendered by the High Court in March, 2012, under the ***Constitution*** of Kenya ***2010.*** That being the case the provisions of ***Article 164 (1)*** of the ***Constitution***, the ***Court of Appeal*** has jurisdiction to hear appeals from the High Court. This is an appeal from an order or decree from the High Court.

[11] Having disposed of the first issue, the second issue was whether the Judge properly evaluated the evidence to arrive at the conclusion and the orders of how the estate of the deceased was shared among the beneficiaries. The appellant's contention was that the house of the appellant which comprises of the appellant and four daughters were given 1/3 of the deceased parcel of land. We have gone through the record of appeal, especially the petition for the grant of letters of administration. It was jointly filed by the appellant and the 1st respondent. It contained the list of survivors and the beneficiaries of the deceased estate. It is curious that the petition and the affidavits that were filed and signed by the appellant did not include his sisters. The appellant indicated the names of the said sisters when he sought the grant to be confirmed which he did without the participation of 1st respondent. The question of whether the appellant was introducing the additional names so as to get a bigger allocation of the estate, or whether indeed the four persons were beneficiaries of the deceased could only have been answered at the trial court. Another concern we have noted is the fact that the appellant never served the said persons with the application or citation. The evidence adduced before the trial magistrate all alluded to the fact that the deceased was survived by two houses, one represented by the appellant who was the only child and the 1st respondent who had 3 sons.

[12] The issue of whether the four persons named by the appellant as beneficiaries of the deceased estate were the deceased daughters was a question of fact that could aptly have been resolved through evidence before the trial magistrate. The appellant was an administrator of the estate; he had a duty to summon all the beneficiaries including his so called sisters so that they could state their position. That would have also given the two courts below an opportunity to resolve the issue. This was an issue of fact that was introduced before this Court for the first time; we find it inappropriate as we have no means of establishing the same. The 1st and 2nd respondents stated that they were satisfied with the mode of distribution adopted by the High Court Judge. If the respondents had cross appealed, it is possible the appellant's share of the estate would have been reduced even further as deceased estate ought to have been distributed in accordance with the provisions of ***Section 40*** of the ***Law of Succession***. In that case the appellant entitlement would have been 1/5th.

[13] We think we have said enough to demonstrate this appeal lacks merit, the appellant's attempt to hide under the guise of sisters whom he failed to disclose to the two courts below is without basis. In the upshot, the appeal is dismissed, this being a family matter we have no desire to keep them against each other any longer. We accordingly order each party to bear their own costs of this appeal.

DATED AND DELIVERED AT NYERI THIS 30TH DAY OF JULY, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR