



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, OUKO & GATEMBU, JJ.A)

CIVIL APPLICATION NO. NAI. 69 (UR 56) OF 2014

BETWEEN

RHODA WAIRIMU KARANJA..... 1st APPLICANT

JOHN KIOI KARANJA..... 2nd APPLICANT

AND

MARY WANGUI KARANJA..... 1st RESPONDENT

SALOME NJERI KARANJA..... 2nd RESPONDENT

(An application for leave to appeal to the Court of Appeal against a Ruling of the High Court of Kenya at Nairobi (W. Musyoka, J.) delivered on 31st January, 2014

in

SUCCESSION CAUSE NO. 1366 OF 1995)

RULING OF THE COURT

Although this matter has had a truly chequered history of a family dispute, the present application raises only two points of law; first, whether leave of this Court is required to appeal to it from the decision of the High Court in probate and administration matters and secondly, whether the applicant has locus standi to bring the instant application.

This is how those questions have arisen. James Karanja alias James Kioi died testate on 3rd February, 1995. The grant of probate was issued on 15th December, 1999 after a protracted trial on an objection. The certificate of confirmation of grant was eventually on 2nd December, 2005 issued to two executrices, Mary Wangui Karanja and Salome Njeri, daughters of the deceased, the respondents. Following that confirmation, there have been a plethora of applications on all manner of things.

It is the decision of the High Court (Musyoka, J.) in one of these many applications that has given rise to the application before us. In his ruling rendered on 31st January, 2014, the learned Judge found that the last will of the late James Karanja, alias James Kioi was clear and sufficiently showed his intention to

bequeath LR. No. 11595, the main property in contention, to the two executrices and their sister, Lucy Wambui; that the deceased person's wife who survived him, Rhoda Wairimu Karanja (Rhoda), who also has since died, and her son, John Kioi Karanja (John), the applicant in the present application, were excluded from that property; that as a matter of fact, the issue of ownership of LR No. 11595 was heard and finally determined, and was for that reason res-judicata.

The learned Judge concluded that:-

"9. The long and short of it is that the 2nd respondent has not convinced me that I ought to interfere with the free exercise of the testator's will and intervene..... I agree with the applicant's argument that the matter is res judicata, as it is obvious even from the record that the matter had been dealt with by a competent court..... I find that the application dated 6th May, 2013, seeking to restrain the 2nd respondent from disposing the remains of the 1st respondent on LR No. 11595 on the basis that the said L.R. No. 11595 belonged to the applicants by dint of the certificate of confirmation of grant... is merited and I hereby allow it with costs."

Although there were arguments before the learned Judge whether, on the authority of **Trouistic Union International V. Jane Mbeyu**, Civil Appeal No. 145 of 1990, John lacked capacity to bring the application, the learned Judge failed to address that issue in the impugned ruling.

We also need to clarify that the 1st respondent referred to in the above quoted passage of the impugned ruling is Rhoda, who passed away on 22nd April 2013. Due to these disputes, her remains have not been interred and are preserved at Chiromo Mortuary, one year and a half after her death. It is the above decision confirming that she cannot be buried on L.R No. 11595 that the applicant, her son, John, intends to challenge on appeal to this Court.

Pursuant to that intention, he presented an application to the High Court seeking leave to appeal to this Court on 12th February, 2014. The learned Judge, (Musyoka, J.) correctly, in our view, observed that in terms of **section 50 (1) (2)** of the Law of Succession Act, appeals from the decision of a resident magistrate lie in the High Court and the decision of the High Court in such appeal is final. In respect of an order or decree from the Kadhi's Court an appeal lies to the High Court and the decision of the High Court is appealable to this Court with prior leave and only in respect of any point of Muslim law.

From the above provision and relying on the decisions in the **Julius Kamau Kithaka V. Weruguru Kithaka Nyaga & 2 others (2013) eKLR** and **Josephine Wambui Wanyoike V. Margaret Wanjira Kamau (2013) eKLR**, the learned Judge found that both the Law of Succession Act and the Probate and Administration Rules do not make provision for leave to appeal to the Court of Appeal from the decision of the High Court exercising its original jurisdiction. He further explained that even if there was a right of appeal he was of the opinion that the application did not meet the threshold for the grant of leave; that it did not disclose a prima facie case.

The application before us is brought pursuant to **Rules 39, 41 and 43** of the Court of Appeal Rules.

Rule 39 is explicit and is worded as follows:-

"39. In Civil matters -

a) Where an appeal lies on certificate by the superior court that the case is fit for such leave may be made informally, at the time when the decision against which it is desired to appeal is given, or by motion or chamber summons according to the practice of the superior court, within fourteen days of such decision;

b) Where an appeal lies with the leave of the Court, application for such leave shall be made in the manner laid down in rules 42 and 43 within fourteen days of the decision against which

it is desired to appeal or, where application for leave to appeal has been made to the superior court and refused, within fourteen days of such refusal." (Emphasis ours).

Although not raised before us the question whether or not the application was brought within the above prescribed period, namely, fourteen days of the date of refusal goes to the competency of the application. The ruling dismissing the application for leave was made on 31st January 2014 and this application filed on 4th April 2014, way out of the fourteen days stipulated by the rules.

On the question of the applicant's capacity to bring this application, once more, that question formed part of the arguments before the learned Judge yet again it was not considered in the ruling. It has been raised again before us.

It is common ground that when the application for leave to appeal was instituted in the High Court and indeed even when this one was presented, the applicant did not have a grant of representation in respect of his deceased mother's estate. That is confirmed by his supplementary affidavit in which he has deposed that he was issued with limited grant of administration ad litem on 25th June 2014, while this application was filed on 4th April, 2014. It follows that the applicant has been participating in this matter since the mother died without authority and capacity. The law is firmly established and we rehash it only as a matter of tradition. The two leading cases in this area have been cited, one before us and the other before the High Court. The holdings in the decisions of **Virginia Wamboi Otieno V. Joash Ougo & Another (1982-1988) IKAR 1050** and **Trouistic** (supra) are to the effect that an action brought by an intestate's intended administrator before the issuance of a grant of representation is incompetent at the date of its inception, even if a grant is obtained within a week, or a month or even a year afterwards. It does not relate back. See also **Bowler V. John Mowlem & Co. Ltd** [1954] 3 ALL ER 556.

Our twin findings above on the competency of the application on account of time when it was filed and on the applicant's lack of capacity to bring this application are sufficient to dispose the application. We however think that we need to say something about the appellate jurisdiction of this Court in respect of decisions of the High Court in its original jurisdiction in succession matters.

We reiterate that **section 50** of the Law of Succession Act is clear that decisions from the magistrate's courts are appealable to the High Court and the decision of the High Court is final. Decisions of the Kadhis Court, on the other hand are appealable first to the High Court and only with leave and in respect of point(s) of Muslim law, to the Court of Appeal. But **section 47** of the Law of Succession Act makes no mention of an appeal to the Court of Appeal from the decision of the High Court made in the exercise of the latter's original jurisdiction. Decisions on this point have been varied both in the High Court and in this Court. The holding in the leading case of **Makhangu V. Kibwana** [1996-1998] 1 EA 168 (Cockar, CJ, Kwach and Shah, JJ.A), which has been cited invariably in almost all the subsequent decisions is to the effect that an appeal does lie to the Court of Appeal from the decision of the High Court in probate matters; that under **section 47** of the Law of Succession Act, the High Court has jurisdiction on hearing a matter 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 Rules or by leave of the court if it did not. It has been said in criticism of this decision that the Law of Succession Act is a complete code with its own rules and that there would be no justification to import into it provisions of the Civil Procedure Act or Rules unless expressly permitted under **Rule 63** of the Probate and Administration Rules. This criticism, notwithstanding, as we have noted the case has not been departed from and has been widely used as a basis of giving a party a right to appeal to this court as demonstrated in the following decisions of this Court, among many others, **Kaboi V. Kaboi & Others** [2003] EA 472. **Jacob Kinyua Kigano V. Tabitha Njoki Kigano & Solomon Machere Munge** Civil Appeal No. 37 of 2013 and **Francis Gachoki Murage V. Juliana Wainoi Kinyua & Another**, Civil Appeal (Application) No. 139 of 2009. There is similarly a long line of High Court cases which have been decided along the same line, relying on the decision of **Mukhangu** (supra). We need only to quote this Court's (Visram, Koome & Odek, JJ.A) recent decision in **Francis Gachoki** (supra) where the Court said as follows:-

"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."

In short, and speaking generally, the practice alluded to by their Lordships in the above passage, is that where there is no automatic right of appeal an aggrieved party wishing to appeal must seek leave to do so and the granting of leave is a discretionary power. It cannot therefore be correct to maintain that no appeal in succession causes lies to the Court of Appeal. There cannot be such a thing in law and moreso today. This is borne out both from the large number of appeals arising from succession causes decided by this Court over the years and from the language of **Article 164 (3)** of the 2010 Constitution which is in contrast with **Section 64 (1)** of the former Constitution and **Section 3 (1)** of the Appellate Jurisdiction Act. We demonstrate this distinction by reproducing these provisions in reverse order. **Section 3 (1)** aforesaid stipulates:-

"3. (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other Court or Tribunal prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under any law." (Emphasis supplied).

Similar language was adopted in **Section 64(1)** of the former Constitution

thus:

"64. (1) There shall be a Court of Appeal which shall be a superior court of record, and which shall have such jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law." (Our emphasis).

Today, **Article 164 (3)** aforesaid provides:-

**"3. The Court of Appeal has jurisdiction to hear appeals from- a) The High Court; and
b) Any other court or tribunal as prescribed by an Act of Parliament." (Emphasis supplied)**

The distinction should be clear; that today the Constitution directly confers jurisdiction in the Court of Appeal to hear appeals from the High Court and from any court or tribunal if such appeal to any court or tribunal is prescribed by an Act of Parliament. See **Equity Bank Limited V. West Link MBO Limited**, Civil Application No. 78 of 2011. Like the five Judge bench in the **Equity** case, observed, obiter, we do not think, that **Article 164 (3)** confers unlimited right of appeal which cannot be restricted by statute because that can have far reaching consequences which may affect the administration of justice generally and the function of the court.

We make two points from the foregoing analysis. One, a court's jurisdiction flows from either the Constitution or statute or both. See **Article 164 (3)** of the Constitution and **section 3** of the Appellate Jurisdiction Act. It cannot be assumed or donated by parties or arrogated by the court itself. Jurisdiction is everything and if a court does not have it, it downs tools. These are well-established principles. The other point we make is the right of access to justice, now elaborately articulated in **Article 48** of the Constitution requiring all state organs, of which courts are, to ensure access to justice for all persons. Bearing in mind that duty and applying the provisions of **section 47** of the Law of Succession Act and **Rule 47** of the Probate and Administration Rules, the High Court will, in exercise of its jurisdiction under the former grant leave to any party aggrieved by its decision to challenge it on appeal to this Court.

We do not think the framers of **section 50** of the Law of Succession Act intended to limit appeals to this Court and allowing decisions of the Kadhis Courts be challenged up to this Court. Succession, (read family), disputes are the most acrimonious kind of litigation all over the world, in the past and today. Starting with the oft-narrated story of the dispute between Baroness, Cecily Bonville who became the wealthiest heiress in England in 1501 when she was less than 1 year old after all her male relatives were slain in the battle for the English throne - the Wars of the Roses [1455-1487] and her son and heir, Thomas Grey over Cecily's right to remain the sole executrix of her late husband's estate after remarriage to a man many years her junior. King Henry VII and the entire royal council had to intervene to quell the acrimony.

Likewise, the fictitious story by Charles Dickens in **Bleak House** of a family dispute over inheritance in England in which the estate was depleted in a litigation which lasted several years. **Virginia Wamboi Otieno** (supra), is a well-known local example.

In view of these and given the adversarial nature of litigation in our system of justice, it would be unconscionable to allow as final the decision of a single judge, and limit the right of appeal to the High Court, especially now when the court hierarchy has been opened by the creation of the Supreme Court as an apex court.

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.

So, what is our decision in this application? We have found that the application was presented out of time; that the applicant lacked capacity to bring it at the time he did; that leave of the High Court to appeal to this Court in succession matters is necessary in the former's exercise of its original jurisdiction; and that where application for leave has been rejected by the High Court, it can be made to this Court.

For the first two reasons, we declare that the application is incompetent and accordingly strike it out with costs.

Dated and delivered at Nairobi this 14th day of November, 2014.

D.K. MUSINGA

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JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR