



IN THE COURT OF APPEAL OF KENYA
AT NYERI
CIVIL APPEAL (APPLICATION) 139 OF 2009

BETWEEN

FRANCIS GACHOKI MURAGE APPELLANT/RESPONDENT

AND

JULIANA WAINOI KINYUA 1ST RESPONDENT/APPLICANT
JUDITH NYAGUTHI 2ND RESPONDENT/APPLICANT

(Being an appeal from the judgment of the High Court of Kenya at Embu (Khaminwa, J) dated 16th January, 2008)

In

H.C. C. A. No. 46 of 2005)

RULING OF THE COURT

In Civil Appeal No. 139 of 2002 pending before this Court, Francis Gachoki Murage, the appellant therein, has challenged the judgment of Khaminwa, J dated and delivered at Embu on 16th January, 2008. By that judgment the learned Judge had dismissed an appeal which Murage had lodged in the High Court from a decree passed by Principal Magistrate Court's court at Embu. The dispute between Murage and Juliana Wainoi Kinyua, the 1st respondent and Judith Nyaguthi, the second respondent, fell squarely within the provisions of the Law of Succession Act, **Chapter 160** of the Laws of Kenya. We agree with Mr. Njage, learned counsel for the appellant, that both decisions of the two courts below resulted in a decree. But we did not hear Mr. Njage contend that the dispute between the parties fell outside the provisions of the Law of Succession Act.

The appellant's appeal was lodged in the Court on 15th June, 2009. On 15th July, 2009, the 2nd respondent lodged a notice of motion under **Rule 80** of the Court's Rules asking that the appeal be struck out on the ground:-

“That no appeal can lie against the decree of the high (sic) Court in its appellant (sic) jurisdiction in succession matters emanating from the lower court.”

In his submissions before us, Mr. Munene Muriuki, learned counsel for the respondents, pointed out to the Court the provisions of **section 50 (1)** of the Law of Succession Act which are in the following terms:-

“50 (1) 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.”

One would have thought there could be no clearer provision than this but Mr. Njage still resisted the motion to strike out the appeal and his reasoning was that the High Court's order was a decree and therefore the appellant was entitled to appeal against it under

section 66 of the Civil Procedure Act which in turn provides as follows:-

“Except where otherwise expressly provided in this Act, and subject to the provision as to the furnishing of security as may be prescribed, an appeal shall lie from the decrees or any part of decrees and from the orders of the High Court to the Court of Appeal.”

According to Mr. Njage, because Khaminwa, J’s judgment resulted into a decree, and we have agreed with him on that point, the appellant was entitled to appeal to this Court under **section 66** of the Civil Procedure Act.

With respect to Mr. Njage, we do not think there is any basis for this contention. The matter the two courts below dealt with fell to be determined and was in fact determined under and in accordance with the Law of Succession Act. **Section 50 (1)** of that Act specifically provides, as we have seen, that an appeal to the High Court from the orders or decrees of a magistrate’s court shall be final . We did not hear Mr. Njage allege that the provisions of **section 66** of the Civil Procedure Act are superior to and must over-ride the provisions of the Law of Succession Act. There would be no valid legal basis for such a contention. Under **section 64 (1)** of the Constitution, the Court of Appeal:-

“----- shall have such jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law.”

Section 50 (1) of the Law of Succession Act specifically deprives the Court of jurisdiction to hear appeals under that section.

Then **section 3 (1)** of the Appellate Jurisdiction Act, **Chapter 9** of the Laws of Kenya, also provides:-

“The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law.”

No appeal lies to this Court under **section 50 (1)** of the Law of Succession Act and as we have said the provisions of **section 66** of the Civil Procedure Act cannot over-ride the specific provisions of **section 50 (1)**.

We agree with the respondents that the appellant’s Civil Appeal No. 139 of 2009 does not and cannot lie to this Court in view of the unambiguous provisions of **section 50 (1)** of the Law of Succession Act. The two cases which Mr. Njage cited to us namely **KABOI VS. KABOI & OTHERS [2003] 2 EA 472** and **MAKHANGU VS. KIBWANA** were cases where the High Court was exercising its original and not appellate jurisdiction. They are irrelevant to the issue at hand.

We accordingly allow the notice of motion dated 13th July, 2009 and lodged in the Court on 15th July, 2009 with the result that Civil Appeal No. 139 of 2009 be and is hereby struck out. We award to the respondents costs of the motion and of the struck out appeal. Those shall be the Court’s orders.

Dated and delivered at Nyeri this 24th day of June, 2010.

R.S.C. OMOLO
.....
JUDGE OF APPEAL

D.K.S. AGANYANYA
.....
JUDGE OF APPEAL

ALNASHIR VISRAM
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR.