Mughal & Rashid (Suing as the legal representatives of the Estate of the Late Rashid Mughal) & another v Bhola (Civil Appeal 41 of 2018) [2025] KECA 420 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KECA 420 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 41 OF 2018

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

FEBRUARY 28, 2025

BETWEEN

SAHEEL RASHID MUGHAL & ARFHAN RASHID (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE RASHID MUGHAL) ..... 1ST APPELLANT

MOHAMMED RAFIQ ..... 2ND APPELLANT

AND

MOHAMMED SHABIR BHOLA ..... RESPONDENT

(Being an appeal from the High Court of Kenya at Nakuru (A. Emukule, J.) dated 14th November 2014 in Succession Cause No. 455 of 1996)

JUDGMENT

1. Saddiq Bhola, alias Mohammed Sadiq Bhola, (the deceased) died intestate on 10th March 1996. On 7th August 1998, a Grant of Letters of Administration Intestate was issued to the deceased's sons, namely, Mohamed Hanif Bhola (now deceased) and Mohamed Shabir Bhola (the respondent). The grant was confirmed by the High Court on 6th December 2000. However, by a ruling dated 4th March 2011, Ouko, J. (as he then was) revoked the said grant. In the said ruling, Ouko, J. held that it was not clear how the administrators accessed the deceased's bank accounts without a grant of letters of administration. Nevertheless, the learned judge ordered that, being an old matter, the surviving administrator should only file fresh summons for confirmation of the grant already issued to him which must comply with the law.

2. Subsequently, the respondent filed summons for confirmation of grant dated 25th March 2011. In his affidavit in support of the summons, he set out the proposed mode of distribution and annexed a will dated 9th January 1994, two agreements dated 19th June 1996 and 24th January 1997 respectively,

a letter dated 21st June 1998 written by one M.S Mughal and a consent to the confirmation of the grant dated 25th March 2011. The respondent's case was that the beneficiaries had already been given their respective shares of the deceased's money as per the said agreement(s) and in any event they acknowledged receipt of the cash. Therefore, the remaining property was to be distributed in the manner proposed. However, Rashid Mughal (deceased) filed an affidavit of protest sworn on 26th May 2011 disputing the proposed mode of distribution and a replying affidavit sworn on 29th April 2013 seeking to have the estate divided equally among the beneficiaries. His contestation was that the agreement(s) between him and the administrators were not valid because it was based on an invalid will and that all the assets were not within the knowledge of the beneficiaries. He contended that the mode of distribution was inequitable and prejudicial to their sisters who never consented to the distribution or the agreement dated 8th August 1996 which agreement was not honoured by the administrators.

3. In the impugned judgment delivered on 14th November 2014, Emukule, J. held that Rashid Mughal and Mohammed Rafiq Mughal had received their portion of the estate, on which basis they willingly renounced their right to an equal portion of the rest of the net intestate assets and in the circumstances, the net intestate estate would be equally distributed between Mohamed Shabir Bhola; Azra Kausar Widow of the deceased co-administrator Mohammed Hanif Bhola; Hazra Bibi and Saira Bibi Tanweer. The assets to be distributed were listed at paragraph 12 of the impugned judgment and remain uncontested. The Administrator was also ordered to file a full and complete account of administration in terms of Section 83(g) of the *Law of Succession Act* within six months from the date of the distribution of the assets.

4. Aggrieved by the said decision, the 1st appellant filed his memorandum of appeal dated 13th June 2018 citing 6 grounds of appeal. Principally, he faults the learned judge for: (a) holding that the agreement dated 8th August 1996 was valid and binding despite the existence of evidence to the contrary; (b) failing to positively consider the contents of the various sworn Affidavits in support of the appellant's protest and the submissions thereto; (c) allowing an injustice to be meted upon the appellant and hence occasioning a miscarriage of justice through inequitable distribution of the deceased's estate; (d) openly showing bias by filing in the gaps in the respondent's case; (e) failing to determine the issues in dispute on merit; and, (f) failing to hold that the appellant had not proved his case on a balance of probabilities.

5. The 2nd appellant was also dissatisfied by the same decision.

   He filed a supplementary memorandum of appeal dated 3rd April 2023 setting out 8 grounds of appeal, which were essentially similar to the 1st appellant's grounds. However, the submissions tendered on his behalf highlighted later in this judgment condensed the said grounds into three issues, namely; (a) whether the agreement dated 8th August 1996 was valid and therefore unenforceable (sic); (b) whether the impugned judgment violates the appellant's right to protection of the law; and, (c) whether the superior court erred in making findings against the 2nd appellant despite excluding him as a party to the judgment.

6. The respondent filed a notice of cross-appeal dated 22nd June 2020 seeking orders that: the appellants' appeal be dismissed with costs to the respondent; this court upholds the wishes of the deceased as per his will dated 9th January 1994; this Court be pleased to uphold the distribution as proposed by the respondents in the summons for confirmation of grant dated 24th March 22011; the court be pleased to hold that the properties available for distribution among the four beneficiaries of the deceased namely; Mohammed Shabir Bhola (the respondent), Azra Kausar (widow of the deceased co-administrator Mahammed Hanif Bhola), Hazra Bibi and Saira Tanweer are those left out in the summons for confirmation of grant dated 25th March 2011 and the agreement dated 8th August 1996; and costs of this cross appeal be awarded to the respondent. Nevertheless, during hearing of the

appeal, the respondent withdrew his cross appeal and there being no objection from the appellants, the withdrawal was allowed with no orders as to costs.

7. During the virtual hearing of this appeal on 27th January 2025, learned Counsel Mr. Mutai appeared for the 1st appellant, learned counsel Mr. Kibe Mungai and Ms Langat appeared for the 2nd appellant and learned counsel Mr. Karanja appeared for the respondents.

8. In his supplementary submissions, the respondent's counsel Mr. Karanja raised a jurisdictional question in effect challenging the competency of this appeal. He argued that a party in a succession cause can only appeal to this Court against the decision of the High Court exercising original jurisdiction, pursuant to leave granted by the High Court and where such leave is declined, with the leave of this Court as was held in Obange & another vs. Onyayo *& 4 Others (Civil Appeal E033 OF 2021*) [2022)] KEHC 14401 (KLR) while citing Hafswa Omar Abdalla Taib & 2 Others vs. Swaleh Abdalla Taib [2015] eKLR.

9. In reply to the said objection, learned counsel for the 1st appellant Mr. Mutai argued that leave to appeal was granted pursuant to a consent order entered into on 30th May 2018 in Civil Application number 108 of 2016. He submitted that the consent was as a result of an application filed by the respondent to strike out the proceedings and in that application the parties consented to the institution of the instant appeal, therefore, the issue of leave is moot.

10. Learned counsel for the 2nd respondent Mr. Kibe Mungai submitted that there seems to be conflicting decisions rendered by this Court regarding the issue of leave to appeal against High Court decisions in succession matters. For example, he cited Julius Kamau Kithaka vs. Warunguru Kithaka Nyaga & 2 Others [2013] eKLR where this Court held that leave was not a prerequisite to appeal against a decision of the High Court is succession matters and that this Court has the jurisdiction to hear and determine such appeals as was held in Francis Gachoki Murage vs. Juliana Waindi Kinyua & Another C.A 139/2009. Conversely, Mr. Mungai submitted that in Rhoda Wairimu Karanja vs. Mary Wangui Karanja & Another, this Court held that there is no specific provision or automatic right of appeal under the *Law of Succession Act*, therefore, a party can only appeal to this court with leave of the High Court. Counsel maintained that these conflicting decisions of this Court endure to date because the Supreme Court is yet to conclusively settle the law on the said issue.

11. Mr. Mungai submitted that it would be unconscionable to allow as final the decision of a single judge of the High Court to stand, especially now when the court hierarchy has been expanded by the creation of the Supreme Court as an apex court. He also submitted that the circumstances leading to his client's joinder to the appeal and filing his supplementary memorandum of appeal are peculiar and should be excused from the requirement of leave from the trial court in order to achieve the ends of justice.

12. He also submitted that the 2nd appellant was belatedly joined in this appeal following his application dated 8th June 2021 which was allowed by consent of the parties, and he was granted leave to file a supplementary affidavit and the supplementary memorandum of appeal was admitted by consent.

13. Mr. Mungai contended that rules of procedure are handmaidens of justice and not the mistress thereof. He invoked section 3A of the *Appellate Jurisdiction Act* to persuade this Court to excuse the 2nd appellant from the rigours of leave indirectly espoused under section 50(1) of the *Law of Succession Act*, since section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules do not provide for the time frame within which an appeal may be filed or within which leave to appeal may be sought. He urged this Court to consider that the 2nd appellant's supplementary memorandum of appeal raises arguable grounds of appeal that have been responded to or could be responded to by

the respondent, who has had notice of the same for more than a year, without any prejudice to him, therefore, this Court should aid substantive justice and permit the appeal to be determined on merit.

14. As stated earlier, the 1st appellant's counsel Mr. Mutai maintained that leave was granted by consent for this appeal to be instituted. Mr. Mutai referred this Court to a consent order recorded on 30th May 2018 in Civil Application No.108 of 2016. However, much as Mr. Mutai tried to persuade this Court that the said consent was recorded, he did not point to this Court the exact page in the record of appeal where the alleged consent is located. Nevertheless, to satisfy ourselves whether there was merit in his assertion, we have carefully scrutinized the entire record, as we are obligated to do in search for the truth. Principally, the basic purpose of a trial is the determination of truth. Truth and the right result is not merely basic, but the sole objective of the judge. Our scrutiny of the entire record confirmed that the alleged consent does not exist. Consequently, it is our conclusion that no leave was sought and or granted by the High Court either by consent as alleged or otherwise.

15. Mr. Kibe Mungai eloquently advanced the argument that there are conflicting decisions of this Court on the question whether or not leave to appeal to this Court in succession matters is a pre-requisite to the institution of the appeal. He argued that the Apex Court is yet to conclusively settle the law on this issue and urged us to allow the appeal contending that it would be unfair to allow the decision of a single judge of the High Court to remain final considering the expanded hierarchy of our courts which now includes the Supreme Court as the highest court.

16. In support of his argument, Mr. Mungai cited this Court's decision in Julius Kamau Kithaka vs. Warunguru Kithaka Nyaga & 2 Others [2013] eKLR. We have carefully read the said decision. It was an application before a single judge for extension of time to file a notice of appeal to challenge a judgment rendered in a succession cause. One of the grounds of objection to the extension of time sought in the said application was that leave had not been sought and obtained to appeal against the said decision. However, the single judge was not persuaded by the said argument and in exercising his jurisdiction to extend time he granted the extension sought. As mentioned above, the mere fact that the extension of time was granted does not mean that the objection could not be raised in the appeal nor were we told whether the appeal was subsequently determined on merit. More important, a decision of a single judge cannot override a decision of a full bench of this Court holding that leave in matters determined under the *Law of succession Act* is a pre-requisite.

17. The other case cited by Mr. Mungai in his bid to persuade this Court to rule that it has the requisite jurisdiction to hear this appeal is Francis Gachoki Murage vs. Juliana Waindi Kinyua & Another C.A No. 139/2009. We have also read the said decision. It does not support the position urged by learned counsel. Conversely, this Court in the said case stated:

> "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 leave is within the discretion of a Judge...The court has discretion to grant leave to appeal to the Court of Appeal."

18. Undeniably, the *Law of Succession Act* does not have an express provision allowing an aggrieved party in succession matters to appeal to this Court against decisions made by the High Court. Section 50 (1) & (2) of the *Law of Succession Act*, the only provisions in the said statute which deal with appeals provides for appeals against- (a) decisions made by the Resident Magistrates' Courts, and, (b) decisions made by the Kadhi's court. Regarding decisions made by the Resident Magistrates, sub-section (1) clearly provides that appeals against such decisions lie in the High Court whose decision shall be final. Regarding decision made by the Kadhi's court in respect of estates of a deceased Muslim, appeals lie

in the Court of Appeal, with the leave of the court. Parliament could have been clearer than that. To provide clarity to the foregoing, we here below reproduce the said provisions: Section 50 (1) &

(2) provides:

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.

2. An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi's Court in respect of the estate of a deceased Muslim and, with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.

19. To illuminate the above statutory provisions, it is important to the provisions of *the Constitution* and the statute that confer jurisdiction to this Court. Article 164 (3) of *the Constitution* provides that 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. The phrase "as prescribed by an act of Parliament" is highly instructive. A court's jurisdiction flows from either *the Constitution* or legislation or both. The Supreme Court In the matter of the Interim Independent Electoral Commission [2011] eKLR. Neutral citation: [2011] KESC 1 (KLR) discussed the issue of jurisdiction in the following manner: "Assumption of jurisdiction by courts in Kenya is a subject regulated by *the constitution*; by statute law, and by principles laid out in judicial precedent." Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written laws. (See the Supreme Court decision in Macharia & another vs. Kenya Commercial Bank Limited & 2 Others (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012) (Ruling).

20. The relevant statute is the *Appellate Jurisdiction Act* which confers on the Court of Appeal jurisdiction to hear appeals from the High Court and for purposes incidental thereto. Section 3 of the said Act provides as follows:

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.

21. In very certain terms, the above provision contemplates appeals which lie under any law. The question that falls for determination is whether an appeal can lie where the law does not expressly provide for it. In our considered opinion, for this Court to properly entertain an appeal from the High Court, as the above section suggests, the appeal must lie to this Court under any written law. In other words, unless a right of appeal is clearly and expressly provided by a statute, it does not exist. This is because a right of appeal infers in no one, that is, it cannot be assumed, and therefore an appeal for its maintainability must have the clear authority of law. That is the entry point that grants this Court jurisdiction to adjudicate on the matter. If the statute does not create any right of appeal, no appeal can be sustained by this Court. It is a prerequisite for invoking the jurisdiction of this Court.

22. It is important to underscore the requirement that an appeal must lie under any law is a jurisdictional prerequisite for this Court to be properly seized of the matter. Although this Court has the inherent power to protect and regulate its own process, that does not extend to the assumption of jurisdiction not conferred upon it by *the Constitution* or the statute. If *the Constitution* or a statute does not provide for such a right that is the end of the matter and this Court cannot assume the power. In addition to the constitutional and statutory requirement that the appeal be provided under the law, there is yet another twofold requirement: first, the existence of a decision of the High court; and, second, where leave to appeal is required, it has been sought and obtained in the first instance, and if leave to appeal

has been refused, it is applied and granted by this Court. It is important to stress that the right to appeal to this Court is neither automatic, nor absolute. This is because an appeal must lie to this Court under any law and where leave is a prerequisite, it must be sought and obtained. As Brand JA said in Newlands Surgical Clinic (Pty) Ltd vs. Peninsula Eye Clinic (Pty) Ltd 2015 (4) SA 34 SCA; [2015] 2 All SA 322 (SCA) para 13:

> "Leave to appeal . . . constitutes what has become known, particularly in administrative law parlance, as a jurisdictional fact. Without the required leave, this court simply has no jurisdiction to entertain the dispute."

23. Jurisdiction is everything. Where, as was in this case, the High Court, whose judgment is sought to be appealed, sat as a court of first instance, it must first be approached for leave. If leave is granted, that condition is met. If it is refused, the party wishing to appeal has a right to apply to this Court for such leave. Here is a case where no leave was sought either before the trial court or before this Court. That omission is fatal to the appellants' case.

24. As the law stands, the appellants were mandatorily required to obtain leave from the High Court or failing that, obtain the leave of this Court to enable them mount a successful appeal. An appeal filed without obtaining the necessary "leave to appeal" from the court, when such leave is required by the law, (as is the case here), is incompetent and will be struck off. It follows that this appeal is incompetent. Such leave not having been obtained, we have no jurisdiction to hear and determine the appeal. Having so held, we decline to delve into the merits of this appeal. Consequently, we dismiss this appeal and order each party to bear own costs for the appeal. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 28TH DAY OF FEBRUARY, 2025.

M. WARSAME

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

M. GACHOKA C. Arb, FCIArb

.....

JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR.