REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Mwilu; DCJ & VP, Njoki, Lenaola & Ouko, SCJJ)

PETITION NO. E029 OF 2024

–BETWEEN–

ELIUD MWENDIA WANDI ..... APPELLANT

–AND–

KEVIN WANJOHI MUCHIRA
(*Suing as the Administrator*
ad litem of **JANE MUTHONI MUCHIRA) ..... RESPONDENT**

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*(Being an appeal from the Judgment and Orders of the Court of Appeal at Nyeri (**Okwengu, Kiage & Sichale, JJ.A**.) delivered in Civil Appeal No. 65 of 2015 on 5th February 2021)*

Representation:

Magee wa Magee for the Appellant.
(*Magee Law LLP*)

Maurice Macharia for the Respondent
(*Macharia Burugu & Company Advocates)*

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The appeal dated 5th July 2024, raises a fundamental question as to whether a litigant has an automatic right of appeal to the Court of Appeal in succession matters arising from a decision of the High Court exercising its original jurisdiction. The

appeal is premised on Article 163(4)(b) of the Constitution and was filed pursuant to leave issued by the Court of Appeal in its ruling of 7th June, 2024.

[2] The question on the right of appeal, arises against the backdrop of conflicting decisions of the Court of Appeal on the issue. One school of thought holds that leave is a jurisdictional prerequisite before an appeal may lie to the Court of Appeal in succession matters arising from the High Court's original jurisdiction. On the other hand, the competing view posits that Article 164(3)(a) of the Constitution confers an unfettered right of appeal from the High Court to the Court of Appeal, thereby dispensing with the requirement for leave. This divergence in judicial opinion has generated uncertainty in succession matters necessitating the present appeal.

B. BACKGROUND

(i) Factual History

[3] Magu Mwenje, *alias* Peter Wandi Mwenje (the deceased), passed away on 17th May, 1998 leaving behind his estate which comprised of land parcel Kabare/ Mutige/20 measuring 1.33 Hectares. Initial succession proceedings were commenced in **Kerugoya Senior Resident Magistrate's Court Succession Cause No. 228 of 1998** by Annah Wanjiku Wandi (Annah), who described herself as the widow of the deceased. She petitioned for letters of administration intestate on 26th October, 1998. In her petition, she listed her children with the deceased namely, Alphan Njagi (Alphan), David Gichobi (David), James Gitari (James), Eliud Mwendia (Eliud) and Eugenia Waruguru (Eugenia) as beneficiaries to his estate.

[4] In turn, Jane Muthoni Muchira (Jane), objected to the petition on 7th June, 1999 arguing that despite being the deceased's wife through inheritance following the death of his brother and the deceased having accepted her children namely, Francis Wachira (Francis), Evans M. Muchiri (Evans), Susan Watoro (Susan), Charles

Mugambi (Charles) and Kelvin Wanjohi (Kelvin) as his own, she had been excluded in the succession process. Accordingly, she sought to be joined as a co-administrator of the estate.

[5] By a judgment delivered on 4th November 2002, the Magistrates' Court (*N. M. Kiriba, SRM*) found that both Jane and Annah were widows of the deceased, that is, Jane having been inherited as a wife by the deceased from his late brother, and Annah having contracted a statutory marriage with the deceased. The subordinate court further found that both women lived on the deceased's property and had never remarried. Accordingly, the court ordered that Jane and Annah be appointed as joint administrators of the deceased's estate.

[6] Subsequently, Jane lodged an application for confirmation of the grant. During the confirmation proceedings, Annah revisited the issue of whether Jane was indeed the deceased's widow. The Magistrates' court dismissed this contest and proceeded to confirm the grant as prayed. Meanwhile, Annah passed away and on 28th October 2004, and Jane applied to have Eliud (the appellant) substituted in place of Annah as a co-administrator of the deceased's estate. By a ruling dated 23rd November 2004, the Magistrate's Court (*Obaga, SRM)* allowed the substitution.

[7] Thereafter, on 23rd May, 2005 Jane applied for confirmation of the grant before the Magistrate's court and proposed that the land be distributed equally between the two houses. By an affidavit of protest, the appellant contended that Jane was not the deceased's wife and that the deceased had allegedly denounced her before his death. He argued that the issue of whether Jane was the deceased's wife was, at the time, in contest in **Nyeri HCCA No. 23 of 1998**. Additionally, the appellant asserted that Jane was purporting to distribute the deceased's estate to persons who were not entitled to inherit, since they were neither the deceased's children nor his

dependants. By a judgment delivered on 25th May 2007, the Magistrates' court (*Onyiego, SRM,* as he then was) found that Jane was a wife to the deceased and that she as well as her children were entitled to his estate. In the end, the court confirmed the grant, distributing the deceased's estate in accordance with the number of children, and counting Jane as an additional unit.

[8] Aggrieved by the Magistrates' Court decision, the appellant lodged an appeal at the High Court, **Embu HCCA No. 81 of 2008**, challenging the confirmed grant. By a judgment delivered on 23rd January 2012, the High Court (*Muchelule, J.*, as he then was) held that the contention that the deceased's estate ought to be distributed according to his wishes was untenable, as he had died intestate.

[9] On the question of whether the deceased had been married to both Annah and Jane, the High Court held that the same was no longer in dispute, since it had already been determined at the Magistrates' court and the decision had not been challenged and/or set aside on appeal or review. However, the court agreed with the appellant that the proceedings were a nullity because Jane had, without his consent, substituted Annah with the appellant as an administrator, notwithstanding that the appellant was not at the time the legal representative of Annah's estate. Accordingly, the court allowed the appeal and ordered for a retrial of the confirmation of grant, upon proper substitution of Annah's estate.

(ii) Litigation History

(a) At the High Court

[10] It would appear that instead of going back to the Magistrates' court, Jane filed **Kerugoya High Court Succession Cause No. 175 of 2012** seeking confirmation of the grant. Moreover, the appellant was successfully substituted in place of Annah, who had since passed away. Later on, with the consent of the parties, a fresh grant of

letters of administration over the deceased's estate was issued on 6th October 2014 in favour of Jane and the appellant. Jane then applied for confirmation of the said grant. However, the appellant opposed the application for confirmation reiterating the argument that Jane was not the deceased's wife. He went on to claim that Jane's children, Evans, Susan, Francis and Charles, were not dependants of the deceased and as such, were not entitled to his estate.

[11] By a judgment delivered on 29th September 2015, the High Court (*Limo, J.*) observed that the question of whether Jane and her children were dependants of the deceased had long been settled. As to whether the application for confirmation of grant was properly before it, the High Court took the view that the issuance of the grant on 6th October 2014 cured the appellant's failure to file a formal application for the issuance of the grant through Form 41, as required under Rule 25 of the Probate and Administration Rules. The High Court accordingly proceeded to distribute the estate of the deceased in accordance with Section 40 of the Law of Succession Act, Cap 160. More specifically, in favour of Jane as the surviving widow and the eleven children, six from Annah's house and five from Jane's house.

[12] In the end, the court issued the following orders:

i. ***The County/District Lands Registrar do dispense with production of identity cards or Personal Identification Numbers for those beneficiaries who may be reluctant to cooperate to facilitate transmission as ordered herein.***
ii. ***The County/District Surveyor do visit the parcel forming the estate herein and mark out the boundaries of each beneficiary as per the confirmed grant and place beacons to mark out their respective boundaries.***

iii. ***The O.C.S Kianyaga Police Station shall provide security for the exercise.***

iv. ***The surveyor's fees shall be paid evenly by all the beneficiaries.***

v. ***The Deputy Registrar or the Executive Officer of this Court shall execute the requisite transfer forms for those beneficiaries who may be reluctant to cooperate.***

vi. ***Each party shall pay its own costs but if any party fails to pay the surveyor's fees then he/she shall pay costs of this cause.***

[13] Subsequently, the appellant filed an application dated 3rd November 2015 seeking a stay of execution of the said judgment, which Jane opposed. In its ruling, the High Court (*Limo, J.*) observed that since the estate had been subdivided, the stay application had largely been overtaken by events. In that regard, the High Court restrained Jane and the beneficiaries from disposing of any part of the estate pending the hearing and determination of the appeal before the Court of Appeal. Nonetheless, the court allowed them to utilize their respective portions to earn a living pending the determination of the appeal.

(b) At the Court of Appeal

[14] Aggrieved by the judgment of the High Court, the appellant lodged an appeal before the Court of Appeal in **Nyeri Civil Appeal No 65 of 2015**. The appellant contended that the learned Judge erred both in law and in fact by: *rendering a decision that was against the weight of the evidence; failing to independently interrogate whether Jane and her children were the deceased's wife and dependants respectively; and misapprehending the provisions of Section 29 of the Law of Succession Act.*

[15] Consequently, the appellant sought *inter alia* orders that the appeal be allowed; the judgment of the High Court delivered on 29th September 2015 be set aside and substituted with an order allowing his protest; and costs of the appeal.

[16] During the pendency of the appeal before the Court of Appeal, Jane passed away and she was substituted on 19th March 2018, with her son, Kevin Wanjohi Muchira (the respondent).

[17] In a judgment delivered on 5th February 2021, the Court of Appeal (*Okwengu, Kiage & Sichale, JJ.A.*) crystallized two main issues for determination. Firstly, the appellate court considered the appellant's challenge to Jane's status as a widow of the deceased and held that the issue had been conclusively determined in **Kerugoya Principal Magistrate's Court Succession Cause No. 228 of 1998** during the objection proceedings, which ruling had not been set aside. In the circumstances, the Court of Appeal held that the issue was not open for reconsideration.

[18] Secondly, the appellate court held that the appeal before it arose from a judgment of the High Court in the exercise of its original jurisdiction in confirming the grant in issue as opposed to from the exercise of the High Court's appellate jurisdiction. On that basis, the Court of Appeal posited that Section 50(1) of the Law of Succession Act, which provides for appeals from the High Court to the Court of Appeal relating to the estate of a deceased Muslim, was inapplicable. The court also held that an appeal to the Court of Appeal from decisions of the High Court rendered in exercise of its original jurisdiction in succession matters lies only with the leave of the court. As no leave had been sought or obtained, the court found the appeal to be incompetent and accordingly struck it out.

[19] Undeterred, the appellant pursuant to Article 163(4)(b) of the Constitution sought leave from the Court of Appeal vide **Civil Application No. 1 of 2022** to

appeal to this Court. By a ruling dated 7th June 2024, the Court of Appeal (*Karanja, J. Mohammed & Kimaru, JJ. A.*) granted the leave sought on the ground that the appeal herein raises issues of general public importance. In doing so, the appellate court held as follows:

> ***"We find that the applicant has demonstrated to our satisfaction that he intends to challenge the interpretation whether an appeal lies to this court (Court of Appeal) in succession matters emanating from the High Court in its original jurisdiction as of right and without leave.***
>
> ***In the circumstances, we find that the instant application has satisfied the test established in the Hermanus Steyn case by reason that it has demonstrated to the Court's satisfaction the existence of specific elements of general public importance which are attributed to this matter. We therefore allow the application and certify the same."***

(c) At the Supreme Court

[20] Pursuant to the leave granted, the appellant has filed this second appeal challenging the Court of Appeal's decision on several grounds, which can be condensed as follows:

i. *The learned Judges of appeal erred in law in failing to find that the appellant had a right of appeal, without seeking leave, from the judgment of the High Court under Article 164(3)(a) of the Constitution.*
ii. *The right of appeal to the Court of Appeal from the decision of the High Court under Article 164(3)(a) can only be denied, limited or*

restricted by express statutory provisions as required by the Constitution.

iii. *An interpretation of Article 164(3)(a) of the Constitution that would deny a litigant a right of appeal to the Court of Appeal would be absurd and unconstitutional for the following reasons:*

a) *It would discriminate against litigants who commence cases in the High Court as against those who commence cases in the subordinate courts, who have a right of appeal under Section 50 of the Law of Succession Act, contrary 27 of the Constitution of Kenya.*

b) *It would lead to a violation of a litigant's access to justice as protected under Article 48 of the Constitution of Kenya.*

[21] Based on the foregoing, the appellant seeks the following reliefs: -

a. *A declaration be and is hereby issued that under Article 163(4)(a) of the Constitution a litigant has a right of appeal, without seeking leave, to the Court of Appeal against a decision of the High Court exercising its original jurisdiction in succession matters.*

b. *An order setting aside the Judgment of the Court of Appeal at Nyeri dated 5th February, 2021 in* **Nyeri Court of Appeal Civil Appeal 65 of 2015**.

c. *An order allowing the appellant's appeal in* **Nyeri Civil Appeal 65 of 2015** *with costs. In the alternative, an order for the rehearing of* **Nyeri Court of Appeal Civil Appeal 65 of 2015** *before a different bench of the Court of Appeal.*

d. *Costs of this appeal.*

C. PARTIES SUBMISSIONS

(i) The Appellant's Submissions

[22] Counsel for the appellant submitted that there are conflicting decisions of the Court of Appeal on whether a right of appeal lies from decisions of the High Court rendered in the exercise of its original jurisdiction in succession matters, or whether one needs to obtain leave of the High Court to appeal to the Court of Appeal. He urges that this divergence calls for the intervention of this Court in order to bring clarity and certainty to the law.

[23] The appellant anchors his argument on Article 164(3)(a) of the Constitution, which, in his view, establishes a general right of appeal from the High Court to the Court of Appeal. He contends that on one hand, there are decisions which hold that leave must be obtained before an appeal may be lodged in the Court of Appeal in succession matters from the High Court when it exercises its original jurisdiction. In that regard, he refers this Court to ***Boit Vs Kumin; Boit & Another (Interested Parties)*** [2025] KECA 568 (KLR), and ***Esther Kabon Rokoch & Another Vs Kobilo Chepkiyen & Another*** [2021] KECA 405 (KLR). According to him, the aforementioned decisions fail to properly consider the scope of Section 47 of the Law of Succession Act. In that, the said provision does not expressly oust the jurisdiction of the Court of Appeal to hear appeals arising from the decisions of the High Court made in the exercise of its original jurisdiction.

[24] On the other hand, he asserts that there are decisions from the same appellate court which hold the view that leave is not a prerequisite for appeals to the Court of Appeal in succession matters. To buttress that line of argument the case of ***In Re Estate of R.B.C*** [2023] KECA 1553 (KLR) is cited.

[25] Making reference to ***Judicial Service Commission & Another Vs Rawal*** [2016] KECA 831 (KLR), the appellant argues that the Constitution expressly vests appellate jurisdiction in the Court of Appeal under Article 164(3)(a), without requiring further prescription by an Act of Parliament. Consequently, he posits that the proper interpretation is that the right of appeal from decisions of the High Court, when exercising original jurisdiction in succession matters, is automatic. As far as the appellant is concerned, an aggrieved party is therefore not required to seek leave before lodging an appeal. By contrasting Article 164(3)(a) and 164(3)(b) of the Constitution, the appellant maintains that the former confers an unfettered right of appeal from the High Court to the Court of Appeal, while the latter qualifies the right of appeal by making it subject to prescription by an Act of Parliament. Moreover, the appellant contends that the High Court's jurisdiction extends to succession matters where the value of the estate exceeds Kshs. 20,000,000/=, matters which are inherently weighty and of great consequence. Given the magnitude of such disputes, and bearing in mind that judicial officers are not infallible, the appellant submits that the right of appeal must be construed as automatic.

[26] The appellant further contends that rejecting an appeal in succession matters from the High Court to the Court of Appeal amounts to discrimination. He argues that litigants whose matters originate in the subordinate courts are accorded a right of appeal to the High Court in similar disputes, thereby resulting in unequal treatment contrary to Article 27 of the Constitution. He further argues that decisions arising from other proceedings before the High Court and courts of equal status generally attract an automatic right of appeal, including civil matters under Section 66 of the Civil Procedure Act, Cap 21, Section 16 of the Environment and Land Court Act, Cap 8D, Section 17 of the Employment and Labour Relations Act, Cap 8E, and criminal matters under Sections 348A and 379 of the Criminal Procedure Code, Cap 75.

[27] In conclusion, the appellant postulates that the right to a fair trial is constitutionally entrenched and non-derogable under Article 25(c) of the Constitution. It is urged that, in order to give meaningful effect to the right to a fair hearing and to secure access to justice under Article 48 of the Constitution, a right of appeal ought to be guaranteed against all decisions of the High Court wherein it is exercising its original jurisdiction.

(ii) The Respondent's Submissions

[28] On the respondent's part, he urges that the Court of Appeal did not hold that there is no right of appeal against a High Court's decision in exercise of its original jurisdiction. Rather, he claims that, while the Law of Succession Act does not expressly prohibit an appeal from the High Court to the Court of Appeal, it is silent on whether such a right exists. While acknowledging the conflicting positions adopted by the Court of Appeal on the question of leave to appeal, the respondent maintains that a careful reading of the impugned judgment reveals that the appellate court recognized the existence of the right of appeal, subject only to the requirement that leave should be obtained. According to the respondent therefore, such leave ought to be sought in the first instance from the High Court, and where declined, from the Court of Appeal. Towards that end, the respondent relies on ***Rhoda Wairimu Karanja & Another Vs Mary Wangui Karanja & Another*** [2014] KECA 255 (KLR).

[29] Regarding the interpretation of Article 164(3)(a) of the Constitution, the respondent claims that the provision merely establishes the appellate jurisdiction of the Court of Appeal and does not create an unqualified right of appeal from every decision of the High Court. Expounding on his position, the respondent cites as an example, Section 38 of the Small Claims Court Act, Cap 10A which provides that decisions of the High Court on appeal from the Small Claims court are final; and

Section 75(1A) & (4) of the Elections Act, Cap 7 which bars further appeals to the Court of Appeal from decisions of the High Court arising from election petitions for Members of County Assemblies heard by Magistrates' courts. The respondent also makes reference to Section 50(1) of the Law of Succession Act, which provides that decisions of the High Court on appeal from Magistrates' courts in succession matters are final.

[30] The respondent contends that the prayer for this Court to allow **Nyeri Civil Appeal No. 65 of 2015** falls outside the jurisdiction of this Court. This is because, as he argues, if the appellant is granted the said prayer, this would in effect be tantamount to this Court sitting on a merit appeal against a decision of the High Court yet the Court of Appeal did not delve into the merits of the appeal before it.

[31] Finally, the respondent submits that Parliament remains at liberty to confer an automatic right of appeal through legislative amendment of the Law of Succession Act, should it deem it appropriate to do so. The respondent also emphasizes that the requirement to seek leave before filing an appeal does not impose an undue burden, nor does it amount to an absolute bar to appellate review, as suggested by the appellant. On that basis, the respondent urges this Court to dismiss the appeal with costs.

D. ANALYSIS

[32] While the present appeal invokes our appellate jurisdiction under Article 163(4)(b) of the Constitution, we note that the Court of Appeal did not specifically delineate the precise issue of general public importance to be determined by this Court, a practice we continue to discourage. In ***Stanbic Bank Kenya Limited Vs Santowels Limited*** [2024] KESC 31 (KLR), we emphasized that the Court of

Appeal must, as a matter of good practice, specifically formulate or delineate the issue or issues it considers to be of general public importance.

[33] In the circumstances, having considered the ruling of the Court of Appeal dated 7th June 2024, by which the matter was certified as raising issues of general public importance, together with the pleadings and submissions before us, we frame the issues for our determination as follows:

i. *Whether, in light of Article 164(3)(a) of the Constitution, leave is a prerequisite for lodging an appeal to the Court of Appeal against a decision of the High Court rendered in the exercise of its original jurisdiction in a succession matter.*
ii. *What orders should issue?*

i. Whether, in light of Article 164(3)(a) of the Constitution, leave is a prerequisite for lodging an appeal to the Court of Appeal against a decision of the High Court rendered in the exercise of its original jurisdiction in a succession matter

[34] The appellant asserts that there are conflicting decisions from the Court of Appeal on whether an appeal from a decision of the High Court rendered in the exercise of its original jurisdiction in succession matters lies as of right or only upon obtaining leave. He argues that Article 164(3)(b) of the Constitution specifically provides that appeals from other courts or tribunals shall lie '***as prescribed by an Act of Parliament***', a language that is absent in Article 163(4)(a). On that basis, the appellant contends that appeals from the High Court to the Court of Appeal lie as of right. Building on his argument, the appellant posits that since the Law of Succession Act is silent on the fate of the appeals in question, one must defer to the Constitution, which provides for the right to appeal decisions of the High Court to the

Court of Appeal. He argues that, viewed against the foregoing and other statutes in different regimes that allow for an automatic right of appeal, a contrary finding would be discriminatory. This discrimination is even more evident, he argues, since litigants who file succession causes before subordinate courts have a right of appeal to the High Court while the same is not available to litigants who approach the High Court as the trial court. To the appellant, this impedes the right to a fair trial and violates the right to access to justice.

[35] On this issue, the respondent urges that while Article 164 (3)(a) of the Constitution recognizes a right of appeal to the Court of Appeal, a litigant is required to seek leave prior to filing such an appeal. While admitting that there is a lacuna in the law in this regard, the respondent posits that the same can only be redressed by Parliament and not through interpretation by courts. According to the respondent, interpreting Article 164(3)(a) of the Constitution in the manner advanced by the appellant would imply that all decisions of the High Court are appealable as of right, thereby depriving Parliament of the power to limit appeals in certain matters. The respondent adds that several statutes expressly designate the High Court as the final appellate forum in specific cases, particularly appeals from tribunals and Small Claims courts, and that the appellant's interpretation would render such statutory provisions ineffective. Accordingly, the respondent maintains that, while a right of appeal exists in succession matters, it is subject to the requirement that leave be obtained, and that position represents the correct interpretation of the law unless amended by Parliament.

[36] This Court has consistently held that jurisdiction flows from the Constitution, statute or both. See ***Macharia & Another Vs Kenya Commercial Bank Limited & 2 Others*** [2012] KESC 8 (KLR). To contextualize the dispute before us, we shall start by setting out the relevant constitutional and statutory provisions.

Article 164(3)(a) of the Constitution provides that the Court of Appeal has jurisdiction to hear appeals from:

"164 (3)

a) the High Court; and
b) any other court or tribunal as prescribed by an Act of Parliament."

[37] In that regard, the Supreme Court has previously considered Article 164(3)(a) of the Constitution and held that, properly construed, the provision establishes the appellate jurisdiction of the Court of Appeal but it does not prescribe how that jurisdiction is to be invoked. In ***Nyutu Agrovet Limited Vs Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branc***h [2019] KESC 11 (KLR), this Court drew a clear distinction between jurisdiction and the right of appeal. We held that, while Article 164(3) establishes the appellate jurisdiction of the Court of Appeal, it does not itself create a right of appeal. That right must be expressly provided either by the Constitution or by Statute. Consequently, a party seeking to approach the Court of Appeal must therefore identify the legal provision that confers the right of appeal. We stated thus in extenso:

> ***"32. Certainly, these submissions raise a critical question on whether there exists a right of appeal under Article 164(3) of the Constitution and if in the affirmative, whether any limitation to such a right hinders the right of access to justice...***
>
> ***33.What exactly does the term "jurisdiction" mean? In Republic v Karisa Chengo & 2 others SC Petition No 5 of 2015; 2017 eKLR, we defined jurisdiction as the "the Court's power to entertain, hear and determine a dispute before it." Also,***

"the sphere of the courts operations." Is jurisdiction therefore synonymous with a right of appeal? In other words, does Article 164(3) grant a litigant a right of appeal to the Court of Appeal? ... this provision does not confer a right of appeal to any litigant. It only particularises the confines of the powers of the Court of Appeal by delimiting the extent to which a litigant can approach it. In this case, the appellate court only has powers to hear matters arising from the High Court or any other defined Court or Tribunal. There is thus no direct access to the Court of Appeal by all and sundry. As such, Article 164(3) defines the extent of the powers of the Court of Appeal but does not grant a litigant an unfettered access to the Court of Appeal.

34.With regard to a right of appeal, our position is that such right can either be conferred by the Constitution or a Statute. For example, under Article 50(2)(q), a person who has been convicted of a criminal offence has a right to appeal or apply for review to a higher court as prescribed by the law. Further, with regard to disqualification from being a Member of Parliament or County Assembly (Articles 99(3) and 199(3), respectively), a person is not disqualified until all possibilities of appeal or review of the relevant sentence or decision have been exhausted. Our statutes have also provided for circumstances when an appeal may be specifically preferred to the Court of Appeal or any other court. For example, Section 39(3) of the Arbitration Act provides circumstances when an appeal may lie to the Court of Appeal.

35.Even more crisply, the Appellate Jurisdiction Act, cap 9, captures our position that a right of appeal is not automatic but rather is a creation of the law. Section 3(1) thereof provides that: 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 law."

[38] In the present case, Section 47 of the Law of Succession Act, provides for the jurisdiction of High Court as follows:

> "*The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:*
>
> *Provided that the High Court may for the purpose of this Section be represented by Resident Magistrates appointed by the Chief Justice*."

[39] Section 50(1) of the Law of Succession Act, provides for '*appeals to the High Court'* and states as follows: -

> *"50*
>
> *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 shall be final."*

[40] As is readily apparent, these statutory provisions are silent and do not expressly provide for appeals to the Court of Appeal from decisions of the High Court rendered in exercise of its original jurisdiction in succession matters. What, then, is the implication of this statutory silence?

[41] To answer this question, it is necessary to trace the evolution of judicial opinion on the question on the right of appeal to the Court of Appeal in succession matters, and to examine the differing positions that have emerged over time.

[42] The development of these judicial approaches can be traced to ***Margaret M. John Vs David J. Kibwana*** [1996] KECA 212 (KLR)**,** which was delivered on 19th January 1996, wherein the Court of Appeal *(Cockar, Kwach, & Shah, JJ.A.*), addressed the issue as follows:

> ***"It will be observed that Section 50 of the Act (Law of Succession Act) has specifically provided for a right of appeal from any order or decree made by a resident magistrate to the High Court whose decision is final. There is no such specific grant of a right of appeal from a decision of a High Court to the Court of Appeal. However, Section 47 of the Act which has given jurisdiction to the High Court to adjudicate on any matter under the Act reads as follows:***
>
> > ***'The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient'***
>
> ***It is clear that the grant made to the respondent by the High Court was through proceedings initiated by way of a petition as provided in the rules of the Act. A final adjudication which had culminated in the making of the grant to the respondent was the decree of the court. The application to annul the grant***

was a part of the same proceedings but its dismissal was not a decree but an order.

The right of appeal to the Court of Appeal from any decree or order of the High Court granted under Section 66 of the Civil Procedure (Cap 21) has in respect of orders as against decrees been limited in certain ways by Section 75 of the Civil Procedure Act. Section 75(1)(h) (order 42 of Civil Procedure Rules) has provided for appeal by way of right and also where needed, with leave of court from any order made under Civil Procedure Rules.

In the Court of Appeal decision in Commission of Income Tax v Ramesh K Mennon (1982-88) - 1 KAR p 695 Hancox J.A (as he then was) held the use of the word "decree" in the relevant Section of the Income Tax Act to mean that the wording of Section 87(3) of the Income Tax Act which provided that an order of the High Court on appeal shall "have effect … as decree" was conclusive and such an order was therefore appealable to the Court of Appeal as of right under Section 66 of the Civil Procedure Act. We respectfully agree with that view entirely and in the same token accept that finding as an authority that the use of the word decree in Section 47 of the Law of Succession Act has made the decision of the High Court appealable by way of right.

The position here, however, is that the appeal is from an order and not a decree. But in our view the use of the two words "decrees" and "orders" in Section 47 of the Act is significant.

Had a word such as "decision" or "adjudication" been used in place of these two distinct words then clearly the High Court's decision or adjudication would have been non-appealable altogether. The effect to the use of the word "decree", as Hancox JA (as he then was) very correctly pointed out in the Income Tax decision (supra), was that the decision of the High Court was appealable as of right under Section 66 of the Civil Procedure Act. But provision of appeals by way of right in respect of orders in Section 66 has been made subject to "where otherwise expressly provided in the Act" (Civil Procedure Act). As we stated earlier Section 75 of the Act has clearly defined the orders where an appeal lies by way of right. The order of dismissal made by the High Court in this matter does not fall under any of these. The term "order" having been specifically used together with the term "decree" is conclusive that an appeal from this order of dismissal lies not by way of right but with leave of court only."

[43] As emerges from the foregoing, the Court of Appeal anchored the right of appeal on the interplay between Section 47 of the Law of Succession Act and Section 66 of the Civil Procedure Act. The court reasoned that, by empowering the High Court, to "*pronounce such decrees and make such orders*", Section 47 brought succession proceedings within the framework of the Civil Procedure Act, thereby opening a pathway for appeals to the Court of Appeal.

[44] In ***Rhoda Wairimu Karanja & Another Vs Mary Wangui Karanja & Another*** [2014] KECA 255 (KLR), which was delivered on 14th November 2014, the Court of Appeal (*Musinga, Ouko & Gatembu, JJ.A.*)

acknowledged that Section 50 of the Law of Succession Act provides that firstly, decisions from the magistrate's courts are appealable to the High Court and its decision is final. Secondly, decisions of the Kadhis Court are appealable to the High Court and thereafter, to Court of Appeal only with leave and in respect of point(s) of Muslim law. The appellate court went on to note that 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. In point of fact, the court noted that decisions of the superior courts below on this point have been varied. Making reference to the decision of a different bench of the appellate court *(Visram, Koome & Odek, JJ.A*) in ***Francis Gachoki Murage Vs Juliana Wainoi Kinyua & Another***, Civil Appeal (Application) No. 139 of 2009, the court opined that*:*

> ***"In short, and speaking generally, the practice alluded to by their Lordships …, 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."***

[45] In ***Machuka & Another Vs Nyangute & Another*** [2025] KECA 538 (KLR), which was delivered on 21st March 2025, the Court of Appeal (*Okwengu, Kairu & Omondi, JJ.A.*) observed that, while Section 50 of the Law of Succession Act expressly provides a right of appeal from decisions of Magistrates' Courts and Kadhi's Courts to the High Court, there is no corresponding provision granting a right of appeal to the Court of Appeal from decisions of the High Court exercising original jurisdiction. The court reasoned that the absence of such a provision does not wholly exclude appeals to the Court of Appeal, as the court's appellate jurisdiction is

anchored in Article 164(3) of the Constitution. However, that jurisdiction does not translate into an automatic right of appeal. Rather, the right is circumscribed and may only be exercised with leave, to be obtained either from the High Court or from the Court of Appeal. In the circumstances of that case, since no leave had been sought or obtained, the court held that the appeal was incompetent for failure to properly invoke its jurisdiction. See also ***Esther Kabon Rokocho & another Vs Kobilo Chepkiyen & Another*** [2021] KECA 405 (KLR); ***Boit Vs Kumin; Boit & Another (Interested Parties)*** [2025] KECA 568 (KLR); and ***Mughal & Rashid (Suing as the Legal Representatives of the Estate of the Late Rashid Mughal) & Anor. Vs Bhola*** [2025] KECA 420 (KLR).

[46] The jurisprudence emerging from the foregoing dicta is that the right of appeal to the Court of Appeal from decisions of the High Court rendered in the exercise of its original jurisdiction in succession matters is not automatic, but is conditional upon the grant of leave. Consequently, in the absence of an express statutory provision granting right of appeal, an aggrieved party is required to obtain leave before lodging an appeal.

[47] On the other hand, the appellant places reliance on the line of decisions from the Court of Appeal to the effect that appeals to the Court of Appeal from High Court matters lie as of right, without the need to first obtain leave, in consonance with his understanding of Article 164(3)(a) of the Constitution. This second school of thought approaches the matter from a constitutional perspective, asserting that Article 164(3)(a) anchors an automatic right of appeal to the Court of Appeal from decisions of the High Court.

[48] In ***Re Estate of R.B.C.*** [2023] KECA 1553 (KLR), the Court of Appeal adopted the view that leave was not necessary for an appeal arising from a review application under the Probate and Administration Rules. The court in reaching that decision

acknowledged that there exists two competing lines of authority within the Court of Appeal on whether leave is a prerequisite for appeals in succession matters. It observed in that regard that succession proceedings are *sui generis*, being primarily governed by the Law of Succession Act, which grants the High Court jurisdiction to determine disputes arising under the Act but does not expressly address appeals to the Court of Appeal. The court further noted that Rule 63(1) of the Probate and Administration Rules imports certain provisions of the Civil Procedure Rules into succession proceedings, including Order 45 on review. Since appeals from review orders under Order 45 Rule 1 are appealable as of right under Order 43 of the Civil Procedure Rules, the court concluded that an appeal arising from such a review order in succession proceedings similarly lies as of right. On that basis, the court found that the appeal before it was competently instituted without the need to obtain leave. This line of reasoning supports the view that where procedural provisions are imported from the civil process to succession proceedings, and those provisions allow an appeal as of right, the requirement for leave does not arise.

[49] Having reviewed this jurisprudential landscape, the question that arise is: what is the legal or juridical basis for requiring leave to appeal to the Court of Appeal against a decision of the High Court rendered in the exercise of its original jurisdiction in a succession matter?

[50] We have surveyed the procedural landscape and identified instances in which statute or subsidiary legislation expressly provides for leave as a prerequisite for an appeal from the High Court to the Court of Appeal. Examples include Section 39(3)(b) of the Arbitration Act, Cap. 49 which stipulates that an appeal shall lie to the Court of Appeal from a decision of the High Court only where the Court of Appeal, being satisfied that a point of law of general importance is involved and that its determination will substantially affect the rights of one or more of the parties, grants

leave to appeal. Similarly, Section 75(1) of the Civil Procedure Act, Cap. 21 provides that an appeal shall lie from specified orders as of right, and from any other order only with the leave of the court making the order or of the court to which the appeal would lie. Further, Order 43 Rule 2 of the Civil Procedure Rules provides that an appeal shall lie with leave where the order is not among those listed as appealable as of right.

[51] From these provisions, a clear legislative pattern emerges. Where Parliament intends to require leave as a condition precedent to the exercise of the right of appeal, it does so expressly and in unambiguous terms. The requirement for leave is therefore neither implied nor inferred from statutory silence. Rather, it is a deliberate legislative prescription. This position is further illustrated by Section 50(2) of the Law of Succession Act, which expressly provides that an appeal shall lie to the High Court from decisions of a Kadhi's Court and, with the prior leave of the High Court, to the Court of Appeal on points of Muslim law.

[52] It follows, therefore, that the Law of Succession Act and the Probate and Administration Rules do not contain any express provision requiring leave for appeals from decisions of the High Court rendered in the exercise of its original jurisdiction. In the absence of such express stipulation, the requirement for leave in succession jurisprudence cannot be said to arise from statute, but rather from judicial interpretation. Indeed, it is notable that the Court of Appeal, in several of the decisions we have considered in this judgment, has characterised the requirement for leave to appeal as one grounded in "judicial practice."

[53] It is apposite to recall that the Law of Succession Act and the Probate and Administration Rules constitute a complete code, permitting the importation of the Civil Procedure Rules only in specifically defined instances as contemplated in Rule 63(1) of the Probate and Administration Rules. Our jurisprudence is replete with

decisions affirming that the Law of Succession Act is a self-contained regime. See ***Rhoda Wairimu Karanja & Another Vs Mary Wangui Karanja & Another*** [2014] KECA 255 (KLR); ***Josephine Wambui Wanyoike Vs Margaret Wanjira Kamau & Another*** [2013] KECA 443 (KLR); ***Josphat Mwania Muia Vs Loice Atieno Oduk*****,** Civil Appeal No. 181 of 2018; ***Re Estate of Samuel Wambugu Ngunyi (Deceased)*** [2025] KEHC 3610 (KLR); and ***Re Estate of Ngaruhia Kamau (Deceased)*** [2021] KEHC 4998 (KLR). This position was aptly captured in ***Re Estate of Nazir Khan Mohamed (Deceased)*** [2025] KEHC 14134 (KLR), where the court stated that:

> ***"It is trite law that the Law of Succession Act is a sui generis legislation with its own procedures... I rely on the case of Josephine Wambui Wanyoike (supra) where it was stated that:-***
>
> > ***"We hasten to add that the Law of Succession Act is a self-sufficient Act of Parliament with its own substantive law and rules of procedure. In the few instances where the need to supplement the same has been identified, some specific rules have been directly imported into the Act through its Rule 63(1)."*** [Emphasis added]

[54] We therefore come to the inevitable conclusion that there is no legal basis for imposing a requirement of leave as a prerequisite for lodging an appeal to the Court of Appeal against a decision of the High Court rendered in the exercise of its original jurisdiction in a succession matter. Such a requirement, not being anchored in either the Constitution or statute, cannot properly be sustained.

[55] This finding inevitably leads us to the closely related question of whether a decision of the High Court rendered in the exercise of its original jurisdiction in a succession matter is appealable as of right to the Court of Appeal. It is notable that Section 50(1) of the Law of Succession Act provides for an automatic right of appeal to the High Court from decisions of Resident Magistrates' Courts. The question that arises is whether, in matters originating before the High Court, a litigant should be placed in a less favourable position. To countenance such a distinction would raise concerns under Article 27(1) of the Constitution, which guarantees equality before the law and the equal protection and benefit of the law. It would be incongruous for litigants in succession matters to enjoy a right of appeal where proceedings originate in subordinate courts, but to be denied a corresponding avenue where the High Court is the court of first instance.

[56] In resolving this question, we are guided by Article 20(3)(a) of the Constitution, which obligates courts, in applying the Bill of Rights, to develop the law to the extent that it does not give effect to a right or fundamental freedom. As we observed in ***FAAF Vs RFM & 2 others*** [2025] KESC 45 (KLR), at para. 63, all laws must be interpreted and applied through the lens of the Bill of Rights, and where existing laws yield outcomes inconsistent with a right or fundamental freedom, the courts are under a duty to infuse those laws with the normative content of the Bill of Rights. This approach is consistent with the principle of harmonious interpretation under Articles 159 and 259, which require that the Constitution be construed in a manner that promotes its purposes, values, and principles, advances the rule of law, and facilitates the development of the law.

[57] This interpretive approach has also been consistently affirmed in our jurisprudence. In ***Steyn Vs Ruscone*** [2013] KESC 11 (KLR) this Court was called upon to determine the scope of its review jurisdiction under Article 163(5) of the

Constitution, which provides that a certification by the Court of Appeal under Article 163(4)(b) may be reviewed by the Supreme Court and either affirmed, varied, or overturned. A key issue for determination was whether such review jurisdiction was limited only to instances where a matter had been certified as being of general public importance. In resolving this question, the Court was guided by its constitutional mandate under Articles 159 and 259, which require that the Constitution be interpreted in a manner that promotes its purposes, values, and principles, advances the rule of law and fundamental rights, permits the development of the law, and contributes to good governance. At paragraph 33, the Court held that its review jurisdiction must be construed in harmony with these constitutional imperatives, emphasizing that access to justice and non-discrimination are fundamental rights guaranteed under the Constitution. We held thus:

> ***"Hence, in interpreting the review competence of the Supreme Court, the mandate must be harmonised with the Constitution. One of the fundamental rights under the Constitution is access to justice for all, and non-discrimination. Consequently, all litigants are to be accorded equal right of access to the Court. Either party can approach the Supreme Court for review under article 163(5). A party may come for review of the decision granting leave or denying leave. Hence, we hold that certification under article 163(5) should be broadly read as alluding to certification by the Court that a matter of public importance is involved, or is not involved. Hence, the applicant is rightly before the Court, despite seeking a review where there was no leave granted by the Court of Appeal."***

[58] Consequently, the Court affirmed that all litigants must be accorded equal access to the Court and that either party may approach the Supreme Court for review under Article 163(5), whether challenging the grant or refusal of certification. The Court thus adopted a broad interpretation of certification, holding that it encompasses both instances where a matter is certified as one of general public importance and where such certification is declined, thereby ensuring that access to justice is not unduly restricted. Guided by these constitutional dictates, we find that a restrictive interpretation that denies a right of appeal in succession matters originating from the High Court would undermine the values of equality and access to justice.

[59] Accordingly, and in the absence of any express statutory limitation, we hold that a decision of the High Court rendered in the exercise of its original jurisdiction in a succession matter is appealable to the Court of Appeal as of right. Any contrary position would be inconsistent with the Constitution's transformative vision of a fair, accessible, and non-discriminatory system of justice.

ii. What order(s) should issue?

[60] The totality of the foregoing is that we find merit in the present appeal and set aside judgment of the Court of Appeal delivered on 5th February, 2021 in its entirety. In its place, we order that the appellant's appeal before the Court of Appeal be reinstated and heard afresh on its merits before a differently constituted bench of that court.

E. COSTS

[61] Bearing in mind the circumstances of the matter at hand and the principles on the award of costs enunciated in ***Rai & 3 Others Vs Rai & 4 Others*** [2014] KESC

31 (KLR), we find that due to the public interest nature of this matter, each party should bear its own costs.

F. ORDERS

[62] In the premise, we issue the following orders:

i. ***The appeal dated 5th July, 2024 is hereby allowed.***
ii. ***The Judgment of the Court of Appeal delivered on 5th February 2021 is hereby set aside.***
iii. ***The appellant's appeal before the Court of Appeal be reinstated and heard afresh on its merits before a differently constituted bench of that court on priority basis.***
iv. ***This being a family matter, we order that Parties do bear their respective costs.***
v. ***We hereby direct that the sum of Kshs. 6,000/= deposited as security for costs upon lodging of this appeal be refunded to the appellant.***

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **31st** day of **March**, 2026.

.....

M. K. KOOME
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....	.....
P.M. MWILU	**NJOKI NDUNGU**
DEPUTY CHIEF JUSTICE &	**JUSTICE OF THE SUPREME COURT**
VICE PRESIDENT OF	
THE SUPREME COURT	
.....	.....
I. LENAOLA	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy
of the original

REGISTRAR
SUPREME COURT OF KENYA