



Ngala & another (Suing on their own behalf and on behalf of the residents of Plot No MN IV/151 Mwatundo Kikambala) v Suleiman (Miscellaneous Civil Application E003 of 2023) [2023] KEHC 3972 (KLR) (28 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3972 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION E003 OF 2023**

G MUTAI, J

APRIL 28, 2023

BETWEEN

CHARLES KARISA NGALA 1ST APPLICANT

KOPLA KARISA BANDA 2ND APPLICANT

**SUING ON THEIR OWN BEHALF AND ON BEHALF OF THE RESIDENTS OF
PLOT NO MN IV/151 MWATUNDO KIKAMBALA**

AND

YAHYA MOHAMED SULEIMAN RESPONDENT

RULING

1. Vide an application dated January 23, 2013 the Applicant sought, *inter alia*, to have this court excise its powers under Articles 22, 23, 47 and 165 (6) & (7) of the Constitution of Kenya, 2010 by:-
 1. Calling for and examining the record of Mombasa Kadhi Court Succession Cause No 143 of 2014;
 2. Having one Yahya Mohamed Suleiman produced in Court by his advocates so that he could produce the original death certificate of a Mr Omar Mohamed;
 3. Removing into this Court and quashing all the proceedings in Mombasa Succession Cause No 143 of 2014 together with all the orders issued in favour of Yahya Mohamed Suleiman, the Petitioner therein; and
 4. Staying the execution of the orders of the Kadhi Court granted on July 12, 2017 and issued on May 31, 2022 directing the eviction of occupiers of LR Nos 1522/III/MN, 1523/IV/MN and 1524/IV/MN;



2. The Respondent objected to the said application and filed a Replying Affidavit. On March 7, 2023 the Respondent filed a Notice of Preliminary Objection together with a Further Affidavit. The said Preliminary Objection raised the following grounds: -

1. A superior court has confirmed orders issued by the Kadhi's court such that this court has no supervisory jurisdiction over a superior court. Article 165 (6) and Article 165 (7) is therefore not applicable;
2. Succession cause No 143 of 2014 proceeded before the Kadhis as provided for under Article 170 (5) and this court cannot interfere with proceedings for the estate of a Muslim which proceeded according to the law unless by way of an appeal. There is no appeal before you;
3. The Kadhis court has power under Order 40 of the *Civil Procedure Rule* to grant injunctions and in event of disobedience punish the party and cannot be faulted on that;
4. Under rules 112 and 116 of the *Kadhis Court (Procedure and Practice) Rules 2020* the power to issue interim order and injunction has been made even more elaborate and the Kadhi's court cannot be faulted for issuing interim order or an injunction;
5. Execution by way of eviction as provide for under Order 22 of the *Civil Procedure Rules* has always been applicable for matters emanating before the Kadhis court and on this again the Kadhis Court cannot be faulted; and
6. Based on the above, this court is not properly moved and as such it lacks jurisdiction.

3. The Preliminary Objection filed by the Respondent contests the jurisdiction of this honourable court to hear and determine the Notice of Motion application dated January 25, 2023. That being the case I directed on March 9, 2023 that the Preliminary Objection be heard first as I needed to determine whether or not I have jurisdiction to hear and determine the same. My decision was grounded on the leading case of The *Owners of the Motor Vessel "Lilian S" versus Caltex Oil (Kenya) Ltd* [1989] eKLR where the Court of Appeal (per Nyarangi, JA) said as follows:-

“With that I return to the issue of jurisdiction and to the words of section 20(2) (m) of the 1981 Act. I think that it is reasonable plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it a court has no power to make one more step. Where the court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law lays down its tools stools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

4. Before looking at the contentions made by the parties herein it is necessary that I should discuss the scope of preliminary objections. The Court of Appeal for *Eastern Africa in Mukisa Biscuits Manufacturing Co Ltd versus West End Distributors Ltd* (1968) EA 696 (per Law, JA) said as follow: -

“so far as I am aware a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.



5. Sir Charles Newbold, P added the following in his consenting decision in the said case: -

“a preliminary objection is in the nature of what used to be called a demurrer. It raises pure points of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

Submissions of the parties

6. Mr Odiaga for the Respondent, for the Respondent, argued that this court has no jurisdiction to supervise courts of equal status. He stated that the decision of the Kadhi's Court had been recognized and enforced by the Environment and Land Court. The decree from the said Court, it was urged recognized the decision of the Kadhi Court. It was submitted that in all its actions the Kadhi Court acted lawfully. I may not therefore interfere with their lawful decision. It was further argued that the Notice of Motion application aforesaid is a gross abuse of the Court process and ought therefore to be dismissed.
7. Mr Odiaga further argued that any challenge to the decision of the Kadhi's Court ought now to be made to the Environment and Land Court. I was informed that the Succession proceedings before the Kadhi's Court were uncontested and were in respect of an estate of a deceased Muslim. Regarding the issue of a death certificate which is sought to be produced, it was argued that before succession proceedings are commenced, death certificates must be produced. Finally, Mr. Odiaga submitted that the instant application was an attempt to prosecute a land matter under the guise of succession proceedings.
8. Mr. Nyabena, for the Applicants opposed the Preliminary Objection raised by the Respondent. He argued that Article 165 (6) & (7) of the *Constitution* of Kenya, 2010 vests this court with supervisory jurisdiction over the subordinate courts. It was submitted that the High Court has the requisite power to call for a lower court file and to make necessary orders in the interests of justice.
9. Mr. Nyabena argued that the Kadhi Court has the jurisdiction to determine disputes between Muslims over personal law issues. The Applicants in this cause are not Muslims and cannot therefore be subject to the Kadhi's Courts.
10. It was thus argued that I should dismiss the preliminary objection and hear the application dated January 25, 2023.

The Synthesis of the Pleaded Facts and the Law

11. The *Constitution* of Kenya 2010 provides in Article 165 (6) and (7) as follows: -
 - 6 the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising judicial or quasi –juridical function but not over a Superior Court;
 - 7 for the purposes of clause (6) the High Court may call for the record of any proceedings before any subordinate court or persons, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure fair administration of justice”
12. The above provision is clear enough in my view. This court has power to ensure that the proceedings before subordinate courts are rational, fair and just. Where that is the case, this court may not interfere. If, however, a subordinate court acts whimsically, capriciously or in flagrant disregard of the rules of natural justice this court must step in to ensure that justice is done, by exercising its supervisory jurisdiction.



13. Section 47 of the *Law of Succession Act*, cap 160 of the Laws of Kenya, provides that the High Court has the jurisdiction it “entertain any application and to determine any dispute under this Act and to pronounce such decrees and to make such orders therein as may be expedient”. These powers are wide and unfettered.
14. Article 169(1) of the *Constitution* of Kenya, 2010 lists the subordinates courts. Among the Courts listed therein is the Kadhi’s Court. Under Article 165(6) of the *Constitution* this Court has supervisory powers over the subordinate courts. My opinion is that determinations made by the Kadhi’s Court are appealable to this Court, not the Environment and Land Court. I am therefore unable to agree with Mr Odiaga that this court lacks jurisdiction.
15. This is not to say that the Notice of Motion application dated January 25, 2023 must succeed. Whether it does so can only be determined once the said application is argued interpartes. It may be the case that the learned Kadhi had lawful reasons for acting as he did and that his determination cannot be said to be whimsical, capricious or flagrant disregard of the rules of natural justice.
16. I am in agreement with the holding by M Sila, J In *R versus Chief Magistrate Mombasa & 3 Others* (2023) KEELC 180 (KLR) at paragraph 57 where he said: -

“in my opinion supervisory jurisdiction under Article 165 (6) of the *Constitution* will be invoked by the court where the court identifies serious misdirection or error of the subordinate which lead to gross injustice for which the superior court must intervene so that justice is done...”
17. It is thus clear that situations that call for intervention can arise at any time during trial. When called upon to exercise its supervisory jurisdiction this court should not hesitate to do so. The Court must however be cautious and only invoke its supervisory jurisdiction sparingly and in the clearest of cases.
18. I will not dwell on points raised by the Respondent in his Preliminary Objection that call for investigations, being based as they are, on disputed facts. Mukisa Biscuit case decision is clear that contested issues of fact are not fit and proper subjects for preliminary objections. Onyiego J in *UFM versus KFM* [2022] KEHC 14589 (KLR) stated that “where factual issues are involved, as it is the case herein, the best approach is to let the parties litigate their case up to the end and determination made on merit”.
19. He also stated that: -

“a preliminary objection is not a tool which should be used as a matter of course to prematurely bring to an end a suit which should be subjected to thorough interrogation through adduction of evidence”.
20. The upshot of this is that I find no merit in the Respondent’s Notice of Preliminary Objection dated March 7, 2023. The same is dismissed with costs to the Applicant.
21. In the interests of justice, the Applicant’s application dated January 25, 2023 is listed before me on May 15, 2023 for hearing and determination on merits.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF APRIL, 2023

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GREGORY MUTAI
JUDGE



In Attendance; -

Winnie Migot – Court Assistant

No appearance for the Applicant

No appearance for the Respondent

