



**Isika v Mwaito & 2 others (Judicial Review Application  
E002 of 2023) [2023] KEHC 21631 (KLR) (4 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21631 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
JUDICIAL REVIEW APPLICATION E002 OF 2023**

**OA SEWE, J  
AUGUST 4, 2023**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE JUDICIAL  
REVIEW APPLICATION FOR THE ORDERS OF PROHIBITION AND CERTIORARI AND**

**2. IN THE MATTER OF ARTICLES 165 AND 170(5)  
OF THE CONSTITUTION OF KENYA 2010 AND**

**3. IN THE MATTER OF SECTIONS 8 & 9 OF LAW REFORM  
ACT, CHAPTER 26 OF THE LAWS OF KENYA AND IN THE  
MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES**

**BETWEEN**

**JOSEPHINE KYAVI ISIKA ..... APPLICANT**

**AND**

**HON SALIM J MWAITO ..... 1<sup>ST</sup> RESPONDENT**

**PRINCIPAL KADHI, KWALE ..... 2<sup>ND</sup> RESPONDENT**

**MISHI KIDZUGA ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Chamber Summons application dated March 31, 2023 was filed ex parte by the applicant, Josephine Kyavi Isika, pursuant to Article 165(6) and 170(5) of the Constitution of Kenya, 2010, Sections 8 and 9 of the Law Reform Act, Chapter 26 of the Laws of Kenya and Order 53 of the Civil Procedure Rules, 2010. The applicant thereby seeks the following orders:

- (a) Spent
- (b) That leave be granted to the applicant to apply for:



- (i) An order of prohibition to prohibit the 1st respondent from proceeding in any matter whatsoever in Kwale Kadhi's Succession Cause No E412 of 2022;
  - (ii) An order of certiorari directing that the proceedings in Kwale Kadhi's Succession Cause NO E412 of 2022 be removed to this Court for purposes of quashing;
  - (iii) An order of certiorari directing that the decision of Hon Salim J Mwaito, Principal Kadhi, Kwale, delivered on March 27, 2023 in Kwale Kadhi's Succession Cause NO E411 of 2022 be removed to this Court for purposes of quashing;
  - (c) That leave if granted to the applicant do operate as a stay of the proceedings in Kwale Kadhi Succession Cause No E412 of 2022 and stay of any further action as a result of the decision delivered in Kwale Kadhi Succession Cause No E411 of 2022.
  - (d) Costs of the proceedings be costs in the main motion.
  - (e) Any other and further relief that the Court may deem fit and just to grant in the circumstances.
2. The application was premised on the grounds that the Principal Kadhi heard Kwale Succession Cause No 412 of 2022 and the same was scheduled for Ruling on May 18, 2023; and that on March 27, 2023 the Principal Kadhi delivered his decision in Kwale Succession Cause No 411 of 2022, yet the deceased was a Christian by religion, and notwithstanding that some of the beneficiaries are Christians by faith. The applicant was therefore apprehensive that the 1st respondent is intent on proceeding with the hearing and determination of Kwale Succession Cause No 412 of 2022 as well as distribution of the deceased's estate in Kwale Succession Cause No 411 of 2022, notwithstanding the lack of jurisdiction.
3. The applicant relied on her Verifying Affidavit sworn on March 31, 2023 and the documents annexed thereto; which included a copy of her identity card and a copy of the Certificate of Death of the deceased, among other documents. She reiterated that a good number of the beneficiaries of the deceased are Christians and therefore do not fall under the jurisdiction of the 1st respondent. She accordingly urged for the intervention of the Court.
4. On behalf of the 1st respondent, Grounds of Opposition dated May 17, 2023 were filed by Ms Ambetsa dated May 17, 2023. She thereby contended that:
- (a) The applicant has not proved that an order of prohibition ought to issue to prohibit a determination in excess of jurisdiction, error of law on the face of the record or breach of the rules of natural justice in Kwale Kadhi's Court Succession Cause No E412 of 2022 by the 1st respondent.
  - (b) That the Principal Kadhi, Kwale, acted without jurisdiction or exceeded his jurisdiction, or failed to comply with the rules of natural justice in Kadhi's Court Succession Cause No E412 of 2022 and E411 of 2022 where those rules are applicable, or where there is an error of law on the face of the record, or the decision is unreasonable to warrant grant of an order of certiorari.
  - (c) The applicant has not shown that the decision delivered in Kwale Kadhi's Court Succession Cause No E411 of 2022 and the proceedings in Succession Cause No E411 of 2022 is tainted with illegality, irrationality and procedural impropriety.
  - (d) That the matters at hand touch on religious beliefs and practices and that albeit the Kadhi's Courts are part and parcel of the Judiciary, they are a special category of courts with the mandate to enforce religious practices and incidents of those religious practices with jurisdiction extending to questions relating to succession matters.



- (e) That the 1st respondent has the necessary jurisdiction to hear and determine the dispute brought before him.
  - (f) That the application is incompetent, bad in law and is an abuse of the court process of the court and is otherwise deliberately intended to hinder the efficient and timely disposal of the matters in the Kadhi's Court.
  - (g) That no sufficient reasons have been given by the applicant to warrant the issuance of the orders sought.
5. Thus, counsel for the 1st respondent prayed that the application be dismissed with costs.
  6. In her Replying Affidavit sworn on May 10, 2023, the 2nd respondent acknowledged that the applicant is her step-daughter and that the deceased Chrispus M Isika was initially a Christian by faith. She pointed out that the deceased converted to Islam on November 23, 2009 immediately before he got married to her; and that he thereupon changed his name to Abdallah Mnamai Isika. She annexed an affidavit to that effect as an exhibit to her affidavit. She therefore deposed that the deceased was a Muslim as at the time of his death and therefore that his estate can only be distributed in accordance with Islamic law through the Kadhi's Court. She therefore prayed for the dismissal of the instant application to pave way for the hearing and conclusion of the two pending matters before the Kadhi's Court.
  7. By way of submissions, Mr Abaja urged the application on June 5, 2023 and relied on the applicant's Supporting Affidavit as well as the Statutory Statement filed therewith dated March 31, 2023. He cited Article 170(5) of the Constitution which provides for the jurisdiction of the Kadhi's Court and emphasized that such jurisdiction is limited to cases where both parties profess the Muslim faith. He also urged the Court to bear in mind the admissions in the 2nd respondent's affidavit to the effect that the applicant and other dependant's of the deceased are indeed Christians.
  8. Counsel for the 1st respondent relied on her Grounds of Opposition dated May 17, 2023 and had nothing to add thereto. Similarly, the 2nd respondent relied entirely on her Replying Affidavit.
  9. I have given careful consideration to the Chamber Summons dated March 31, 2023 and the pertinent responses thereto. At this point the Court is not required to determine the merits of the parties' respective positions, but simply to establish that the threshold for judicial review has been met. Indeed, in Independent Electoral and Boundaries Commission (IEBC) vs National Super Alliance (NASA) Kenya & 6 others [2017] eKLR, a decision by a 5-judge bench of the Court of Appeal it was held:

' In our considered view presently, judicial review in Kenya has Constitutional underpinning in articles 22 and 23 as read with article 47 of the Constitution and as operationalized through the provisions of the Fair Administrative Action Act. The common law judicial review is now embodied and ensconced into constitutional and statutory judicial review. Order 53 of the Civil Procedure Act and rules is a procedure for applying for remedies under the common law and the Law Reform Act. These common law remedies are now part of the constitutional remedies that the High Court can grant under article 23(3)(c) and (f) of the Constitution. The fusion of common law judicial review remedies into the constitutional and statutory review remedies imply that Kenya has one and not two mutually exclusive systems for judicial review. A party is at liberty to choose the common law order 53 or constitutional and statutory review procedure. It is not fatal to adopt either or both. We hold that Kenya has one and not two mutually exclusive systems for judicial review. The



common law and statutory judicial review are complementary and mutually non-exclusive judicial review approaches.'

10. Accordingly, the purpose of leave was well explicated in Mombasa HCMCA No 384 of 1996: *Republic v County Council of Kwale & Another, Ex Parte Kondo and 57 others* thus:

' The purpose of application for leave to apply for Judicial

Review is firstly to eliminate at an early stage any applications for Judicial Review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for Judicial Review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with the administrative action while proceedings for Judicial Review of it were actually pending even though misconceived. Leave may only be granted therefore if on the material available before the court the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised Judicially'.

11. With the foregoing principles in mind, I have looked at the application for leave and the accompanying statement from the prism of Order 53 of the Civil Procedure Rules. There is no gainsaying that the application has been made within the 6 months' period stipulated in Order 53 Rule 2 of the Civil Procedure Rules; and that by dint of Article 170(5) of the *Constitution*, the jurisdiction of the Kadhi's Court is circumscribed as hereunder:

'The jurisdiction of a Kadhi's court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.'

12. The 2nd respondent having conceded that the applicant is her step-daughter and that a number of the deceased's beneficiaries are Christians by faith, it is plain that the applicant has met the threshold for the grant of leave.

13. As to whether leave should operate as stay I have taken into account the position taken in *Taib A Taib v The Minister for Local Government & Others Mombasa HCMISCA No 158 of 2006* that:

' The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken.'

14. In the result, the application dated March 31, 2023 is hereby allowed and orders granted as hereunder:

- (a) That leave be granted to the applicant to apply for an order of prohibition to prohibit the 1st respondent from proceeding in any matter whatsoever in Kwale Kadhi's Succession Cause No E412 of 2022;



- (b) That leave be and is hereby granted to the applicant to apply for an order of certiorari for the purposes of directing that the proceedings in Kwale Kadhi Succession Cause No E412 of 2022 be removed to this Court for purposes of quashing;
- (c) That leave be and is hereby granted to the applicant to apply for an order of certiorari directing that the decision of Hon Salim J Mwaito, Principal Kadhi Kwale delivered on March 27, 2023 in Kwale Kadhi Succession Cause NO E411 of 2022 be removed to this Court for purposes of quashing;
- (d) That the substantive application be filed within 21 days from the date hereof.
- (d) That leave thus granted to the applicant do operate as a stay of the proceedings in Kwale Kadhi Succession Cause No E412 of 2022 and stay of any further action as a result of the decision delivered in Kwale Kadhi Succession Cause No E411 of 2022.
- (e) Costs of the proceedings be costs in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 4TH DAY OF AUGUST 2023**

**OLGA SEWE**

**JUDGE**

