



**Republic v Principal Kadhi-Malindi; Brek (Exparte Applicant);
Nzawa (Interested Party) (Judicial Review Miscellaneous Application
007 of 2021) [2022] KEHC 15594 (KLR) (26 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 15594 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 007 OF 2021**

SM GITHINJI, J

OCTOBER 26, 2022

IN THE MATTER OF: THE LAW REFORM ACT (CHAPTER 26) LAWS OF KENYA;

AND

**IN THE MATTER OF: AN APPLICATION BY; AISHA BREK, FOR
LEAVE TO APPLY FOR ORDERS OF CERTIORARI & PROHIBITION**

AND

IN THE MATTER OF: THE MAGISTRATES' COURT ACT (2015)

AND

IN THE MATTER OF: THE KADHI COURT'S ACT (CAP 11) LAWS OF KENYA

BETWEEN

REPUBLIC APPLICANT

AND

PRINCIPAL KADHI-MALINDI RESPONDENT

AND

AISHA BREK EXPARTE APPLICANT

AND

AISHA MOHAMED NZAWA INTERESTED PARTY



RULING

1. *Vide* a notice of motion application dated December 3, 2021, the *ex-parte* applicant sought the following orders;
 1. That this honourable court be pleased to grant a writ of *certiorari* to bring to this court for the purposes of being quashed, the decision of the respondent made on May 5, 2021 removing all that parcel known as Malindi plot number 3659 from the list of the deceased's estate.
 2. That the costs of this application be in the cause.
2. The following were the grounds on the face of the application;
 - a. That the *ex-parte* applicant is a *bona fide* beneficiary of the deceased's estate.
 - b. That on April 15, 2019 this honourable court declared the deceased's estate to include all that parcel known as Malindi plot number 3659- Kwa Chocha.
 - c. That there has never been any appeal or application seeking to review the said decision.
 - d. That by dint of the said ruling, the jurisdiction of the respondent on the same subject matter was exhausted.
 - e. That on October 5, 2021, the respondent, without considering its lack of jurisdiction over the inclusion of Malindi plot number 3659- Kwa Chocha villa as being part of the deceased's estate, purported to find that the said parcel was indeed not part of the said deceased's estate.
 - f. That the respondent is bound by the principle of *stare decisis*.
 - g. That the respondent's decision under challenge therefore amount to an abuse and/or excess of power and it has been made *mala fide* with a view to oppress, vex, embarrass and harass the *ex-parte* applicant.
 - h. That the *ex parte* applicant will suffer harm and loss at the instance of the respondent and the interested party.
 - i. That the respondent's decision offends the rules of natural justice.
 - j. That the respondent's decision was demonstrably unreasonable as to constitute irrationality and therefore judicial review is the only appropriate remedy.
3. The application was also supported by the verifying affidavit of Aisha Brek sworn on the November 2, 2021. The contents of the said affidavit do not differ from the contents of the grounds in the face of the application and for that reason there is no need to replicate its contents.
4. The interested party in response filed a replying affidavit sworn on the December 22, 2021. She deponed that she instituted an application before the Kadhi Court praying that plot No 3659 Malindi be removed from the estate of the deceased for reason that it does not form part of the deceased's



estate and that on or about May 5, 2021, the Hon Kadhi delivered a ruling ordering that plot No 3659 Malindi did not form part of the deceased's estate. It was her contention that plot No 3659 has never been listed as the deceased's estate either in petition and/or responses in succession cause No 19 of 2013.

5. Further, that plot No 3659 Malindi is registered in the names of Samira Said Abdulrahmam and Abdulrahman Said Abdulrahman who are children of the deceased. She also contended that the High Court *vide* ruling delivered on May 26, 2019 declined to include the said plot as part of the estate of the deceased.
6. The *ex-parte* applicant filed a further affidavit pursuant to the leave of court on March 10, 2022. She stated that plot No 3659 Malindi is the same plot where Kwa Chocha villa stands and the said property has always been referred to as Kwa Chocha villa. That it is not true that the said property was purchased by the minors as has been alleged since at the time of purchase in 2001, they were both minors who had no capacity to transact. That the matter before this court is of a judicial review which seeks to interrogate whether the respondent acted *ultra vires* and seeks to quash the impugned ruling of the Honourable Kadhi.
7. The parties filed their respective submissions which this court has taken note of.

Analysis and Determination

8. I have duly considered the application, the responses as well as the submissions and the various authorities and case law cited by the parties. I have equally had an opportunity of going through the judgment of the Honourable Kadhi dated October 26, 2016, the ruling of Honourable Justice Weldon Korir and the ruling of the Honourable Kadhi of October 5, 2021 which is the subject of this ruling.
9. To this end, I have identified the following issues for determination; whether this court has jurisdiction to entertain this application; and whether the *ex-parte* applicant should be granted the orders sought in the application dated December 3, 2021.
10. The purpose of an application for judicial review is not to delve into the merits of the decision that is being challenged but with the decision-making process and the sole purpose is to ensure that the parties are given fair treatment by the authority which they have been subjected to. The applicant moved this court under order 53 of the *Civil Procedure Rules* seeking judicial review orders of *certiorari* and therefore the court must ascertain whether the circumstances presented before the court merits the special jurisdiction donated to this court under order 53. It is trite that judicial review should concern itself not with the merits of a decision but with the decision-making process.
11. I wish to rely on the Court of Appeal case in *Municipal Council of Mombasa v Republic & Umoia Consultants Ltd* Civil Appeal No 185 of 2001 where the court affirmed the proposition that judicial review proceedings, is concerned with the decision-making process, not with the merits of the decision itself. Further, it follows that where an applicant in a judicial review application appears to be aggrieved with the merit of the impugned decision, then judicial review would not be the appropriate forum in the obtaining circumstances, even if appropriate grounds for granting the orders may have been pleaded. The justification for this proposition is that a court exercising jurisdiction under order 53 is not an appellate court and it cannot interrogate impugned decision on merit.
12. I am of the position that since the applicant was granted an opportunity to be heard and fully participated in the proceedings before the Honourable Kadhi, it turns out that if aggrieved by the decision, then the remedy is to apply for stay of execution and file an appeal in the High Court. This court cannot therefore appropriately purport to assume any jurisdiction as invited by the applicant.



13. I have noted that no appeal was filed to challenge the decision of the Honourable Kadhi and where an applicant brings judicial review proceedings with a view to determine contested matters of facts for purposes of securing a determination on the merits of the dispute, the court would not have jurisdiction to determine such a dispute by way of a judicial review. It is also noted that certiorari is the only relief that can undo an already made decision but must be appropriately presented and it cannot serve the purpose of a stay or an appeal.

14. I rely on the findings in the case of *Lemanken Aramat v Harun Meitamei Lempaka & 2 others* [2014] eKLR where the Supreme Court of Kenya expressed itself as follows:

“On the basis of the foregoing principle, this court’s priority in the instant case is to ascertain the extent of the jurisdiction of the other courts at the time they made their determinations: and if they lacked jurisdiction, then their decisions would be null and consequently it would not be necessary for this court to examine such other questions as may have been the subject of the orders of those courts.”

15. The issue of administration and distribution of a deceased’s estate cannot be properly determined in a judicial review process.

16. The application lacks merit and is hereby dismissed with costs.

This court so orders.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 26TH DAY OF OCTOBER, 2022.

S.M. GITHINJI

JUDGE

In the absence of; -

1. Oduor Siminyu Advocates for the Ex- Parte Applicant
2. Michira Messah & Co. Advocates for the Interested Party.
3. The Attorney General

