



In re matter of the Estate of Mbarak Awadh Salim (Deceased) (Succession Appeal E14 of 2020) [2022] KEHC 14548 (KLR) (21 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14548 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION APPEAL E14 OF 2020
JN ONYIEGO, J
OCTOBER 21, 2022**

FREEDOM LIMITED.....APPELLANT

VERSUS

IN THE MATTER OF: THE ESTATE OF MBARAK AWADH SALIM (DECEASED)

OMAR AWADH MBARAK.....RESPONDENT

BETWEEN

OMAR AWADH MBARAK.....PETITIONER

VERSUS

FREEDOM LIMITED APPLICANT/OBJECTOR

BETWEEN

FREEDOM LIMITED APPELLANT

AND

OMAR AWADH MBARAK RESPONDENT

(Being an Appeal from the Ruling of the Kadhi’s Court Delivered On 2nd December 2020 by the Hon.Chief Kadhi Sheikh Al Muhdhar A.S Hussein)

JUDGMENT

1. The respondent herein moved the Kadhi’s Court *vide* a petition filed on April 25, 2013 seeking distribution of the estate of Mbarak Awadh Salim (deceased). He listed the following persons as heirs surviving the deceased;

Omar Awadh Mbarak

Mbarak Awadh Mbarak



Alham Awadh Mbarak

Husna Awadh Mbarak

2. The following properties were listed as constituting the estate of the deceased;
 - a. Plot No 287 section v South East Mazera Station
 - b. Plot No 440 section ii Mwakirunge
 - c. Plot No 414 section ii Mtopanga N.E of Mombasa Island
 - d. Plot No 399 section ii Mtopanga N.E of Mombasa Island
 - e. Plot No 349 section vi Changamwe Miritini
 - f. Plot No 321 section ii Mtopanga N.E of Mombasa Island
3. Upon hearing the petition, the Hon Kadhi gave the following orders on June 12, 2013;
 - a. That the legal heirs and shares of the above mentioned deceased are: -
 - i. Omar Awadh Mbarak (grandson) -33.33%
 - ii. Mbarak Awadh Mbarak (grandson)-33.33%
 - iii. Alham Awadh Mbarak (granddaughter)-16.66%
 - iv. Husna Awadh Mbarak (granddaughter)-16.66%
 - b. That the deceased's estate consists of the following properties as per the documents produced in court;
 - i. Plot No 287V S.E Mazeras Station
 - ii. Plot No 414 Sec.II Mtopanga N.E Mombasa Island
 - iii. Plot No 399 Sec.I N.E –Mombasa Island
 - iv. Plot No 349 Sec VI, Changamwe Miritini
 - v. Plot No 321 Sec 11, Mtopanga N.E –Mombasa island
4. When the appellant learnt of the orders through its advocates, it made an application to the Kadhi's Court seeking to have the same set aside/reviewed/cancelled and or revoked. The appellant's claim was that it was the bonafide registered owner of all that parcel of land being plot number 1948/V/Mn(CR 32564) mother title No LR 287/V/Mn CR 6302. Further, that the respondent herein had obtained the orders of June 12, 2013 and issued on June 18, 2013 through non-disclosure of material facts and deceit.
5. The application was canvassed by way of written submissions. The Chief Kadhi then delivered his ruling on December 2, 2020 and held as follows;

“Upon reading the objector's submissions, it came clear that, the main objection is based on ownership and fraud issues. The Kadhi Court derives its jurisdiction from article 170(5) of the *Constitution* of Kenya 2010 and section (5) of *Kadhis Act* chapter 11 Laws of Kenya and it revolves around the personal status, marriage, divorce and inheritance where both parties confess muslim faith and submit to the jurisdiction of this court.



It's therefore the opinion of this court that the objection filed on September 22, 2020 is out of the court jurisdiction and therefore it's prompt for this court to down its tools and order the same to the competent court for determination.”

6. Dissatisfied with the ruling of the Chief Kadhi of December 2, 2020, the appellant moved to this court *vide* a memorandum of appeal filed on December 18, 2020 citing the following grounds;
 - a. That the learned chief kadhi erred and misdirected himself in dismissing the appellant's application for review dated September 22, 2020.
 - b. That the learned Chief Kadhi erred in law by upholding his ruling delivered on June 18, 2013 where he failed to appreciate that the said orders issued on June 18, 2013 were obtained through material non-disclosure, deceit and concealment of material facts.
 - c. That the learned Chief Kadhi erred in law in failing to appreciate that the proceedings used to obtain the confirmation order were defective.
 - d. That the learned Chief Kadhi erred in law and fact by failing to appreciate that the chief's letter in a succession cause serves an important purpose in the ascertainment of the deceased's dependants as well as properties of the deceased and where the same is defective as was in the case before him, the confirmation orders for grant cannot and ought not to be issued.
 - e. That the learned Chief Kadhi erred in law and fact in disregarding the new material evidence before him that proved that the ownership documents he relied on to confirm the objectors grant were prima facie illegal and that the grant/order was obtained by means of untrue allegations of fact.
 - f. That the learned Chief Kadhi erred in law and fact in finding and acknowledging that the succession matter is now disputed yet failed to assert status quo by reviewing its succession orders made on June 18, 2013 instead of choosing to down the courts tools.
 - g. That the learned Chief Kadhi erred in law by failing to consider the submissions of the appellant in its entirety.
 - h. That the learned Chief Kadhi's ruling is erroneous and based on the wrong principles.
 - i. That the learned Chief Kadhi therefore erred and misapprehended himself in the application of the principles of the law applicable in all the circumstances of the case and therefore failed to exercise his discretion judiciously.
7. The appellant urged the court to allow the appeal, set aside and or revoke the ruling of the Chief Kadhi dated December 2, 2020 and allow its application for review dated September 22, 2020. The appeal was canvassed by way of written submissions.
8. The appellant through its advocates Borana & Associates Advocates filed its written submissions dated October 1, 2021. Counsel submitted on three issues namely; non-disclosure of material facts, right to be heard and jurisdiction.
9. On the question of non -disclosure of material facts, counsel submitted that from the onset, the respondent failed to disclose several facts to the honourable Chief Kadhi one of them being the certificate of title for the subject parcel. That from the last three entries of the title, the land registrar had not registered the said entries meaning that the land did not belong to the respondent's grandfather. That the respondent failed to disclose that the appellant was the owner of all that parcel of land being LR No 1948 /V/Mn, CR 32564, original title No LR 287/V/Mn CR 6302 as the said land was



- transferred and registered on November 12, 2010 to the appellant hence could not form part of the estate.
10. Counsel submitted that the sale agreement and transfer presented by the respondent were illegitimate documents and could not confer ownership interest to the deceased as it showed that the purported transfer document was executed in 1978 to Mbarak Awadh from M.A Khan. That the said M. A Khan could not have executed those documents as there was a gazette notice No 2197 showing that M. A Khan died in 1967.
 11. It was contended that the respondent did not provide crucial ownership documents which include copies of search, copies of deed plan and stamp duty receipts for all the six properties. That the entries on the titles showed no transfer was either made or registered to Mbarak Awadh Salim. Thus the entire succession petition was devoid of merit and failed to meet the sufficient threshold of scrutiny required by the law to warrant the confirmation that was issued by the Chief Kadhi.
 12. Counsel relied on section 76(b) of the [Law of Succession Act](#) on revocation of grant thereby asserting that the grant was obtained fraudulently by making of false statement or by the concealment from the court of something material to the case. To support that argument, reliance was placed on the case of [Re Estate of Joseph Kilonzo Musyoka \(Deceased\)](#) (2018) eKLR.
 13. Counsel further submitted that the documents presented before the Chief Kadhi were misleading and or false specifically the certificate of title which was not registered in the name of the deceased/ respondent's grandfather.
 14. On the right to be heard, counsel submitted that the Chief Kadhi failed to apply the correct principles of law in failing to revoke/set aside the confirmation order issued on June 18, 2013, particularly the principle of fair hearing. In that regard, reliance was placed in the case of in [Re Estate of M'imwitha M'ithanga \(Deceased\)](#) (2021)e KLR where the importance on the right to be heard was emphasized.
 15. On jurisdiction, counsel opined that although courts can and do share concurrent jurisdiction on matters of land, the Hon Kadhi had the primary duty of distributing the correct estate to the rightful beneficiaries. That to make a proper determination, the court should have identified the properties of the estate before distributing the applicant's land. To buttress this position, counsel relied on the case of [Re Estate of Julius Ndubi Javan \(Deceased\)](#) (2018) eKLR.
 16. The respondent through his Advocates Muturi Gakuo & Kibara Advocates filed his written submissions dated October 22, 2021.
 17. On the first ground of appeal, counsel submitted that the Hon Kadhi was right in dismissing the appellant's notice of motion application dated September 22, 2020 seeking review of the chief Kadhi's orders for reasons that; the applicant was placing a claim of ownership over plot No LR 1948/V/MN, CR 32564 which property was completely different from plot No 287/V S.E Mazera Station against which the order was made; the property being claimed by the appellant was subject to an ongoing case before the Environment and Land Court at Mombasa which was the court with competent jurisdiction to hear and dispense with the matter extensively; the Chief Kadhi was justified to dismiss the application by the applicant as he had no jurisdiction; the appellant did not discharge the onus of proof by way of documentary evidence to show that indeed the property belonged to it and; that the appellant did not demonstrate the nexus between itself and the deceased's estate.
 18. Counsel further submitted that; the claim of ownership by the appellant over plot No LR 1948 /V/ MN, CR 32564 had not crystallized for the reason that the matter was still pending determination before a competent court being the Environment and Land Court Mombasa; it was only after the decision of the environment and land court that parties would know the next available option;



19. Counsel relied on the case of in re estate of *Solomon Mwangi Waweru (Deceased)* [2018] eKLR to express the position that a probate court in this case the Kadhi's Court had no power to determine issues of ownership dispute over the property thus the Chief Kadhi was right in dismissing the appellant's application.
20. On grounds 2, 3 and 4, counsel submitted that the Chief Kadhi was right in dismissing the appellant's application as the appellant had not met the criteria for review of its orders as set out under order 45 rule 1 and 3 of the *CPRS*. To that extent, the court was referred to the case of *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR where the Court of Appeal emphasized on proof of the grounds for review under order 45 of the *CPRS*.
21. According to the learned counsel, there was no proof of; discovery of new and important matter or evidence or mistake or error apparent on the face of it. In that regard, the court was referred to the case of *In Re Estate of Simoto Omwenje Isaka (Deceased)* [2020] eKLR.
22. That the respondent did not conceal any material fact within his knowledge at the time of confirmation of grant from the Chief Kadhi and thus the appellant's application lacked merit.
23. Counsel contended that the appellant filed his application seven years later after the delivery of the orders he was seeking review against with no justifiable reason for the delay to warrant the Chief Kadhi to consider its application. To underscore that position, the court was referred to the case of *In Re Estate of Simoto Omwenje Isaka* (deceased (supra) to advance the proposition that an application for review which is filed very late in time with no justification is fit for dismissal.
24. I have considered the record of appeal and rival submissions by both counsel. The only issue which crystalizes for determination is whether the honourable Chief Kadhi misdirected himself in dismissing the appellant's application for review.
25. The crux of the matter is dismissal of the review application by the Kadhi on account of lack of jurisdiction to determine a claim over land dispute. It is trite that jurisdiction is everything and without it a court cannot move any further step. See the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR where the court stated that;

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
26. The supreme court in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR while dealing with the issue of jurisdiction had this to say;

“A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
27. From the citations above, its evident that jurisdiction can only be drawn from the *Constitution* and or legislation or both. In this case the Kadhi's Court derived its jurisdiction from the *Constitution* under article 170(5) and the *Kadhis' Court Act* section 5 which provides;

Article 170(5)-



- (5) The jurisdiction of a Kadhis' 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.

Section 5

A Kadhi's Court shall have and exercise the following jurisdiction, namely 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; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.

28. Under the law of succession, a party who is aggrieved by the decision of the Kadhi's Court has a recourse to the high court by way of appeal under section 50 of the [Law of Succession](#) hence the appeal is properly before this court.
29. In this case, the appellant is not a beneficiary nor a creditor but a third party who claims ownership of a property that was listed as an asset of the estate of the deceased. He was also not a party to the lower court suit. However, in succession matters, it does not matter whether the aggrieved party was a party to the suit in which the grant was obtained. The appellant is covered by section 50 and section 76 of the [Law of Succession Act](#). See the case of [In re Estate of Athman Ali \(Deceased\)](#) [2021] eKLR where the court stated;

“Unlike ordinary civil cases where a party who never participated in proceedings before the court whose decision is being challenged cannot file an appeal, in succession cases, any party claiming to be a bonafide beneficiary but was not consulted or made aware of the existence of probate proceedings has a right to lodge an appeal before the High Court under section 50 and section 76 of the [Law of Succession Act](#) challenging the issuance and confirmation of a grant.”

30. In view of the circumstances of this case, it's my finding that the chief kadhi had the jurisdiction to hear and determine the succession suit and the application for review.
31. On whether the honourable Chief Kadhi misdirected himself in dismissing the appellant's application and whether the appellant established the grounds for review to warrant a review of the orders of June 18, 2013 by the Chief Kadhi, the court was duty bound to seek refuge under section 80 of the [Civil Procedure Act](#) and order 45 of the CPRS.
32. The issue of review of a court order is provided for under section 80 of the [Civil Procedure Act](#) and order 45 rule 1 of the [Civil Procedure Rules](#) which provide;

section 80-

Any person who considers himself aggrieved —

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

order 45 rule 1

- (1) Any person considering himself aggrieved—



- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

33. The above provisions does set out three grounds for review interalia; discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the parties' knowledge or could not be produced by him at the time when the decree was passed or the order made; existence of mistake or error apparent on the face of the record or for any other sufficient reason.

34. In dealing with the issue of review, the court in the case of *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR stated thus;

“It is also important to distinguish grounds of appeal and grounds for review. Guidance can be obtained from the case of *National Bank of Kenya Ltd v Ndungu Njau* [9] where the court held:-

“In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue? In my opinion the proper way to correct a judge's alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose.”(emphasis added).

In *Abasi Belinda v Fredrick Kangwamu and another* [10] the court held that:-

“a point which may be a good ground of appeal may not be a good ground for review and an erroneous view of evidence or law is not a ground for review though it may be a good ground for appeal”

35. The Chief Kadhi having appreciated that he had no jurisdiction nor powers to determine ownership dispute over land and correctly so, he had the power under order 45 (1) of the civil procedure for sufficient reason to review his orders of June 12, 2013 declaring plot No 287/section v as part of the estate by removing the said plot from the list of assets for distribution. That is not the same as determining the issue of ownership which is the work of the ELC. Had this information been laid before him before distribution, he could not have shared out the disputed property.



36. In view of the above holding, it was not necessary for the appellant to seek revocation of the grant as there was none in place and the correct procedure was to appeal under section 50 of the *Law of Succession Act* which he did.
37. It is my finding further that the appellant is entitled to a fair hearing before a court of competent jurisdiction. Parties having agreed that there is a pending dispute before the ELC court over the same property, the best option is to exclude the subject plot from the list of distributed assets pending the outcome of the ELC case aforesaid.
38. Accordingly, I am satisfied that the appeal herein is merited and therefore allowed with orders that;
- a. The orders of the Chief Kadhi dated December 2, 2020 are hereby substituted with the orders that;
 - (i) The Chief Kadhi has no jurisdiction to entertain a dispute over land ownership
 - (ii) That the orders of June 12, 2013 and issued on June 18, 2013 issued by the Chief Kadhi are hereby reviewed to the extent that plot number 287 section v Mazeras is removed from the list of assets for distribution in the estate herein pending hearing and determination of the pending civil proceedings in ELC case No 358 of 2016
 - iii. That upon determination of the said dispute, parties shall be at liberty to move the Kadhi's Court for review of its orders dated June 12, 2013 so as to include the property in-case the ELC decision is in favour of the estate
 - iv. That distribution of the rest of the properties which are not disputed shall continue as directed on June 12, 2013.
 - (v) That each party shall bear own costs

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 21ST DAY OF OCTOBER 2022

J.N.ONYIEGO
JUDGE

