



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW NO. 13 OF 2017

IN THE MATTER OF: APPLICATION BY JAMSHAIID HUSSAIN MAHMOOD FOR JUDICIAL REVIEW AND FOR ORDERS OF MANDAMUS, PROHIBITION AND CERTIRARI

AND

IN THE MATTER OF: ORDER 53 RULE (1) & (2) OF THE CIVIL PROCEDURE RULES, SECTIONS 3, 3A AND 63 (e) OF THE CIVIL PROCEDURE ACT, CAP 21, SECTIONS 8 AND 9 OF THE LAW REFORM ACT, AND ALL OTHER ENABLING PROVISIONS OF THE LAW

AND

IN THE MATTER OF: KADHI'S COURT SUCCESSION CAUSE NO. 141 OF 2002 (IN THE MATTER OF THE ESTATE OF RASHID ATHMAN MWAKURUHIRA AND MOHAMED RASHID)

BETWEEN

JAMSAID HUSSAIN MAHMOOD...EX-PARTE APPLICANT

AND

- 1. THE HON. ATTORNEY GENERAL**
- 2. HON. KADHI: SHEIKH SAID HAMISI, AT KWALE**
- 3. MWANAHAMISI SAID MWINYIHAJI**
- 4. ALI MOHAMED MWAGANYIKA.....RESPONDENTS**

RULING

Introduction

1. By a Notice of Motion dated 3/7/2017, the Ex-parte Applicant herein, **Jamsaid Hussain Mahmood**, prays for the following orders:

- 1. That this honourable court be pleased to issue an order of Mandamus, prohibition and certiorari and Quo Warranto to recall for the record of KCCC NO. 141 of 2012 at Kwale for purposes of considering it's propriety, legality and regularity with a view to quashing them.**
- 2. That, this Honourable court do make any other consequential and or incidental relief(s) / orders it deems fit and expedient to meet the ends of justice.**
- 3. That the costs of this application be provided for.**

Ex Parte Applicant's Case

2. The application is premised on the grounds set out therein and is accompanied by the Ex-parte Applicant's verifying affidavit sworn on the 21/4/2017, and a Statutory Statement dated 19/4/2017 filed in court together with the chamber summons application dated 21/4/2017 for leave (to the Ex-parte Applicant) to apply for prerogative orders of certiorari, prohibition and mandamus.

3. In a nutshell, the *ex parte* Applicant's case is that he is the registered owner of all that parcel of land known as KWALE/WAA/1336 (herein referred as the suit "*property*") having purchased the same from one **Mwanabiashara Athman Mohamed** (the registered owner) on the 16/10/2012 and the said property was transferred to the Ex-parte Applicant's name on 20/12/2013.

4. The Ex-parte Applicant avers that the siblings of the owners Binti **Hamisi Mwamajapo, Mejuma Juma Tunu, and Binti Mohamed Abdallah Mawnyota** commenced nullification of the title issued to **Mwanabiashara Athman Mohamed** before the Kadhi's Court.

5. The Ex-parte Applicant avers that all along, he was not party to the proceedings before the Kadhi's Court, and he was never called to make any representation thereto in conformity with the principles of natural justice. Therefore, he calls upon this Court to quash the proceedings before the Kadhi's court which are intend to circumvent the procedural way of passing of property as ordained by the now deceased sisters and brothers, and that the Kadhi's Court lacks jurisdiction to determine the issue of ownership of the property.

1st & 2nd Respondents' Case

6. The 1st and 2nd Respondents through the Attorney General opposed the Application vide Grounds of Opposition dated 16/1/2019, stating:

1. That the Application is an afterthought and an abuse of the Court process.

2. That the Applicant is guilty of material non-disclosure to the extent that he fails to disclose that the order issued by the Kadhi on 28/9/2012 was set-aside for misrepresentation.

3. That the Kadhis Court's had jurisdiction to grant the orders complained of.

The 3rd and 4th Respondents' Case

7. The Application was opposed vide Replying Affidavit sworn on the 5/11/2019 by **Ali Mohamed Mwaganyika**. He avers that the property herein constitutes the estate of the following deceased: **Binti Hamisi Mwamajapo, Mejuma Juma Tunu, Binti Mohamed Abdallah Mwanoyota, Rashid Athumani Mwakuvuhira, and one surviving Mwanamisi Said Mwinyihaji**. He further avers that, the property herein was allocated to the above named deceased persons, and one **Mwanamisi Said Mwinyihaji** in equal share of 1/5 each. He further averred that the Learned Kadhi's Court held that the share of **Binti Hamisi Mwamajapo** in the property herein be vested in her son being the 4th Respondent since **Mwanabiashara Mohamed Athumani** who later transferred the property to the Ex-parte Applicant obtained the same via fraudulent means by misleading the Kadhi Court that he was inheriting the property and as a result he misrepresented to the Court that **Mwanamisi Said Mwinyihaji** was deceased and/or did not exist.

8. The 4th Respondent avers that **Mwanabiashara Mohamed** who later sold and transferred the property to the Ex-parte Applicant herein was a party to succession cause 141 of 2012 and a just determination was made vide ruling delivered on 15/11/2016, which reversed the orders issued earlier vesting the property to **Mwanabiashara Mohamed Athumani**. Following the ruling, the 4th Respondent caused a restriction to be filed on the parcel of land to show that **Mwanamisi Said Mwinyihaji** was still alive, and that the transfer by **Mwanabiashara Mohamed Athumani** was fraudulent.

9. The 4th Respondent avers that the only remedy available to the Ex-parte Applicant is seeking for a refund of his purchase price from **Mwanabiashara Mohamed Athumani**

Submissions

10. The Application was canvassed by way of written submissions. The Ex-parte Applicant filed his submissions on 3/3/2020 while, the 3rd and 4th Respondents' submission were filed on 9/9/2020. The Attorney General indicated that they would not be filling any submission.

11. **Mr. Opulu** learned Counsel for the Ex-parte Applicant submitted that the Kadhi's Court lacked jurisdiction to determine the issue of ownership of the property, since that jurisdiction rests with the Environment and Land Court in accordance with Article 162(2), (3) and Section 13 of the Environment and Land Court Act. Further, Counsel submitted that in the ruling delivered on 15/11/2016, the Kadhi erred when he considered the matter afresh whereas he was *functus officio* and the corpus of the estate had ceased to exist, since it had been sold and transferred and was therefore not part of the estate.

12. Counsel further submitted that the Ex-parte Applicant was an innocent purchaser for value and consideration and he was not aware of any adverse claims against the suit property since there was no restriction on the property and the transfer was clean.

13. **Mr. Bosire**, learned Counsel for the 3rd and 4th Respondents submitted that the best Court to determine the Ex-parte Applicant's grievances is the Environment and Land Court and not the High Court and that the Kadhi's Court was the proper Court to deal with the succession matter before it as stipulated under Article 170 (3) (5) of the Constitution, and under Section 5 of the Kadhi's Court Act and that the Respondents upon learning of the illegality visited upon them, moved the Court for review of the decision made on 28/9/2012 vide Notice of Motion Application before the Kadhi dated 2/5/2013.

Determination

14. I have considered the application herein, the reply by the Respondents and the rival submissions filed herein. The issues for determination are:

- 1. Whether the Kadhi's Court had jurisdiction to determine the issues of ownership of the suit property.**
- 2. Whether the Ex-parte Applicant's right to natural Justice was violated.**

15. Judicial review proceedings are provided for under the Fair Administrative Action Act, 2015 which was enacted to give effect to Article 47 of the Constitution regarding right to fair administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. Under Section 9(1) of the Act, a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.

16. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** the Court of Appeal held:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

17. The Court of Appeal in **Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others, [2016] eKLR** observed that while *Article 47* of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveal an implicit shift of judicial review to include aspects of merit review of administrative action, *the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.*

18. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See **R v Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.**

1) Whether the Kadhi's Court had jurisdiction to determine the issues of ownership of the suit property.

19. In the Application before this Court, the Ex-parte Applicant has endeavored largely to advance his main argument that he was an innocent purchaser for value without notice of the suit premises. This appears to be the cornerstone on which the whole case is built. He claims to have acquired the suit premises without knowledge of any other rights attaching to it and acquired good title. He further avers that he was never given any notice of the proceedings in KCCC NO. 141 of 2016, which affects the title issued to him lawfully and that the Kadhi's Court lacked the requisite jurisdiction to review the order issued on 2/10/2012 because it relates to ownership of the property, which is the preserve of the Environment and Land Court.

20. Article 170 establishes the Kadhi's Courts and under Clause 5 thereof confers jurisdiction to the court, limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance relating to proceedings in which all parties profess Muslim religion and submit to the jurisdiction of the Kadhi's court.

21. The jurisdiction of the Kadhi's Court is reserved under section 48 (2) of the Act as follows:

“48. (2) For the avoidance of doubt it is hereby declared that the Kadhi's courts shall continue to have and exercise jurisdiction in relation to the estate of a deceased Muslim for the determination of questions relating to inheritance in accordance with Muslim law and of any other question arising under this Act in relation to such estates.”

22. In addition, the Kadhis' Courts Act, cap 11 Laws of Kenya, acknowledges the limit of the Kadhi's Court to determination of questions of Muslim law and the unlimited jurisdiction of the High Court in succession matters that come before it as follows:

“5. Jurisdiction of the Kadhis' Courts.

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.”

23. In the case of **Genevieve Bertrand v. Mohamed Athman Maawiya and Anor.**, Malindi Civil Application No. 24 of 2013 [2014] eKLR, the Court of Appeal held that –

“23. In the case of the Kadhi's Court, it is a creature of the Constitution (section 66 of the retired Constitution and article

169 of the current Constitution). The jurisdiction of the Kadhi's Court is specifically defined under Article 170 (5) of the Constitution and section 5 of the Kadhi's [Court] Act, as "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 Court". Thus, the jurisdiction of the Kadhi's Court is determined by the existence of three factors. That is the subject matter of the claim or dispute, the party's Muslim faith, and the party's submission to the jurisdiction of the Kadhi's Court."

24. From the impugned Cause KCCC. 141 of 2012, the dispute related to the inheritance of the assets and liabilities of **Rashid Athumani Mwakuvuhia**. In the ruling delivered on 15/11/2016, the Kadhi found that the Respondents did not mention any surviving relatives/heirs for the deceased thereby misleading the Court in inheriting the property. Therefore, the acts of the Respondents amounted to fraudulent acquisition of property to which Petitioner are entitled to a share.

25. In **Pricilla Ndubi and Zipporah Mutiga v Gerishon Gatobu, Meru Succession Cause No. 720 of 2013**, it was held:

"The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on ownership of the property in the estate are raised in a succession cause, they must be resolved before such property is distributed..."

26. From the foregoing, I find that the Kadhi's Court had the requisite jurisdiction to determine the issue of inheritance of the petitioners before him in KCCC. 141 of 2012.

Whether the Ex-parte Applicant right to Natural Justice was violated

27. The Ex-parte Applicant's averment that he was not served with the reinstated Petition (KCCC 141 OF 2012) was never rebutted. He was not supplied with details of the complaint; he was not afforded an opportunity to face the complainant and cross-examine him on the complaints and adduce evidence to rebut the allegations. The manner in which the proceedings were undertaken was a clear breach of the established rules of natural justice, oppressive and an infringement on the rights of the Ex parte Applicant, and violated the constitutional principles of access to justice and fairness.

28. It is a fact that the Ex-parte Applicant at the time of the reinstatement of the Petition (KCCC 141 OF 2012) was the absolute owner of the suit property herein. Therefore, the 2nd Respondent's decision was likely to adversely affect the Ex-parte Applicant as he stood to be deprived of his property rights over the suit property for lack of a fair judicial process.

29. This Court cannot however, fault the 2nd Respondent since the 2nd Respondent was acting within his jurisdiction in determine the issues before him and it is the 3rd and 4th Respondents who did not serve the Ex-parte Applicant with notice of proceedings in Kadhi's Court. Nevertheless, a decision arrived at in breach of the rules of natural justice is *ultra vires*, null and void and cannot be allowed to stand.

30. Having found the above irregularities, can this court grant the certiorari orders prayed for? I am mindful that certiorari orders are discretionary. In the case of ***Republic v Senior Principal Magistrate & Others – Misc. Application No. 321 of 2006*** – Wendoh J. held that judicial review remedies are discretionary and the court has to consider whether they are the most efficacious in the circumstances of the case. In this case it is my view that if the orders prayed for are not granted the effect would be to divest the Ex-parte Applicant of his proprietary rights without the due process.

31. Consequently, I allow the application and grant the certiorari order sought. The ruling delivered on 15/11/2016 is hereby quashed forthwith, and the trial Court is ordered to determine the reinstated Petition with the Ex-parte Applicant's participation. Costs in the cause.

Orders accordingly.

Dated, Signed and Delivered at Mombasa this 28th day of January, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Mr. Makuto for 1st and 2nd Respondents

Mr. Opolu for Ex parte Applicant

Mr. Bosire for 3rd and 4th Respondents

Ms.

Peris

Court

Assistant