Ahmad & another v Kadhi Mombasa; Khalifa & another (Interested Party) (Judicial Review 4 of 2020) [2021] KEHC 133 (KLR) (21 October 2021) (Ruling)

Neutral citation: [2021] KEHC 133 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

JUDICIAL REVIEW 4 OF 2020

JM MATIVO, J

OCTOBER 21, 2021

BETWEEN

FUAD MBARAK ALI AHMAD ..... 1ST APPLICANT

SALMA MBARAK ALI ..... 2ND APPLICANT

AND

KADHI MOMBASA ..... RESPONDENT

AND

ABDULRAZAK KHALIFA ..... INTERESTED PARTY

PUBLIC TRUSTEE ..... INTERESTED PARTY

RULING

1. A brief historical background to the application dated 31st May 2021, the subject of this ruling will help in contextualizing, appreciating and bringing the issues raised in the application in to proper perspective. As the saying goes, if content gives the colour, context gives the texture. None can be ignored. Both are important.[1]

2. Briefly, Succession Cause No. 122 of 2017 filed in the Kadhi's Court at Mombasa involves the estate of the late Mwanana Binti Salim Hero (deceased) who died intestate in 1922 at Mombasa. The Petitioners in the said cause are Salima Mbarak Ali and Fuad Mbarak Ali Ahmad, who are also the applicants in the instant application. Vide a judgment rendered on 8th May 2018, the Kathi's Court inter alia determined the heirs to the deceased and distributed the deceased's estate as more particularized in the said judgment.

[1] See *Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and other, {1987} 1 SCC 424.*

3. However, vide an application dated 30th May 2019, the Public Trustee and Mr. Abdulraza Khalifa moved the court seeking orders that they be pleased enjoined plus any other beneficiary of the said estate as affected Interested Parties. They also prayed that the decree issued on 8th May 2018 be set aside on account of dishonest suppression of facts. Further, they prayed that the said decree be stayed to prevent misuse and or further abuse of the court process and or dealings with land in contravention of lis pendens. Lastly, they prayed for costs of the application to be in the cause.

4. In a ruling dated 23rd January 2020, the Kadhi held as follows: -

> " I am satisfied that the application dated 30th May 2019 is meritorious. Therefore, I proceed to set aside and vacate the judgment I delivered on 8th May 2018 and all the consequential orders/decrees issued earlier herein. Also, having indicated herein above that there is a suit at the High Court touching on the estate of Mwana Ana. This court cannot be dragged to issue orders that may contradict the High Court. My view is that the best forum for heirs/ beneficiaries of the late Mwana Ana to know the fate of the deceased's estate is at the High Court. There, they can be enjoined to defend the estate and also seek interpretation on issue of the "extinguished estate."
>
> In view of the above, I hereby dismiss this succession Petition dated 29th May 2017. Each party shall bear its own costs. Right of appeal is 21 days. Orders accordingly."

5. The applicants did not prefer an appeal against the above ruling. But, evidently, taking cue from the said ruling, on 10th February 2020, they moved the court in HCC NO ELC No. 414 of 1996, Mohammed Bwana Bwanaadi & another v Rishad Abdulrehman Khator & others seeking to be enjoined in the said proceedings. However, vide a ruling dated 3rd February 2021, the High Court (Sila J) in a well-reasoned ruling dismissed their said application.

The instant application

6. On 10th February 2020, the same day the applicants filed the above application, they also filed the instant application seeking leave to commence these judicial review proceedings. For un explained reasons, no action was taken on this application for a period on 1 year and about 5 months! As stated above, on 3rd February 2021, the court in ELC No. 414 of 1996 dismissed the application in the said case. On 22nd March 2021, about 47 days after the dismissal of the said application, the applicants' representative, took a date at for the hearing of the applicant's application filed on 10th February 2020. This is the first time an action was being taken on this file. A date was fixed for 6th May 2021 when only the applicants' counsel attended court and applied to amend the application. The court granted the leave to amend. The amended application dated 31st May 2021; the subject of this ruling was filed on 2nd June 2021.

7. In the amended application, the applicants seek leave to apply for the following Judicial review orders: -

    a. An order of certiorari to remove into the High Court to call, remove, deliver up to this court and quash the Respondent's decision made on 23rd January 2020 which vacated the judgment the Respondent made in Succession Cause no. 122 of 2017 with regards to matters including those relating to the estate of the late Mwanana Binti Salim Hero.

    b. An order of prohibition retraining the Respondent or anyone claiming under or pursuant to its authority, from applying or in any way howsoever asserting or giving effect to the impugned decision of the Respondent made on 23rd

January 2020 which decision has been made in violation of article 156(4) of the *Constitution*, section 5(1) (g) of the Office of the *Attorney General Act*, Section 5B of the *Public Trustee Act* (Cap 168 Laws of Kenya).

c. The grant of such leave as prayed in paragraphs (2) & (3) above to operate as a stay of the decision of the Respondent made on 23rd January 2020 which vacated the judgment the Respondent made in Succession Cause no. 122 of 2017.

d. This court does grant any other or further relief as it may deem fit to grant including but not limited to timelines for expeditious determination of the substantive motion.

e. That costs be in the main cause.

f. An order of certiorari to quash the orders issued by the 1st Respondent dated 19th December 2018.

g. That the costs of the application be provided for.

8. The application is premises on grounds that judgment in the above succession cause No. 122 of 2017 was rendered on 8th May 2018, but on 30thMay 2019 persons not related to the deceased applied to set aside the said decision. They state that one of the applicants is the Public Trustee, the 1st Interested Party, and, that the Attorney General never made any representations in the said application. They state that Respondent set aside the said decision on grounds inter alia that the decision may have contradicted an ongoing High Court suit touching on the deceased's estate. Further, the applicants state that the court advised them to seek to be joined to a High Court suit on the issue of an alleged extinguished estate.

9. They contend that the Respondent's decision premised on the exercise of discretionary authority, that it was made in error since the Public Trustee was never heard at all before the Respondent vacated the said orders, that the Respondent disregarded the applicant's objections on who are heirs of the deceased's estate and considered the submissions of strangers to the estate.

10. Additionally, the applicants state that the Respondent is constitutionally and legally vested with the authority to decide on matters relating to succession and inheritance under Islamic Law. They also state that Civil Suit No. 414 of 1996 in the Environment and Land Court, which they were directed to apply to be enjoined deals with interests in land, unlike the Respondent who is constitutionally ordained to handle matters under Islamic Law relating to inheritance and succession.

11. The applicant states that the impugned decision was made without and in excess of authority under the Constitution, the Office of the Attorney General Act,[2] the Public Trustees Act,[3] the *Fair Administrative Action Act*[4] and the Civil Procedure Rules. Further, the applicants state that the decision is illegal because the Respondent did not hear the Public Trustee before arriving at the decision, and that the Respondent disregarded the applicants' submissions and instead chose to give weight to submissions made by strangers to the estate.

2 Act No. 49 of 2012.

3 Cap 168, Laws of Kenya.

4 Act No. 4 of 2015.

12. Further, that the applicants state that the Respondent improperly exercised its discretion in vacating the judgment and that it relied on unsubstantiated allegations. Additionally, they state that the Respondent disregarded the Constitution and the law contrary to Article 156(4) of the Constitution, section 5(1) (g) of the Office of the Attorney General Act, Section 5B of the *Public Trustee Act*. Flowing from the foregoing, the applicants seek to review the said decision on grounds of illegality, unreasonableness, and breach of procedure. As a consequence, the applicants aver that it is lawful, just, proper and fair that the leave sought be granted.

The 2nd Interested Party's grounds of opposition

13. The 2nd Interested Party filed Grounds of opposition dated 2nd June 2021 stating that the applicant's application abated upon the demise of the 2nd applicant, that the delay between February 2020 and May 2021 has not been explained and the amendment of the application for after 14 months is an abuse of court process.

14. It also states that the applicant's remedy lies in an appeal. Further, the 2nd Interested Party states that the instant application being filed after the dismissal of the applicant's application to join ELC No. 414 of 1996 is an abuse of court process and an attempt to appeal or review both rulings through the back door. It states that under Article 165 of the Constitution, the High Court has no jurisdiction to entertain, by way of an appeal or review a ruling on matters relating to ownership of land. Further, the 2nd Interested Party states that the availability of alternative remedies under private law is a complete answer to the application for leave.

15. Further, the 2nd Interested Party states that the applicants have not explained what interests in the suit lands have been ignored by the Plaintiffs or by the Administrator.

The 2nd Interested Party's Affidavit

16. In addition to the above grounds, the 2nd Interested Party swore the affidavit dated 4th June 2021. He deposed that the amendment to introduce the Interested Parties was done without leave, and that the application for leave was not brought in the name of the Republic. Additionally, he deposed that soon after the impugned order was made, the applicants applied in Mombasa ELC No 414 of 1996 seeking to enjoin the said proceedings as Interested Parties.

17. Further, Mr. Khalifa deposed that the applicants had a right of appeal to the High Court, but he applied to be enjoined in the ELC case. He averred that if the deceased died on 15th February 1922 and the Supreme Court of Kenya found as a fact that the estate was administered in Mombasa P & A Cause No. 108 of 1922, then it is an abuse of court process to discreetly start parallel administration proceedings over the same estate after 95 years. He averred that the Judicial Review remedy is not available to quash the Kadhi's decision because the proceedings are res judicata. He exhibited a copy of the decree and judgment of the Supreme Court rendered in Civil Case No. 264 of 1961.

18. Further, he averred that the applicants seek to vindicate an interest in or over two parcels of land registered in 1923, long after the deceased died in 1922. He averred that the leave sought ought to be refused because the application is an abuse of court process and that the leave would not serve any purpose 95 years after the administration of the deceased's estate. Lastly, he deposed that the surviving applicant has the right to seek intervention of the court in the ongoing civil litigation involving the land.

The applicant's advocates submissions

19. The applicants' counsel submitted that the application is founded on the grounds that the applicants consider the impugned decision to be illegal, unreasonable and in breach of procedure because the

decision effectively abrogated their rights to rightfully inherit the estate. He also submitted that the applicant's application was amended with this courts leave.

20. He submitted that grant of leave in judicial review proceedings is an exercise of judicial discretion as was held in *Felix Kiprono Matagei v Attorney General; Law Society of Kenya (Amicus Curiae)*.[5]

21. Regarding the argument that the 2nd applicant is deceased, he submitted that it is an attempt by the 2nd Interested Party to perpetuate miscarriage of justice based on procedural technicalities. He argued that the verifying affidavit dated 10th February 2020 was signed by the 1st applicant both on his own behalf and on behalf of the 2nd applicant herein. Responding to the argument that the applicant ought to have preferred an appeal, he submitted the scope of judicial review has been expanded under the 2010 Constitution and cited *Judicial Service Commission & another v Lucy Muthoni Njora*[6] which held that there is nothing doctrinally or jurisprudentially amiss or erroneous in a judge's adoption of a merit review in judicial review proceedings.

22. Additionally, counsel cited *Peter Muchai Muhura v Teachers Service Commission*[7] which held that "it is possible for a litigant to apply for and pray for both compensatory relief and orders of judicial review in the same pleading under the current constitutional dispensation. Further, counsel cited *Kenya Human Rights Commission v Non-Governmental Organisations Co-ordination Board*[8] which held that "in exercising its powers to superintend bodies and tribunals with a view to ensuring that Article 47 of the Constitution is promoted, the court is not limited to the traditional judicial review grounds..."

23. On the issue of jurisdiction, counsel argued that by dint of Article 165(6) of the Constitution, this court has jurisdiction to supervise the Kadhi Court and cited *Re Estate of Asman Siva Mudachi (Deceased)*.[9]

24. Counsel argued that the applicants have satisfied the requirements for leave and cited *Republic v Kenya Revenue Authority, Commissioner Ex parte Keycorp Real advisory Limited*[10] in which the court held that at the leave stage, an applicant must show 'sufficient interest' in the matter otherwise known as locus standi; that he/she is affected in some way by the decision being challenged; that he/she has an arguable case and that the case has a reasonable chance of success; the application must be concerned with a public law matter, i.e. the action must be based on some rule of public law; and that the decision complained of must have been taken by a public body, that is a body established by statute or otherwise exercising a public function. He submitted that the applicants are inviting this court to review the validity and legality of the Respondent's decision on grounds that the Respondent exercised its discretion wrongly, and that the Respondent exercised its authority in an illegal and an unreasonable manner in such a way as to amount to breach of the law and procedure.

25. He submitted that the main ground upon which the court set aside its orders was that there was a suit pending at Mombasa High Court and that some of the prayers in that suit directly touched upon the estate of the late Mwana Ana Bint Salim. He submitted that the issues before the said court relates to interests /ownership of various pieces of Land, so, vacating a succession judgment abrogated the

5 {2021} e KLR (Petition 337 of 2018).

6 {2021} e KLR (Civil Appeal No. 486 of 2019).

7 {2015} e KLR.

8 {2016} e KLR.

9 {2020} e KLR.

10 {2019} e KLR.

applicants' rights to inherit which is illegal, unreasonable, and is ultra vires and breach of procedure. He submitted that the said ruling essentially extinguished the applicants' constitutional right to own property contrary to Article 40 (2) (a) of the Constitution without hearing the Public Trustee who was one of the critical parties in the matter. He submitted that the applicants have demonstrated that the impugned decision is ultra vires, illegal, unreasonable and in breach of procedure and relied on *Pastoli v Kabale District Local Government Council & Others*.[11]

The 2nd Interested Party's submissions

26. The 2nd Interested Party's counsel submitted that the application is incompetent because it was not brought in the name of the Republic and that the 2nd applicant is deceased.

27. Regarding the argument that the impugned decision is ultra vires, counsel submitted that the Kadhis court has power to set aside its own orders upon application.[12] He submitted that the instant application is an abuse of court process because the applicants unsuccessfully moved the ELC seeking to be enjoined. Also, he submitted that the applicants failed to appeal against the said decision and also against the decision rendered by the Kadhi's court.

The Public Trustee & the Attorney General

28. On 8th June 2021, counsel for the Public Trustee informed the court that he will not participate in the proceedings. Also, counsel for the Attorney General informed the court that he will not file pleadings.

Determination

29. A pertinent issue which warrants early resolution is whether the instant application is an abuse of court process. In the introductory part of this ruling, I rendered a detailed account of the history of this case. It will add no value to rehash it here. Suffice to state that the said account represents the correct position. It is supported by the court record in this file and in the related matters. There is no dispute that after the impugned ruling was delivered, the applicants applied to be enjoined in HCC ELC No. 414 of 1996. Concurrent with their application in HCC ELC No. 414 of 1996, they also filed the instant application the same day. Interestingly, as noted earlier, no action was taken in the instant application until after the dismissal of their application in HCC ELC No. 414 of 1996. After the said application was dismissed, the applicants fixed their application in this matter for hearing.

30. Significantly, on 10th February 2020, the court directed the applicants to serve their application. Despite the clear court dictate, service was not done. Instead, the applicants' representative approached the court registry and secured a date for hearing ex parte for 6th May 2021. Despite the earlier order decreeing service, again, the applicants never served the application. Instead, the applicants' counsel attended court alone and applied to amend the application, which plea was allowed.

31. It is trite law that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The Black's Law Dictionary defines abuse as "Everything which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use.[13]

11 {2008} 2 EA 300.

12 Citing *Craig v Kansen {1943} 1 AER 108 at 116.*

13 *Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11.*

32. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.[14]

33. The situations that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations: -

    a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

    b. Instituting different actions between the same parties simultaneously in different court even though on different grounds.

    c. Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.

    d. Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.

    e. Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.[15]

    f. Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

    g. Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.

    h. Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.[16]

34. Abuse of judicial process is a term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. Abuse of process can also mean abuse of legal procedure or improper use of the legal process.[17] Abuse of court process creates a factual scenario where litigants are

14 *Public Drug Co V Breyerke cream Co, 347, Pa 346, 32A 2d 413, 415.*

15 *Jadesimi vs. Okotie Eboh (1986) 1NWLR (Pt 16) 264.*

16 (2007) 16 NWLR (319) 335.

17 In the words of **Oputa J.SC** (as he then was) in the Nigerian case of *Amaefule & other Vs The State.*

pursuing the same matter by two court process. In other words, a litigant by the two-court process are involved in some gamble, a game of chance to get the best in the judicial process.[18]

35. A litigant has no right to purse paripasua two processes which will have the same effect in two courts either at the same time or at different times with a view of obtaining victory in one of the process or in both. I have in several decisions decried that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks.

36. There is no dispute that had the application filed in HCC ELC 414 of 1996 was triggered by the ruling the applicants seek to review in these proceedings. In fact, it is he Kadhis Court in the same ruling which advised the applicants to move the said court for joinder so as to ventilate their claims. It is correct to state that had the said application been allowed, the instant application would not have been filed. Perhaps, that is why the applicants kept the instant application in a parking bay after filing it for close to one year and 5 months only to re-activate it after they lost the application in HCC ELC No. 414 of 1996. It is not open for the applicants to institute these Judicial Review proceedings having unsuccessfully sought to be enjoined in the said case. They ought to have appealed against the said ruling. The two processes are in law not available to the applicants.

37. Multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse.[19] The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right per se. The abuse consists in the intention, purpose and aim of the person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice.[20]

38. This obstacle to the efficient administration of justice is not immovable. Tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which such abuse cannot complacently be tolerated consistently with the good order of society. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception, fraud and blatant abuse of judicial processes. All courts have an inherent or implied jurisdiction to prevent their processes from being used as an instrument of oppression. Courts are able to modify their procedures to avoid such prejudice and take any steps that are necessary to prevent an abuse of process.[21]'The concept of abuse of process extends to the use of the court's processes in a way that is inconsistent with two fundamental requirements arising in court proceedings. These are, first, that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizens alike. The second is that unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence. The court's processes will be seen as lending themselves to oppression and injustice.[22]Perhaps I should add that the concept of abuse of process overlaps with the obligation of a court to provide a fair trial. The obligation on a court is to provide a fair trial in accordance with law. The due administration of justice is a continuous process. Courts must be vigilant to ensure that public confidence in the administration

18 Justice Niki Tobi JSC in *Agwusin vs Ojichie*

19 Ibid.

20 Ibid.

21 *Clyne vs New South Wales Bar Association* (1960) 104 CLR 186; *Barton v R* (1980) 147 CLR 75; *Connelly vs DPP* {1964} AC 1254; *Neill vs County Court of Victoria* {2003} VSC 328.

22 *Clark vs R* {2016} VSCA 96 at [14].

of justice is maintained.[23] For the reasons discussed above, I find and hold that the instant application is an abuse of court process, and on this ground, I dismiss it.

39. As was held in *Meixner & Another vs A.G*,[24] the grant or refusal to grant leave involves an exercise of judicial discretion. Leave being a discretionary remedy, it cannot be granted where an applicant has approached the court in circumstances which manifest abuse of court process.

40. Notwithstanding my above findings, I will address the application on merit. It is critical to identify whether the decision of the Kadhis Court is an 'administrative action' within the meaning of the definition at section 2 of the *Fair Administrative Action Act*,[25] thereby rendering it amenable to Judicial Review under section 7 of the FAA Act. The Act defines "administrative action" to include "powers, functions and duties exercised by authorities or quasi-judicial tribunals" or "any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates." The decisive question is therefore whether the judgment, ruling or orders made by a court of competent jurisdiction or a subordinate court such as the decision under challenge in this case can be classified as an administrative action or decision falling with the above definition.

41. The implication of the above definition is that the decision of a public authority or quasi-judicial tribunal is outright amenable to judicial review while the decision of any other person or body is amenable to judicial review if it affects the legal rights or interests of the concerned party.

42. Judicial bodies are the ordinary courts of law - such as the Supreme Court, High Courts and the subordinate courts. A quasi-judicial body is a non-judicial body which can interpret law. It is an entity such as an arbitrator or tribunal board, generally of a public administrative agency, which has powers and procedures resembling those of a court of law or judge, and which is obliged to objectively determine facts and draw conclusions from them so as to provide the basis of an official action.

43. There is a clear distinction between supervisory jurisdiction and judicial review jurisdiction. Supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts. Through supervisory jurisdiction, superior courts aim to keep subordinate courts within their prescribed sphere, and prevent usurpation. In order to exercise such control, the power is conferred on superior courts to issue the necessary and appropriate writs.[26]

44. This power of superintendence conferred by Article 165 (6) of the Constitution, as pointed out by Harries, C.J. in Dalmia Jain Airways Ltd. v Sukumar Mukherjee,[27] is to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors. This power involves a duty on the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power does not vest the High Court with any unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the Court or Tribunal. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principle of law or justice, where grave injustice would be done unless the High Court interferes. As the Supreme Court of India stated unless there was any grave

23 *Moevao vs Department of Labour* {1980} 1 NZLR 464; *Jago vs District Court of NSW* {1989} 168 CLR 23; {1989} HCA 46.

24 {2005} 1 KLR 189

25 Act No. 4 of 2015.

26 *Gallagher v. Gallagher*, 212 So. 2d 281, 283 (La. Ct. App. 1968).

27 AIR 1951 Cal. 193.

miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under Article 165 (6) of the Constitution to interfere.[28]

45. The grounds cited by the applicant clearly show that the Kadhis Court rendered the impugned decision clearly within the limits of its jurisdiction. Even if the Kadhi had either misinterpreted the evidence or the facts or failed to apply the law correctly, or had regard to inadmissible evidence, it does not mean that he misconceived the nature of the inquiry or his jurisdiction or his duties in connection therewith. In my view, it only means that he erred in the performance of his duties within the confines of his jurisdiction. A court 'has the right to be wrong' on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the inquiry – they may be misconceptions about meaning, law or the admissibility of evidence but that is a far cry from saying that they constitute a misconception of the nature of the inquiry or improper exercise of jurisdiction. Such misstates as cited by the applicant are corrected by way of appeal nor review.

46. The power given to the Kadhi by the law was to interpret the law and the evidence, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly.[29] Upon being confronted with the application to set aside the judgment, again, the law on setting aside or reviewing judgments came into play. Errors of the kind mentioned have nothing to do with him exceeding his powers or jurisdiction; they do not amount to illegality or breach of procedure as alleged; they are errors committed within the scope of his mandate. To illustrate, a court in has to apply the law but if he errs in his understanding or application of the law the parties have to live with it or invoke the appellate jurisdiction.

47. Instead of preferring an appeal, the applicants have invoked the supervisory jurisdiction of this court. The power under Article 165 (6) is used sparingly when the Authority/Tribunal has exceeded its jurisdiction or proceeded under erroneous presumption of jurisdiction which is not the case here. The High Court cannot assume unlimited prerogative to correct all species of hardship or wrong decision. For the court to interfere, there must be a case of flagrant abuse of fundamental principles of law or where order of the Tribunal, etc. has resulted in grave injustice. The fact that the applicants are aggrieved by the decision does not amount to grave injustice. What the applicants are citing are pure grounds of appeal as opposed to review which are illegality, irrationality, ultra vires and procedural impropriety.

48. Judicial review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. The role of the court in judicial review is supervisory. It is not an appeal and the court should not attempt to adopt the forbidden appellate approach.

49. Save for the decision in support o tests for granting leave in judicial review proceedings, all the cases cited by the applicants' counsel relate to the substantive application as opposed to the leave stage. In the instant case, the impugned decision is a judicial function, arrived at within the confines of the jurisdiction conferred to the Kadhi by the law, which to me is not amenable to judicial review but is appealable to the High Court. In fact, as severally stated above, the reasons cited by the applicant are grounds of appeal as opposed to grounds for judicial review. It follows that the grounds cited do not meet the threshold for grant of leave.

28 *See D. N. Banerji v. P. R. Mukherjee 1953 SC 58.*

29 *Armah v Government of Ghana* [1966] 3 All ER 177 at 187 quoted in Anisminic Ltd v Foreign Compensation Commission [1969] 1 All ER 208 (HL) at 223D-F.

50. In view of my analysis and the determination of the issues discussed above, the conclusion becomes irresistible that the applicants' amended application dated 31st May 2021 is fit for dismissal. Accordingly, I hereby dismissed the said with costs to the 2nd Interested Party.

Orders accordingly.

SIGNED, DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OFOCTOBER 2021

JOHN M. MATIVO

JUDGE