



REPUBLIC OF KENYA



**KENYA LAW**  
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**Salim v Karama & 5 others (Family Miscellaneous Application  
24 of 2021) [2021] KEHC 9826 (KLR) (26 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 9826 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
FAMILY MISCELLANEOUS APPLICATION 24 OF 2021**

**JO NYARANGI, J  
NOVEMBER 26, 2021**

**BETWEEN**

**TALAL ABDALLA SALIM ..... APPLICANT**

**AND**

**SAID SALIM KARAMA ..... 1<sup>ST</sup> RESPONDENT**

**AHMED SALIM KARAMA ..... 2<sup>ND</sup> RESPONDENT**

**KARAMA SALIMUKARAMA ..... 3<sup>RD</sup> RESPONDENT**

**ALI SALIM KARAMA ..... 4<sup>TH</sup> RESPONDENT**

**FATHIYA SALIM KARAMA ..... 5<sup>TH</sup> RESPONDENT**

**MUNA SALIM KARAM A. .... 6<sup>TH</sup> RESPONDENT**

**RULING**

1. Vide succession cause No E006 /2020 Mariakani Law courts, Said Salim Karama, Ahmed Salim Karama, Karama Salim Karama, Ali Salim Karama, Fathiya Salim Karama and Muna Salim Karama petitioned the Marikiani Kadhi's court for identification of heirs and distribution of assets in respect of the estate of Sahim Salim Karama.
2. After hearing the case through viva voce evidence, the Hon Kadhi delivered his judgment on 21<sup>st</sup> January, 2021 thus distributing the estate to the beneficiaries.
3. However, on 7<sup>th</sup> July , 2021 ,one Talal Abdalla Salim claiming to be a nephew to the deceased moved this court vide a Notice of Motion dated 30<sup>th</sup> June 2021 seeking orders as follows;
  - a. That this application be certified as urgent.



- b. That there be a stay of proceedings in Mriakana Kadhi's court succession case No E006/2021, in the matter of the Estate of Sahim Salim Karama also known as Swabri Salim Karama, pending the hearing and determination of this application.
  - c. That the Mariakani Kadhi's court succession cause No E 006/2021, in the matter of the Estate of Sahim Salim Karama aka Swabri Salim Karama be transferred from the Mariakani Kadhi's court to the Mombasa Kadhi's court for trial and final disposal.
  - d. That the costs of this application be provided for.
4. The application is based on grounds stated on the face of it and averments contained in the affidavit in support sworn on 1<sup>st</sup> July 2021. It is the applicant's case that he has since applied to be enjoined as an interested party in Mariakani Kadhi's court Succ No E006/2021. That the said succession case was filed by the respondents herein in their capacity as brothers and sisters to the deceased without involving him as a nephew to the deceased.
  5. He averred that he came to learn of this matter when he was served with the judgment and decree thereof from the Kadhi's court. That the matter is now pending a ruling in respect of his application seeking to set aside the *exparte* proceedings.
  6. He further averred that he had raised the issue of territorial jurisdiction before the Kadhi's court Mariakani and that the Mombasa Kadhi's court was the right court to hear the suit.
  7. In response, the respondents filed grounds of opposition contending that the application offends Article 170 (5) of *the Constitution* and Order 42 rule 1. They also filed a replying affidavit sworn on 22<sup>nd</sup> July, 2021 by Ahmed Salim Karama and Said Salim Karama on their own behalf and that of the other respondents. It was averred that the applicant is not a direct beneficiary of the estate. That the applicant had applied for review of the Kadhi's court's judgment on 29<sup>th</sup> May, 2021 and a ruling was delivered on 19<sup>th</sup> June, 2021.
  8. They further averred that the applicant had challenged the Kadhi's jurisdiction via a Preliminary Objection which was heard and dismissed through a ruling delivered on 27<sup>th</sup> May, 2021. They deposed that the applicant ought to have appealed against the decision of the Kadhi and not file an application.
  9. When the matter came up for hearing, Mr Khatib for the applicant basically reiterated the content in the affidavit in support of the application. Equally, Mr Abdalla relied on the affidavit in reply. I have considered the application herein, response thereto and oral submissions by both counsel.
  10. The application herein is seeking stay of proceedings before Mariakani court and that the same be transferred to Mombasa Kadhi's court. Among the grounds cited are; the applicant was not consulted when the petition was filed being a nephew to the deceased and that the Mariakani court lacks territorial jurisdiction.
  11. Under Article 170 (5) of *the Constitution*, the jurisdiction of a Kadhi's court is limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceeding in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's court.



12. Upon institution of a suit, any decision arising from the decision of a Kadhis's court is subject to appeal pursuant to Section 50(2) of the Law of Succession Act. For avoidance of doubt, I will reproduce the said section as hereunder;

“an appeal shall lie to the high court in respect of any order or decree made by a kadhi's court in respect of any estate and the decision of the high court thereon shall be final”.

13. According to paragraph 8 of the replying affidavit, the issue of jurisdiction was addressed by the Kadhi's court in its ruling of 27<sup>th</sup> May, 2021. This fact was not controverted. On that ground alone, the application before me purporting to challenge Kadhi's judgment cannot apply. The only remedy then available was to appeal and not to approach the court through an application of this nature. To entertain this argument regarding jurisdiction of the kadhi's court, this court will be encroaching to the original jurisdiction of the kadhi's court as a court of first instance.

14. As regards transfer of the suit, the court is empowered under Section 18 of the Civil Procedure Act to transfer a suit at any stage of the proceedings even from itself to a subordinate court or from one subordinate court to the other. However, in this case, the case has been fully determined without the applicant's participation. To that extent, there is nothing to stay nor transfer. How did he participate in objection proceedings before his joinder as an interested party? Since his application for joinder was pending before he moved to this court, he should have waited for the outcome and then challenge the Kadhi's decision on appeal.

15. It is apparent that the applicant has not exhausted the process of joinder from which he can challenge the Kadhi's decision by review or appeal. To seek transfer of a suit which is already finalized is a futile exercise as there is nothing pending to be heard by the receiving court. Equally, to seek review of the orders of the trial court must be in compliance with the conditions set out under order 45 rule 1 and 2 of the civil procedure rules.

16. Indeed, review cannot substitute an appeal. See Pancras Swai vs Kenya Breweries Ltd (2014) e KLR where the court held ;

“It seems clear to us that the appellant, in basing his review application on the failure by the court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are factus(Sic) officio and have no appellate jurisdiction....”

17. In view of the above finding, it is my holding that the application herein is misplaced and therefore not meritorious. It is consequently dismissed with costs to the respondents.

**DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 26TH DAY OF NOVEMBER, 2021**

**J. N. ONYIEGO**

**JUDGE**

