



**Oge v Kara & another (Environment & Land Petition  
E001 of 2021) [2023] KEELC 18725 (KLR) (17 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18725 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO  
ENVIRONMENT & LAND PETITION E001 OF 2021  
PM NJOROGE, J  
JULY 17, 2023**

**BETWEEN**

**MARE OGE ..... PETITIONER**

**AND**

**HABIBA AILA KARA ..... 1<sup>ST</sup> RESPONDENT**

**KADHI COURT'S MARSABIT ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Petitioner's Notice of Motion dated 22<sup>nd</sup> day of December, 2021 reads as follows; -

Petitioner's Notice of Motion

(Under Section 1A, 1B, 3A of the *Civil Procedure Act*, Under Rules 16 & 17 of the High Court (Organization and Administration) (General) Rules 2016), the inherent jurisdiction of this Court, and all other enabling provisions of the law)

Take Notice that the Environment Court will be moved on the .....day of .....2021 at 9.00 O'clock in the forenoon or so soon thereafter as the Defendants' through their counsel on record, may be heard on this application for orders;-

1. That the petitioner's Notice of Motion dated 22<sup>nd</sup> December be certified urgent and be admitted for hearing during the December vacation.
2. That pending the hearing and determination of this Motion, this Honourable court be pleased to grant and order staying any implementation of the Order of the 2<sup>nd</sup> Respondent, Principal Kadhi, in Succession No. 04 of 2019, given on 21<sup>st</sup> December, 2021 and issued on 20<sup>th</sup> December, 2021 as well as suspending the legality or validity of the same particularly with regards to Title Number Marsabit/Mountain/1725.



3. That the costs of and/or incidental to this Motion be borne by the Respondent.
2. The application has the following grounds;
  1. The Principal Kadhi at Marsabit, on 21<sup>st</sup> December, 2021 gave orders on distribution of the purported estate of Gina Ailla Dae (Deceased) in Succession Case No. E04 of 2019.
  2. The impugned orders (sic) was purportedly given on 21<sup>st</sup> December, 2021 but issued on 20<sup>th</sup> December, 2021.
  3. The Kadhi's Court failed to observe the rights of the Applicant to a fair hearing provided under Article 50 of *the Constitution* as her advocates on record, Messrs Njoroge Wachira & Company Advocates, were not informed of any hearing.
  4. The Applicant's advocate had filed a Preliminary Objection dated 23<sup>rd</sup> September, 2021 which was not heard and determined by the Kadhi's Court and the court had not issued any directions with regards to the Preliminary Objection.
  5. The Respondent's advocate had also not served the Applicant's advocate with a response to the Preliminary Objection despite being served with the Preliminary Objection.
  6. The court did not give a ruling on the Preliminary Objection or notified the Applicant of any directions with regards to hearing, submissions or ruling.
  7. The actions of the Kadhi's court is therefore a blatant breach of Article 50 of *the Constitution*.
  8. The Principal Kadhi has issued orders directing the County Surveyor to subdivide the property including Title Number Marsabit/Mountain/1725 which belongs to the Applicant.
  9. The Kadhi has also ordered the OCS Marsabit Police Station to provide security as the said parties are given their share.
  10. The Applicant has been informed that the process is to begin on Thursday 23<sup>rd</sup> December, 2021.
  11. Previously, the Applicant had challenged the decision of the Kadhi's Court in Marsabit High Court Civil Appeal No. 19 of 2019, where the judge on 27<sup>th</sup> January, 2021 set aside the decision of the Kadhi and ordered the Kadhi to hear all the relevant parties including owners of the Title Number Marsabit/Mountain/1726 and other affected titles.
  12. The Kadhi nor the Respondents have not made any effort to serve on the affected 3<sup>rd</sup> parties who still stand to suffer the same fate if the orders are not stayed.
  13. Given the hostility among the family amid the continuing security tensions in Marsabit and the challenge faced by the Security organs to maintain peace, it would be in the interest of Justice to stay the Kadhi's orders pending the hearing and determination of this Application.
  14. The Applicant thus prays for a stay of the order of the Marsabit Kadhi's Court issued on 20<sup>th</sup> December, 2021, for the above reasons.

Dated At Nairobi This 22<sup>Nd</sup> Day Of December, 2021.

Njoroge Wachira & Company



3. Although the Petitioner filed this application, he did not file a substantive Petition. Therefore, in some respect, this application lacks a foundation such as is provided by a substantive suit. Indeed, there is not petition in this matter.
4. On 14/2/2022, the parties were directed to canvass this application by way of written submissions. The applicant was directed to file and serve his submission within 30 days and the respondents were directed to do so within 30 days after receipt of the applicant's submissions.
5. On 18/7/2022 Miss Nyasani who held brief for the Petitioner's advocate misled the court by intimating that the Petitioner had filed submissions. The Petitioner filed his submissions on 3<sup>rd</sup> July, 2023 over 4 months after expiry of the period this court had stipulated. There was no explanation at all concerning this inordinate delay. As a consequence, I strike out the Petitioner's submissions filed on 3<sup>rd</sup> July, 2023 but backdated to read as signed on 26<sup>th</sup> April, 2022 FOR being filed out of the stipulated time and without the court's leave.
6. A conspectus of the 1<sup>st</sup> respondents' submissions dated 18<sup>th</sup> May, 2023 is that this application is an abuse of the court process as similar issues had been ventilated in Marsabit High Court Civil Appeal No.17 of 2012 and were therefore res judicata that case. He says that the Kadhis court at Marsabit performed its duties as allowed by *the constitution* and, therefore, there was no infringement of the Petitioner's rights as enriched under Articles 40,50 and 162 of *the Constitution* of Kenya. The 1<sup>st</sup> Respondent asks the court to disallow the application.
7. A conspectus of the 2<sup>nd</sup> respondent's submissions filed by the Marsabit Kadhi Mr M.A Mahmoud is that;
  - a. He acted upon an order of the High Court in Marsabit High Court Civil Appeal No.17 of 2012 TO REHEAR the matter in accordance with Islamic Tenets and precepts.
  - b. He delivered Judgement as specified by Holy Quran and as mandated by Article 170 of *the Constitution* of Kenya.
  - c. That he afforded all the concerned parties' opportunities to be heard.
  - d. In the circumstances, he submitted that the Petition should be dismissed with costs to the 2<sup>nd</sup> respondent.
8. I have carefully gone through all the proceedings proffered in this matter. I am however constrained to refer to the decision of the High Court at Marsabit in Civil Appeal No. 17 of 2019. The Learned Hon. S Chitembwe, found as follows;

“....The respondent is entitled to claim the land whether it is Plot 50, 1393 or 1275. I do review the Judgement dated 19<sup>th</sup> February, 2020 by making the following orders; -

  - a. The Appellant's appeal is hereby allowed and the Judgement of the trial court is set aside.
  - b. The succession cause is hereby remitted to the Kadhis' Court in Marsabit to be heard afresh in view of the new information.
  - c. Those who purchased land from the deceased namely Joseph Mare Guyo and Hassan Morse Sarbo together with Ali Doyo Kassim shall be at liberty to participate in the fresh hearing as interested parties.



d. There shall be no order as to costs.”

9. The court notes that the appellant, Mare Oge, in Marsabit High Court Civil Appeal No. 17 of 2019 is the same person as Mare Oge who is the applicant herein.
10. I find that some of the issues raised in this matter are res judicata Marsabit High Court Civil Appeal No. 17 of 2019. I also find that the Marsabit Kadhi conducted the Impugned proceedings as mandated by *the constitution* of Kenya and afforded all parties opportunities to be heard.  
Finally, I find that no constitutional fundamental rights were infringed by the Kadhi when he heard the case in question and arrived at his impugned Judgement.
11. I declare that I have no authority and/or jurisdiction to overrule the findings made by a court of concurrent jurisdiction in Marsabit High Court Civil Appeal No. 17 of 2019 (S Chitembwe, J)
12. In the circumstances, the following orders are issued;
  - a. The Notice of Motion application dated 22<sup>nd</sup> December, 2021 is hereby dismissed.
  - b. As the Applicant has not filed a substantive Petition, this matter is marked as closed.
  - c. As a consequence of this ruling, the interlocutory orders issued by this court in favour of the applicant are Automatically Vacated.
  - d. Costs shall follow the event and are awarded to the respondents.

**DELIVERED IN OPEN COURT AT ISIOLO THIS 17<sup>TH</sup> DAY OF JULY, 2023 IN THE PRESENCE OF**

**COURT ASSISTANT: BALOZI**

Mr Nyenyire for the 1<sup>st</sup> Respondent.

Mr Adan Dadacha absent for the Petitioner.

Kimathi for 2<sup>nd</sup> Respondent.

**HON. JUSTICE P.M. NJOROGE**

**JUDGE**

