



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL 16 OF 2017

ALI MOHAMED KARAMA..... APPELLANT

VERSUS

AMINA SHEIKH MOHAMED.....RESPONDENT

RULING

1. Ali Mohamed Karama, the Appellant herein has by his application dated 25.2.2020 come to this Court seeking that the Hon. Chief Kadhi be disqualified and recused from sitting as an assessor at the hearing of the Appeal herein. The Appellant also seeks an order that another Kadhi other than the Hon. Chief Kadhi be appointed and designated by an order of the Court to sit as assessor at the hearing of the Appeal. The Appeal is against the judgment of Hon. Principal Kadhi Abdulhalim Athman delivered on 25.4.17 in Mombasa Kadhi Succession Cause No. 167 of 2015.

2. The Application is premised on the grounds set out in the Appellant's affidavit sworn on 25.2.2020. The Appellant avers that he is apprehensive that the Hon. Chief Kadhi cannot act or be seen to act impartially if he sits as assessor. It is alleged that the Hon. Chief Kadhi delivered the judgment appealed against, on 25.4.17, yet he did not preside over the trial. At the time he delivered the judgment, the trial Kadhi was present at the station. Further, the Hon. Chief Kadhi did not read the judgment but signed it and instructed the Court assistant to pass the same on to the parties who were waiting in open Court for the delivery. According to the Appellant, the conduct of the Hon. Chief Kadhi was without legal decorum and impartiality and was a violation of procedure and due process of law. There is no indication in the judgment that the same was delivered on behalf of the trial Kadhi. As a result of the foregoing, the Appellant is of the view that it would be unjust and inappropriate for the Hon. Chief Kadhi to sit as assessor in the Appeal herein.

3. The Respondent opposed the Application by means of her replying affidavit sworn on 9.3.2020. She averred that upon the conclusion of the matter, the trial Kadhi was transferred to a different station. The Respondent asserted that the Hon. Chief Kadhi did not preside over the trial. His involvement was only in delivery of the judgment, which he did in the presence of both parties, signed and handed the same over to the parties. Parties only became aware of the presence of the trial Kadhi in the Court precincts when they were leaving. No prejudice has been demonstrated to have been suffered by the Appellant by the delivery of the judgment by the Hon. Chief Kadhi. Similarly, no partiality on the part of the Hon. Chief Kadhi, has been demonstrated. The mere apprehension of bias by the Appellant is without any basis and should not be used to disqualify the Hon. Chief Kadhi. It was further averred that the role of the Hon. Chief Kadhi is to advise the Court on Islamic law. Order 21 Rule 3(2) of the Civil Procedure Act only requires a judge pronouncing judgment to sign and date the same. There is no requirement to indicate that the judgment is delivered on behalf of another judge.

4. The Application was heard by way of oral submissions by the parties' respective counsel.

5. For the Applicant, it was submitted that contrary to the requirements in the Rules, the judgment was not read in open Court, but handed over to the parties by the Hon. Chief Kadhi. The trial Kadhi did not deliver the judgment yet he was in Court, a fact admitted by the Respondent. From the face of the record, the judgment was delivered by 2 Kadhis. The Appellant contended that she does not know when the Hon. Chief Kadhi got the judgment from the trial Kadhi and whether he changed the same. For this reason, it was argued, the Appellant is apprehensive that the Hon. Chief Kadhi cannot be impartial as he sits as assessor in the Appeal herein, but will be biased in favour of the Respondent. This to the Appellant, goes to the root of integrity of the process in the administration of justice. It was further submitted that in the last ground of appeal, the Appellant will criticize the Hon. Chief Kadhi, which will be embarrassing to him if he sits as assessor. The Appellant further argued that the fact that the Respondent opposes the recusal of the Hon. Chief Kadhi justifies her fears and another Kadhi should be appointed to sit as assessor.

6. The Respondent countered the Applicant's contention by submitting that the Hon. Chief Kadhi did not participate in the trial and further that judgment was delivered in the presence of both parties. Citing Order 21 Rule 3(2) of the Civil Procedure Rules, the Respondent contended that a judicial officer is required to sign and date judgment. There is no requirement for the Hon. Chief Kadhi to give reasons for delivering judgment on behalf of the Hon. Kadhi. Any prejudice that would have been suffered as a result of the delivery of the judgment by the Hon. Chief Kadhi would be suffered by both parties. Further, that the role of the Kadhi as assessor is to advise on Islamic law. How a

judgment is delivered is a procedural issue and not one for determination by the Hon. Chief Kadhi. The Respondent further argued that there was no evidence of impartiality on the part of the Hon. Chief Kadhi.

7. I have looked at the judgment. The last page contains the following words in print:

“Dated and delivered on 25th April 2017

ABDULHALIM ATHMAN

PRINCIPAL KADHI”

The bottom of the page contains the words:

“Delivered on 25.4.17 by CK”

8. Both the trial Kadhi and the Chief Kadhi signed the judgment.

9. Order 21 Rule 3 of the Civil Procedure Rules provides:

(1) A judgment pronounced by the judge who wrote it shall be dated and signed by him in open court at the time of pronouncing it.

(2) A judgment pronounced by a judge other than the judge by whom it was written shall be dated and countersigned by him in open court at the time of pronouncing it.

(3) ...

10. It is clear from the foregoing provision that a judgment shall be dated and signed in open Court at the time of pronouncing the same. Where a judgment is delivered by a judicial officer on behalf of the one who wrote it, such judicial officer shall countersign and date the same at the time of pronouncing it. Rule 3 requires that judgment be pronounced in open Court. The impugned judgment contains the signature of the trial Kadhi and the countersignature of the Hon. Chief Kadhi, and date. The words “and delivered” in the part signed by the trial Kadhi ought to have been omitted given that he is not the one who delivered the judgment. My view, is that given that the judgment contains the date and signature of the Hon. Chief Kadhi, the requirement that the judicial officer pronouncing the judgment countersigns and dates the same at the time of pronouncement, was met.

11. On the claim that the Hon. Chief Kadhi did not read the judgment, it is not clear from the material before the Court whether the Hon. Chief Kadhi read the judgment or not at the time he countersigned the same. The Appellant claims he did not do so, while the Respondent claims that the Hon. Chief Kadhi read the finding, in the judgment. It is trite law that he who alleges must prove. Section 107 of the Evidence Act provides:

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

12. The burden of proving that the judgment was not read by the Hon. Chief Kadhi, but was only handed over to the parties was squarely on the Applicant. This burden was not discharged to the satisfaction of the Court.

13. The Appellant further contended that the trial Kadhi did not deliver the judgment though he was present at the station. The Respondent claimed that the trial Kadhi had proceeded on transfer to another station after the parties closed their respective cases. This fact was not controverted by the Appellant. The fact of the trial Kadhi being present at the station on the date judgment was delivered is not disputed.

14. It is not uncommon that there are and will be situations when a judicial officer is unable to deliver his judgments. The reasons for this are varied. This is why provision for just such situations has been made under Order 21 Rule 3 of the Civil Procedure Rules. When such a situation arises, the judicial officer pronouncing judgment on behalf of a colleague, is required to countersign and date the same at the time of delivery. It is not known why the trial Kadhi was at the station on the date of the delivery of the impugned judgment and the Court cannot venture into speculation. The presence of the trial Kadhi on the date his judgment was delivered on his behalf by the Hon. Chief Kadhi does not in any way invalidate the same, provided that it was dated and countersigned at the time of delivery.

15. I now turn to the issue of perceived bias. The Appellant contends that the Hon. Chief Kadhi, having dealt with the judgment will be biased against him. Given the circumstances of this case, is there reasonable ground for possibility of bias? Are the circumstances herein likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice as alleged by the Appellant? The test of bias is objective and the facts constituting the same must be specifically alleged and established. In the case of Philip K. Tunoi & Another v Judicial Service Commission & another [2016] eKLR, the Court of Appeal observed regarding bias:

“The House of Lords held in R v. Gough [1993] AC 646 that the test to be applied in all cases of apparent bias was the same, whether being applied by the Judge during the trial or by the Court of Appeal when considering the matter on appeal, namely

whether in all the circumstances of the case, there appeared to be a real danger of bias, concerning the member of the tribunal in question so that justice required that the decision should not stand.

The test in R v. Gough was subsequently adjusted by the House of Lords in Porter v. Magill [2002] 1 All ER 465 when the House of Lords opined that the words “a real danger” in the test served no useful purpose and accordingly held that –

“[T]he question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

In determining the existence or otherwise of bias, the test to be applied is that of a fair-minded and informed observer who will adopt a balanced approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias.

16. In the present case, would a fair minded and informed observer having the facts as set out herein, adopting a balanced approach, conclude that there is a real possibility that the Hon. Chief Kadhi will be biased. There is no evidence that the Hon. Chief Kadhi, wrote the judgment. As has been established herein, the Hon. Chief Kadhi’s involvement in the matter in the Court below was limited to the delivery of the judgment. Is the reason that the judgment was delivered by the Hon. Chief Kadhi, sufficient to draw a conclusion that he will not be impartial as an assessor in this appeal?

17. The requirement that the Hon. Chief Kadhi shall sit as an assessor on an appeal to this Court from the Kadhis’ Courts is stipulated in Section 65(1)(c) of the Civil Procedure Act which provides as follows:

“(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—

(c) from a decree or part of a decree of a Kadhi’s Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.”

18. It must be remembered that the role of the Hon. Chief Kadhi as assessor, in the appeal herein is to assist the Court on issues of Islamic law. How and by whom the impugned judgment was delivered is not a matter of Islamic law. Moreover, the Court is not bound by the opinion of the Hon. Chief Kadhi. The ultimate decision lies with the Court. It would appear to me therefore that the perception of bias or partiality on the part of the Hon. Chief Kadhi is misplaced.

19. In the result therefore, this Court finds that the facts cited by the Applicant, would not lead to the conclusion that there is a possibility that the Hon. Chief Kadhi will be biased and will not be fair or impartial. The apprehension by the Applicant, is in my view, both unfounded and unreasonable and cannot form a justifiable basis for recusal of the Hon. Chief Kadhi. In the premises the Application dated 25.2.2020 lacks merit and is hereby dismissed. Costs in the cause.

DATED, SIGNED and DELIVERED in MOMBASA this 29th day of May, 2020

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**