



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISCELLANEOUS CIVIL CASE NO. 26 OF 2020

SHABAN KHAMIS.....1ST APPLICANT

KHALID KHAMIS.....2ND APPLICANT

RAMADHAN AVINA.....3RD APPLICANT

MBALE JAMIA MOSQUE COMMITTEE.....4TH APPLICANT

VERSUS

HAJJ AMANI.....1ST RESPONDENT

AKWIVISIRA MBARAKSEIT.....2ND RESPONDENT

RAJAB ARADI.....3RD RESPONDENT

RULING

1. This matter was referred to me from the Vihiga Principal Magistrate’s Court, vide a letter dated 14th March 2020, for me to give effect to an order that the Principal Kadhi had made in Vihiga PKCCC No. 1 of 2020, on 16th April 2020, for transfer of the matter to the Magistrate’s Court for disposal and that the file be placed before the High Court for transfer.

2. The suit in Vihiga PKCCC No. 1 of 2020 was initiated by the parties, who have be designated in the instant cause as respondents, as against the parties, designated herein as applicants. The dispute centred around the management of a mosque at Mbale, where the applicants were accused of failing to call elections, holding office illegally and misusing funds and property belonging to the mosque. The respondents sought that the applicants be barred from holding office, from accessing the mosque’s bank accounts and the freezing of said bank accounts. The respondents contemporaneously filed a Motion, dated 23rd March 2020, for interim relief, with respect to the management of the mosque, among other orders.

3. Upon being served with the plaint and the Motion, the applicants entered appearance, filed a joint defence, a notice of preliminary objection and submissions. In the defence, they averred that the Kadhi’s court had no jurisdiction over the matter, arguing that the issues raised in the plaint were better disposed of within the context of the Societies Act. The notice of preliminary objection turned on the same point, and so were the written submissions.

4. When the matter was placed before the Principal Kadhi, Hon. DS Ratori, on 16th April 2020, the court made the orders that I have recited above, at paragraph 1 of this ruling, inclusive of an order that Hon. Ratori had recused himself from the matter, as the parties had sought to engage him, ostensibly outside of the judicial process.

5. The issues that arise in this matter relate to the jurisdiction of the Kadhi’s Court. The Kadhi’s court is a creature of the Constitution of Kenya, through Articles 169 and 170, which state as follows:

“Part 3—Subordinate courts

169. (1) The subordinate courts are—

(a) ...

(b) *the Kadhis' courts;*

(c) ...

(d) ...

(2) *Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1).*

170. (1) ...

(2) ...

(3) *Parliament shall establish Kadhis' courts, each of which shall have the jurisdiction and powers conferred on it by legislation, subject to clause (5).*

(4) ...

(5) *The jurisdiction of a Kadhis' court shall be limited to 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 and submit to the jurisdiction of the Kadhi's courts."*

6. Articles 169 and 170 of the Constitution command Parliament to pass legislation to confer jurisdiction, functions and powers on the Kadhi's court. The jurisdiction of the Kadhi's court is stated by the Constitution itself at Article 170(5). The legislation in place is the Kadhi's Court Act, Cap 11, Laws of Kenya. The legislation has been in force since 1967. It would appear that Parliament is yet to re-enact the said statute, or pass a new one, to align it to the Constitution, 2010, or, at any rate to comply with Articles 169(2) and 170(3) of the Constitution. Nonetheless, the jurisdiction of the Kadhi's court stated in Article 170(5) of the constitution, is word for word that in section 5 of the Kadhis' Courts Act, which states:

"The 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."

7. The rules of procedure to be followed by the Kadhi's court are stated in section 8 of the Kadhis' Courts Act, which provides as follows:

"8. Procedure and practice

(1) The Chief Justice may make rules of court providing for the procedure and practice to be followed in Kadhis' courts.

(2) Until rules of court are made under subsection (1), and so far as such rules do not extend, procedure and practice in a Kadhi's court shall be in accordance with those prescribed for subordinate courts by and under the Civil Procedure Act."

8. The Chief Justice has not yet made the rules of procedure required of him under section 8(1) of the Kadhi's Court Act. However, that has not left the said court in a state of flux, for section 8(2) states that in such event the Civil Procedure Act, and by extension, the Civil Procedure Rules, would apply. There is, therefore, no vacuum so far as rules of procedure are concerned. The application by section 8(2) of the Kadhi's Court Act, of the Civil Procedure Act to proceedings conducted by the Kadhi's court, would mean that the said court is bound to apply the rules of procedure as set out in the Civil Procedure Act and Rules to their fullest. The said court is bound each and every one of those rules. The jurisdiction that the Kadhi's court exercises, as stated in Article 170(5) of the Constitution and section 5 of the Kadhi's Courts Act, is civil in nature, hence the provision in section 8(2) of the Kadhis' Court Act, that the Civil Procedure Act should govern the proceedings of that court in the event the Chief Justice does not make the rules envisaged in section 8(1).

9. The jurisdiction exercisable by the Kadhi's court is limited to matters of a personal nature, that is to say matters resolving around personal status, marriage divorce or inheritance. It would appear that anything outside the matters set out in Article 170(5) of the Constitution and section 5 of the Kadhi's Court Act would be outside the jurisdiction of the said court. The Kadhi's court does not exist to handle disputes of any sort or character between Muslims, or where the parties are exclusively Muslims. It exists only for the limited purpose of determining disputes of the nature delineated by Article 170(5) of the Constitution and section 5 of the Kadhi's Courts Act. The dispute, the subject of Vihiga PKCCC No. 1 of 2020, revolves around the management of a mosque. It has nothing to do with personal law, and, therefore, it falls outside the scope of Article 170(5) of the Constitution and section 5 of the Kadhi's Court Act, meaning, therefore, that the Kadhi's court has no jurisdiction over the dispute.

10. The matter has been placed before me so that I can make an order for transfer of the dispute to the magistrate's court. Do I have jurisdiction to do that?

11. I have stated above, that section 8 of the Kadhi's Court Act has applied the Civil Procedure Act to the Kadhis court. I have also held that the said court is bound fully by that law. That law provides for transfer of suits, and that, by dint of section 8 of the Kadhi's Court Act, would

include suits pending or filed at the Kadhi's court. Those provisions are in sections 17 and 18 of the Civil Procedure Act, under which only the High Court has jurisdiction to transfer suits from one court to another.

12. The two provisions provide as follows:

“17. Where a suit may be instituted in any one of two or more subordinate courts, and is instituted in one of those courts, any defendant after notice to the other parties, or the court of its own motion, may, at the earliest possible opportunity, apply to the High Court to have the suit transferred to another court; and the High Court after considering the objections, if any, shall determine in which of the several courts having jurisdiction the suit shall proceed.

18. (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage –

(a) transfer any suit, appeal or other proceedings pending before it for trial or disposal to any other court subordinate to it and competent to try or dispose of the same; or

(b) withdraw any suit or other proceedings pending in any court subordinate to it, and thereafter –

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any other court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the court from which it was withdrawn;

(2) ... ”

13. The two key words used in sections 17 and 18 of the Civil Procedure Act are “jurisdiction” and “competent.” The suit to be transferred should be before a court of competent jurisdiction and ought to be transferred to a court of competent jurisdiction. The Court of Appeal has variously made determinations on transfer of suits by the High Court, in exercise of the powers in sections 17 and 18 of the Civil Procedure Act, and has been emphatic that the High Court can only transfer suits that are competent or have been filed in a court with competent jurisdiction, and that any suit that has been filed in a court without jurisdiction or competence is not available for transfer, and the High Court has no jurisdiction, under sections 17 and 18 of the Civil Procedure Act, to order transfer of such suit.

14. It bears stating that the matter of jurisdiction looms large over transfer of suits. If a suit was filed in a court that has no jurisdiction, then that anomaly cannot be cured by merely moving the suit from that court, which lacks jurisdiction, to the court with jurisdiction. Jurisdiction is at the heart of any proceedings, and without it nothing moves. The Court of Appeal said as much, in *Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd* [1989] eKLR:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

15. In *Equity Bank Limited vs. Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR, the Court of Appeal said, on the subject of transfer of suits:

“In numerous decided cases, courts, including this Court, have held that it would be illegal for the High Court in exercise of its powers under section 18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled law that parties cannot even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the “O2” principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the same.”

16. In *Phoenix of EA Assurance Company Limited vs. SM Thiga t/a Newspaper Service* (2019) eKLR, the same court said:

“... Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If the suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction upon itself ...”

17. There can be no contestation that the dispute that was placed before the Principal Kadhi, in Vihiga PKCCC No. 1 of 2020, did not fall within the parameters set in Article 170(5) of the Constitution and section 5 of the Kadhi's Court Act for suits to be heard by the Kadhi's court. That would mean that the suit was placed before a court which did not have jurisdiction, and, therefore, the suit itself was incompetent. Going by the decisions that I have cited above, it would follow that there is no competent suit to be transferred, and I have no jurisdiction, sitting as a judge of the High Courts to order transfer of an incompetent suit I, therefore, decline to do what the Principal Kadhi has requested me to do. The suit in Vihiga PKCCC No. 1 of 2020 is as dead as dodo. It cannot be transferred. There is nothing to transfer. Let the parties obtain guidance from *Phoenix of EA Assurance Company Limited vs. SM Thiga t/a Newspaper Service* (supra).

18. The original records in Vihiga PKCCC No. 1 of 2020 to be returned to the relevant register at Vihiga Law Courts.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 26th DAY OF JUNE, 2020

W. MUSYOKA

JUDGE