



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

MISCELLANEOUS APPLICATION NO. 4 OF 2019

ASHA HAMISI NIMUTENDEAPPLICANT

VERSUS

MWARONGA NASSORO NASSORO..... 1ST RESPONDENT

MWINYI HAMISI SHEE MBETO..... 2ND RESPONDENT

RULING

1. By a Notice of Motion dated 26.2.19 brought under Articles 165 (6) and (7) & 169 (1) (b) of the Constitution of Kenya, 2010, Sections 1A, IB, 3,3A and 63(e) of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 22 Rule 52 & Order 51 Rule 1of the Civil Procedure Rules, 2010 Asha Hamisi Nimutende, the Applicant herein seeks the following orders:

1. ***THAT this matter be certified as extremely urgent and service be dispensed with in the first instance.***
2. ***THAT this Honourable Court be pleased to issue orders for stay of execution of all orders issued by Hon. Said Hamisi Bedzenga in Kwale Kadhi's Succession Cause No. 186 of 2015 pending the hearing and determination of this application.***
3. ***THAT this Honourable Court be pleased to call for the records of the Kwale Kadhi's Succession Cause No. 186 of 2015 from Kwale subordinate Court's civil registry.***
4. ***THAT this Honourable Court be pleased to order that the proceedings in Kwale Kadhi's Succession Cause No. 186 of 2015 irregular, unprocedural and are in abuse of the court process and in breach of the right to fair hearing and therefore void ab initio.***
5. ***THAT this Honourable Court be pleased to order that the proceedings and subsequent orders issued in Kwale Kadhi's Succession Cause No. 186 of 2015 are vacated and/or discharged forthwith.***
6. ***THAT this Honourable Court makes such other Orders it deems fit in the circumstances.***
7. ***THAT this Honourable Court grants costs of the Application.***

2. The Applicant claims that she and her siblings are the sole beneficiaries to the estate of their grandfather Abdalla Kisinyo. The 1st Respondent filed Succession Cause No. 186 of 2015 without the knowledge of the Applicant and obtained title in respect of Kwale/Waa/114 (the property) in their favour. Following an application, the Applicant was enjoined in the proceedings. She further claims that without an application for review, the Hon. Kadhi sat on appeal of his own judgment of 15.6.15 and issued orders to the effect that the Applicant's family and that of the 2nd Respondent should inherit the property in equal shares. The Applicant claims that the 1st Respondent is a descendant of a distant cousin of the deceased. On his part, the 2nd Respondent laid claim to the property by claiming to be a descendant of the sister to the deceased Abdalla Kisinyo when in fact the deceased was an only child. The Applicant states that she did not prefer an appeal as the records are not proper as observed from the Court's ruling of 30.10.18. Without a proper record, an appeal would prejudice the interests of the Applicant and her siblings.

3. In a replying affidavit sworn on 20.5.19 Mwinyi Hamisi Shee Mbeto the 2nd Respondent averred that the succession matter relates to the property which was registered in the names of Mwanakombo Nguwe and Abdalla Kisinyo in equal shares. By an order of 15.6.15, the property was vested in the names of Suleiman Omar Mwaronga and Mwaronga Nassoro Nassoro the 1st Respondent. Following the evidence of the Applicant upon her being enjoined in the matter, the Court ordered that the property be shared equally between the heirs of

Mwanakombo Nguwe and Abdalla Kisinyo. The 2nd Respondent further stated that the Kadhi's decision cannot be challenged through this Application.

4. The 1st Respondent did not participate in the matter herein. Parties relied on their affidavits filed in Court.

5. I have considered the application and the rival affidavits. The issue for determination is whether this Court can call for the record of the succession matter in the Kadhi's Court on grounds that the proceedings therein are irregular, unprocedural and an abuse of the court process and in breach of the right to fair hearing and therefore void *ab initio*. The Court is then asked to order that the said proceedings and subsequent orders be vacated and/or discharged forthwith.

6. The Constitution of Kenya 2010 clothes this Court with supervisory jurisdiction over subordinate Courts which under Article 169(1) include the Kadhis Courts. This Court may in exercise of its supervisory jurisdiction call for the record of any proceedings before any subordinate court and may make any order or give any direction it considers appropriate to ensure the fair administration of justice. Article 165(6) and (7) provide:

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice

7. The record shows that the Applicant after being enjoined participated in the succession proceedings and presented her case. It would appear that at that point she did not have a problem with the proceedings. The Applicant now finds fault with the proceedings having been aggrieved by the Hon. Kadhi's decision of 25.10.18. The remedy available to the Applicant in my view, was to file an appeal against the decision of the Hon. Kadhi. In this regard, I agree with the Respondent that the decision of the Hon. Kadhi cannot be challenged by means of this miscellaneous application. The Applicant ought to have filed an appeal against the said decision. The supervisory jurisdiction is not to be invoked where an appeal should be filed.

8. The Applicant says that she and her siblings are the sole beneficiaries of the estate of Abdalla Kisinyo. I have looked at the succession petition. It is in respect of the estates of Mwanankombo Ngulue and Abdalla Kisinyo. The 2nd Respondent sought *inter alia* a determination of the heirs of the estates and distribution of the same in accordance with Islamic law. My view therefore is that the succession matter is properly before the Kadhi's Court.

9. The Court notes that the ruling was delivered on 25.10.18 and the Application herein was filed on 26.2.19. It would appear to me therefore that upon realizing that the time for filing an appeal had lapsed, the Applicant opted to file the Application herein. To allow the instant Application would be tantamount to allowing an appeal of the decision of the Hon. Kadhi through the back door.

10. In Fredrick Karanja Mbui v Simon Ndichu Nyiha & 2 Others [2013]eKLR, Ogola, J. had this to say:

It is true that the High Court has supervisory powers and jurisdiction over the lower court. This power is exercisable with caution and only where the inferior court has exceeded its jurisdiction or where a party's constitutional rights are being or about to be abrogated through the process in that inferior court.

However, there is no power granted to this court to transfer a matter from an inferior court to this court simply because the Applicant is unhappy with the decisions made by the inferior court. In such circumstances the option for the Applicant is to appeal to this court through the normal appellate procedure. This application, if granted, would amount to this court giving appellate reliefs to party through the back door.

11. I agree with the Ogola, J that Article 165 of the Constitution Court does not empower this Court to exercise its supervisory jurisdiction over a lower Court simply because a party is aggrieved by the decision of that Court. No evidence has been placed before this Court to demonstrate that the Kadhi's Court exceeded its jurisdiction or that the Applicant's constitutional rights have been abrogated through the proceedings in the Kadhi's Court.

12. In the end therefore, I find that the Application lacks merit and the same is dismissed with costs to the 2nd Respondent.

DATED, SIGNED and DELIVERED in MOMBASA this 21st day of June 2019

AMENDED ON 26th day of June 2019

M. THANDE

JUDGE

In the presence of: -

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

..... for the 1st Respondent

..... for the 2nd Respondent

..... Court Assistant