



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**PETITION NO. 20 OF 2017**

**IN THE MATTER OF CHAPTER FOUR ON THE BILL OF RIGHTS OF THE CONSTITUTION OF THE SOVEREIGN  
REPUBLIC OF KENYA, 2010**

**AND**

**IN THE MATTER OF CONSTITUTION OF KENYA (SUPERVISORY) JURISDICTION AND THE PROTECTION OF THE  
FUNDAMENTAL RIGHTS OF THE INDIVIDUAL HIGH COURT PRACTICE AND PROCEDURE RULES, 2006**

**AND**

**IN THE MATTER OF ARTICLE 1, 2, 3, 10, 12(1)(A), 19, 20, 21, 22, 23, 27(4), 35(2), 40, 47, 50, 64, 73(1)(A) AND 129 OF THE  
CONSTITUTION OF THE SOVEREIGN REPUBLIC OF KENYA 2010**

**IN THE MATTER OF CONTRAVENTION OR BREACH OF THE CONSTITUTION OF KENYA TO WIT ARTICLE 258**

**AND**

**IN THE MATTER OF INTERPRETATION, IMPLEMENTATION AND ENFORCEMENT OF THE CONSTITUTION OF  
KENYA TO WIT ARTICLE 259**

**AND**

**IN THE MATTER OF KADHI'S COURT AT MALINDI; SUCCESSION CAUSE NO. 87 OF 2008; IN THE MATTER OF THE  
ESTATE OF THE LATE BATUL OMAR MAHENDAN (DECEASED)**

**AND**

**AHMED MOHAMED HONEY.....PETITIONER**

**AND**

**IN THE MATTER OF KADHI'S COURT AT MALINDI SUCCESSION CAUSE NO. 35 OF 2016; IN THE MATTER OF THE  
ESTATE OF THE LATE MARIAM SHARIF SALIM ALI.....PETITIONER**

**AND**

**IN THE MATTER OF THE KADHI'S COURT AT MALINDI SUCCESSION CAUSE NO. 27 OF 2017; IN THE MATTER OF  
THE ESTATE OF THE LATE SHARIF SALIM ALI (DECEASED) FATMA SHARIF SALIM (PETITIONER)**

**BETWEEN**

**FATMA SHARIF SALIM.....1<sup>ST</sup> PETITIONER**

**MARYAM SHARIF SALIM.....2<sup>ND</sup> PETITIONER**

**ALI SHARIF SALIM.....3<sup>RD</sup> PETITIONER**

ELVINA KIBIBI BAIMU.....4<sup>TH</sup> PETITIONER  
KAMARIA SHARIF SLAIM.....5<sup>TH</sup> PETITIONER  
ZUHURA SHARIF SALIM.....6<sup>TH</sup> PETITIONER  
OMAR SHERIFF SALIM.....7<sup>TH</sup> PETITIONER  
TWAHA SHERIFF SALM.....8<sup>TH</sup> PETITIONER

**VERSUS**

AHMED MOHAMED HONEY.....1<sup>ST</sup> RESPONDENT  
NURU OMAR MAHENDAN.....2<sup>ND</sup> RESPONDENT  
MARIAM OMAR MAHENDAN.....3<sup>RD</sup> RESPONDENT  
FARIDA OMAR MAHENDAN.....4<sup>TH</sup> RESPONDENT  
ANZUN OMAR MAHENDAN.....5<sup>TH</sup> RESPONDENT  
MALKIA OMAR MAHENDAN.....6<sup>TH</sup> RESPONDENT  
FERRUZ OMAR MAGHERAM.....7<sup>TH</sup> RESPONDENT  
KADHI COURT-MALINDI.....8<sup>TH</sup> RESPONDENT

**RULING**

**[THE 2<sup>ND</sup>, 3<sup>RD</sup>, 5<sup>TH</sup> AND 6<sup>TH</sup> RESPONDENTS' NOTICE OF PRELIMINARY OBJECTION DATED 27<sup>TH</sup> SEPTEMBER, 2017]**

1. Nuru Omar Mahendan, Mariam Omar Mahendan, Anzun Omar Mahendan and Malkia Omar Mahendan being the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents have filed a notice of preliminary objection against the Petition of Fatma Sharif Salim, Maryam Sharif Salim, Ali Sharif Salim, Elvina Kibibi Baimu, Kamaria Sharif Salim, Zuhura Sharif Salim, Omar Sherif Salim and Twaha Sherif Salim, the 1<sup>st</sup> to 8<sup>th</sup> petitioners respectively. Ahmed Mohamed Honey, Farida Omar Mahendan, Ferruz Omar Maghram and the Kadhi's Court at Malindi being the 1<sup>st</sup>, 4<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents did not participate in the submissions concerning the preliminary objection.

2. The grounds upon which the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents object to the Petition are:

**“1. This court lack jurisdiction to hear and determine both this petition and the application dated the 18<sup>th</sup> day of September, 2017.**

**2. The petition is in violation of the Constitution.**

**3. The application and the petition is an abuse of the court process some of the prayers being statutorily time-barred.**

**4. Constitutional petition is not the right forum to address the issues raised.”**

3. The petitioners opposed the preliminary objection.

4. The matter was disposed off through written submissions. Through the submissions dated 27<sup>th</sup> September, 2017, the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents' counsel asserted that through the chamber summons filed together with the Petition, the petitioners seek orders in relation to the occupation, possession and ownership of land portion number 332 Malindi which orders can only be granted by the Environment and Land Court established by Article 162 of the Constitution. On that score, it is asserted that this court has no jurisdiction to hear and determine the instant Petition.

5. Counsel for the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents concludes on this point by positing that the same violates Article 162(2)(b) of the Constitution, Section 101 of the Land Registration Act, 2012 and Section 150 of the Land Act, 2012 for being filed before the wrong court.

6. The second ground taken up by the said respondents is that the Petition seeks an order of certiorari against the judgement and order of distribution issued on 28<sup>th</sup> December, 2016 by the 8<sup>th</sup> Respondent. It is the respondents' position that an order of certiorari can only issue

within six months from the date of the decision it seeks to quash and in the instant case, the order the petitioners seek to quash was made nine months prior to the filing of the Petition. They assert that the prayer sought is statutorily time-barred and the petitioners cannot purport to use a constitutional petition to do acts that are in violation of legislation.

7. The third ground upon which the named respondents seek to dismiss the Petition is that the matter is before the wrong forum. According to them, the petitioners ought to have filed objection proceedings before the Kadhi's Court. They conclude that there is nothing constitutional about this Petition and seek its dismissal with costs.

8. The petitioners filed submissions dated 29<sup>th</sup> September, 2017 vehemently opposing the preliminary objection. On the issue of jurisdiction, they submitted that this court has the requisite jurisdiction to hear and determine this Petition. They pointed out that the Petition is in regard to an order from the Kadhi's Court exercising its jurisdiction as mandated by Article 170(5) of the Constitution. Their view is that what is before this court is a question of inheritance and distribution of the estate of a deceased person which falls into the category of questions of Muslim law relating to personal status, marriage, divorce or inheritance.

9. The petitioners assert that it is not prudent for the respondents to allege that this Petition should have been instituted in the Environment and Land Court considering that the dispute is not over ownership and/or proprietary claim of the suit land but is a succession dispute in nature.

10. Further, the petitioners contend that Section 50(2) of the Law of Succession Act, Cap. 160 provides that appeals from any order or decree made by Kadhi's Court in respect of the estate of a deceased Muslim lies to this court.

11. According to the petitioners, the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents having instituted several judicial review applications in this court staying the proceedings in the Kadhi's Court are estopped by their conduct from questioning the jurisdiction of this court.

12. The petitioners wrap up their submissions on the question of jurisdiction by stating that Article 165(6) provides that the High Court has supervisory jurisdiction over subordinate courts, any person, body or authority exercising a judicial or quasi-judicial function.

13. Turning to the other grounds raised in the preliminary objection, the petitioners submit that having established that this court has jurisdiction, the other issues do not fall into the realm of preliminary objections as they are not capable of disposing of this petition on points of law.

14. As to whether the order of certiorari sought is time-barred, they contend that the issue does not arise as this is not a judicial review application but a constitutional petition.

15. When a party challenges the jurisdiction of a court to hear the dispute before it, the court should determine the question of jurisdiction promptly, in order to determine whether to down its tools or proceed with the matter.

16. That jurisdiction is the foundation upon which the court launches its inquiries into the issues presented to it by the parties is not in dispute. In **Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another [2014] eKLR** the Court of Appeal observed that:

**“[A] court’s jurisdiction flows from either the Constitution or statute or both... It cannot be assumed or donated by parties or arrogated by the court itself. Jurisdiction is everything and if a court does not have it, it downs tools.”**

17. The question then is whether this court has jurisdiction to deal with the subject matter of this Petition. A perusal of the Petition dated 18<sup>th</sup> September, 2017 and the chamber summons application filed with it discloses that the petitioners seek orders in respect of parcel number 332 as dealt with in various succession causes before the Kadhi's Court. That being the case, the subject of the Petition is the succession causes. Nobody is asking the court to determine a dispute relating to the use and occupation of, and title to the land in question outside the issue as to who should inherit the said land from the deceased registered owner. If indeed the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents are honest about the question of jurisdiction then they ought to have taken it up before the Kadhi's Court. I need not say more in order to demonstrate that the claim that this court lacks jurisdiction to hear this matter has no merit. The preliminary objection in so far as it raises the issue of jurisdiction therefore fails.

18. The other grounds raised by the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents go to the root of the Petition and they cannot be addressed before a fully pledged hearing. It would thus be prejudicial to the parties for this court to address those issues at this stage.

19. The result is that the preliminary objection has no merit and the same is dismissed. The costs to abide the outcome of the Petition.

**Dated, signed and delivered at Malindi this 17<sup>th</sup> day of April, 2018.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**