



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA MOMBASA

MISCELLANEOUS APPLICATION NO. 79 OF 2011

IN THE MATTER OF: THE CONSTITUTION OF KENYA

=AND=

IN THE MATTER OF: THE KADHI'S COURT ACT CAP. 11 LAWS OF KENYA

=AND=

IN THE MATTER OF: LAND CONTROL ACT OF CAP. 302 LAWS OF KENYA

=BETWEEN=

REPUBLIC.....APPLICANT

=VERSUS=

THE KADHI'S COURT AT MOMBASA.....RESPONDENT

=AND=

M H M.....EX-PARTE APPLICANT

=AND=

K F Y.....INTERESTED PARTY

JUDGMENT

Introduction

1. The Ex-parte Applicant herein seeks the Judicial Review order of Certiorari to remove into the Honourable Court for quashing the proceedings and order of the Kadhi's Court at Mombasa given on the 11th July 2011, in Civil Suit No. 263 of 2009. The grounds for the application are that the Kadhi's Court heard an ex-parte application dated the 6th July 2011 and on the said 11th July 2011, granted orders in breach of the rules of natural justice which orders were void and *ultra vires* the Kadhi's Court's Jurisdiction. The Ex-parte Applicant brought this application following grant of leave by the Court.

2. The facts of the case relied on by the EX-PARTE APPLICANTS are set out in the Verifying Affidavit sworn by M H M on the 28th July 2011 that:

1. The Ex-parte Applicant was the Defendant in Civil Case No. 263 of 2009 at the Kadhi's Court in Mombasa, which case was determined on 25th May 2011 (copy of the order given attached as 'A'). the order, given under the hand of Honourable Sheikh Twalib B. Mohamed read to the effect that upon reading the judgment in the presence of the Plaintiff's (the Interested Party herein) advocates and in the absence of the Defendant, it is thereby ordered;

- a. That the divorce be and was thereby confirmed and divorce certificate ordered to be issued to the Plaintiff upon payment of requisite fees.
- b. That the Defendant was thereby compelled to finalize the transfer of the former matrimonial house to the Plaintiff's sole

name.

c. That custody of the minor child namely, S M H be given to the Plaintiff with maintenance to be paid by the Defendant.

d. That costs be paid to the Plaintiff.

2. Immediately after the suit was determined, the Interested Party through her advocates made a Notice of Motion Application dated 6th July 2011 seeking for orders inter-alia that the Interested Party be allowed to break open the gate and door to the Ex-parte Applicant's house on Plot No. [particulars withheld], Mtwapa (copy of said application annexed as 'B').

3. The Notice of Motion Applicant dated 6th July 2011 was heard ex-parte on 11th July 2011 when an order granting the prayers as sought was given immediately thereupon (copy of said order annexed as 'C').

4. The Ex-parte Applicant avers that he is the lawful owner of the suit property, having purchased it from its previous owner Muma Koban Binti Salim (copy of Land Control Board Consent and Agreement for Sale in the Ex-parte Applicant's favour attached as 'D').

5. The Ex-parte Applicant asserts that he was never given an opportunity to oppose the application that led to the grant of the order and that in granting the said order, the Kadhi's Court relied on an agreement date 28th April 2003 which had been annexed to the Interested Party's application as Exhibit A.

6. The Ex-parte Applicant asserts that the said agreement dated 28th April 2003 is void for lack of consent from the Land Control Board and by reason thereof the order given on 11th July 2011 was also void in itself.

7. It is further asserted that the Kadhi's Court did not have jurisdiction under the Constitution to give the orders given on 11th July 2011.

Respective Cases of the parties

The ex parte applicant's case

3. The Notice of Motion of 10th August 2011 seeking orders of certiorari to remove into the Honourable Court for the purpose of quashing the proceedings and order of the Kadhi's Court in Civil Suit No. 263 of 2009 was founded on grounds that-

1. The Respondent heard an ex-parte application dated 6th July 2011 filed by the Interested Party.

2. An application was heard ex-parte and an order granting the prayers sought given on 11th July 2011.

3. The said order was given in breach of the rules of natural justice as the Ex-parte Applicant was never given chance to oppose the application despite the drastic effect of the order.

4. The order is a nullity as the Kadhi's Court does not have jurisdiction to preside over property matters.

5. The order is in itself a nullity as it gives effect to a transaction that had become void for want of the Land Control Board Consent as provided by the Land Control Act Cap 302 Laws of Kenya.

6. It is in the interest of justice to grant the order sought.

The respondent's case

4. The respondent did not file any response to the application.

The interested Party's cases

5. The Interested Party chose to rely on the Grounds of Opposition filed on the 16th September 2011 that:

1. The application is incurably defective, incompetent and bad in law.

2. The Application is not grounded in law.

3. The Respondent's actions were fully within its jurisdiction and that,

4. The application is otherwise an abuse of the court process.

Submissions

6. The ex parte applicant filed written submissions and urged that the application dated 6th July 2011 before the Kadhi's Court was heard *ex parte* on 11th July 2011 and an order granting the prayers as sought was given immediately thereupon. In light of the drastic effect of the order in question, to with the breaking in to the Ex-parte Applicant's house and the taking of possession of the said house by the Interested Party, the Ex-parte Applicant submits that in accordance with the rules of natural justice, he ought to have been given a chance to present his case to the Kadhi's Court. The Ex-parte Applicant submits that the jurisdiction of the Kadhi's Court is limited to matters of Islamic personal laws of marriage, divorce and inheritance where both parties profess the Muslim religion and submit to the Kadhi's Court's jurisdiction. In Civil Case No. 263 of 2009 the Kadhi's Court purported to rely on an agreement dated 28th April 2003 to decide that the house on Plot No. [particulars withheld] belonged to the Interested Party. The Ex-parte Applicant submits that the Honourable Kadhi failed to consider the fact that he did not have the authority to rule on the ownership and possession of the house as matter dealing with property are beyond the purview for the Kadhi's Court jurisdiction. The Ex-parte Applicant further submits that even if the Kadhi indeed had the jurisdiction to make the impugned order, which he asserts the Kadhi did not, the Kadhi ought to have considered the fact that agreement on which his decision was based related to a controlled transaction and that it did not meet the statutory pre-requisite for such a transaction under the law. It is submitted that **Section 6 (1) of the Land Control Act** that was then in force provides:

6.(1) Each of the following transactions.

(a)

(b)

(c) *The issue, sale, transfer, mortgage or any disposal or dealing with any share in a private company or Co-operative Society which for the time being was agricultural land situated within a control area is void for all purposes unless the Land Control Board for the area or division in which the land is situated has given its consent in respect of the transaction in accordance with this Act.*

In effect, the agreement 28th April 2003 which the Kadhi relied on in making his decision was void for want of consent and therefore the Kadhi ought not to have purported to give effect to a nullity. The Ex-parte Applicant relies on the authority of ***Simiyu v. Watambamala*** (1985) KLR 852 on this issue and submits that whether the Kadhi's Court had jurisdiction or not, the order that it gave on 11th July 2011 was still a nullity having been based on nullity.

8. The Interested Party did not file written submissions choosing to rely on the pleadings filed.

Determination

9. In the absence of an affidavit to rebut the averments of fact that the application leading to the impugned order was heard ex parte, without opportunity to be heard being granted to the applicant, the Court must find that the rules of natural justice were violated.

10. The jurisdiction of the Kadhi's Court is clearly set out in Article 170 (5) of the Constitution and section 5 of the Kadhi's Court Act cap. 11 to relate to '*determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance*'. Determination of property disputes even between spouses or former spouses is not one of the matters within its competent jurisdiction.

11. It is trite law that an agreement for the transfer, disposal or other dealing of agricultural land is void for all purposes if the consent of the Land Control Board for the transaction is not obtained in accordance with section 6 of the Land Control Board Act. See ***Simiyu v Watambamala*** (1985) KLR 852.

12. In view of the above, the ex parte applicant's case herein for the grant of the order of certiorari is unanswerable.

13. The Notice of Motion for judicial review order of Certiorari herein is granted with costs as prayed.

Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 17TH DAY OF APRIL, 2018.

E. K. OGOLA

JUDGE

Appearances:

M/S A.O. Hamza & Co. Advocates for the Ex Parte Applicants.

Ms. Namahia, Litigation Counsel for the Respondent.

M/S A. A. Mazrui & Co. Advocates for the Interested Party.