



**Athuman v Rajab & 2 others (Environment and Land Miscellaneous Application
E001 of 2023) [2023] KEELC 21701 (KLR) (21 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21701 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E001 OF 2023
LG KIMANI, J
NOVEMBER 21, 2023**

BETWEEN

MOHAMMED ATHUMAN APPLICANT

AND

JUMA MUSA RAJAB 1ST RESPONDENT

RAJAB MUSA 2ND RESPONDENT

MAHMOUD MUSA 3RD RESPONDENT

RULING

1. Before the court is an Application filed under Notice of Motion dated 30th June 2023, seeking for the following orders:
 1. That the proposed Appellant be granted leave to appeal out of time against the whole ruling and orders of the Hon. M. Mvudi (Senior Resident Kadhi), delivered on 12th November 2019 at Kitui.
 2. That the Memorandum of Appeal annexed hereto be deemed as duly filed and served.
 3. That the costs of this application be in the cause.
2. The application is supported by the affidavit of the Applicant who claims that he purchased Plot No. 19 (37) loc, Market 02/SV/19(37) from the duly appointed administrator of the estate of Rajab Hajji one Juma Rajab (now deceased) vide a sale agreement dated 30th June 2014.
3. By its decision delivered on 28th October 2015 in Succession Cause 426 of 2014, the High Court revoked the grant issued to Juma Rajab (now deceased) and directed that the succession cause be heard afresh.



4. Vide a ruling delivered on 12th November 2019, and a subsequent order dated 28th November 2023, the Hon. M. Myudi (Senior Resident Kadhi) canceled the sale agreement entered into between the Appellant and the then administrator Juma Rajab in view of the revoked grant by the High Court. This was as a result of the application by the 1st Respondent to be appointed an administrator in Succession Cause No.7 of 2019.

The Respondent's Preliminary Objection

5. The Respondents filed a preliminary objection dated 17th July 2023 on the following points:
 1. That the honourable court has no jurisdictions to hear; act or determine this application. (This is the wrong forum).
 2. That the Appellant does not have the requisite locus standi to be instituted and prosecute the Notice of Motion dated 30th June 2023 and the appeal and as such the present application is fatally defective, incompetent, an abuse of the court process and the same should be struck out and dismissed with costs to the respondents.

Hearing of the Preliminary Objection

6. The preliminary objection was heard on the 17th of October 2023 where Mr. Wambua Counsel for the Respondents objected to the jurisdiction of this Court to hear and determine the application dated 30th June 2023. He cited the Court's jurisdiction under Section 13 of the [Environment and Land Court Act](#) and Article 162(2)(b) of the [Constitution](#) of Kenya 2010.
7. Counsel referred to the jurisdiction of the Kadhi's court under Article 170 of the [Constitution](#) which covers succession matters among people of the Islamic faith. He also cited the Kadhi's court order 1977 as well as the [Kadhi's Courts \(Practice and Procedure Rules\) 2020](#) at regulation 86 which states that an appeal from the Kadhi's court shall be made to the High Court and an appeal from the High Court shall lie to the Court of Appeal.
8. He noted that the intended appeal arises from a succession cause at the Kadhi's Court, stating that the substratum of the matter was not a land issue but a succession dispute since the Kadhi has no jurisdiction over land matters.
9. In response to this, counsel for the Applicant Mr. Maingi submitted that Article 162(2)(b) of the [Constitution](#) clearly states that this court has the same status as that of the High Court and that the only question is whether the ruling that he is seeking leave to appeal touches on occupation, use or title to land.
10. Counsel for the Applicant stated that among the orders sought was the cancellation of the sale of the suit property and that the Kadhi sitting as a probate court acted beyond his powers by revoking the sale yet the parties were not involved in the case and submitted that the court had no jurisdiction to cancel a sale agreement.
11. Counsel for the Applicant relied on the ruling in Succession Cause 122 of 2010 Estate of Gideon Maundu Nzioki where the Court referred the matter of a property acquired by third parties, to the Environment and Land Court. It is therefore his submission that where the issue in contention relates to use, occupation and title to land in accordance with Article 162(2)(b), then this court is the appropriate forum to allow the applicant to pursue the appeal and his right to own property under Article 40.



12. In response thereof counsel for the Respondents Mr. Wambua submitted that an interested party who is not a beneficiary cannot file new proceedings. He also submitted that the authority submitted to the Court is irrelevant since the matter was not one filed at the Kadhi's Court and they are both guided by different laws and reiterated that the appeal should lie at the High Court as a Probate and Administration Case and urged the Court to down its tools as it is not within its mandate.

Analysis and Determination

13. The ruling and order the Applicant seeks to appeal from was issued in the Kadhi's Court at Kitui in Succession Cause 7 of 2019 on the 12th of November 2019 in respect of the application by one Juma Musa Rajab. In the said application Juma Musa Rajab sought to be appointed administrator of the estate of Rajabu Hajji (Deceased). He also sought to have the sale of the only property in the estate of Rajab Hajji (deceased) Plot No.19(37) loc, Market 02/SV/19(37) to Juma Athumani and Mohamed Athumani (the Applicant herein) be canceled in view of the revocation of grant dated 19th June 2014 by the High Court. He further sought to have the suit property preserved and protected pending the determination of the cause. All the prayers sought were granted by the Kadhi's Court.
14. Thereafter, the Applicant herein made an application in the same succession cause seeking to have the grant of letters of administration made to Juma Musa Rajab revoked or the Certificate for Confirmation of Grant be rectified to include him as a purchaser. Hon. Mvudi, Principal Kadhi, by a ruling dated 5th June 2023 dismissed the application citing lack of jurisdiction. The applicant subsequently filed the application before this court.

Ground 1: Does this Court have the jurisdiction to hear and determine the matter at hand?

15. According to the *Black Law Dictionary* a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

16. The above legal preposition has been made graphically clear in the now famous case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd*. [1969] E.A. 696. Where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure point of law. The Learned Judge then held that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

17. The objection on jurisdiction is certainly a preliminary issue since jurisdiction is everything and the court cannot take any further steps if it lacks the requisite jurisdiction. The often-cited case on jurisdiction is *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR where the Court held that:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue



right away on the material before it. 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

18. The jurisdiction of the Environment and Land Court is derived from Article 162(2)(b) of the Constitution of Kenya, 2010 where the court’s jurisdiction to hear and determine disputes relating to the environment and the use and occupation of, and title to, land is established and Section 13 of the Environment and Land Court Act.

19. On the other hand, the scope of the jurisdiction of the Kadhi’s Court is found under Article 170 (5) which provides that:

“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.”

20. The above is replicated in section 5 of the Kadhi’s Court Act, CAP 11 Laws of Kenya. From the description of the jurisdiction of Kadhi’s Courts, it is clear that land disputes save for inheritance and issues concerning Muslim law do not fall within the scope of the said courts. The question is whether this particular case falls within the jurisdiction of the Environment and Land Court.

21. There is no contest that the suit from which the applicant seeks to appeal was a succession cause within the jurisdiction of the Kadhi’s Court. Counsel for the Applicant wishes to convince the court that even, then the matter of cancellation of the agreement for sale of the suit property is a land matter and touches on occupation, use or title to land which is within the jurisdiction of this court. Counsel for the Respondents on the other hand contends that appeals such as what the Applicant is seeking only lie to the High Court and not the Environment and Land Court.

22. The Kadhis’ Courts (Procedure and Practice) Rules provides as follows at Rule 86:

“An appeal against the decision of the Kadhi’s court shall be made to the High Court, and against the decision of the High Court to the Court of Appeal.

(2) An appeal shall be made by giving a notice of appeal.

(3) An appellant may appeal against the whole or any part of a decision.

(4) The notice of appeal shall be filed within thirty days from the day on which the decision was pronounced, and shall state whether the whole or part only, and what part, of the decision is appealed against.”

23. Section 50(2) of the Law of Succession Act provides that:

“An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi’s Court in respect of the estate of a deceased Muslim and, with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.”



24. The Court in the case of *Republic v Khamis Ramadhani, Senior Resident Kadhi, Mombasa; Said Ahmed Jafaar (Interested) Ex parte Jaafar Ahmed Jaafar* [2019] eKLR held as follows:

“The Kadhi proceeded to determine what constituted the estate and who the beneficiaries were. He concluded by stating that the estate was to be valued and beneficiaries to file proposals on the best mode of distribution. The appeals from the Kadhi’s Court in matters of inheritance or personal law lie to the High Court and not the Environment and Land Court. Section 50 (2) of the *Law of Succession Act* provides that, “an appeal shall lie to the High Court in respect of any order or decree made by a Kadhi’s Court in respect of the estate of a deceased Muslim and with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.”

The proceedings complained of were undertaken in a Succession Cause which the Environment and Land Court is not clothed with jurisdiction to hear and determine by virtue of the provisions of article 162(2) of the *Constitution* and Sec 47 -50 of the Succession Act. Further under article 165 of the *Constitution*, the Kadhi’s Court is not one of the courts and or tribunals that the Environment and Land is clothed with powers to supervise. In summary, this Court lacks jurisdiction to entertain the dispute as presented.”

25. In the present case the Kadhi’s Court was dealing with a succession matter and all matters pertaining 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 fall under the jurisdiction of the Kadhi, with the option of appeal to the High Court. It is thus the finding of this court that an appeal from Kadhi’s Court in the Succession Cause under consideration in this case does not lie to this court but to the High Court and thus this court lacks jurisdiction to hear and determine an application such as the one before the court.

2. Does the Applicant have the requisite locus standi in this application?

26. The second ground in the Respondents’ Preliminary objection is that the intended Appellant does not have the requisite locus standi to institute and prosecute the instant application.

27. Having found that this court lacks jurisdiction to hear and determine the application dated 20th June 2023, this court has to down its tools since without jurisdiction, 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 and a court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. (as per *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (supra)*)

28. Final orders of the court are:

1. The preliminary objection dated 17th July 2023 has merit and the same is hereby upheld.
2. The application dated 30th June 2023 is hereby struck out.
3. Costs are awarded to the Respondents.

DELIVERED, DATED AND SIGNED AT KITUI THIS 21ST DAY OF NOVEMBER, 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE - KITUI

The ruling was read in open court and virtually in the presence of:

Musyoki Court Assistant.



Maingi for the Applicant
Wambua for the Respondent

