



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

MISC. CIVIL APPLICATION CASE NO. 30 OF 2016

NADH'YA MOHAMED.....1ST RESPONDENT

ABDULHUSSEIN.....2ND RESPONDENT

VERSUS

HASSAN MOHAMED ABDALLA.....1ST APPLICANT

FAYADH MOHAMED ABDALLA.....2ND APPLICANT

MUNIB MOHAMED ABDALLA.....3RD APPLICANT

RULING

The application dated 26.5.2016 seeks the following orders:-

- i) That, the file comprised of KCC No. 18 of 2015 at Lamu be transferred and vested in the subordinate Court Lamu or Mpeketoni.
- ii) That the Honourable Court be pleased to stay proceedings in KCC No. 18 of 2015 pending hearing and determination of the application herein or further orders of the court.
- iii) That the Honourable Court be pleased to make other orders it deems fit and just to meet the ends of justice.
- iv) That the costs of the application be provided for.

The application is supported by the affidavit of the 2nd applicant sworn on the same date and a supplementary affidavit of the same applicant filed on 29.6.2016. The respondent filed a replying affidavit sworn on 15.6.2016. Parties agreed to determine the application by way of written submissions.

The main issue being raised by the applicants is that the issue in dispute does not fall within the jurisdiction of the Kadhi's Court. Section 18 of the Civil Procedure Act allows this court to have the dispute transferred from the Kadhi's Court in Lamu to the Subordinate Court. The court can do so on its own or on an application by a party. The Kadhi's Court is acting without jurisdiction as its jurisdiction is limited to questions of Muslim Law relating to personal status, marriage, divorce and inheritance. The

issue in dispute involves an alleged denial or refusal of access by the respondent's relatives. The issue of jurisdiction was raised before the Kadhi who was of the view that the dispute involved the estate of the late Mohamed Abdala alias Mohamed Abdulhussein. If that were the case, then the Kadhi would be required to identify the estate and the rightful heirs of the deceased and then distribute the estate. That is not the dispute before the Kadhi. There is also duplicity in the dispute as there is another case before the ELC Court in Malindi vide Case No. 243 of 2015. The remedy would be to transfer the matter before the Kadhi's Court and consolidate it with ELC matter.

Counsel for the respondent opposed the application. The applicants raised the objection before the Kadhi's Court and the Kadhi made a ruling. The Kadhi held that he had jurisdiction to determine the dispute as the matter concerned the distribution of the parties' late father's estate. The sons took the big house while the daughters who include the respondent took a small house. Therefore, the issue in dispute involves the distribution of an estate of a Muslim. The applicants ought to have applied for review of the ruling or lodge an appeal instead of filing the current application. The applicants were fully aware of the matter before the Kadhi's Court and they proceeded to file another suit before the ELC Court in Malindi. The applicants are guilty of nondisclosure and have come to court with unclean hands. The applicants are trying to frustrate the determination of the suit which is pending before the Kadhi's court.

I have read the petition No. 18 of 2015 which is pending before the Kadhi's Court at Lamu. The parties herein are brothers and sisters. The dispute arises out of a house which was inherited from the parties' deceased parent. The respondent states that she lives on the 3rd floor of the house. The applicants carted away her building materials and do not allow her to keep anything for her own use in her house. Further, the 2nd applicant has registered Plot Number 498 into his own name to the exclusion of all others and is planning to sell off Plot Number 609. The respondent is seeking an order to stop the selling of the plot and the nullification of the registration of Plot Number 498 in one of the applicant's name.

I have read the ruling of the Hon. Kadhi dated 4.4.2016 in relation to a preliminary objection. The pleadings also include an order of the same Kadhi issued on 17.12.2015 which order deals with some of the issues in dispute. The order under its paragraph 3 restrained the respondents who are the current applicants from interfering with the current respondent's occupation of her portion of inheritance. The respondent was also allowed to continue with the construction of the 3rd floor of the premises. The Kadhi also dealt with the issue relating to Plot Number Lamu/Block 1/609.

It is therefore clear to me that the Kadhi is well versed with the issue in dispute and has dealt with it before. The succession petition was filed before the Kadhi's Court and the applicants filed their response dated 16.5.2016. There was no issue raised by the applicants in relation to the jurisdiction of the Kadhi to handle the dispute. It is clear that the case is still pending before the Kadhi's court and the estate will be distributed. Upon hearing the parties, the Kadhi is well placed to determine the dispute. It is clear to me that Civil Suit No. 245 of 2015 pending before the ELC Court was filed after the suit before the Kadhi's Court was filed. The best way forward would be to have the case pending before the Kadhi's Court determined so that issues relating to inheritance can be determined. The fact that the dispute involves land cannot stop the Kadhi's Court from hearing the matter. The properties in dispute were inherited and it has to be established how the share of each beneficiary is ascertained.

I do find that the current application is simply intended to scuttle the determination of the dispute pending before the Kadhi's Court. I do find that the Kadhi's Court has jurisdiction to hear and determine Succession Cause No. 18 of 2015 pending before the court. The application dated 26.5.2016 lacks merit and is hereby dismissed with costs to the respondent.

Dated, signed and delivered in Malindi this 29th day of March, 2017.

S.J. CHITEMBWE

JUDGE