



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**FAMILY DIVISION**  
**CIVIL APPEAL 15 OF 2016**

**PETER MUCHERU NJUGUNA..... APPELLANT**

**VERSUS**

**FATUMA AHMED ABDULRAHMAN**

**HUSSEIN MOHSEN MOHAMED**

**MOHAMED MOHSEN MOHAMED**

**NOOR MOHSEN ALBEITY.....RESPONDENTS**

**RULING**

***(An Appeal from the Ruling of Hon. Sheikh Abdulhalim H. Athman, Principal Kadhi delivered on 7.4.16 in Mombasa Succession Cause No. 171 of 2012)***

1. The Appeal herein arose from the Ruling of Hon. Sheikh Abdulhalim H. Athman, Principal Kadhi delivered on 7.4.16 in Mombasa Succession Cause No. 171 of 2012 in respect of the estate of Mohsen Mohamed Albeity. In the said Ruling, the Hon. Principal Kadhi dismissed the Appellant's application dated 30.10.15.

2. The brief background of this matter as can be gleaned from the record is that the Appellant had filed High Court Civil Case No. 337 of 1996 against the deceased who was his landlord in respect of premises where the Appellant operated a studio. His claim was that the deceased had blocked the Appellant's studio premises by erecting a wall of iron sheets. In the process, the Appellant had lost goods and cash worth Kshs. 1,060,000/=. He had also lost business worth Kshs. 138,651/90 when the studio was closed for 145 days. In a Judgement delivered on 24.9.10, the High Court awarded the Appellant Kshs. 450,000/= for the lost goods, Kshs. 50,000/= as exemplary damages and costs. By an order of 5.5.15, the taxing master declined to tax the Appellant's bill of costs as he found that the suit had abated. The Appellant was unable to execute the decree.

3. Kadhi Court Succession Cause No. 171 of 2012 was filed by Noor Mohsen Mohamed a daughter of the deceased seeking a determination on what constitutes the estate of the deceased, the heirs of the deceased and their share in the estate. A judgement was delivered on 24.4.14 by the Hon. Principal Kadhi. The Application by the Appellant was filed on 30.10.15. The Appellant sought to be enjoined in the proceedings before the Kadhi's Court. He also sought the setting aside of the proceedings therein touching on Plot No. 1743/VI/MN ("the suit property") on the ground that the suit property was under attachment under an order of the High Court. He claimed that the entries on the title to the suit property

showing that the attachment had been lifted and the suit property transferred to Ahmed M. Mohamed were fraudulent.

4. In his Judgement, the Hon. Principal Kadhi found that the Appellant had no locus standi being a person not professing the Muslim faith. The Hon. Principal Kadhi, also found that the Kadhi's Court was *functus officio* as the matter before him had been finalized and the estate of the deceased distributed. The Hon. Principal Kadhi further found that the Kadhi's Court lacked jurisdiction to hear the matter as the decree in favour of the Appellant had been issued by the High Court and it is at the High Court that the Appellant should have applied for enforcement.

5. The Grounds of appeal in summary are that the learned Kadhi erred in law and fact in that he:

- a) Took proceedings in a skeleton file without the benefit of the original record.
- b) Found that the Appellant had no locus standi in the matter in that he does not profess the Islamic religion yet the cause was dealing with rights to property attached in Mombasa HCCC No. 337 of 1996.
- c) Found that the decree in HCCC No. 337 of 1996 had abated.
- d) Disregarded the said decree which rendered the suit land unavailable for distribution as part of the estate of the deceased.
- e) Found that the Court was *functus officio* when he ruled on the Appellant's Application and failed to hear the Application on merit and establish the serious allegations of fraud.
- f) Failed to hold that he had no jurisdiction to determine the matter as the Property belonged to the Appellant and did not form part of the estate of the Deceased.
- g) Held that the Respondents had a share in the Property which is duly registered in the Appellant's name.

6. The parties filed written submissions which were highlighted before the Court and in the presence of the Honourable Chief Kadhi as assessor.

7. The issues for determination herein are:

- a) Whether the Appellant had locus standi in the matter in the Kadhi's Court.
- b) Whether the Hon. Kadhi had jurisdiction to hear the matter.
- c) Whether the Kadhi's Court was *functus officio* when the Application dated 30.10.15 was filed by the Appellant.

8. The jurisdiction of the Kadhi's court is set out in Article 170(5) of the Constitution which provides:

***“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.”***

9. Appellant who acted in person submitted that he approached the Kadhi's Court as a decree holder and not as a Christian. As such, he had locus standi. For the Respondents, it was submitted parties in the Kadhi's Court must be Muslims and must submit to the jurisdiction of the Kadhi's Court. As indicated in Article 170(5) of the Constitution, the jurisdiction of the Kadhi's Court is limited to "*proceedings in which ALL the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts*" (*emphasis added*). While the Court notes that the Appellant submitted to the jurisdiction of the Kadhi's

Court, the fact remains that he is not a Muslim. For this reason, no action of whatever nature brought by him may be entertained in the Kadhi's Court for want of *locus standi*.

10. The Appellant further submitted that the Hon. Principal Kadhi erred in not hearing the case on merit. For the Respondent's, it was submitted that the Appellant's cause of action was contractual. It was contended that the Appellant had sued the deceased in his lifetime and obtained a decree against him; that the Appellant ought to have raised the issues in the High Court and not in the Kadhi's Court the jurisdiction of which is limited to marriage and inheritance. I am inclined to agree with the submissions for the Respondent. Article 170(5) provides that the jurisdiction of the Kadhi's Court is limited *to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance*. Matters before the Kadhi's Court are limited to questions of Muslim law relating to personal status, marriage, divorce and inheritance. The Appellant is not a beneficiary of the estate of the deceased herein. He cannot therefore purport to oppose the distribution of the estate of the deceased in the Kadhi's Court. His claim is contractual. It does not fall under any of the categories of personal status, marriage, divorce or inheritance listed in Article 170(5) of the Constitution. This being the case, the Kadhi's Court was not the correct forum for the Appellant to file his application for want of jurisdiction. His recourse lay elsewhere. Indeed the Hon. Principal Kadhi stated in his Ruling:

***“The decree in this case was issued by the High Court in 2010. Decrees are enforced at the Court which issued them. This is therefore the wrong forum for the applicant to seek the orders sought.”***

11. The Appellant faulted the Hon. Principal Kadhi in finding that the Court was *functus officio*. For the Respondents, it was submitted that the Hon. Principal Kadhi had delivered his judgement on distribution of the estate of the deceased when the Appellant filed his application. The doctrine of *functus officio* is set out in an article by Daniel Malan Pretorius entitled, “*The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law*” (2005) 122 SALJ 832 thus;

***“...The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”***

12. The record shows that the Hon. Principal Kadhi delivered his judgement in the succession petition on 24.4.14. The Appellant filed his application 1½ years later on 30.10.15. The moment judgment was entered by the Hon. Principal Kadhi, other than for purposes of execution, the court's function was done. The attempt by the Appellant to reopen the proceedings by his application of 30.10.15 thus went against the principle of finality expressed in the doctrine of *functus officio*.

13. The Hon Chief Kadhi who sat with me as assessor in this matter opined:

***“In conclusion, there were some errors by the Hon. Kadhi on procedure and in law by rejecting the appellant to be party in the case just by being not a Muslim. It is my opinion that the appeal should be allowed for the appellant to tell his interests in the Succession Petition at the Kadhi's Court.***

14. With respect, I disagree with the Honourable Chief Kadhi. Article 170(5) of the Constitution which sets the jurisdiction of the Kadhi's Court is clear - all parties before a Kadhi's Court must profess the Muslim religion. The issue of jurisdiction is key in determining whether a court seized of a matter will proceed with it or not. As Nyarangi, JA., opined in the celebrated case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1

***“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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”*

15. In the premises having evaluated the evidence and the law relevant in this matter, my finding is that the Appeal herein has no merit. The same is dismissed with costs to the Respondent.

**DATED, SIGNED and DELIVERED in MOMBASA this 24<sup>th</sup> day of March 2017**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Appellant**

..... **for the Respondents**

..... **Court Assistant**