



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. CIVIL CASE NO. 1 OF 2017

MUNAA ABDULRAMAN SAID.....APPLICANT

VERSUS

MOHAMED YUSUF MOHAMED.....RESPONDENT

RULING

The application dated 24.1.2017 seeks the following orders:-

- 1. That this application be certified as urgent and service be dispensed with in the first instance.**
- 2. That there be stay of execution of the decree in Malindi Kadhi's case No.49 of 2008 pending the hearing and determination of this application inter parties.**
- 3. That status quo obtained before the 19th day of January be maintained by the court bailiff.**
- 4. That the proceedings and judgment of the Kadhi's Court in Malindi Kadhi case number 49 of 2008 between Munaa Abdulrahman Said versus Mohamed Yusuf Mohamed be declared null and void**
- 5. That costs to the application be provided for.**

The application is supported by the affidavit of the applicant sworn on 24.1.2017. The respondent filed a replying affidavit sworn on 31.1.2017.

Mr. Otara, Counsel for the applicant submit that the dispute emanated from the Kadhi's court. The dispute before the Kadhi's Court was about ownership of a house in Timboni, Watamu. The applicant's complainant before the Kadhi was that she contributed Ksh.200,000 towards the building of the house. Evidence was adduced before the Kadhi's Court which showed that the applicant made contribution towards the construction of the house. It is submitted for the applicant that the Kadhi's Court had no jurisdiction to deal with the dispute. **Section 5** of the Kadhi's Court Act, Chapter 11 laws of Kenya, limit the Jurisdiction of the Kadhi's Courts to questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings where all parties are Muslims.

Counsel for the applicant maintain that the Kadhi's Court lacked jurisdiction to determine the dispute. The proceedings before the Kadhi are null and void and cannot be the basis of execution. The applicant should be allowed to continue presiding on the suit premises.

Mr. Matini appeared for the respondent. Counsel submit that the two parties were married but are now divorced. The suit premises were in existence even before the marriage. That is the house the applicant occupied when she was married. Counsel maintain that both parties profess Islam as their religion. The applicant subjected herself to the jurisdiction of the Kadhi's Court. The applicant's claim before the Kadhi was that she contributed Ksh.200,000 towards the completion of some part of the property. The applicant was divorced and could not continue living in the premises. It is submitted that the proceedings before the Kadhi's Court are still alive.

The issue for determination is whether the Kadhi's Court had jurisdiction to hear and determine the dispute. I have been shown the chamber summons dated 4.7.2008 by the applicant that was filed before the Kadhi's Court. The applicant sought an order of temporary injunction against the respondents.

The applicant's application was grounded on the contention that the applicant contributed Kshs.200,000 towards the construction of the house. The respondent filed a defence denying the allegations by the applicant. It appears from the record that interim orders were issued by the Kadhi's Court on the same date of the application, 4.7.2008. A final decree of the Kadhi's Court was issued on 20.1.2012, presumably

after the Suit was fully heard and determined. The applicant was not satisfied by the decision of the Kadhi and filed Civil Appeal No.2 of 2012 before the Malindi High Court. The appeal was filed on 24.1.2012. An order of stay of execution was granted on 7.2.2012 by the High Court. On 8th May, 2013 parties appeared before Justice Meoli and marked the appeal as withdrawn. The orders and Judgment and any other orders issued in the Kadhi's Court case No.40 of 2008 were set aside. Both Mr. Matini and Mr. Otara appeared before the Judge on 8th May, 2013 to record the consent. Although the consent makes reference to Kadhi's case number 40 of 2008, I believe the correct case number was 49 of 2008. The consent orders reads as follows:

1. That this appeal be and is hereby marked as withdrawn and the judgement and any other orders in Kadhi's Court case No.40 of 2008 be and are hereby set aside.

2. That the Appellant shall meet the costs.

3. That parties be at liberty to take fresh proceedings if need be

The effect of the above consent is that the judgment of the Kadhi was no longer available to either party. The letter dated 18.1.2017 by the respondent to the applicant was therefore of no effect as there was no decree. Similarly, the interim orders of injunction granted to the applicant is of no effect. The applicant will have to either withdraw her case before the Kadhi's Court or prosecute it or file a fresh suit.

The contentions by the applicant that the Kadhi's Court lacked jurisdiction is therefore misplaced. It is the applicant who filed the suit before the Kadhi. The Kadhi's judgment was set aside. The applicant's claim before the Kadhi was for Ksh 25,000 as dowry, maintenance and one half share of the house. The Kadhi's court could also not issue fresh orders as the earlier proceedings were set aside.

According to me, the applicant is claiming her share of the matrimonial house. This is an issue of Muslim law. It is not an issue of ownership of a house. She does not claim that they bought a plot jointly, built the house and lived therein during their marriage. It is upto her to prove to the Kadhi once again that indeed she made such contribution. As of now there is nothing to stay in form of execution since the Kadhi's judgment was set aside. The dispute revolves around a claim for matrimonial property. I see no good reason as to why the Kadhi cannot deal with the dispute. However, the applicant is at liberty to withdraw the claim before the Kadhi and file a fresh suit before her preferred Court.

It is clear to me that the parties are now divorced. It is also established that the applicant was utilizing the suit premises as by January, 2017. It is evident that the applicant's occupation of the premises was derived from her marriage to the respondent. The marriage does not exist. Before proving her claim of contribution of Ksh.200,000, the applicant cannot insist on residing on the suit premises. According to the respondent, the applicant was only allowed to rent out the premises so as to get money for her maintainance since the respondent had travelled to Italy.

Having set aside the judgement of the Kadhi, I can't declare the proceedings before the Kadhi's Court as null and void. All what is pending before the Kadhi is the parties' pleadings.

I do find that the application dated 21.1.2017 lacks merit and is hereby dismissed with no orders as to costs.

Dated and Signed at Marsabit this 18th day of October, 2017

S. CHITEMBWE

JUDGE

Dated, Signed and Delivered at Malindi this 19th day of December, 2017

WELDON KORIR

JUDGE