



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CONSTITUTIONAL & JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS APPLICATION NO. 57 of 2017**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI**

**IN THE MATTER OF: ARTICLES 10, 29, 47 & 50 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF: SECTION 8 & 9 OF THE LAW REFORM ACT (CAP 26) OF THE LAWS OF KENYA**

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT (NO. 6 OF 2015) OF THE LAWS OF KENYA**

**IN THE MATTER OF: CIVIL SUIT NO. 259 OF 2016, KADHI'S COURT MOMBASA BETWEEN REHEMA ALI, UNI ALI, RUKIA ALI, AMINA ALI, MAIMUNA ALI, HADIJA ALI, MAHMUD ALI, SAUDA ALI, NASIR ALI, OMAR ALI, AFUSA ALI VS. KHALID KHAMIS BIN MWINYIKOMBO**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**THE SENIOR RESIDENT KADHI, MOMBASA.....RESPONDENT**

**GHALIB CHUBA.....EX PARTE APPLICANT**

**AND**

**REHEMA ALI.....INTERESTED PARTY**

**RULING**

1. Pursuant to leave granted on 28<sup>th</sup> September, 2017, the Applicant filed Notice of Motion dated 3<sup>rd</sup> October, 2017 seeking the following orders:

- a) An Order of Certiorari to remove to this Honourable Court to be quashed the proceedings of the Honourable Court in Civil Suit No. 259 of 2016, Kadhi's Court of 26<sup>th</sup> July, 2017 and subsequent order dated 26<sup>th</sup> July, 2017 and issued on 13<sup>th</sup> September, 2017.
- b) Costs of and incidental to the application be provided for.
- c) Such further and other reliefs that the Honourable Court may deem just and expedient to grant.

2. The application is premised on the grounds set out in the Statement of Facts dated 28<sup>th</sup> September, 2017 and those in the supporting affidavit of GHALIB CHUBA sworn on 28<sup>th</sup> September, 2017.

3. The Applicant alleges that on 26<sup>th</sup> September, 2017 he was informed by one KHAMIS MWINYIKOMBO that a warrant had been issued against him in Civil Suit No. 259 of 2016 before the Kadhi's Court. The Applicant claims that he perused Civil Case No. 259 of 2016 and noted from the record that on 24<sup>th</sup> March, 2017, the firm of Aziz & Associates filed an application for stay of the Order of 14<sup>th</sup> March, 2017 which was allowed partially and the order set aside.

4. The Applicant contends that the suit before the Kadhi's court was heard severally thereafter and on 26<sup>th</sup> July, 2017, the Honourable Kadhi sentenced the Applicant to 3 months imprisonment and a fine of Kshs. 200,000/= for contempt of court.

5. The Applicant faults the Honourable Kadhi for meting out the above sentence claiming that he was not a party to the proceedings before the Kadhi's court. Further, the Applicant claims that he has neither been summoned to attend court to warrant issuance of such orders nor has he been enjoined to the said proceedings. To this end, the Applicant suggests that an adverse order cannot be issued against a person that is not a party to the suit or a person that has not been procedurally made a party to the suit.

6. The Applicant alleges that the decision by the Hon. Kadhi to issue orders of arrest against him is unlawful, unfair and unreasonable as the Applicant was not afforded an opportunity to be heard especially since the order issued would curtail one of his fundamental rights under the Bill of Rights. Also, the Applicant claims that the decision was based on ulterior motive and violates the Applicant's legitimate expectation to fair administrative action.

### **The Responses**

#### **The Interested Party**

7. The Interested Party responded to the application by way of a Replying Affidavit sworn by the Interested Party on 16<sup>th</sup> January, 2018.

8. The Interested Party claimed that the Applicant had knowledge of Civil Suit No. 259 of 2010 as the Interested Party together with one KHALID KHAMIS MWINYIKOMBO were responsible for rent collection for house on Plot No. 171/I/MN since 1989. The said property was part of the subject matter in Civil Suit No. 259 of 2010.

9. The Interested Party contended that the Applicant together with KHALID KHAMIS MWINYIKOMBO were ordered by the lower court to appear before the court on 26<sup>th</sup> July, 2017 and provide accounts on the proceeds of Plot No. 171/I/MN. The Applicant failed to appear before the court as required. Consequently, he was convicted of the offence of contempt of court and sentenced to three years in prison plus a fine of Kshs. 200,000/= and latter a warrant of arrest was issued.

10. The Interested Party's case is that the Hon. Kadhi's decision was merited as the Interested Party failed to honour the court's orders thus this application should be dismissed.

#### **Submissions**

11. The Respondent filed its submissions on 5<sup>th</sup> June, 2018 while the Ex parte applicant filed his on 8<sup>th</sup> June, 2018. The Interested Party made oral submission in court on 11<sup>th</sup> June, 2018.

12. Ms. Kiti, learned Counsel for the Respondent in support of the application submitted that the ex parte applicant was not a party to the suit but was just mentioned by one of the parties when the proceedings were ongoing. Counsel faulted the Hon. Kadhi for failing to issue summons for the ex parte applicant to appear before the court prior to convicting him for contempt of court. Counsel opined that any person likely to be adversely affected by a decision of an authority ought to be accorded a fair process in line with the provisions of Article 47 of the Constitution.

13. Mr. Egunza, Counsel for the Ex parte Applicant submitted that a person likely to be affected by an administrative decision should be afforded an opportunity to be heard prior to making of the decision. Counsel contended that the ex parte applicant having not been a party to the proceedings before the Kadhi's court should have been afforded an opportunity to be heard prior to issuance of orders of 26<sup>th</sup> July, 2017 and warrant of arrest. Further, Counsel opined that the decision of the Hon. Kadhi was unreasonable and riddled with considerations of irrelevant matters.

14. Mr. Egunza submitted that there was an ulterior motive on the part of the Hon. Kadhi in making the decision. Counsel stated that the Hon. Kadhi had a preconceived opinion or pre-deposition to decide the part in favour of the Interested Parties.

15. Mr. Egunza suggested that the decision by the lower court had violated the applicant's right to legitimate expectation. Counsel stated that the ex-parte applicant had a legitimate expectation that the Kadhi's Court being part of the judiciary would ensure that justice is upheld.

16. Ms. Wambani, for the Interested Party in her submissions changed tactic and decided to support the application partially. Counsel submitted that the order of contempt of court was appropriate against the Defendants in that suit but not the Ex parte applicant who was not party to the proceedings. Counsel submitted that the orders of the court should not be quashed, but that only the order directed against the Ex Parte Applicant should be quashed, the other orders being procedural.

#### **The Determination**

17. The only issue for determination is whether the decision by the Hon. Kadhi made on 26<sup>th</sup> July, 2017 and codified into an order on the same date should be quashed. It is important to note that all parties herein are agreeable and fault the Hon. Kadhi for reaching the aforementioned decision.

18. I have perused the application and the supportive documents therein. I do note that the Ex Parte Applicant was never a party to the proceedings before the Kadhi's court. There is also no evidence to show that the Plaintiff in the lower court suit intended to enjoin the ex parte applicant to the said suit. The Interested Party contends that the ex parte applicant together with the Respondent in that matter was

required to appear before the court on 26<sup>th</sup> July, 2017 and provide accounts on the proceeds of Plot No. 171/I/MN. The ex parte applicant failed to do so. The ex parte applicant had no way of knowing that his presence was required by the court. The Kadhi's court therefore lacked standing to condemn the ex parte applicant for contempt of court for disobeying an order which in the first place the ex parte applicant did not know existed. The decision of the Kadhi's court to condemn the ex parte applicant to contempt of court goes against the established rules of natural justice. The Ex Parte Applicant with the approval of this court cited **JMK vs. MWM & another [2015] eKLR** which quoted the case of **Mbaki & Others vs. Macharia & Another [2005] 2 EA** where the court held as follows:

**“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”**

19. In the instant case, contempt of court is a serious offence which can lead to curtailment of the contemnor's liberty. Therefore, it behoves the court to afford the contemnor an opportunity to explain why the court should not find him to be in contempt.

20. I therefore allow the application dated 3<sup>rd</sup> October, 2017 as the procedure used in reaching the order dated 26<sup>th</sup> July, 2017 contravened the rules of natural justice. Orders are therefore issued as follows:

a) An Order of Certiorari do and is hereby issued to remove into this Honourable Court to be quashed the proceedings of the Honourable Court in Civil Suit No. 259 of 2016, Kadhi's Court of 26<sup>th</sup> July, 2017 and subsequent order dated 26<sup>th</sup> July, 2017 and issued on 13<sup>th</sup> September, 2017.

b) Costs of the application to the ex parte Applicant.

**Dated, Signed and Delivered in Mombasa this 10<sup>th</sup> day of December, 2018.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Ms. Wambani for Interested Party

Mr. Egunza for Ex parte Applicant

Mr. Nguyo Wachira for 1<sup>st</sup> Respondent

Mr. Kaunda Court Assistant