



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**JUDICIAL REVIEW NO. 3 OF 2016**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW  
ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF MALINDI KADHI'S COURT SUCCESSION NO. 87 OF 2008**

**AND IN THE MATTER OF LAND PARCEL KNOWN AS PLOT L.R. NO. 686**

**AND IN THE MATTER OF A VESTING ORDER OF THE KADHI OF 17<sup>TH</sup> MARCH, 2016**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**NURU OMAR MAHENDAN**

**MARIAM OMAR MAHENDAN**

**ANZUN OMAR MAHENDAN**

**MALKIA OMAR MAHENDAN**

**FERRUZ OMAR MAHENDAN .....EX-PARTE APPLICANTS**

**VERSUS**

**THE KADHI (MALINDI) ..... RESPONDENT**

**AND**

**AHMED MOHAMED HONEY ..... INTERESTED PARTY**

**RULING**

The Notice of Motion dated 17.3.2016 seeks the following orders: -

- 1. That the vesting order issued by the respondent on the 17.3.2016 vesting land parcel known as***

***Plot L.R. 686 belonging to one CAROLE BURTON be removed to his Honourable Court and be quashed.***

***2. That the respondent be prohibited from dealing with any land parcel or property not mentioned in the pleadings or the judgment.***

***3. That the interested party be condemned to pay the Ex-parte applicants' costs to the applicant.***

The application is supported by the affidavit of Malkia Omar Mahendan sworn on the same date and a supplementary affidavit filed on 4.8.2016. The interested party filed a replying affidavit sworn on 13.6.2016.

Mr. Otara, counsel for the ex-parte applicants informed the court that there is a judgement delivered by the Kadhi's Court in a succession matter. The interested party is the petitioner in the succession cause which relates to the estate of the late Batuli. The petitioner disclosed the deceased's estate in the succession cause. The applicants herein are Batuli's sister. Part of Batuli's estate was her inheritance from her mother but she also had her own property.

It is submitted that the proceedings before the Kadhi were finalized and the estate was distributed. The main contention is that the petitioner introduced a property being a house on Plot Number 686. This property is unknown to the applicants and was not part of the proceedings. The applicants are now being asked to surrender an apartment located on Plot Number 686, Malindi yet that property belongs to one Carole Burton. It is not also located in Malindi but in Watamu.

Mr. Otara maintains that the applicants are being compelled to provide particulars for that property which is unknown to them. The applicants cannot give that which they did not possess. It is alleged that the house is located at Barani. Barani is a large area in Malindi with many houses. The alleged house is being introduced at the execution stage.

Mr. Mwazogo, counsel for the interested party opposed the application. Counsel maintains that the succession cause cited a house at Barani. There was no mention of a house on Plot Number 686. The applicants are challenging the Kadhi's decision through Judicial Review proceedings which require oral evidence to prove ownership of the house in dispute. The applicants annexed a demand note for rates to prove that they do not own the house. That cannot be proof of ownership. It is submitted that if the applicants have no interest in the house on Plot Number 686, they should then allow the execution to proceed. The Kadhi dealt with the issue of a house on Plot Number 1343 and finalized it. The parties have been litigating from 2008 to date and appeal have been taken up to the Court of Appeal.

I have read the two affidavits in support of the application as well as the replying affidavit of the interested party. The contents of the affidavits reflect what the respective counsels submitted before me. The application only raises one issue, that the interested party obtained vesting orders in the process of execution which relate to a property not disclosed in the succession cause. I have seen the succession cause pleadings. There is mention of a house at Barani. The interested party has indicated in his replying affidavit that it is a house without land. There are two houses at Barani mentioned. One is indicated to be near Sheikh Nassir Mosque. It is evident that the interested party knows where the houses are located.

The order of the Kadhi issued on 17.3.2016 states as follows: -

***“Upon reading the application dated 11.2.2016 in the above named suit and upon hearing Mr. Mwazogo advocate for the petitioner/applicant in the absence of the respondents' advocate who was duly served, it is hereby ordered: -***

***1. That the house on Plot No. LR No. 686 situated at Barani is vested to the petitioner Ahmed Mohamed Honey as his rightful share of inheritance according to Islamic law.***

***2. That the respondents are hereby ordered to provide full statement of account.***

**3. That any heir who took more than his/her allotted share to refund to the estate.**

**4. That the applicant be refunded the costs of valuation.**

**5. That costs be on the cause.**

**Given under my hand and seal of the Honourable Court this 17.3.2016**

**Sheikh Salilm S. Mohamed**

**Kadhi Malindi**

**Issued at Mombasa this 24.3.2016.**

**Penal Notice: Any person served with this order and disobeys it will be in contempt of court proceedings and will be liable to fine and/or imprisonment.”**

It is the above orders which led to the filing of the current application. The main contention being that the applicants are unaware of the alleged house on Plot Number 686. The applicants annexed a demand notice from the County Government of Kilifi in relation to Plot Number 686, Watamu which belongs to Carole Burton. The ordinary procedure is for Carole Burton to make an application indicating that the execution is being made on her property yet she is not a party to the suit. There is no document asking the applicants to provide the particulars of the property. The Kadhi only indicated that the house situated at Barani on Plot Number 686 is the share of the interested party. All what remains is for the interested party to execute against that specific house. The house was specifically identified and the contentions by the applicants that they are unaware of the house are misplaced. The petitioner in the succession cause should proceed with the execution and point out the specific house at Barani to the auctioneer who will be executing the warrants. The orders of the Kadhi of 17.3.2016 cannot be the subject of Judicial Review proceedings. Why should the applicants worry themselves with a property they allege is unknown to them. The home is located at Barani in Malindi and not Watamu. It is possible that there is Plot Number 686 at Barani, Malindi. the annexed demand note cannot prove that there is no house at Barani in Malindi.

Given the pleadings herein, I do find that there is nothing to quash. All what the Kadhi did was to identify a specific property as the rightful share of the interested party. The dispute involves a succession matter and the orders were granted so as to help in the distribution of the deceased's estate. The application herein is an abuse of the court process as it is brought without any legal basis. No one has asked the applicants to provide information relating to the property as alleged. No warrants of execution have been attached. If the warrants are issued, they will indicate the specific house at Barani as per the Kadhi's decision. I do find that the applicants have opted to continuously engage the interested party in litigation instead of having the deceased's estate distributed.

In the end, I do find that the application dated 17.5.2016 lacks merit and the same is hereby dismissed with costs to the interested party.

**Dated and delivered in Malindi this 25<sup>th</sup> day of October, 2016.**

**S.J. CHITEMBWE**

**JUDGE**