



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISC. CIVIL APPLICATION NO. 43 OF 2013

IN THE MATTER OF: ORDER 53 THE CIVIL PROCEDURE RULES

**IN THE MATTER OF: AN APPLICATION BY SAID RAMADHAN MWANJAMA FOR
ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**IN THE MATTER OF: THE KADHI'S COURT ACT (CAP 11) THE MAGISTRATE'S
COURT ACT (CAP 10) AND THE REGISTERED LAND ACT (CAP 300)**

AND

**IN THE MATTER OF: KWALE KADHI'S SUCCESSION CASE NO. 99 OF 2012 IN RE: THE
ESTATE OF RAMADHAN MWANJAMA (DECEASED)**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE RESIDENT KADHI, KWALERESPONDENT

AND

1. ALI HAMISI MWANGANGUVU

2. SAUMU HASSAN

3. JUMAA ALI MWANJAMA.....INTERESTED PARTIES

EX PARTE SAID RAMADHAN MWANJAMA

JUDGMENT

INTRODUCTION

1. By way of a Chamber Summons dated 4th July of 2013, the Ex Parte applicant herein, SAID

RAMADHAN MWANJAMA seeks the following principal orders;

1. That this Honourable Court be pleased to grant leave to the Ex-parte Applicant herein to apply for an Order of Certiorari to remove into this Honourable Court and to quash the decision(s) of the Honourable Resident Kwale Kadhi while presiding over Kwale Kadhi Succession Case Number: 99 of 201, In Re: Estate of Ramadhan Mwanjama (Deceased) to:

a. Admit onto the court record the Notice of Motion Applications dated 4th April, 2013 and 27th May, 2013 filed by the interested Parties without any leave sought or granted to the interested parties to so appear after entry of Judgment;

b. Hear and determine and Rule on the Notice of Motion Applications dated 4th April, 2013 and 27th May, 2013 filed by the Interested Parties at a time when the said Kadhi Court was functus officio, having entered final Judgment ten (10) months earlier on 8th June, 2012;

c. Hear and determine and Rule on the Notice of Motion Application dated 4th April, 2013 and 27th May, 2013 filed by the Interested Parties without the benefit of any evidence other than oral evidence, which oral evidence was itself adduced onto the Court Record contrary to natural justice and contrary to Articles 25(b), 47 & 50 of the Constitution of Kenya (2010) which guarantee fair trial, fair administrative action and fair hearing;

d. Hear and determine and Rule on the Notice of Motion application dated 27th May 2013 filed by the Interested Parties and make orders that were not specifically pleaded in the said Notice of Motion Application dated 27th May 2013;

e. Hear and determine and Rule on the Notice of Motion Application dated 27th May 2013 filed by the Interested Parties and make orders that contravene Articles 29(c), 31(a) & (b) Constitution of Kenya 2010 which guarantee respectively, freedom from any source of violence, freedom from arbitrary search and freedom from arbitrary seizure or deprivation of private property; And

f. Hear and determine and Rule on the Notice of Motion application dated 27th May 2013 filed by the Interested Parties And make orders that affect persons not named as Respondents in the said Notice of Motion Application, to wit NIMAJENI RAMADHANI MWANJAMA and FATUMA RAMADHANI MWAKUHADZWA, who together with the Ex-parte applicant are registered as joint proprietors of the suit property;

2. That this Honourable Court be please to grant leave to the Ex-parte applicant herein to apply for an Order of Prohibition directed to the Honourable Resident Kwale Kadhi, while presiding over proceedings in Kwale Kadhi Succession Case Number: 99 of 201, In Re: Estate of Ramadhan Mwanjama(Deceased), either by himself and/or by his servants and/or agents including but not limited to the OCS Diani Police Station from:

a. Entertaining and/or adjudicating any claim relating to the Estate of Ramadhan Mwanjama other than an application for leave to appear and/or be joined in the proceedings after entry of Judgment And thereafter an application for leave to appeal Judgment dated 8th June, 2012 out of time or such other application as may properly be brought by the Interested Parties; And

b. Entertaining and/or adjudicating any claim relating to the Estate of Ramadhan Mwanjama or such other application as may properly be brought by the Interested Parties without properly serving the Ex-parte Applicant and/or any other person(s) as may be affected by the said proceedings and/or consequential orders; And

c. Enforcing the Order four(4) in the Order dated 31st May 2013;

3. That grant of leave to apply for orders of Certiorari and Prohibition aforesaid do operate as a stay of all further dealings in and with the suit premises until hearing and determination of this application.

4. That costs of this application be provided for.

2. The grounds upon which the relief is sought were set out in the verifying affidavit of SAID RAMADHAN MWANJAMA the statements of facts accompanying the application dated 4th July 2013 are:

(i) That the Ex-parte applicant herein is the Petitioner in Kwale Kadhi Succession Case Number: 99 of 201, In Re: Estate of Ramadhan Mwanjama (Deceased).

(ii) That the deceased was his biological father and he filed Kwale Kadhi Succession Case Number: 99 of 201, In Re: Estate of Ramadhan Mwanjama (Deceased) on 17th April 2012 and following a hearing on 30th April 2012 was granted letters of administration over his Estate by an Order dated 8th June, 2012 and proceeded to transfer the sole property of the Estate, to wit, title number: Kwale/Ukunda/1171 into his name and that of two(2) of his sisters and co-heirs namely, NIMAJENI RAMADHANI MWANJAMA and FATUMA RAMADHANI MWAKUHADZWA.

(iii) That he was surprised on 3rd May 2013, ten months after estate had been fully and finally administered, the Interested Parties filed a Notice of Motion Application dated 4th April 2013 seeking a review of the Order dated 8th June 2012 to include them as heirs, though being the grandchildren of his great uncle.

(iv) That his advocates appeared in court on the date of inter partes hearing and were granted an adjournment on inter-partes hearing until the 2nd of July 2013 and leave to file a response on or before the said date.

(v) That on 25th April 2013, the Honourable Kadhi proceeded to hear and take oral evidence from the interested parties contrary to Articles 47 & 50 of the Constitution.

(vi) That the Kadhi Court was functus officio having already pronounced judgment and had no jurisdiction to entertain the said Notice of Motion application dated 4th April, 2013 as it was filed by person who had neither applied for nor been granted leave to appear in suit out of time.

(vii) That he was served by the Interested Parties a second Notice of Motion application dated 27th May 2013 together with an Order dated 31st May, 2013 requiring him to deposit the original title deed to Kwale/Ukunda/1171 with the Honourable Kadhi.

(viii) That on 29th May 2013 the Honourable Kadhi proceeded to hear the application and make final orders compelling him to hand over the title deed.

(ix) That on 3rd July 2013 an illegal search was conducted at his residence despite the order of 31st May 2013 being an Order compelling him to surrender the title deed rather than an order allowing the police to forcefully seize the title deed.

3. On 8th July 2013, the Court (Muya, J.) after considering the application certified the matter as urgent granted the orders as prayed in the application and ordered that the main application be filed within 21 days and that all parties be served within 8 days before the hearing of the main application.

NOTICE OF MOTION

4. The Notice of Motion was filed on the 29th day of July 2013 supported by the verifying affidavit sworn by SAID RAMADHAN MWANJUMA on the 4th of July 2013.

THE RESPONSES

5. In response, respondent Kadhi filed a replying affidavit dated the 21st of February 2014 in which he averred that;

(i) The Interested Parties herein filed an application on the 4th of April 2013. The ex-parte applicant herein was duly served with the application on the 8th of April 2013 but did not reply to the application.

(ii) The hearing of the application was set for the 23rd of May 2013 and the ex-parte applicant herein was served with a notice on the 26th of April 2013. The ex-parte applicant refused to receive the hearing notice.

(iii) The parties appeared before the Kadhi's court on the 24th of May 2013 where a representative of the ex-parte applicant asked to be given time to respond to the application.

(iv) The interested parties filed another application on 27th May 2013 under certificate of urgency to estop the ex-parte applicant herein from doing major alterations on the parcel of land in dispute.

(v) The ex-parte applicant was duly served with the Certificate of urgency, a Notice of Motion and a Supporting affidavit on the 27th of May 2013. The notice demanded that all parties appear before the Kadhi on the 29th of May 2013. Only the interested party herein attended the court on that date. Ruling was made on the 31st of May 2013.

(vi) The ex-parte applicant herein filed grounds of opposition on 2nd July 2013 instead of appealing the decision of the Kadhi's court.

(vii) The averments alleging contravention of Articles 25(b), 47 & 50 of the Constitution as stated have not basis at all.

6. The Interested Parties filed their grounds of opposition dated the 16th of August 2013, as follows;

(i) That the application is misconceived, fatally defective and an abuse of the court process.

(ii) That Judicial review remedies are discretionary in nature and sometimes the court will not grant them even when deserved.

(iii) That judicial review is concerned not with the merits of the decision being challenged but with the decision making process.

(iv) That the application was not properly entitled.

7. The grounds of opposition were supported by a replying affidavit dated the 19th of August 2013 sworn by JUMAA ALI MWANJAMA on behalf of the other interested parties. It was averred that;

(i) The ex-parte applicant sometime in the year 2012 secretly filed succession cause no. 99 of 2012 at Kwale Law Courts and obtained orders. The interested parties did not know of the existence of the Succession case.

(ii) On learning of the said succession case, the interested parties filed the application dated 4th of April 2013 asking the court to enjoin them in the Succession matter

(iii) The ex-parte applicant was served with both applications but he ignored to appear in the Kadhi's Court at Kwale.

(iv) The Kadhi's court is a special court established by the Constitution whose decision can only be challenged by way of appeal and not judicial review.

(v) The applicant has not sought other remedies so as to seek judicial review remedies.

(vi) The application should be dismissed.

SUBMISSIONS

8. The Interested Parties filed their submission dated the 30th of April 2014. It was their submission that the Judgment entered on the 7th of June 2012 was entered ex-parte. The Honourable Kadhi has the powers under Order 10 Rule 11 and Order 12 Rule 7 of the Civil Procedure Rules to set aside the ex-parte Judgment and hear the matter. The Kadhi cannot be said to be *functus officio*.

9. It was submitted that Order 45 of the Civil Procedure rules provides no limit for bringing an application for review. Further, Section 80 of the Civil Procedures Act grants powers to review a Judgment and or Order. That upon discovery of new and important matters or evidence, the Court may review its Judgment. It was their submission that the ex-parte applicant had not disclosed to the Honourable Kadhi important matters that he had misled the Court that the suit property belonged to his father when it in fact belonged to his great-grandfather. They both went known under the name RAMADHAN MWANJAMA.

10. Further, it was submitted that the main reason why the interested parties sought to be enjoined in the Petition is to inform the Honourable Kadhi that the suit property belongs to the great grandfather of the *ex parte* Applicant and that they also have an interest in the said property. They submitted that the Honourable Kadhi was right in law to issue temporary orders to restrain the ex parte Applicant from wasting the property belonging to the estate of RAMADHAN MWANJAMA pending the conclusion of the Petitions and applications.

11. Counsel for the Parties – Mr. S. Kithi for the ex parte applicant, Mr. Ngari for the Respondent and Mr. Khatib for the Interested Parties - further made oral submissions and judgment was reserved. The Court regrets that owing to heavy workload and subsequent transfer for the Court station, the court was not able to deliver judgment in good time.

DETERMINATION

12. The Kadhi's Court has jurisdiction in accordance with Article 170 of the Constitution to determine succession causes on estates of deceased Muslims. Article 170 (5) of the Constitution grants jurisdiction to the Kadhi's Court as follows:

“(5) 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.”

13. In such proceedings the Court is exercising a civil jurisdiction and by virtue of section 89 of the Civil Procedure Act, the Act and the Civil Procedure Rules made thereunder apply, as follows:

“89. Miscellaneous proceedings

The procedure provided in this Act in regard to suits shall be followed as far as it may be applicable in all proceedings in any court of civil jurisdiction.”

14. The Kadhis' Court Act cap. 11 of the Laws of Kenya prescribes application of the Civil Procedure Act pending the promulgation by the Chief Justice of its own Rules of Procedure, as follows:

“8. Procedure and practice

(1) The Chief Justice may make rules of court providing for the procedure and practice to be followed in Kadhis' courts.

(2) Until rules of court are made under subsection (1) of this section and so far as such rules do not extend, procedure and practice in a Kadhi's Court shall be in accordance with those prescribed for subordinate courts by and under the Civil Procedure Act (Cap. 21).”

No such rules of court have been made by the Chief Justice.

15. In accordance with the Civil Procedure Act, the Court does not become *functus officio* for purposes of applications for setting aside or varying judgment or order made in default of appearance and defence or attendance in court for hearing, respectively under Order 10 rule 11 and 12 rule 7 of the Civil Procedure Rules. In addition, provision for review of judgment and orders is prescribed under section 80 of the Civil Procedure Act and Order 45 (1) of the Civil Procedure Rules. There is no provision in the Kadhi's Court Act or other written law limiting the jurisdiction of the Court to review its decision as prescribed in section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.

16. There is no merit in the complaint that the ex parte applicant had not been granted a hearing. Although the hearing of the application dated 27th July was set for the 29th May 2013, when the matter proceeded in the absence of the ex parte applicant and ruling was fixed for 31st May 2013, there was no denial of fair hearing as the ex parte applicant had been served. It is not unusual that an application filed under certificate of urgency as the present application is set for expedited hearing depending on the exigencies of the situation. At paragraphs 6 – 9 of the Affidavit, the Respondent gives the background against which it considered the matter before it as follows:

“6. That the mentioned interested parties filed another application under Certificate of Urgency complaining that the intended respondent was doing major alterations on the parcel of land No. Kwale Ukunda/1171 which is the subject of the dispute, seeking an order for a temporary injunction until the application is determined. The Applicant (mentioned as interested party) was heard ex parte on the 27th of May 2013.

7. The intended respondent (SAID RAMADHAN MWANJAMA) was duly served with the Certificate of Urgency, a Notice of Motion and a Supporting Affidavit on the 27th May 2013 as per the Affidavit of Service filed on the 28th of May 2013. The Notice of Motion demanded all parties concerned to attend the Kadhi's Court in chambers on the 29th of May 2013, for the hearing of the second application on the part of the applicant.

8. That the Applicant (mentioned as interested party) attended the Court. The intended respondent (SAID RAMADHAN MWANJAMA) did not attend the Court.

9. That the Ruling on the application was fixed for the 31st of May 2013. I delivered the ruling on the 31st of May 2013 and issued a temporary injunction”

17. The Court was satisfied with the affidavit of service filed on 28th May 2013 indicating service on the ex parte applicant on the 27th May 2013.

18. I do not agree with the ex parte applicant that the court could only grant the interim injunction after granting the application for the Interested Parties' application for joinder. The Court could to preserve the status quo and to avoid waste threatened by a respondent issue a temporary order pending hearing of an

applicant's application for joinder to the suit. There is no inconsistency in that, the object being to preserve the status quo and avoid the waste or destruction of the subject of the suit pending hearing of the application. Indeed, Order no. 3 of the Order of the Court made on 31st May 2013 was ***“that status quo to be maintained until succession is finalized.”***

19. Section 63 of the Civil Procedure Act specifically provides for such situations in terms that –

“63. Supplemental proceedings

In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed—

(a) issue a warrant to arrest the defendant and bring him before the court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to prison;

(b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order the attachment of any property;

(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;

(d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;

(e) make such other interlocutory orders as may appear to the court to be just and convenient.”

20. The Kadhi's Court, however, did not have to recall the **physical** title deed issued pursuant to grant made to the *ex parte* applicant, as it had granted an injunction to restrain any dealings with the suit property pending hearing of the applications before it. But that is not to say that the order could not be issued if there was danger of, say, use of the title deed as collateral or surety. The proper procedure for challenging the order is at the *inter partes* hearing of the matter or an application for the setting aside or stay of such an order, as appropriate, before the Kadhis' Court once it is accepted that the Court has jurisdiction in the matter.

Merits of the matter

21. Clearly, the Kadhis' Court has jurisdiction under the Constitution of Kenya and the Civil Procedure Act to entertain the applications before it relating to the succession matter herein. The objections as to whether there was leave to file the applications before the Court after judgment, whether the Court could act on oral evidence presented by the Interested Parties in the absence of respondent/*ex parte* applicant, order recall of title deed and make orders that affected persons who were not parties to the application, as with the Interested Parties' contention of non-disclosure on the part of the *ex parte* applicant and the parties' respective interest in the suit property, are all matters of the merits of the application, which this Court will not entertain in its limited judicial review procedure.

ORDERS

22. For the reasons set out above, the Court makes the following orders on the *ex parte* Applicant's Notice of Motion dated 29th July 2013:

a. The prayers for Certiorari and Prohibition sought in prayers 1 and 2 of the Notice of Motion are declined.

b. In view of the succession nature of the dispute the subject of the matter giving rise to these judicial review proceedings, the Court makes no order as to costs.

23. The Court has become aware of intimation by **Counsel for the Interested Parties** by letter to the Court dated 5th September 2016 indicating that **“our clients wish to withdraw the matter”**. However, the suit belongs to the **ex parte** applicant who has not indicated that he wishes to withdraw it and this court has no control over the parties’ conduct.

24. Accordingly, the judgment of Court is signed for delivery in the event that the withdrawal or other consent of the parties does not come to fruition.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS. 21ST DAY OF NOVEMBER, 2016.

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JUDGE

In the Presence of:-

Mr Adhoch holding brief for Sirwe Kilhu for the Ex Parte Applicant

Mr Mukuro (state Council) for the Respondent

No appearance for the Interested Parties

Mr Rawal - Court Assistant.