



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

MISC. CIVIL APPLICATION NO. 4 OF 2015

ABDULKADIR GODO DARCHE.....1ST APPLICANT

ABDI GOBO DARCHE.....2ND APPLICANT

FATUMA GOBO DARCHE.....3RD APPLICANT

VERSUS

KHADIJA GOBO DARCHE.....1ST RESPONDENT

MUMINA GOBO DARCHE.....2ND RESPONDENT

HABIBA GOBO DARCHE.....3RD RESPONDENT

R U L I N G

1. The applicants through a Notice of motion dated 9th February, 2015 brought pursuant to Section 18, 1A and 1B of the Civil Procedure Act seeks the following orders:-
 - i. ***That this honourable court be pleased to certify this application as urgent and order that eth same be heard expeditiously.***
 - ii. ***That this honourable court be pleased to order transfer of Marsabit Kadhis Civil Case No. 90/2014 from Marsabit to Isiolo Kadhis Court for hearing and disposal.***
 - iii. ***That, pending substantive hearing of prayer (b) herein there be a temporary stay of proceedings of Marsabit Kadhis court case No. 90 of 2014.***
2. The application is based on the following grounds; that the learned Kadhi has openly exhibited great bias against the applicants both in court and outside, that the applicants may not get a fair hearing; and that the applicants stand to suffer great prejudice if the case is not heard by a different Kadhi.
3. The applicant is supported by affidavit of Abdulkadir Gobo Darche who has deponed that they have a pending Marsabit Kadhi Civil Suit No.90/2014 in which the respondents are the plaintiffs; that there is only one Kadhi at Marsabit one Mohammed A. Mahmoud that the said case is part heard as per attached proceedings marked (AG-01); that before the case started the applicants questioned the validity of the case as verifying affidavit was sworn by a “Stranger” but the presiding Kadhi simply dismissed their objection and stated it was a mere “computer error” referring to annexure AG-02 a copy of the plaint; that the 1st witness was not sworn and their

objection was met with strange arrogance and intimidation from the Presiding Kadhi; that the Presiding Kadhi has either taken a position in the case before hearing the parties or he does not appreciate basic legal principles and procedure and/or is totally biased; that the honourable Kadhi treats the applicants with interjections of “you have no case” in open court, that Kadhi entertains a third party one “Bayayla Darse” shortly before the case proceeds and immediately the case adjourns for hours in chambers referring to a letter annexure AG-03; that the applicants have a reasonable and serious apprehension in their minds that justice won’t be given before Kadhi’s court at Marsabit.

4. The respondents are opposed to the application through a Replying Affidavit dated 5th March, 2015 in which they have responded as follows; that at time of hearing of their case at Marsabit before Kadhi the applicants raised the issues of their verifying affidavit being sworn by a stranger in which the respondents responded it was a typing error on their part as they are unable to read and write English; that a ruling was thereafter delivered and Kadhi agreed it was a typing error; that the first witness Mariam Gabo testified after taking an oath as indicated in the proceedings; that Kadhi has not taken sides while conducting the case; that Balyon Dorse is their step brother and has not testified; that the applicants do not want him to testify; that the respondents are all mothers of minors who are still breastfeeding and others are still going to school and it is difficult for them to travel to Isiolo for the hearing; that the key witnesses are old men who cannot travel to Isiolo and that the respondents are unable to cater for their expenses to Isiolo, that the subject land is situated at Marsabit and if court wishes to visit the land it would be easy for Marsabit Kadhi to visit it than the Isiolo Kadhi; that this application is intended to frustrate the respondents efforts to get their lawful inheritance.
5. I have very carefully considered the applicants application, affidavit in support and annexures, the respondents replying affidavit and annexures thereto and the issue for consideration can be summarized as follows:- is whether the applicants have met the conditions to warrant this matter being transferred from Marsabit Kadhi court to Isiolo Kadhi Court for hearing and determination.
6. This court has jurisdiction to transfer a case whether part- heard or not from one subordinate court to another for hearing and determination under Section 18 of the Civil Procedure Act.
7. The Marsabit Kadhi Civil Case NO. 90 of 2014 is part heard by M. A. Mohammed Kadhi at Marsabit. I have perused the proceedings and more particularly on the allegation by the applicants against the Marsabit Kadhi.
8. One of the grounds for seeking transfer is that he allowed a verifying affidavit sworn by “a stranger”. The Marsabit Kadhi heard both sides and gave a ruling allowing the verifying affidavit to be used stating it is possible the typing was an error as the name beside and against the signature is that of the plaintiff’s name. The applicants have not demonstrated how the Marsabit Kadhi was biased or was against them in his ruling and at any rate if the applicants were aggrieved by such ruling their option was to appeal or wait for determination of their case and file an appeal rather than seeking transfer of the suit on the basis of the ruling not being in their favour.
9. On the issue of swearing of the 1st witness, the applicants aver that the witness was not sworn whereas the respondents state otherwise. The applicants rely on the annexed proceedings marked AG-01. The 1st witness PW1 on page 6 was clearly sworn. There were no objection raised by the applicants as per court’s proceedings nor is there evidence of the alleged arrogance and intimidation by the kadhi as alleged. There is no evidence of Kadhi having taken position over this matter before hearing of the parties nor is there evidence of the Kadhi having interfered and having stated to the applicants “you have no case” in open court. There is no affidavit by independent witnesses to support the applicant’s allegations. The letter of complaint AG-03 over “Bahylu Darse” does not complain against Kadhi nor does it mention the allegations that shortly before the case proceedings and immediately the case adjourns, that Kadhi entertains the said party. The letter dated 11/12/2014 to Kadhi court is complaining of the said party’s interference in a chief’s meeting to resolve a land dispute involving one of the applicants and its intention is to

influence Kadhi not to engage parties in this case. There is no complaint whatsoever against the Kadhi disclosed in the alleged letter.

10. The applicants complain further that the Marsabit Kadhi if he has not taken position in this matter, he either does not appreciate the basic legal principles and procedure and/or is totally biased. The applicants herein are not sure whether the Kadhi is biased or does not appreciate basic legal principles and procedure. My view is that when a legal officer does not appreciate legal principles and procedure the High Court in exercise of its supervisory power has no right during the pendency of the matter before a Judicial Officer to interfere in whatever capacity as that would amount to interference with independence of the court. Section 160 (1) of the Constitution of Kenya, 2010 states:-

160. (1) In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.

11. That if the applicants are aggrieved by Kadhi's decision or lack of appreciation basic legal principles and procedure they can only appeal or seek review but not to seek transfer of the matter on those grounds. The good grounds of appeal may not be good grounds for seeking transfer of a case from a Judicial Officer.

12. Having considered the grounds raised by the applicants and the opposition by the respondents and having considered the proceedings before the trial court, and annexure thereto, I am not satisfied the applicants have established sufficient grounds for the apprehension that justice won't be done if the matter proceeds before the Marsabit Kadhi court. They have not in my mind met the conditions to warrant the transfer of this matter from Marsabit Kadhi court to Isiolo Kadhi court. I am of the view that justice shall be served if the matter proceeds at Marsabit Kadhi Court as the respondents also have a right to be heard near their base and not to be put into unnecessary expenses and to be able to avail their witnesses at minimum expenses and especially be afforded opportunity to bring their elderly witnesses to give evidence.

13. The upshot is that the applicant's application is dismissed with costs to the respondents to be agreed or taxed by the taxing master.

DATED, SIGNED AND DELIVERED AT MERU THIS 25TH MARCH, 2015.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN PRESENCE OF:-

- 1. Mr. Ondari for the applicant**
- 2. Respondents in person – present**
- 3. C/clerk Penina/Mwenda**

J. A. MAKAU

JUDGE