



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Judicial Review No. 18 Of 2014

IN THE MATTER OF: THE ESTATE OF NYUNI KUNYAPA

AND

IN THE MATTER OF: PLOT NO. KWALE/MSAMBWENI 'A' 2164

AND

IN THE MATTER OF: KWALE KADHI'S COURT CIVIL CASE NO.

337 OF 2013

BETWEEN

THE REPUBLIC.....APPLICANT

VERSUS

THE KADHI'S COURT KWALE.....RESPONDENT

AND

1. BAKARI NASSORO CHOMBO

2. MOHAMED JUMA ALI

3. ADRIS JUMA KITALE

4. MOHAMED BAKARI NYUNI

5. BAINA AHAMED SEIF.....INTERESTED PARTIES

KASSIM HAMISI NYUNI.....EX-PARTE

RULING

1. The *ex parte* applicant (Kassim Hamisi Nyuni), was granted leave by this court to commence Judicial Review proceedings for orders of certiorari and prohibition against the judgment of the Hon. Principal Kadhi delivered in Kwale Kadhi's Court Civil Case No. 337 of 2013.

2. Following the grant of leave, the *ex parte* applicant filed the substantive Notice of Motion on 15th May, 2014, and served it upon the firm of Musyoki Mogaka & Company Advocates for the Interested Parties, Bakari Nassoro Chombo and 4 others, and the Attorney General (for the Principal Kadhi, the respondent).
3. Apart from the Memorandum of Appearance dated and filed on 25th June, 2014, on behalf of the Interested Parties, the said firm filed no other papers in these proceedings. The Hon. Attorney-General who was represented by Ms. Kiti, neither filed a Memorandum of Appearance nor any other papers for or against the Notice of Motion, the subject of this Ruling. Counsel for the *ex parte* Applicant however filed written submissions on 27th February, 2015, but are dated 20th February, 2015. Mr. Mohamed, who appeared for the *ex parte* Applicant at the hearing of the petition, relied on the said written submissions, and the authorities attached thereto.
4. Though the Notice of Motion was filed as a Judicial Review application, the submissions were in essence made as if the Judicial Review application were an appeal in the court's civil jurisdiction. That is why reliance was placed upon the doctrines of *res judicata*, provided for under Section 7 of the Civil Procedure Act, (Cap 21, Laws of Kenya), and the cases in support of that doctrine **NGUGI VS. KINYANJUI & 3 OTHERS [1989] KLR 146**. The English case of **REX VS. FULHAM, HAMMERSMITH & KENSINGTON RENT TRIBUNAL ex parte PHILIPPE [1950] ALL ER 211**, concerned the Tribunal's jurisdiction or power to fix rental in rent controlled premises, when it did not have such power. An order **certiorari** properly issued.
5. Judicial Review is primarily concerned with controlling the exercise by public bodies/statutory or other public law powers conferred upon them. The role of the court is to ensure that those bodies do not exercise those powers unlawfully. It is not the role of the court to determine how those powers should be exercised. That is why Section 8(1) of the Law Reform Act, (Cap 26, Laws of Kenya) expressly prohibits this court from issuing any of the judicial review orders (i.e. certiorari, prohibition or mandamus) in exercise of its civil or criminal jurisdiction.
6. The case here is vastly different. The *ex parte* applicant's case here is that the matter of inheritance before the Kwale Kadhi's Court was **res judicata**, it had been directly and substantially in issue between the same parties and finally determined by a court of competent jurisdiction. It is not that the previous court had no jurisdiction. It is merely that there was no material disclosure to the subsequent court that the case had been previously determined. These are however no reasons for granting the orders sought, of certiorari or prohibition. They are grounds for setting aside in exercise of its appellate civil jurisdiction of the orders made by the Principal Kadhi in his Judgment of 2nd May, 2005.
7. For those reasons, I will treat the Notice of Motion of 15th May, 2014 as an appeal. I decline to grant the orders of certiorari and prohibition sought, and in exercise of the inherent powers of this court under Sections 3A of the Civil Procedure Act, to make such orders so to meet the ends of justice and prevent abuse of the process of court, I set aside the Judgment aforesaid of the learned Principal Kadhi dated 2nd May, 2005, and direct that the Judgment of the learned Chief Kadhi delivered on 29th October, 1986 be implemented in terms thereof.
8. Though costs follow the event, I direct that each party bears its own costs. There shall be orders accordingly.

Dated, Delivered and Signed at Mombasa this 18th day of March, 2015.

M. J. ANYARA EMUKULE

JUDGE

In open court

In the presence of:

Mr. Khatib for Applicant

Mr. Ngare for Respondent

No appearance for Interested Parties

Court Assistant Mutisya