



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION AT NAIROBI
PETITION NO. 374 OF 2015

FAZLEABBAS MOHAMMED CHANDOO.....PETITIONER

VERSUS

A.I HUSSEIN,KADHI, THE KADHI'S COURT.....1ST RESPONDENT

BUSHRA SULTANA ALI.....2ND RESPONDENT

SADHA IQBAL.....3RD RESPONDENT

MUSLIM KHIMJI.....4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....5TH RESPONDENT

JUDGMENT

Introduction

1. The Petition herein covers essentially the broad question of the extent of jurisdiction of the Kadhis' Courts. The Kadhi's Court as an institution of dispute resolution has been in existence since the early 19th Century along the East African coastal line.

2. In Kenya, the existence of the Kadhis' Courts may be traced to just after the middle of the 20th Century when letters exchanged between the then Prime Minister of Kenya the late Jomo Kenyatta and the Prime Minister of Zanzibar in 1963 reveal a deal having been struck to have Kadhis' court continue to operate in Kenya along the 10 mile coastal strip.

3. The Kadhis' court is ensconced under the Constitution. Articles 169 and 170 of the Constitution recognize and establish the Kadhis' Court headed by a Chief Kadhi. The Articles also outlay the jurisdiction of the Kadhis' Court. It is that jurisdiction that is the subject of contest in this Petition.

The Parties

4. The Parties, save the Fifth Respondent, all profess the Muslim faith.

5. The Petitioner is the vice chairperson of a society registered under the Societies Act (Cap 108) Laws of Kenya. The society, known as Shia Asna Ashri Jamaat ('SAAL'), was through its chairperson the third defendant in the dispute before the Kadhis' Court that ultimately led to the filing of this Petition. The dispute was registered as Civil Suit No. 248 of 2012 before the Kadhi's Court at Nairobi.

6. The First Respondent is a Kadhi. He holds office pursuant to Article 169(4) of the Constitution. He presided over the dispute in the Kadhis' Court.

7. The Second Respondent was the First Plaintiff before the Kadhis' court case while the Third Respondent was the Third Plaintiff before the Kadhis' Court, in Civil Suit No. 248 of 2012.

8. The Fourth Respondent was the Second Defendant in the case before the Kadhis' Court while the Fifth Respondent has been enjoined to these pursuant to Article 156 of the Constitution. He is the Attorney General of the Republic of Kenya.

Background Facts

9. The facts leading to the Petition may be stated shortly as follows.

10. In 2012 Bushra Sultan H. Ali, a daughter of one Kurshid Ali-Sheikh ('deceased') filed proceedings before the Kadhi's Court Nairobi. She was joined by two of her siblings as co-claimants. The suit was Civil suit No. 248 of 2012. The suit was against one Ashir Karam, the then chair of Shia Ashua Ashri Jamaat ("SAAJ"). Bushra also named one of her brothers as a co-defendant. He had been a Vice-Chairman of SAAJ. Bushra sought delivery up of items of jewellery. Bushra also sought a distribution of an asset, namely House No. 28 LR. No 209/5559/28 to Bushra and all her siblings. Bushra claimed that the deceased's Will had expressly stated that the jewellery belonged to her. Bushra also claimed that the Defendants had kept the jewellery and had failed to surrender the same.

11. Bushra asserted that all attempts to have the matter amicably resolved had failed. Bushra urged for a resolution by the Kadhi.

12. In 2013 with the pleadings having been closed and interlocutory matters dispensed with, Bushra's claim was listed for trial. The record of proceedings before the Deputy Chief Kadhi reveals that the parties then attempted out of court negotiations. These failed.

13. Then in 2014 the claim proceeded to full trial before the 1st Respondent herein. The full trial chanced. The parties testified and were cross-examined. Witnesses were summoned. They attended and testified. The trial was concluded on 17th June 2014.

14. On 5th August 2014 a seven paged judgment was delivered by the Kadhi. The Kadhi found for the Bushra and made the following order.

“That the Chairman of Shia Athna Ashania Jamaat (the 3rd Defendant) is hereby ordered and directed to deliver the jewellery, the subject matter to Ms. Bushra Sultana H. Ali (the 1st Plaintiff hereinabove) or in the alternative an equivalent value in monetary terms of the jewellery”.

15. The Defendants apparently did not heed, so Bushra moved the Kadhi's court for extraction and execution of the decree. The Kadhi obliged and issued a decree on 8th April 2015 and warrants on 3rd August 2015. The decree contained a particular as to the equivalent monetary value of the jewellery. Kshs. 853,000/=, it was. When Bushra sought to pursue the execution of the warrants, the Petitioner moved this court through the Petition.

The Petition

16. The Petition laid a basis for various reliefs by stating that the Constitution had been infringed and violated. Inter alia, the Petitioner claimed that:

- i. ***The Kadhi had acted in excess of his jurisdiction as provided for under Article 169 and 170 of the Constitution***
- ii. ***The warrants of attachment issued by the [Kadhi's] Court were a nullity as the Kadhis' Court had no jurisdiction and the same is in breach of the Constitution and that the warrants issued were in respect of dead parties..***
- iii. ***The decree issued by the Kadhi's Court on 28th[sic]April 2015 did not conform to the judgment***

17. The Petitioner then sought the following reliefs

1.
2. ***A declaration do issue to declare that the First Respondent's judgment dated the 5th day of August 2014 be and is hereby a nullity as the same is in breach of the Constitution in respect of the Chairman of SAAJ and or relating to SAAJ***
3. ***A declaration do issue that the decree issued on 28th day of April 2015 is a nullity as the same is in breach of the Constitution and the law***
4. ***A Declaration do issue that the Warrants of Attachment issued by the Kadhis Court in Civil Suit no. 248 of 2012 are a nullity***
5. ***An injunction do issue restraining the First Respondent and Second Respondent and or the Third Respondent and or their servants and or agents and or any other persons acting in the authority of the said Respondents from proceeding against the Petitioner and or SAAJ and or the Chairman of SAAJ and or any other members of the Management Committee of SAAJ in respect of Kadhis Case No 248 of 2012.***

The Petitioner's case

18. The Petitioner claims that the 1st Respondent acted in excess of jurisdiction and contrary to the provisions of Articles 169 and 170 of the Constitution. In particular the Petitioner contends that the warrants of attachment issued by the Kadhi's court are a nullity and in breach of the Constitution. The Petitioner also adds that the decree issued by the 1st respondent is irregular. A declaration to like effect is now sought by the Petitioner. Likewise, an order restraining further action against SAAJ or any other member of the management committee of SAAJ in respect of the order or proceedings emanating from Kadhi's case no. 248 of 2012.

The Respondents' case

19. The Respondents' case is contained mainly in the Replying Affidavit of the 2nd Respondent, Bushra Sultana Ali sworn on 18th September 2015 and the Grounds of Opposition filed on the same date.

20. The Respondents contend that the Kadhi's court had jurisdiction under Article 170 and under the Kadhis' Court Act (Cap 11) as the dispute involved a deceased's estate and Will. That the dispute sought a determination on whether the 2nd Respondent was entitled to appropriate any assets of the deceased. The 2nd Respondent also contends that the Petitioner's counsel as well as counsel for SAAJ fully participated in the proceedings before the 1st Respondent and further that the 1st Respondent was perfectly in order in placing a value of Kshs. 853,000/= on the jewellery. That value, stated the Respondents, was never objected to by the Petitioner or any other party.

Submissions

21. The Petition was heard through the oral arguments advanced by the parties on 6th October 2015. The evidence was as stated in the affidavit in support of the Petition and the Replying Affidavit.

22. Ms. Janmohammed, for the Petitioner, reiterated the contents of the Petition and submitted that, under Article 170 of the Constitution, the Kadhi's Court's jurisdiction was clearly set out. She further asserted that there was no dispute falling under the said Article which involved the 2nd and 3rd Respondents. Finally, Ms. Janmohammed submitted that the decree did not conform to the judgment in so far as the former purported to state an ascertained value of the jewellery. She also asserted that the decree and the proceedings were contrary to Article 170 of the Constitution as well as the Kadhis' Court Act as the 1st Respondent could not sign warrants of attachment or issue the same.

23. Ms. Mwangi who appeared for the 1st and 5th Respondent submitted that Kadhis' courts are subordinate courts under Article 169 of the Constitution. That they could however only deal with the matters stated under Article 170 (5) of the Constitution. She further contended that in the instant case the Kadhi was within his jurisdiction when he determined the matter which also saw warrants being issued under the Civil Procedure Rules.

24. Ms. Waiganjo, advocating for the 2nd and 3rd Respondents, also contended that the Kadhi's court had jurisdiction to deal with the dispute. Adding that jurisdiction had not been contested before the Kadhi, Ms. Waiganjo urged the court to dismiss the Petition as the warrants could be lawfully issued under the Civil Procedure Rules pursuant to Section 11 of the Kadhis' Court Act. According to Ms. Waiganjo, the claimants before the Kadhi's court, now Respondents before this court, were perfectly suited and the evidence vindicated them as against the SAAJ and the other defendants.

Discussion and analysis

25. I have read the Petition as well as the Replying Affidavit, filed in response. I have also considered the respective submissions by the Advocates.

26. The crux of this Petition is the extent of the Kadhi's court jurisdiction. That is the only discernible issue.

27. Before I proceed with the determination of the aforesaid issue, it would be important to point out that the Petitioner has pleaded the court's jurisdiction under Article 22, 23 and 165 (3) (d) of the Constitution. The first two Articles deal with the enforcement of the Bill of Rights. The last Article is the omnibus jurisdiction of the High Court to deal with matters constitution. In particular, the Article grants jurisdiction to hear any question respecting the interpretation of the Constitution including a determination as to whether any law is inconsistent with or in contravention of the Constitution or whether anything said to be done under the authority of the Constitution or of any law is inconsistent with or in contravention of the Constitution.

28. With regard to Articles 22 and 23 the law in relation to their application, for any person invoking them, is now relatively well settled. A party alleging a violation or threatened violation of his rights or fundamental freedoms must precisely state the right or fundamental freedom violated or threatened with violation. The party must further describe with reasonable precision the rights have been violated or threatened with violation: see **Anarita Karimi Njeru –v- Republic [1976-80] 1 KLR 1272, Mumo Matemu –v- Trusted Society for Human Rights Alliance & 5 Others [2013] eKLR, Anami Silverse Lisamula –v- IEBC & 2 Others SCP No. 9 of 2014 [2014] eKLR.**

29. A cursory look at the Petition will reveal that the Petitioner has not framed his claim with the requisite precision. I have not been able to identify, even with a closer perusal of the Petition, any particular Articles of the Constitution or rights or freedom specifically pinpointed by the Petitioner as having been violated or under the threat of violation by the Respondents. Neither have I also noted any precise description of the alleged violation or threats of violation.

30. While I agree that the fundamental freedoms and rights allegedly infringed or violated ought not be left to speculation, caution must however be exercised when invoking the *ratio decidendi* in **Anarita Karimi Njeru v Republic (supra)**. The court should not be in a hurry to declare Petitions fatally defective. Attempts to ensure that the ends of justice are met must be made. Reflection should also be on

the fact that **Anarita Karimi Njeru's** case was determined nearly one quarter of a century prior to the promulgation of the current Constitution, which has consistently been described as progressive.

31. Article 22(3) of the Constitution enjoins the Chief Justice to make rules providing for court proceedings relating to the Bill of Rights. Such rules are required to satisfy the norm that formalities relating to proceedings are kept to the bare minimum and in particular the fact that the Court is enjoined, if necessary to entertain proceedings on the basis of informal documentation. This clause read together with Article 258 of the Constitution leads to the more prudent conclusion that the rigorous requirements set out by the Court in the **Anarita Karimi Njeru's** case need deeper reflection before being applied to any given case.

32. In the instant Petition, the Petitioner's plea may very well be that , coming under Article 258, certain provisions of the Constitution are being violated hence the Petitioner's reference to Article 165(3)(d) of the Constitution.

33. I would , notwithstanding the apparent latent defect in the drafting of the Petition, proceed and consider its merits as below.

An issue of jurisdiction

34. The epistemology of "jurisdiction" has been dealt with in depth by this Court previously.

35. In the case of **Patrick Musimba v National Land Commission & 4 Others**[2015]eKLR, after considering the cases of **Guaranty Trust Co. of New York v Hannay & Co** [1915]2 KB 536, **Garthwaite v Garthwaite** [1964]2 All E R 233, **The Lillian S** [1989]KLR 1, **Wachira v Ndanjeru** [1986-89]1 EA 577, **Seven Seas Technologies Ltd v Erick Chege** [2014]eKLR together with various treatises stated as follows :

"[47]...Put very shortly and reading from the above definitions, it is apparent that in its strict sense the "jurisdiction" of a court refers to the matters the court as an organ not an individual is competent to deal with and reliefs it is capable of granting. Courts are competent to deal with matters that the instrument, be it the Constitution or a piece of legislation, creating them empowers them to deal with. Such jurisdiction may be limited expressly or impliedly by the instrument creating the court..."

36. Jurisdiction is basically to be discerned from the instrument creating the court and or conferring jurisdiction.

37. I understood the Petitioner's counsel to state that the Kadhis' Court as was presided over by the 1st Respondent purported to exercise jurisdiction it did not have. That it acted in excess of its jurisdiction, if at all.

Jurisdiction of the Kadhis' Court

38. The Kadhis' Court is itself a creature of the Constitution. It is stated to be a subordinate court under Article 169 of the Constitution. Article 169(2) and Article 170(3) of the Constitution both mandate Parliament to enact legislation conferring jurisdiction , functions and powers of the Kadhis' Court. Such jurisdiction as may be conferred by an Act of Parliament is to be limited to the matters provided for under Article 170(5) of the Constitution. Article 170(5) states as follows:

"(5) The jurisdiction of a Kadhi's Court shall be limited to the determination of questions of Muslim Law relating to a 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 court."

39. Prior to the promulgation of the Constitution however, the Kadhis' Court Act (Cap 11) Laws of

Kenya had long been enacted. Section 5 of the Kadhis Court Act provided as follows, in so far as jurisdiction of the Kadhis' court was concerned:

“5. A Kadhi shall have and exercise the following jurisdiction, namely 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; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.”

40. Reading from both Article 170(3) and (5) of the Constitution as well as Section 5 of the Kadhis' Court Act (Cap 11), it is apparent that there has always been the intention to limit the jurisdiction of the Kadhis' Court to matters of personal law specifically involving parties or protagonists professing the Muslim faith and relating to personal status, marriage, divorce or inheritance.

41. For the jurisdiction also to exist, the parties to the dispute must submit themselves to the jurisdiction of the Kadhis' Court. The parties must not only profess the Muslim religion but must also submit to the jurisdiction of the Kadhis Court. The jurisdiction is consequently consensual. So that where one party decides not to recognize the fact that the Kadhis' Court can resolve the dispute and declines to participate in the proceedings, the Kadhis' Court is immediately divested or robbed of jurisdiction. In such a case the dispute must then be referred to the High Court or the magistrates' court for resolution.

42. In my view, due to the provision as to consensuality of jurisdiction, the rider under Section 5 of the Kadhis' Court that the provisions of Section 5 does not take away the jurisdiction of the High Court or the subordinate court, cannot be deemed to be inconsistent with the Constitution. Parties must be free to have their disputes resolved by forums chosen by them and where they are not able to agree on the forum, the forums established under the Constitution are expected to resolve such disputes.

43. No doubt the provisions of the Constitution must always be construed generously and positively rather than pedantically and narrowly: see **James -v- Commonwealth of Australia [1936] A.C 578**, **Ndyanabo -v- Attorney General [2001] E.A 485**, **Githunguri -v- Republic [1986] 1 KLR 1** and **Societe United & Others v Mauritius [1985]2WLR 114** amongst many other decisions the world over. With regard to interpreting the Constitution on matters touching and concerning the judiciary and its role as an arm of the Government it must also always be taken into account that judicial power is derived from the people and is exercised by the courts in the name of the people. It must be exercised in conformity with the law and with the values, norms and aspirations of the people: see **Article 159 (1)** of the Constitution.

44. Context is always important in the process of judicial decision making. Where there is a constitutional question, the history of constitutional making is also always relevant. The Kadhis' Court issue and jurisdiction must be understood from the perspective of history as well, especially the immediate period preceding the promulgation of the Constitution.

45. The entrenchment of the Kadhis' Court in the Constitution was not devoid of challenge and controversy. As earlier indicated, the Independence Constitution carried with it the Kadhis' Court: see **Sections 178 and 179** of the 1963 Constitution. Later, the Kadhis' Court Act (Cap 11) was enacted in 1967 to regulate and guide the said court system besides stating its jurisdiction. Section 66 (formerly Sections 178/9) of the now repealed Constitution provided as follows:

66. Kadhis' courts.

(1) There shall be a Chief Kadhi and such number, not being less than three, of other Kadhis as may be prescribed by or under an Act of Parliament.

2) A person shall not be qualified to be appointed to hold or act in the office of Kadhi unless

(a) he professes the Muslim religion; and

(b) he possesses such knowledge of the Muslim law applicable to any sect or sects of Muslims as qualifies him, in the opinion of the Judicial Service Commission, to hold a Kadhi's court.

(3) Without prejudice to section 65 (1), there shall be such subordinate courts held by Kadhis as Parliament may establish and each Kadhi's court shall, subject to this Constitution, have such jurisdiction and powers as may be conferred on it by any law.

(4) The Chief Kadhi and the other Kadhis, or the Chief Kadhi and such of the other Kadhis (not being less than three in number) as may be prescribed by or under an Act of Parliament, shall each be empowered to hold a Kadhi's court having jurisdiction within the former Protectorate or within such part of the former Protectorate as may be so prescribed:

Provided that no part of the former Protectorate shall be outside the jurisdiction of some Kadhi's court.

(5) The jurisdiction of a Kadhi's court shall extend 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. (emphasis)

46. The above section was the subject of challenge in the case of **In Re Kadhis' Court: Rev. Jesse Kamau & 25 others v Attorney General [2010]eKLR**. The applicants challenged the 'constitutionality' of a constitutional provision within the Constitution. They argued that Kenya was a multi-religion and multi-cultural State and the existence of the Kadhis' Court funded by the State amounted to segregation, sectarianism and discrimination. The Court, in May 2010, controversially then held and declared, inter alia, that Section 66 as quoted above was inconsistent with sections 65 and 82 of the Constitution and further that any form of religious courts could not form part of the Judiciary in the Constitution as it offended the doctrine of separation of state and religion.

47. Just a few months later, Kenyans were to vote in a referendum for or against the new Constitution which still carried along provisions for the Kadhis' Court. Despite the Kadhis' court being an issue, the Kenyan voter positively voted for the Constitution in the majority.

48. There was however now a slight difference in so far as the jurisdiction of the Kadhis' Court was concerned. The Constitution now expressly stated that the jurisdiction of the Kadhis' Court was to be limited to the matters stated under Article 170(5), unlike the repealed Constitution which had stipulated that the jurisdiction was to extend to the matters stated under the Constitution. The latter provision implied a wider jurisdiction, while the former gave a more restricted remit.

49. Secondly, the Constitution also provided for a consensual jurisdiction. Even if one professed the Muslim religion, he could not be subjected to the jurisdiction of the Kadhis' Court unless he agreed to the same as the dispute resolution forum. The repealed constitution never had a similar provision.

50. The net result was that the jurisdiction of the Kadhis' Court was and is now more limited. Unlike other provisions of Chapter Ten of the Constitution which donate jurisdiction (see for example Articles 163 (3), 164(3) and 165(3) which confer and donate jurisdiction to the Supreme Court, the Court of Appeal and the High Court respectively), the jurisdiction of the Kadhis' Court was to be set by Parliament but limited by the Constitution to matters stated under Article 170(5).

51. In my judgment, the words of Article 170(5) of the Constitution are unambiguous and precise. They must be given their literal and natural meaning especially in view of the history of Constitution making in Kenya. The Kadhis' Court Act (Cap 11) must be subjected to the provisions of the Constitution and in particular Article 170(3) and (5). Any attempt to confer or invite jurisdiction beyond the matters stated in Clause (5) must be frowned at. Likewise, not all persons professing the Muslim faith can be subjected to proceedings before the Kadhis' Court if they do not consent to the same.

52. There is no controversy that since 2010 Parliament has not enacted any legislation under Article 169(2) and 170(3). No time limit was however provided for under Article 261(2) and the 5th Schedule to the Constitution. No lacuna exists however. There is in place the Kadhis' Court Act (Cap 11) which outlines the jurisdiction, functions and powers of the Kadhis' Court. The said statute, like all other statutes and laws which were in existence as of August 2010, must be construed pursuant to Section 7 of the 6th Schedule to the Constitution. The section reads as follows:

“7 .(1) All law in force immediately before the effective date continue in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution

(2).....”

53. While there may be need to amend the Kadhis' Court Act to bring it in line with various values and systems of governance, especially the devolved system , under the Constitution, I am unable to discern any reason to amend the provisions of Section 5 thereof. Even if it were to be given the widest and most liberal interpretation, the Section is, in my considered view and judgment, in line with the provisions of Article 170(5) of the Constitution.

54. I must perhaps only add the Kadhis' Court also has jurisdiction to deal with any matter incidental to the exercise of jurisdiction over matters within its exclusive jurisdiction.

55. In the context of the instant Petition, the 1st Respondent was faced with a dispute between persons who professed the Muslim faith. The dispute involved a Will. It also involved the distribution of the estate of the deceased Kurshid Ali Sheikh. It further involved the recovery of certain personalty (in the form of jewellery) which belonged to the deceased. The 2nd Respondent laid claim to the jewellery. The dispute invited a determination as to whether the then Claimant, now the 2nd Respondent herein, was entitled to the personalty. It involved the balancing of a testamentary transfer and of a gift *inter vivos*. The Kadhis' Court, with the 1st Respondent herein presiding, returned the verdict that the 2nd Respondent herein had established that she was entitled to the personalty by reason of a gift *inter vivos*. That was after hearing all the evidence by both protagonists.

56. It is also to be noted that the parties subjected themselves to the judicial process or the jurisdiction of the Kadhis' Court. Such consensual jurisdiction is a requirement under the Constitution in so far as the Kadhis' Court is concerned. The parties, including the SAAJ, apparently agreed to have the dispute resolved before the Kadhis' Court. Ultimately, through evidence, the 1st Respondent herein found that the personalty that was at the core of the dispute had been handed over to SAAJ.

First determination

57. In my judgment, the 1st Respondent had jurisdiction to determine the dispute that was before him. It was within the confines of both the relevant statute as well as the Constitution. I have not been able to identify any instance where the Constitution or any law was violated and neither was there any evidence to back up the allegations of violation made by the Petitioner.

Of the Decree and the Warrants

58. The Petitioner also complained that the 1st Respondent in purporting to extract a decree and execute warrants acted beyond its jurisdiction. In these respects, the Petitioner's contention was that the process of execution and enforcement of judgments by the Kadhis' Court was the reclusé of another forum. The Respondents contend that the Kadhis' Court must not issue orders and judgments in vain. It must always be in a position to enforce the same itself.

59. I have perused the record of the court proceedings before the 1st Respondent. I have also perused the

documents availed by the parties. The 1st Respondent extracted and issued the Decree. The warrants were thereafter signed and issued by a Deputy Registrar of the Kadhis' Court. It was stated that this process was pursuant to the provisions of the Civil Procedure Act and Rules.

60. I find that argument plausible. Section 8 of the Kadhis' Court Act (Cap 11) Laws of Kenya, provides as follows:

“8. Practice and Procedure

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

(2) Until rules of the 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.”

61. There is no controversy that the rules contemplated under Section 8 of the Kadhis' Court Act are yet to be promulgated. Effectively, the provisions of the Civil Procedure Act and the rules made thereunder would be applied by the Kadhis' court. My reading of the said Section 8 does not suggest that a separationist approach ought to be adopted by the Kadhis' court. I do not view it possible as suggested by the Petitioner that when it comes to execution of its own orders and judgments, a Kadhi's court is hapless and must seek help elsewhere .

62. Given that the Kadhis' court under the Constitution is of even status to the Magistrates' court, to state that the Kadhi must surrender his ability to execute his orders to a magistrate would also be unreasonable and untenable.

63. The procedure and practice so prescribed for execution of decrees and judgments of both the subordinate courts and the High Court may be found under Order 22 of the Civil Procedure Rules,2010. It is relatively clear. The Decree may be executed by a magistrate as well as a Deputy Registrar. The warrants too may be executed by a Deputy Registrar or a Magistrate. In my view, to say that the Kadhis' court is to be limited to expressing views and opinions of the matters and questions before them without the ability to enforce those opinions and views while the magistrates' court can would be a wrong and unreasonable construction of both the Constitution and the statute. The magistrates' court may enforce a decree and so too may the Kadhis' court.

Second Determination

64. In the current case, I have seen nothing wrong with the enforcement process vis-a-vis the Constitution and the relevant statute law. I am not satisfied that there was a violation of either. I hold the view too that if there is a challenge to the decree or judgment then the Petitioner ought to have moved to the High Court by way of an appeal or review rather than a constitutional petition.

65. On the Decree itself, it was also contended that it did not conform to the judgment. Order 21 Rule 11 of the Civil Procedure Rules is relatively clear as well when it comes to extraction of decrees for return of movables. The decree the subject matter of this Petition was for the return of movables. It was for the delivery of certain jewellery. Order 22 rule 11 is to the effect that where such a decree is to be issued , then it must state the amount of money to be paid in the alternative and in the event that delivery of the movables cannot be made. I find in the circumstances of this case that the decree as extracted was not irregular.

Disposal

66. The upshot of the foregoing is that I am unable to find for the Petitioner. I am not convinced that the petitioner has demonstrated to the required standard any violation of the Constitution or of any law by any of the Respondents or at all. The Petition fails. It is dismissed.

Costs

67. The Petition was not public interest litigation. The Petitioner sought to secure private rights. The complaints did not merit the filing of the Petition. An appeal or review would perhaps have been more suitable but the Petitioner genuinely believed in the Petition. The Respondents have succeeded in resisting the Petition in its entirety. The award of costs is however at my discretion. My view ,in the circumstance of this case is that the Respondents ought to have a recompense . I see no reason to deny the Respondents costs.

68. The Petitioner will bear the costs of the Petition , payable to the 1st , 2nd 3rd and 5th Respondents.

DATED and DELIVERED at NAIROBI this 21st day of October 2015

J.L.ONGUTO

JUDGE

Advocates:

Ms. Janmohamed for the Petitioner

Ms. Mwangi instructed by the Attorney general for the 1st & 5th Respondents

Ms. Waiganjo for the 2nd & 3rd Respondent

N/A for the 4th Respondent