



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

HIGH COURT CIVIL APPEAL NO. 6 OF 2007

(From the original judgment of the Kadhi's Court Malindi Civil Miscellaneous Suit No. 53 of 2005)

IN THE MATTER OF: THE ESTATE OF THE LATE AISHA RASHID MGUTE (DECEASED)

CHIDUNGA SULEIMAN NDOROAPPELLANT

VERSUS

ALI ABDALLA AZZAN

HASSAN RASHID MGUTERESPONDENTS

JUDGMENT

1. This appeal emanates from the Kadhi's court in Malindi. On 19th May, 2006 the Kadhi delivered a judgment in respect of the Originating Summons filed by the Respondents against the appellant, seeking a determination on four questions as follows:

- “1. That he honorable court be pleased to determine the validity of the will of the late Aisha Rashid Mgute under Islamic law.**
- 2. That the respondent be compelled by order of this honorable court to produce and account for all property he is holding on behalf of the estate of the deceased pending a determination of the issues arising therefrom.**
- 3. That the honorable court do determine whether there existed a valid marriage in Islamic law between the deceased Aisha Rashid Mgute and the respondent.**
- 4. That the honourable court do order the administration of the personal estate and administration of the real estate of the deceased in line with her wishes.”**

2. The Originating Summons was heard exparte as the present appellant, the respondent in the Lower Court, was absent, despite notice. In his judgment, the Learned Kadhi noted that the alleged will bore no date and stated correctly that for the will to be valid, it should be witnessed. He however proceeded to state that:

“I hold the same and order for witnesses to proof the validity of the will.” (Sic) He concluded that for those reasons the 2nd respondent could not be granted leave to administer the estate of the late Aisha

Rashid Mgute. He stated as follows in that regard: **“On the same grounds stated the 2nd applicant cannot be granted leave to administer the estate of the late Aisha Rashid Mgute.”**

3. The learned Kadhi also further concluded regarding the alleged marriage between the appellant and the deceased:

“It was a customary form of marriage and has nothing to do with Islamic form of marriage....Therefore unless the contrary is proved, no Islamic marriage existed between the two.. In this case the parties seem to be muslims but opted to marry customarily...in contravention of the above cited law. I therefore declare that no valid marriage existed between the two. On the same grounds stated above the respondent is not legally entitled to the asset and properties left behind by the deceased.” (sic).

4. The learned Kadhi proceeded to make an order directing the appellant to produce an account of all assets and properties of the deceased. Following submissions made on 28th September, 2006 by counsel for the respondents regarding failure by the appellant to comply with the said court order, the Kadhi issued a Notice to Show Cause why the appellant should not be arrested and committed to civil jail for disobedience of his orders, which resulted in the arrest of the appellant. At the end of the subsequent proceedings conducted in the presence of the appellant and his counsel on 6th November, 2006, the Kadhi set aside the notice to show cause and the “arrest order for failure by the applicants to make the necessary service on the defendant.”

5. There followed an application for a temporary injunction by the respondents seeking to restrain the appellant from interfering with the “suit property”. The said application was also heard exparte and a ruling subsequently delivered. In the course of the ruling, the Kadhi made no reference to the orders sought in the application. Instead the learned Kadhi observed that the appellant was delaying the case and proceeded to state:

“I therefore confirm that there was no legal marriage between the defendant and the deceased, Aisha Rashid Mgute hence her estate devolves to her children Juma and Suleiman and to her mother Fatuma Nguyo. The petitioners have asked the court to compel the defendant to surrender the property. Therefore I order for the expeditious hearing of the case and the matter is fixed for hearing on 26th February, 2007 ad the defendant be arrested and be committed to civil jail for disobeying the court order until the matter is heard and completed.

6. On the appointed ‘hearing’ date the 1st respondent gave evidence and asked that ‘final’ judgment be given so that the “estate is inherited properly and the children equally”. What followed was a ruling which the learned Kadhi stated in part that final judgment was entered on 19th May, 2006 but that “execution of the decree had been very difficult as the judgment debtor had decided to disobey the court order.”

7. In the said ruling, the court distributed the assets of the deceased and issued a permanent injunction against the appellant to “restrain himfrom encroaching upon the suit property in any manner”...Custody of the two children of the deceased was given to one Fatuma Nguyo, mother to the deceased. An order was issued requiring that the appellant hands over certain identified properties to the named legal heirs of the deceased and to give an account. The Kadhi further ordered a freeze on the deceased’s savings account at Afya SACCO and directed the respondent’s to apply to the High Court for Letters of Administration. An application for stay of execution pending appeal brought later by the appellant was dismissed on 4th June, 2007.

8. On 26th March, 2007 the appellant filed the memorandum of appeal citing five grounds as follows:

“1. That the learned Kadhi’s court heard and determined the case before it without jurisdiction and constitutional powers as provided under the Constitution of Kenya and

Kadhi's Courts Act.

- 2. That the learned Kadhi erred both in law and in fact by not considering the evidence tendered by the appellant.**
- 3. That the Kadhi's court determined the issue of the custody of the issues of marriage when the same should have been done by the Children's Court.**
- 4. That the Kadhi's court heard and determined the dispute over the property which the appellant contributed to which property was jointly owned by the appellant and his deceased wife and so the dispute should have been heard and determined by another court and not the kadhi's Court.**
- 5. That the respondents herein had no capacity to file suit against the appellant.”**

These grounds were argued by the appellant and opposed by the respondents.

9. In their submissions, the appellant's advocates challenged the jurisdiction of the Kadhi on three fronts:
 - a. To entertain an Originating Summons brought under Order XXXVI (old Civil Procedure Rules)
 - b. To entertain a matter in which all the parties were not adherents of the muslim religion.
 - c. To deal with the issue of custody, reserved for the Children's Court under the Children's Act.
 - d. To purport to reopen the matter after final judgment on 19th June, 2006 and to determine issues of custody and distribution of the estate of the deceased.

They also challenged the capacity of the respondents to bring the originating summons before the Kadhi.

10. The respondents opposed all the grounds and argued that the Kadhi had jurisdiction to determine questions of the validity of the will under Islamic Law and the existence of a marriage between the appellant and the deceased in accordance with Section 5 of the Kadhi's Court Act. The respondents pointed out that the appellant did not tender any evidence at the "trial". Further, that the issue of custody was intertwined with that of marriage and inheritance. It was submitted that the respondents as uncle and brother to the deceased were entitled to bring the suit.

11. I have considered the rival submissions in addition to studying the pleadings and record of proceedings before the Kadhi's court. I would agree with the opinion of the two Kadhi's sitting with me as assessors (Hon. Abdulhahim H. Athman, Principal Kadhi Mombasa) and (Sheikh Salim M. Salim, Kadhi Malindi) that on the face of it the Kadhi in the Lower Court had jurisdiction to deal with the four questions set out in the Originating Summons filed on 4th October, 2006 by the respondents. If there was any objection concerning adherence of any of the parties to the Muslim faith, the objection ought to have been raised before the Kadhi at the earliest opportunity. I might add however, that even the learned Kadhi appeared to express some doubt in his judgment wherein he stated that the "parties seem to be Muslims..."

12. Under Order 36 of the old Civil Procedure Rules the Originating Summons was returnable before a judge. In the interpretation section of the Civil Procedure Act the term 'court' is defined as "the High Court or a Subordinate Court, acting in the exercise of its civil jurisdiction". The term 'judge' means the presiding officer of a court". In my view the objection by the appellant on the basis that the Originating Summons can only be heard before a judge therefore has no merit.

13. My concern however, is whether the procedure adopted by the respondents was appropriate for a case of this nature. Strictly speaking the procedure prescribed under Order 36 (now Order 37 of the Civil Procedure Rules) is a summary procedure. Yet the questions that were put before the Kadhi were

questions that required not only elaborate pleadings but also full adduction of evidence before a determination could be reached. The key issues were disputed. It is in recognition of such an eventuality that Order XXXVI allowed discretion to the court to give directions for the calling of evidence and trial of any issues and to order the cause to proceed as if began by a plaint, with liberty for filing of further pleadings by the parties. In the case before us, no directions were taken before hearing, in accordance with the rules.

14. Secondly, the manner in which the Hon. Kadhi dealt with the matter leaves a lot to be desired. As I have outlined earlier, the Originating Summons was heard in two instalments, the first where no evidence was called ended with a final judgment and the latter a ruling delivered after a viva voce evidence. The ruling introduced the issues of custody and gave orders which were not included in the Originating Summons. A third party Fatuma Nguyo who was a stranger to the suit got custody of the children of the deceased. I agree with the appellant's submissions that once he gave his final judgment, the Hon. Kadhi was rendered functus officio and could not reopen the cause in order to distribute the assets or determine custody, much less order for the arrest of the appellant as he did.

15. In my considered view the record of the proceedings herein is replete with serious breaches of rules of procedure which resulted in a failure of justice in a matter involving very serious issues. Far reaching orders were given without regard to parties' pleadings or basic procedure. For these reasons, and in the interest of justice, I would set aside the judgment of the Kadhi and orders made in respect of the Originating Summons and direct that a retrial, involving calling of witnesses, be conducted before a different Kadhi. In accordance with Order 37 rule 19 of the Civil Procedure Rules I direct that for purposes of the retrial, the Originating Summons be deemed as a plaint and that the parties be at liberty to amend their pleadings and/or to file further affidavits to facilitate the trial. The matter is to be heard before the Kadhi sitting at Kilifi on a priority basis. For this purpose there will be a mention on 14th July, 2014 before the said Kadhi.

Costs in the cause.

Delivered and dated at Malindi on this 23rd day of **June, 2014** in the presence of Mr. Shujaa for the respondents, Mr. Odhiambo for the appellant absent.

C. W. Meoli

JUDGE

23-6-2014