



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT**

**MISC APPLICATION NO. 90 OF 2020**

**REPUBLIC.....APPLICANT**

**- VERSUS -**

**PRINCIPAL KADHI, MOMBASA.....RESPONDENT**

**AND**

**MURTAZA TURABALI PATEL.....INTERESTED PARTY**

**EXPARTE**

**1. ALIBHAI ADAMALI DAR**

**2. SHABBIR ALIBHAI DAR**

**3. ZAINULABIDIN YUSSUFALI DAR.....APPLICANTS**

**JUDGEMENT**

**I. Introduction**

1. On 8<sup>th</sup> December 2020, Yano J, considered the Chamber Summons application dated 3<sup>rd</sup> December 2020 by granting the Ex Parte Applicants leave to commence Judicial Review Proceedings in terms of prayers (b) and (c) of the said Chamber Summons application under the provisions of Order 53 of the Civil Procedure Rules, 2010.

2. The leave granted was to operate as stay in terms of prayer in terms of prayer (d). Subsequently, the Ex – Parte Applicants were directed to file the substantive Motion within 21 days thereafter and which they obliged accordingly.

3. At the same time from the records, there is also a Notice of Motion application dated 14<sup>th</sup> July, 2021 filed by the Interested Party still pending hearing and determination by this Court. The said application filed by the Interested Party was brought under the provisions of Sections 13, 16 and 19 of the Environment and Land Court Act, No. 19 of 2011, Article 40 of the Constitution of Kenya, 2010, Sections 1A, 1B, 3, 3A and 63 of the Civil procedure Act. Cap. 21 of the Laws of Kenya, Order 40 Rules 1, 2, 3 and 4 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 Sections 24 and 25 of the Land Registration Act of 2012. The details on this application will be discussed hereinbelow.

**II. The Ex – Parte Applicants' Case.**

4. Subsequently, on 12<sup>th</sup> January, 2021, the Ex Parte Applicants filed the substantive Notice of Motion application dated 12<sup>th</sup> January 2021. He sought the following orders:-

a) **An order of Certiorari be issued to bring to this court and quash the proceedings and orders of the Principal Kadhi, Kadhis' Courts, Mombasa taken and given on 25<sup>th</sup> November, 2020 in Mombasa Kadhi's Court Succession Cause No. 41 of 2019 (Murtaza Turabali Patel – Versus - Alibai Adamali Dar, Shabbir Akibhai Dar, Amirali Adamali Dar (sic) & Zainualbidin Yussufalidar (sic).**

b) **An order of Prohibition be issued to prohibit the Principal Kadhi, Kadhis' Courts, Mombasa from hearing or continuing to hear the Notice of Motion application from Murtaza Turabali Patel dated 24<sup>th</sup> November, 2020 and filed on 25<sup>th</sup> November, 2020 in Mombasa Kadhi's Court Succession Cause No. 41 of 2019 (Murtaza Turabali Patel – versus - Alibai**

**Adamali Dar, Shabbir Akibhai Dar, Amirali Adamali Dar (sic) & Zainualbidin Yussuffalidar (sic) and from hearing any application concerning the use, possession and occupation of land and relating to investigations by the National Police Service.**

**c) The costs of this application and of the application for leave be provided for.**

5. The application by the Ex – parte Applicant is grounded on the facts, testimony and averments on the statement of facts dated 3<sup>rd</sup> December 2020 and the 15 Paragraphed Verifying Affidavit dated and sworn by ZAINULABIDIN YUSSUFFALI DAR on 3<sup>rd</sup> December 2020. The 3<sup>rd</sup> Ex - Parte Applicant provided court with a brief history of the suit at the Kadhi's court. He stated that the Ex Parte Applicants together with AMIRALI ADAMALI DAR (deceased) were the Objectors/Applicants in the Kadhi's Court Succession Petition No. 41 of 2019 where the dispute involved the distribution of the suit land. On 25<sup>th</sup> November 2020, the Respondents filed an application and obtained ex parte orders of injunction that restrained the Ex - parte Applicants from dealing with the suit property and interfering with the Respondent's peaceful occupation of the same. There was a dispute involving multiple estates of the deceased persons and a piece of land in old town 24<sup>th</sup> November 2020 known as parcel of land known as Land reference Numbers Mombasa/Block XXXII/27 (hereinafter referred to as "The Suit Land"). It is developed with apartments and other facilities. That the said application was on the use and occupation of all that which was not within the jurisdiction of the Kadhi's court as provided for under Article 170 (5) of the Constitution and Section 5 of the Kadhis' Court Act. For this reason, the court was urged to prohibit the Principal Kadhi from further hearing and determining the application scheduled for "inter parties" on 11<sup>th</sup> December 2020.

6. The deponent maintained that the Principal Kadhi's jurisdiction only existed in the distributing the suit premises and not on ownership, use or occupation of the same. The deponent further argued that the Principal Kadhi had no jurisdiction to hear or issue injunctive orders relating to the suit premises, as the said jurisdiction was to a preserve for this court. In the long run, the court was urged to stop the Principal Kadhi from further encroaching on its jurisdiction.

### **III. The Interested Party's Case**

7. On 15<sup>th</sup> June 2021, the Interested Party through their Advocates the Law firm of Messrs. Marende Necheza & Company Advocates filed six (6) pointed Grounds of Opposition. As indicated above, on 14<sup>th</sup> July, 2021, the Interested Party filed a Notice of Motion Application dated 14<sup>th</sup> July, 2021 under the provisions of the law cited above and seeking for following orders:-

Spend;

**a) That this Honorable Court be pleased to issue an order stopping the Respondents by themselves, their servants, agents, employees and/or third parties and more particularly Yakuta Ali Hussein Dar from dealing, interfering, demolishing, shifting/changing apartments developing, causing unlawful arrest and/or in any other manner interfering with the Applicant's peaceful and quiet occupation and possession of the suit property pending the hearing and determination of this application.**

**b) That this Honorable Court be pleased to restrain the Land Registrar, Mombasa from interfering and/or dealing with the suit property Title No. Mombasa/Block XXXII/27;**

**c) That the status quo be maintained on the suit property Title No. Mombasa/Block XXXII/27 pending the hearing and determination of the Respondents' application No. 90 of 2020 (JR) in the Environment and Land Court, Mombasa.**

**d) That the Officer In Charge of the Police station do ensure compliance of the court orders.**

**e) That any other order this Honorable Court may deem fit to grant.**

8. The Notice of Motion Application dated 14<sup>th</sup> July, 2021 by the Interested Party was premised on the facts, grounds, testimony and averments of the 9 Paragraphed Supporting Affidavit of MURTAZA TURABALI PATEL sworn and dated the 14<sup>th</sup> July, 2021. He deposed that he was conversant with the matter and hence competent to swear the affidavit. He stated that the Respondents and more particularly the 2<sup>nd</sup> Respondent's relative one Yakuta Ali Hussein Dar was interfering with the suit property contrary to an order of the Honorable Kadhi's court issued on 25<sup>th</sup> November, 2020. They are shifting from one apartment to another on the suit premises causing damages to the previous apartment occupied by her. He stated that the Respondents were also attempting to interfere with the records at the Land registry. It was their prayer that the status quo be maintained awaiting the hearing of this application and also the Judgement in the Judicial Review JR. No. 90 of 2020.

9. From the filed grounds of opposition and the Replying Affidavit, they held that the application was misconceived, frivolous, vexatious and an abuse of the Court process. They pressed that the matter was still pending before the Kadhi's Court which has jurisdiction to hear and determine the case for its determination. They argued that should the Applicant feel aggrieved by the determination of the Kadhi's Court, then it would be at that point that it could prefer an appeal before this Court. Otherwise, at the moment, the filing of this application before this Court it was premature before it was concluded before the Kadhi's Court and in any case the Applicant also professed the Muslim religion therefore they voluntarily sought legal redress in that Court.

10. On 9<sup>th</sup> July, 2021, they filed an eight (8) Paragraphed Replying Affidavit filed on 9<sup>th</sup> July 2021 sworn by MURTAZA TURABALI PATEL. He reiterated that the application was misconceived, frivolous, vexatious and an abuse of the court's process. He posited that the Respondent has jurisdiction to hear succession matters and that the application was premature for seeking prayers before the conclusion of the matter before the said Kadhi's Court. The interested party contended that the Applicants ought to have filed a Notice of Preliminary

Objection or appealed against the said decision instead. The application was stated to be malicious, unmerited and should be dismissed with costs.

### **III. Submissions.**

11. On several occasions being the 15<sup>th</sup> July, 2021, 21<sup>st</sup> July, 2011, 6<sup>th</sup> October, 2021 and 15<sup>th</sup> December, 2021 respectively this matter would be mentioned in the presence of all the parties for purposes of on taking directions with regard on how the case would be disposed off. During all these dates, an issue or the other would always arise making the progress of the case impossible.

12. Be that as it may, finally, parties were directed to have the Notice of Motion be disposed off by way of written submissions. Pursuant to that all the parties obliged and a date for delivery of Judgement was reserved accordingly.

#### **A. The Ex – Parte Applicant’s Written Submissions.**

13. On 3<sup>rd</sup> March, 2021, the Learned Counsel for the Ex Parte Applicants the law firm of Messrs. Kinyua Muyaa & Company Advocates filed their written submissions dated 2<sup>nd</sup> March, 2021. M/s. Muyaa submitted that the Principal Kadhi was embroiled in an abuse of the due process of office. She argued that the Kadhi though knew he had no jurisdiction to issue orders of injunction concerning ownership, use and occupation of land and that there was no Civil suit through a Plaintiff but still proceeded to do so on 22<sup>nd</sup> November, 2020. Additionally, the Learned Counsel contended that the Principal Kadhi was aware of the existence of the CMCC/ELC (Mombasa) No. 160 of 2019 filed by the Interested Party/Applicant against the same persons over the same subject matter seeking orders of eviction. All these acts were in callous violation of the provisions of Article 162 (2) (b), 170 (5) of the Constitution of Kenya and the Kadhi’s Court Act where he is neither a Magistrate nor a Judge of the Environment and Land Court.

14. The Learned Counsel distinguished the case cited by the Interested Party of “**Republic – Versus – Kadhi’s Court at Wajir & Another Ex – Parte Addi Koriyoy Gabow**” (2019) eKLR for being irrelevant in this instant case to the effect that this suit was filed on 8<sup>th</sup> December, 2020 only less than a month after the delivery of the ruling by the Kadhi’s Court on 25<sup>th</sup> November, 2020 and not after the six months period as envisaged in law and alleged by the Interested Party.

15. With regard to the Notice of Motion application dated 14<sup>th</sup> July, 2021, the Learned Counsel submitted that this were Judicial Review proceedings under Section 8 and 9 of the Laws Reforms Act, Cap. 26 and Order 53 of the Civil Procedure Rules, 2010 seeking for prerogative orders and there was no way such an application would be sustainable. Besides, these are matters already pending before the Magistrate court in the CMCC No. 160 of 2019 hence it is sub judice and therefore interfering with them would be usurping their role. Further, some of the parties – Yakuta Ali Hussein Dar and the Land Registrar - from the prayers sought are not parties in this suit. They strongly castigated the allegedly negative and unprofessional conduct of the law firm of Messer. Marende Necheza & Company and in particular Mr. Shimaka N. Leonard.

16. On the grounds of opposition by the Respondent dated 4<sup>th</sup> February, 2021 and filed on 5<sup>th</sup> March 2021, the Learned Counsel held that under the provision of Article 156 of the Constitution of Kenya, the Attorney General is to represent the National Government in Courts except in Court Martials and to promote, protect and to uphold the rule of law and defend public interest. But clearly, it appears the Attorney General is defending the interest of the Interested Party and the Principal Kadhi who has glaringly and grossly violated the law and assumed jurisdiction that he does not have at all in this matter. For these reasons, they urged Court to allow the Notice of Motion dated 12<sup>th</sup> January, 2021 with costs and dismiss the Notice of Motion application dated 14<sup>th</sup> July, 2021 with costs.

#### **B. The Interested Party’s Written Submissions.**

17. On 9<sup>th</sup> July, 2021 and 3<sup>rd</sup> December, 2021 the Learned Counsels for the Interested Party the Law firm of Messrs. Marende, Necheza & Company filed their written submissions dated 7<sup>th</sup> July, 2021 and 25<sup>th</sup> November, 2021 respectively. Mr. Ondieki Advocate submitted that they opposed the Judicial Review application by the Ex – Parte Applicant dated 12<sup>th</sup> January, 2021. He argued that the Ex – Parte Applicant ought to have preferred an appeal if they were aggrieved. They held that the decision by the Principal Kadhi was legal and fair taking that the parties involved all prescribed to the Muslim faith and hence were subject to the jurisdiction of this court being a succession dispute.

18. The Learned Counsel opined that the application was an abuse of the due process of courts as the Applicant was using the Courts to harass and intimidate the Interested Party having failed to succeed before the Kadhi’s Court. It had no respect to that Court at all and hence acted in impunity yet being a succession matter the court had jurisdiction to deal. They relied on several authorities to buttress their case being “**Re Bivac International SA (Bureau Veritas) 2005 2EA 43; Republic – Versus – Kenya Revenue Authority Ex Parte Yaya Towers Limited (2008) eKLR and Republic – Versus – Kadhi Courts at Wajir & Another Ex – parte Abdi Koriyoy Gabow (2019) eKLR.**

19. Additionally, the Learned Counsel based on the definitions on the meaning of the prerogative writs of “**Certiorari**” and “**Prohibition**” as defined by Halsbury Laws of England, Forth Edition and the decision of “**Camnock Chase District Council – Versus – Kelly (1978)**”, the Counsel argued that in the instant case the Kadhi’s Court had not made a determination on the application dated 24<sup>th</sup> November, 2021 and therefore there was no decision to quash nor prohibit. The application was still pending hearing and determination before that court. Therefore, they contended that the Judicial review suit was pre mature. Based on all these, they therefore prayed that the application be dismissed altogether with costs.

### **IV. Analysis and Determination**

20. I have carefully considered the Notice of Motion application dated 12<sup>th</sup> January, 2021 by the Ex – Parte Applicants, the Notice of Motion application dated 14<sup>th</sup> July, 2021 by the Interested party/Applicant , the Grounds of Oppositions by the Respondent dated 4<sup>th</sup>

February, 2021, all the responses thereto, together with the articulate written submissions as well as the Constitution of Kenya, the statutory law applicable and the relevant precedents. I have noted the Respondent never filed any submissions at all.

21. The four (4) main questions for determination before me are:-

- a) **Whether the Kadhi's court has jurisdiction to hear and determine the dispute relating to the ownership, use and occupation of all that parcel of land known as Mombasa /Block XXXII/27.**
- b) **Whether the Judicial review in form of the prerogative orders of Certiorari and Prohibition are available to the Ex – parte Applicants.**
- c) **Whether the orders sought particularly of temporary Injunction by the Interested party vide the Notice of Motion Application dated 14<sup>th</sup> July, 2021 meets the threshold established under the Orders 40 Rules 1, 2, 3 and 4 and Order 51 Rule 1 of the Civil Procedure Rules, 2010.**
- d) **Who will bear the Costs of the application.**

**ISSUE a). Whether the Kadhi's court has jurisdiction to hear and determine the dispute relating to the ownership, use and occupation of all that parcel of land known as Mombasa /Block XXXII/27.**

#### **Brief facts**

22. On 25<sup>th</sup> November 2020, the Principal Kadhi heard an application dated 24<sup>th</sup> November 2020 brought by Murtaza Turabali Patel in Mombasa Kadhi's Court Succession Cause No. 41 of 2019, in the case of "Murtaza Turabali Patel -Versus - Alibai Adamali Dar and 2 others". He granted the following orders:-

- a) **That the application is certified as urgent.**
- b) **That the Respondents are restrained by either themselves, their servants, agents, employees and third parties from dealing, interfering, demolishing, shifting, developing, causing unlawful arrest and or in any other manner interfering with the applicant's peaceful and quiet occupation or possession of the suit property until this application is heard and determined.**
- c) **That Mr. Shimaka to serve the respondents and or their learned counsel with the application for them to file a reply.**
- d) **That the application is fixed for inter parties hearing on 11/12/2020 at 10.00am.**

#### **The issue of Court's Jurisdiction**

23. It is trite law that the moment a party in a suit challenges the jurisdiction of a Court, anything else the court does from then onwards becomes a nullity whatsoever. Once that happens, it is significant that that hurdle is finally tackled first and foremost. This is because without jurisdiction the court has no mandate to make one more step. It must down its tools. This legal proposition was well established in the now famous case in the now famous case of "Owners of Motor Vessel "Lilian S" – Versus - Caltex Oil (Kenya) Limited (1989) eKLR dealt with a court, jurisdiction thus:-

***"Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given".***

24. The Ex – Parte Applicants argue that the Principal Kadhi had no jurisdiction to hear and determine an application relating to ownership, possession and use of land, and that the said orders were illegal. The Applicant claims that the Respondent is well aware that the Kadhi's court has no jurisdiction to hear a land matter and they even filed another suit in the Chief Magistrate's court, Mombasa CMCC No. 160 of 2019. The Applicant urged court to prohibit the Principal Kadhi from usurping the powers of a judicial officer. The prayers sought were opposed by the Respondent who argued that the application was premature as the Principal Kadhi has jurisdiction to hear and determine succession issued between Muslims, and that if the Applicant was dissatisfied he ought to appeal to the High Court.

25. Now turning to the analysis of the issue under this sub- heading. First and foremost, it is important to appreciate the meaning of Judicial Review. The concept is based on the fact that administrative excesses must be checked through Judicial intervention. Administrative law relates to decision of offices or organs of Central Government or Public Authorities which may affect the rights or liberties of the citizens and which are enforceable in or organized by the courts of law. Therefore judicial review is an integral component of administration law.

26. In our legal parlance and jurisprudence, judicial review is founded under the provisions of Order 53 Rules 1 to 7 of the Civil Procedures Rules 2010 where the prerogative orders are issued. Primarily, the provisions of Sections 8 and 9 of the Law Reform Act Cap 26 of the Laws of Kenya where the Provisions of Order 53 of the Civil Procedure Rules 2010 was borrowed from ***the case of Farmers Bus Services – Versus - Transport Licensing Appeals Tribunal (1975) E.A. 523***. And upon the promulgation of the Constitution of Kenya in 2010 Article 47 of the Constitution of Kenya introduced the Provisions of Fair Administration of justice and later on the legislation of "the Fair Administration of Action Act of 2012" which is the statutory framework governing judicial review and the Administrative law in Kenya

currently.

27. The legal efficacy and scope of the statutory order of Mandamus, Prohibition and Certiorari are remedies granted by High Court to persons conferred by the exercise of administrative of judicial powers. These prerogative orders are only available against public bodies. Their origins lie in the expansion of common law in England and the jurisdiction of the Court of King Bench to acquire Superintendence over the observance of law by officials. These orders are predicated upon the fact that without law, society cannot function with fundamental values such as social order, social justice and personal freedom. Today public authorities determine an overwhelming extent how much of these values are enjoyed. Their decision affect vast numbers of people collectively and individually “*Ipsa Facto*” unlawfully decision, must be available to Judicial Scrutiny hence judicial Review. The social need for how and the protection of legality is violated when a public official exceeds his/her authority or does not use his/her power in the prescribed manner.

28. The prerogative writs of “*Certiorari*” derives from the Latin word “*Certiorari*” which means to be certified, informed, appraised or shown. Both in its embryonic days and today, the order, initially and prerogative writ was inferior courts and required the proceedings of that to be transferred to the High Court and examined for validity. It meant the decision would be quashed. From the Provisions of Order 53 of the Civil Procedure Rules the Applicant ought to move court within a period of six (6) months from the time the order, decree, judgment, conviction or other proceeding was made. The Order of “*Prohibition*” issues where there are assumption of unlawful jurisdiction or excess of jurisdiction. It’s an order from the High Court directed to an inferior tribunal or body as in this case the Kadhi’s Court. Its functions is to prohibit and/or forbids encroachment into jurisdiction and further to prevent the implementation of orders issued when there is lack of jurisdiction. The order of “*Mandamus*” is derived from the Latin word “*Mandare*” meaning to command. It is issued in cases where there is a duty of a public or a quasi-public nature or a duty imposed by statute, it compels the fulfillment of a duty where there is a lethargy on the part of a body or officer concerned.

29. In a nutshell Judicial Review is the means by which High Court judges scrutinize public law functions intervening as a matter of discretion to quash, prevent, require and/or classify not because they disagree with the judgment but so as to right a recognizable public law wrong. This public law wrong could be unlawfulness, Wednesbury unreasonableness or irrationality, unfair hearing, ultra vires bad faith, unfairness, made or arrived at out of excess powers (ultra vires) biasness, capriciousness or un Judicially.

30. In an application for Judicial review the Applicant must be a person with a sufficient interest – (*Locus Standi*) and who commences proceedings promptly. To support this legal concept on judicial review, I have made indepth references to several literature review and court decisions – “*Pharmaceutical manufacturers Association of South Africa in re- exparte president of Republic of South Africa* - 2000 S.A. 674 CC at 33 *Republic – Versus - Speaker of the Senate and Another Ex-parte Afrison Export Import Limited 2018 eKLR Republic – Versus- Stanley Mambo Amuti (2018) eKLR.*”; *the Kenya National Examination Council – Versus - Republic (Ex - Parte - Geoffrey Gathenji & Another Nairobi Civil Appeal No. 266 of 1996.*

In the instant case, the Ex-Parte Applicant has sought all the above two out of the three known the writ prerogative Orders – certiorari and prohibition.

31. This court has powers under Sections 8 and 9 of the Law Reform Act, Cap. 26 of the Laws of Kenya to issue prerogative writ of Certiorari, which brings into this court to quash a decision which is ultra vires. A writ of prohibition intended to forbid or prevent an action by a public officer from taking place is granted alongside Certiorari, since it’s a similar remedy but more prospective than retrospective. While certiorari looks at the past, prohibition looks at the future. The provision of Section 8 of the Law Reform Act, also provides for a writ of prohibition which primarily prohibits a tribunals, judicial bodies or subordinate courts from doing or taking an action in excess of its jurisdiction.

In the book of “*Administrative Law*”, Sir. W. Wade and C. Forsyth, Page 605 noted that:-

***“I can see no difference in principle between Certiorari and Prohibition, except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quashed on certiorari. I think that prohibition will lie to restrain it from so exceeding its jurisdiction.*”**

***Although prohibition was originally used to prevent tribunals from meddling with cases over which they had no jurisdiction, it was equally effective and equally often used, to prohibit the execution of some decision already taken but ultra vires. So long as the tribunal or administrative authority still had power to exercise as a consequence of the wrongful decision, the exercise of that power could be restrained by prohibition. Certiorari and prohibition frequently go hand in hand, as where certiorari is sought to quash the decision and prohibition to restrain its execution. But either remedy may be sought by itself.”***

32. Now applying these principles to the instant case. The Kadhi’s court is a creation of the law. It is established under the provisions of Article 170 of the Constitution of Kenya. Under Article 178 Sub article (5) provides for the jurisdiction of the Kadhi’s court:-

***“The jurisdiction of a Kadhi’s 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”.***

Further, Section 5 of the Kadhis’ Act provides *inter alia*:-

***“A Kadhi's Court 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”.***

33. The main question for determination is whether the Kadhi's court has jurisdiction to hear and determine the dispute arising from the use and occupation of the suit land. It is trite law that the moment a party in a suit challenges the jurisdiction of a Court, anything else the court does from then onwards becomes a nullity whatsoever. Once that happens, it is significant that that hurdle is finally tackled first and foremost. This is because without jurisdiction the court has no mandate to make one more step. It must down its tools. As stated above, this legal proposition was well established in the case of **"Owners of Motor Vessel "Lilian S" (Supra)**

34. Primarily, jurisdiction goes to the root of the court and it is not a mere procedural technicality that can be cured by Article 159 (1) of the Constitution. In the **"Supreme Court case of "Samuel Kamau Macharia and anor – Versus - Kenya Commercial Bank Limited & 2 others (2012)eKLR"** authoritatively dealt with jurisdiction, it held that:-

***"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."***

35. From the foregoing, it is apparent that the Kadhi's court assumed jurisdiction not conferred to it either by the Constitution or the law. From the cited law, Article 170 of the Constitution and Section 5 of the Kadhis' Court Act, it is clear that the jurisdiction of the Principal Kadhi is to matters of personal law that is marriage, divorce and inheritance. No mention is made of the use and occupation of and title to land. The Kadhi's court as a subordinate court, has limited jurisdiction and must be kept within their legal bounds. When the Principal Kadhi makes any decision outside his jurisdiction, that decision and the process of making that decision can be brought before this court and be declared a nullity.

36. The jurisdiction to hear and determine all disputes relating to the use and occupation of and title to land has been confined upon this court by **Article 162(2)(b) of the Constitution and Section 13 of the ELC Act**. Therefore it is only the Environment and Land Court and selected Magistrates courts, that have been clothed with the jurisdiction to hear, determine and make orders in respect to land disputes. I totally disagree with the sentiments expressed by the Interested Party that the Applicant being of Muslim faith voluntarily submitted to the Kadhi's court jurisdiction. Parties cannot mutually consent to confer jurisdiction upon a court which has no jurisdiction in the first place. As held in the case of **"Samuel Kamau Macharia (Supra)**, the Supreme Court noted that court's jurisdiction must flow either from the Constitution or the legislation or both. The Principal Kadhi had no jurisdiction to determine the dispute relating to ownership of the suit land, his jurisdiction ended at distributing the estate of the deceased as per the Islamic laws. His orders of 25<sup>th</sup> November 2021, which purported to do so were ultra vires.

**ISSUE b). Whether the Judicial review in form of the prerogative orders of Certiorari and Prohibition are available to the Ex – parte Applicants.**

37. Having found that the Kadhi's court has no jurisdiction to hear and determine disputes over the use, occupation and title of Mombasa/Block XXXII/27, this Honorable Court is satisfied that the Ex – Parte Applicants are fully entitled to the prerogative writs of Certiorari and prohibition as prayed in their filed Notice of Motion application. Thus, the Honourable Court will proceed to grant the prerogative orders as sought accordingly. I need to say no more.

**ISSUE No. d). Whether the orders sought particularly of temporary Injunction by the Interested party vide the Notice of Motion Application dated 14<sup>th</sup> July, 2021 meets the threshold established under the Orders 40 Rules 1, 2, 3 and 4 and Order 51 Rule 1 of the Civil Procedure Rules, 2010.**

38. Now turning to the issues under this sub-heading. I must determine whether the Interested Party/Applicant is entitled to a temporary injunction orders prayed for in the Notice of Motion application dated 14<sup>th</sup> July, 2021. In deciding whether to grant the orders or not it is trite law that I should be guided on well-established principles enunciated in the *locus classicus* in the now famous precedent of **GIELLA – VERSUS- CASSMAN BROWN (1973) E.A. Page. 358** whose holding is as follows:-

***"The condition for the grant of an interlocutory injunction are now, I think well settled in East Africa.***

***First, an applicant must show a prima facie case with a probability of success.***

***Secondly an interlocutory injunction will be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.***

***Thirdly, if the court is in doubt, it will decide an application on the balance of convenience".***

39. But before proceedings further, the fundamental issue to ponder is whether the Interested Party/Applicant has made a **"Prima facie"** case in his case with a probability of success. In the case of **MRAO –VERSUS - FIRST AMERICAN BANK OF KENYA LTD. & 2 OTHERS (2003)eKLR 125** cases which have also been extensively referred to by the Learned Counsel for the Proposed Defendant, "a Prima facie" case was well described as follows:-

***"A prima facie case in a civil application includes but not confined to "a genuine and arguable case", it is a case which, on material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently***

*been infringed by the opposite party as to call for an explanation or rebuttal from the latter”*

40. In a very peculiar way, I have noticed that the Interested Party /Applicant though pleaded in its application and sought for temporary injunction orders against the Respondents its being done in a Judicial Review proceedings which is brought under Order 53 Rules 1, 2 and 3 of the Civil Procedure Rules, 2010. The application by the Interested Party/Applicant is not anchored on any suit through a Plaint or otherwise as it should have ideally been in law. All interim and interlocutory injunction orders are issued and pegged on the final determination of both the said application and the suit. The Court found that rather strange. Nonetheless, the provisions of Order 2 Rules 6 of the Civil Procedure Rules, 2010 holds that parties are bound by their own pleadings and cannot make a departure thereafter from it. Therefore, this Court will still proceed to squarely deal with the issue at hand and placed before it. From their pleadings, the Interested Party/Applicant avers that He stated that the Respondents and more particularly the 2<sup>nd</sup> Respondent’s relative one Yakuta Ali Hussein Dar was interfering with the suit property contrary to an order of the Honorable Kadhi’s court issued on 25<sup>th</sup> November, 2020. They are shifting from one apartment to another on the suit premises causing damages to the previous apartment occupied by her. He stated that the Respondents were also attempting to interfere with the records at the Land registry. It was there prayer that the status quo be maintained awaiting the hearing of this application and also the Judgement in the Judicial Review JR. No. 90 of 2020.

40. The Court fully agrees with the Learned Counsel for the Proposed Defendant and the provisions of Section 107 and 120 of the Evidence Act, Cap. 80 on the legal ratio that he who alleges must prove. In other words, although the Interested Party/Applicant makes these strong allegations but there was no empirical documentary evident such as official searches, copies of title deeds, photographs and so on produced to proof such serious allegations. Thus, the Honorable Court concludes that the Interested Party/Applicant has failed to establish any *“Prima facie”* case to be considered for the temporary injunction sought. On arriving at this decision, has also relied on the decisions of *Kenya Horticultural Exporters Pg. 1977 Limited –Versus - Pape 1986 KLR 705, Nguruman Limited –Versus- Jan Bonde Neilson & 2 Others 2014 eKLR.*

41. It is trite law that taking that the grounds for granting temporary injunction as set out in the *GIELLA –VERSUS - CASSMAN BROWN case (Supra)* are in sequential pattern and now that the Interested Party /Applicant has failed to prove the first grounds, this Honorable Court need not spend more time venturing into the other well - known two (2) grounds. Furthermore, as I fully concur with the Learned Counsel for the Ex – Parte Applicant, its noted that some of these parties who are adversely mentioned in the prayers sought by the Interested party/Applicant – Yakuta Ali Hussein Dar and the Land Registrar, Mombasa are not a party in this suit. It therefore becomes very difficult to issue such orders against them being an affront to the principles of natural Justice, equity and Conscience altogether. But for the benefit of doubt, this Honorable Court holds that the Interested Party/Applicant is unlikely to suffer any irreparable damage to occur due to the ostensible invasion the fact that there is no prima facie case he cannot claim to suffer any irreparable damage at all and hence even the balance of convenience tilts in favour of the Respondents which argument this court fully agree with the Learned Counsel for the Respondents as they have failed to prove there is any right on their part which has apparently been infringed by the Respondents and which is incapable of being compensated by way of damages. In order to show irreparable harm, the applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. This position was upheld in the Court of Appeal Case of *“Kenya commercial Finance Co. Limited –Versus - Afraha Education Society (2001) 1 E.A. 86 as follows:-*

*“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is .....Sequential so that the second condition can only be addressed if the first one is satisfied. The same position was upheld in Court of Appeal (Mombasa) No. 8 of 2015 –Hassan Huri –Vs- Abdulrazak Huri Ibrahim”,*

For these reason the Honorable Court concludes that the Notice of Motion application dated 14<sup>th</sup> July, 2021 by the Interested Party/Applicant has no merit and therefore fails under this sub - heading.

## **V. DETERMINATION**

42. Therefore, the Honorable Court proceeds to invoke the provisions of Article 165 (6), (7) of the Constitution, Sections 8 and 9 of the Law Reforms Act. Cap. 26, Section 13 (1) of the Environment and land Act, No. 19 of 2012, Section 150 of the Land Act, No. 6 of 2012 and Section 101 of the Land Registration Act, No. 3 of 2012 of the laws of Kenya Order 53 (1) & (2) of the Civil procedure Rules, 2010 and enter Judgement in favour of the Ex – parte Applicant by issuing the Judicial review orders as follows:-

a) **THAT** the Court issues Judicial review orders in form of Certiorari bringing into this court for purpose of quashing all the proceedings and orders made or issued by the Principal Kadhi, Kadhis’ Courts, Mombasa in Mombasa Kadhi’s Court Succession Cause No. 41 of 2019 in so far as those proceedings touch on the use and occupation of and title to Mombasa/Block XXXII/27.

b) **THAT** the Court issues Judicial review orders in form of Prohibition, forbidding and/or preventing the Principal Kadhi, Kadhis’ Courts, Mombasa from hearing or continuing to hear the Notice of Motion application from Murtaza Turabali Patel dated 24<sup>th</sup> November, 2020 and filed on 25<sup>th</sup> November, 2020 in Mombasa Kadhi’s Court Succession Cause No. 41 of 2019 and from hearing any application concerning the use and occupation of and title to Mombasa/Block XXXII/27.

c) **THAT** the Notice of Motion application dated 14<sup>th</sup> July, 2021 be and is hereby dismissed as the orders sought particularly of temporary Injunction by the Interested party cannot be sustainable in this suit and fail to meet the threshold established under the Orders 40 Rules 1, 2, 3 and 4 and Order 51 Rule 1 of the Civil Procedure Rules, 2010.

d) **THAT** the costs of the application/suit are granted to the Ex - Applicants.

41. **IT IS ORDERED ACCODINGLY.**

DATED, SIGNED AND DELIVERED AT MOMBASA THIS .....4<sup>TH</sup> ..... DAY OF .....APRIL.....2022.

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT

**MOMBASA**

**In the presence of:-**

M/s. Yumnah, Court Assistant

Mr. Muthuri holding brief for Mr. Kinyua Advocate for the Ex – Parte Applicants.

Mr. Ondieki holding brief for M/s. Kyalo Advocate for the Respondents.

No appearance for the Interested Party.

**In the presence of:-**

M/s. Yumnah, Court Assistant

Mr. Muthuri holding brief for Mr. Kinyua Advocate for the Ex – Parte Applicants.

Mr. Ondieki holding brief for M/s. Kyalo Advocate for the Respondents.

No appearance for the Interested Party.