



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 53 OF 2010

IN THE MATTER OF: ORDER LII RULE 3 OF THE CIVIL

PROCEDURE RULES, SECTION 3A OF THE CIVIL PROCEDURE ACT, CAP 21, SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CAP 26 AND ALL OTHER ENABLING PROVISIONS OF LAW

IN THE MATTER OF: APPLICATION BY:-

1. MWANAHARUSI IBRAHIM
2. TWALIHA JUMA SALIM
3. SALIM JUMA SALI
4. FARID JUMA SALIM
5. FAIZA JUMA SALIM
6. HASSAN JUMA SALIM

FOR JUDICIAL REVIEW AND FOR ORDERS OF CERTIORARI AND PROHIBITION

IN THE MATTER OF: CIVIL SUIT NO. 12 OF 2009 OF THE

KADHI'S COURT, MOMBASA (IBRAHIM JUMA SALIM & SHAMSIYIA JUMA SALIM –VS- MWANAHARUSI IBRAHIM)

REPUBLIC

VERSUS

THE CHIEF KADHI

THE HON. ATTORNEY GENERAL RESPONDENTS

AND

1. IBRAHIM JUMA SALIM
2. SHAMSIYIA JUMA SALIM INTERESTED PARTIES

JUDGEMENT

(1) Before this court is a Motion dated 12th May 2010 and filed on 13th May 2010 in which the Exparte Applicant seeks an order of certiorari to bring before this court “*and to quash an order of the Kadhi’s Court sitting in Mombasa on 4th March 2010.*”

(2) The 1st Exparte Applicant is the widow of Juma Salim Aboud (the “Deceased”) while all the other Exparte Applicants and the interested parties are his children. The Deceased died on 27th March 2003 and left an estate comprising of Plot No. 1815, 1816 and 1820 (*hereinafter called the properties*).

(3) The interested parties filed Civil Suit No. 12 of 2008 at the Kadhi’s Court at Mombasa in which they sought the following orders against the 1st Exparte applicant-

(a) *Distribution of the estate of the deceased to the heirs in accordance to Islamic Law.*

(b) *An order for the sale of the properties at market value and the proceeds thereof to be distributed in accordance to the shares of the heirs in accordance to Islamic Law.*

(4) The Kadhi heard and determined the suit in a judgment delivered on 4th November 2009. A hand written copy of the proceedings and judgment was annexed to the verifying affidavit of the 6th Exparte Applicant who swore an affidavit on behalf of the other applicants. The order which is the subject of these proceedings is, however, that of 4th March 2010. Regrettably the handwritten proceedings of 4th March 2010 are not legible to this court and the Exparte Applicants failed to comply with the provisions of Order LIII Rule 7 of The Civil Procedure Rules by not lodging in a duly verified copy of the order.

(5) Anyhow, the complaint by the Exparte Applicants is that (save for the 1st Exparte Applicant) they were not served with summons or joined in the suit and that the Kadhi proceeded to determine it without hearing them. That as co-heirs they had a right to be heard. Secondly, that at the time the Kadhi made the orders in the suit there existed Succession Cause No. 89 of 2008 in respect to the Deceased’s estate and which remains pending. It is argued by the applicants that the proper forum for a resolution of the succession matter was the succession cause and not the suit.

(6) The Interested Parties response was two pronged. That the application was incompetent and/or bad in law and that it was also without merit. On the competence of the application, the interested parties say as follows-

(i) *The relief’s sought in the Notice of Motion are different from those stated in the statement which accompanied the application for leave, this breaches order LIII Rule 4(1) of the Rules.*

(ii) *The Notice of Motion was filed contrary to the provisions of Order LIII Rule 3 of The Civil Procedure Rules as it was not filed within 21 days of the time leave was granted.*

(iii) *Contrary to the provisions of Order LIII 7(1) of the Rules, a verified copy of the order sought to be quashed is not lodged as required by law.*

(7) The Exparte Applicants do not have answers to the above objections but have urged this court to find that they are procedural technicalities which should not be allowed to stand in the way of substantial justice. (Article 159(1) (d) of The Constitution 2010 and Sections 1A and 1B of The Civil Procedure Act).

(8) I will begin by making a determination of the procedural matters raised. The proceedings before the Kadhi and these Judicial Review proceedings were commenced before the coming into force of The Civil Procedure Rules, 2010 and so reference to the Rules in this decision shall be to the pre-2010 rules.

(9) Section 9 of The Law Reform Act provides for the making of rules relating to the procedure of courts in Judicial Review matters and Subsection (1)(c) thereof is in the following terms:-

“... where leave is obtained no relief shall be granted and no ground relied upon, except with the leave of the court, other than the relief and grounds specified when the application for leave was made.”

Order LIII Rule 4 of the Rules provides procedure which is faithful to the above statutory provision.

(10) In the Chamber Summons of 16th April 2010 the Exparte Applicants sought leave to-

“(a) Apply for orders of certiorari and

prohibition for purposes of judicial review.

(b) Leave if granted as prayed for in (a) above to operate as stay for (sic) orders made on the 4th March, 2010 by the Kadhi’s Court in KCC Case No. 12 of 2008 or any other Orders made thereafter or at all pending hearing the application for judicial review/or further orders of the court.”

In the statement accompanying the application for leave the applicants expressed themselves as seeking the following reliefs-

(a) That the exparte Applicants be granted leave to apply for orders of Certiorari and Prohibition for the purposes of Judicial Review.

(b) That leave if granted as prayed for in (a) above to operate as stay of orders made on the 4th March, 2010.

In the main motion of 12th May 2010 and filed on 13th May 2010 the Applicants sought the following prayer;

“... Order of certiorari to move into this Honourable Court and to quash an order of Kadhi’s court sitting in Mombasa on 4th March 2010 ...”

Although the reliefs specified in the application for leave and in the main motion could have been expressed in more elegant and specific terms, the accompanying prayer for stay clearly indicates that the order of the Kadhi under attack is that of 4th March 2010 made in Kadhis Civil Case No. 12 of 2008. In my view therefore the relief sought in the main motion is substantially the same as that specified in the application for leave and I am unable to find any infringement of the provisions of Section 9(1)(c) of The Law Reform Act.

(11) On 19th April 2010, Hon. Justice F. Azangalala granted leave to the exparte applicants to file the main motion. That motion ought to have been filed on or before 10th May 2010. (Order LIII Rule 3(1) of Rules). The court receipt stamp and the receipt for payment of court fees shows that the motion was filed on 13th May 2010, this was three (3) days late. The 21 day timeline is imposed by the Civil Procedure Rules and not The Law Reform Act. I have no doubt that in appropriate circumstances a court may allow the extension of this time. The time limit is a procedural and not a substantive prescription and it would be in keeping with Article 159 (2) (d) of The Constitution 2010 for a court to consider an application for its extension. A party must, however, make the request. The Exparte Applicants herein have to date not sought to regularize their lateness. The Applicants cannot ask this court to overlook this procedural matter when they have not taken any steps to remedy the lapse. For this reason I hold that the main motion is time barred.

(12) Another technical lapse raised by the interested party is the non-compliance with Order LIII Rule 7(i) which states as follows:-

“In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court. (my emphasis)

(13) The order sought to be quashed is an order of the Kadhi’s Court and is a formal order contemplated by the provisions of Order LIII Rule 7 of the Rules. As at the time of the hearing the Exparte Applicants had neither lodged a copy of the Kadhi’s order verified by affidavit with the Registrar nor accounted for their failure to do so. It is true that the Exparte Applicants annexed some handwritten proceedings of the Kadhis Court to the affidavit verifying the facts to the application for leave. Unfortunately these proceedings were neither certified nor legible.

(14) The provisions of Order LIII Rule 7 of the Rules permits a party to comply anytime before the hearing of the motion. The failure to comply by the Exparte applicants was brought to their attention in an affidavit of the 1st Interested Party filed on 16th June 2010, way before the hearing. They had sufficient opportunity to comply. This matter was heard by way of written submissions but by the time of filing written submissions on 10th February 2011 nothing had been done to remedy the situation. The applicants have themselves to blame. This again is another reason for the application to fail.

(15) The Exparte applicants have placed stumbling blocks on their own path and this court would even at this stage strike out the motion as being time barred and for breaching the provisions of Order LIII Rule 7. But I shall nevertheless consider the merits of the application.

(16) It is said on behalf of the 2nd to 6th applicants that they are beneficiaries of the Estate of JUMA SALIM ABOUD, (deceased) and that it run counter to the rules of natural justice for the Kadhi to make the order of 4th March 2010 without giving them a hearing. It is not in dispute that they were neither joined nor served with the pleadings in Kadhis Court Case No. 12 of 2008.

A preliminary issue to consider is what avenue should these aggrieved persons have taken in seeking redress. By dint of Section 8 of The Kadhis Courts Act, the Kadhis Court is required to apply the procedure prescribed for Subordinate courts by and under the Civil Procedure Act until such time that the Chief Justice has made its special rules. Those rules are yet to be made and so the rules of procedure for the Kadhis Court are the Civil Procedure Rules.

(17) Order 1 Rule 10 of The Rules deals with the Substitution and

addition of parties. Subrule (2) is relevant here and provides:-

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.” (my emphasis)

A party desirous of joining a suit as a plaintiff or defendant may move court under this rule. It is the view of the interested parties, and this court agrees, that the option available to the 2nd to 6th applicants was to move court for joinder and thereafter for setting aside of the offending order. As to the 1st applicant she was already a party to the proceedings and enjoyed a right of appeal against the order.

(18) This court must weigh whether in the context of this matter the Judicial Review Procedure is more appropriate than the process under the Civil Procedure Rules. In doing so I bear in mind the recent words of The Court of Appeal in **Civil Appeal No. 84 of 2010 Republic –Vs- National Environment Management Authority [2011]eKLR** in which the learned Judges stated as follows:-

“The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.”

These words ring true even where the alternative remedy is procedural in nature.

(19) It is admitted by both sides that the dispute between them is a succession matter governed by Muslim Law and so the Kadhi is properly seized of it. It cannot be gainsaid that on issues of substance involving Muslim Law, the Kadhi is, or ought to be, extremely well versed. On procedure, his teaching of The Civil Procedure Act guides his hand. The plea of the Applicants is that they need to be given a fair hearing before any matter touching on the estate is determined. This, in my view, is a well founded expectation. But it is an expectation that can be satisfactorily met by invoking the available provisions of the Civil Procedure Rules. The overriding objective of The Civil Procedure Act is to facilitate, inter alia, just and fair resolution of civil disputes. The procedure for joinder and setting aside available under the Civil Procedure Rules would in my view be an efficacious way of bringing the applicants before The Kadhis proceedings and in the circumstances of this case a more appropriate remedy than Judicial Review orders. It is for this reason, in addition to the matters discussed earlier, that I would decline to exercise my discretion in favour of the applicants.

(20) All is not lost to the applicants! They can still move the Kadhis Court with

an appropriate application. They may be able to persuade the Kadhi that their non-participation has occasioned a failure of justice.

(21) For now, I reach the conclusion that the application of 12th May 2010

must, as I hereby do, be dismissed with costs.

Orders accordingly.

Dated and delivered at Mombasa this 19th day of April, 2012.

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-

Chebukaha for Applicant

Timamy for Interested Party – Absent but aware of date.

Kamau for Respondent

Court clerk – Moriasi

F. TUIYOTT
JUDGE