



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

Civil Appeal 72 of 2009

1. **YAHYA HUSSEIN SALIM**
2. **FATUMA**
3. **ABUBAKAR**
4. **MOHAMED**
5. **MARIAM..... APPELLANTS**

VERSUS

HUSSEIN SALIM JUMA.....1ST RESPONDENT

MAHMOOD ABDALAH MOHAMMED2ND

RESPONDENT

RULING

This is the Notice of Motion dated 19th May 2009 by which the Appellant seeks inter alia orders that:-

(2) THAT there be a stay of proceedings and/or execution of the Kadhi's Court order dated 17th March 2009 joining the 2nd respondent as an interested party to Kadhi's case No. 58 of 2006 herein as a party to this suit".

Both the Applicants and the Respondents are in agreement that there was in existence a matter filed before the Kadhi's court vide Kadhi's Case No. 58 of 2006 seeking the distribution of the estate of one FATUMA KASEMBE (deceased). Indeed copies of proceedings from the Kadhi's court are annexed and marked **YHSI**. This matter was heard before the Kadhi's court on 26th July 2007 by way of viva voce evidence. The learned Kadhi gave his judgement on 19th August 2008 and awarded to the Petitioner and Respondent therein shares in the Swahili house belonging to the deceased of ? and ? respectively. The Kadhi further ordered that parties must agree if any one wished to sell his share in the said Swahili house to a third party. Subsequent to that judgement the 2nd Respondent herein Mahmood Abdallah Mohamed did on 10th December 2008 file an application again before the Kadhi's court seeking to be enjoined as an

interested party in the (now concluded) suit No. 58 of 2006. On 17th March 2009 the learned Kadhi allowed his application and enjoined the 2nd Respondent to the suit. It is against that decision of the Kadhi that the Applicant herein now appeals. Mr. Kenzi advocate submitted on behalf of the Applicant. The 1st Respondent who appeared in person told the court that he had no objection to the Kadhi's ruling of 17/3/2009. Mr. Mwinyi for the 2nd Respondent opposed this application arguing that since the 2nd Respondent purchased the 1st Respondent's share in the deceased estate he was entitled to be enjoined in the suit in order to protect his interest.

The application for joinder by the 2nd Respondent was brought under O. 1 r 3, 8 and 10. It becomes necessary at this point to look at the wording of O. 1 of the Civil Procedure Rules. O. 1 r 3 provides that:-

“3. All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise.”

O. 1 r 10(1) provides that:-

“10(1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit”.

In both O. 1 r(3) and r(8) the law talks of an enjoiner of a party to a “**suit**”. In my view the term “**suit**” relates to a cause of action which is ongoing or which has been commenced. Indeed S. 2 of the Civil Procedure Act defines a suit as:-

“suit” means all civil proceedings commenced in any manner prescribed”

In the present case the Suit No. 58 of 2006 before the Kadhi's court was commenced, heard and effectively concluded by the ruling of the Kadhi delivered on 19th August 2008. All that time the 2nd Respondent made no application to be enjoined. Did he not have an interest in the suit property then. It is only on 10th December 2008 four clear months after the Kadhi's ruling that 2nd Respondent applies to court to be enjoined. I do agree with Mr. Kenzi that such an application made **after** the matter has been heard and determined cannot be entertained. The 2nd Respondent ought to have made his application for joinder before the suit was heard and determined. The rights of this applicant are prejudiced as they were not given an opportunity to be heard and neither did the 2nd Respondent participate in the hearing of the suit in order to be challenged or cross-examined by the applicant on what interest if any he may hold in the suit property.

Mr. Mwinyi for the 2nd Respondent did concede in his oral submissions to the court that it was only subsequent to the Kadhi's judgement of 19th August 2008 that the 2nd Respondent purchased the ? share in the house from the 1st Respondent. The Kadhi's ruling was clear that the parties must agree before either sells his share in the house. I have no evidence to indicate that the Applicant was informed about and/or consented to this sale. The house is a single unit and obviously any one part-owner selling off his share will affect the other part-owner. Therefore the 2nd Respondent only came on board **after** the matter had been heard and determined by the Kadhi. It is my considered opinion that in the interests of justice the Kadhi's decision to enjoin the 2nd Respondent ought to be stayed pending the hearing and determination of the Applicants appeal. As such I do allow this present application in terms of prayer (2) thereof pending the hearing and determination of the appeal.

Dated and delivered in Mombasa this 4th day of August 2009.

M. ODERO

JUDGE

Read in the open court in the presence of:

Mr. Kenzi for Applicant

Mr. Mwinyi for 2nd Respondent

M. ODERO

JUDGE

4.8.2009