



Gituma & another v Kadhi Courts Nairobi; Farhan (Interested Party) (Environment and Land Judicial Review Case E017 of 2021) [2022] KEELC 14502 (KLR) (27 October 2022) (Judgment)

Neutral citation: [2022] KEELC 14502 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E017 OF 2021
EK WABWOTO, J
OCTOBER 27, 2022**

BETWEEN

MOHAMED GITUMA 1ST APPLICANT

ZEITUN HUSSEINS 2ND APPLICANT

AND

KADHI COURTS NAIROBI RESPONDENT

AND

HASSAN ALI SALEH FARHAN INTERESTED PARTY

JUDGMENT

1. Before me for determination is the notice of motion dated February 7, 2022. By the said motion, the applicants prays for the following orders: -
 1. That an order for *certiorari* does issue for the purpose of quashing in its entirety the decision of the respondent *vide* a court order dated July 14, 2021.
 2. That an order for *certiorari* does issue for the purpose of quashing in its entirety the decree issued on July 28, 2021 by the respondent.
 3. That an order of prohibition does issue prohibiting the interested party either by himself, his agents and or servants from disturbing, trespassing or encroaching into the suit property.
2. The said application is supported by an affidavit sworn by Mohamed Gituma on February 7, 2022 the 1st applicant herein and is premised on the grounds on its face.
3. In its response to the application, the interested party filed a replying affidavit sworn by Hassan Ali Saleh Farhan on March 11, 2022 stating *inter alia* that: -



1. That the applicants have not brought before this court proceedings to show that they are the legal representatives of the estate of Mohamed Gituma.
 2. That interested party will suffer great prejudice should the application be allowed.
 3. That the applicants have not shown how they were prejudiced by the proceedings before the Kadhi's Court;
 4. That the application has not met the threshold for grant of judicial review orders and ought to be dismissed with costs;
 5. The application is otherwise an abuse of the process of this honourable court.
4. When the matter came up for directions on July 7, 2022 October, it was directed that the application for judicial review be canvassed through written submissions. Save for the respondent, both parties duly complied. I have considered the motion and the responses thereto. I have equally perused and considered the submissions filed herein by the learned advocates for the parties and the main issue for determination is whether the applicants have made out a case for grant of the judicial review orders sought.
 5. The subject application seeks judicial review orders in the nature of *certiorari* and prohibition. To the extent that the subject application is seeking for the issuance of the prerogative order/writs of judicial review, it is common ground that the subject application ought to and should be commenced in the name of the republic as the applicant.
 6. In any event, it is common ground that the prerogative order of judicial review can only be procured in the name of the republic and not in the name of an individual citizen and or subject.
 7. In the premises, though the application for leave to commence judicial review proceedings is ordinarily sought by and in the name of the subject, immediately the leave to commence judicial review proceedings is granted, the substantive application must *ipso jure*, be filed and/or commenced in the names of the republic.
 8. Simply put, it is the republic that is the applicant and the subject, whose rights and or interests has been violated, breached and/or otherwise threatened with violation, becomes the ex-parte applicant.
 9. However, in respect of the subject matter, the subject, in whose favor leave was sought and granted has filed the application in own name as the applicant. For clarity, the republic who ought to be the applicant has not even be impleaded and or made a party.
 10. Suffice it to note that judicial review proceedings are neither civil nor criminal, but same are *sui juris* proceedings and thus same have special procedure regulating not only their institution, but also prosecution.
 11. Consequently, it is imperative to note that every subject that is keen to commence and/or originates judicial review proceedings must strictly comply with and/or adhere to the laid down procedure and not otherwise.
 12. It is also appropriate to mention here and now that failure to comply with and adhere with the strict rules governing the judicial review proceedings, does not amount to procedural technicality, but same goes to the root of the proceedings and thereby invalidates the entire suit.



13. Based on the foregoing, I find and hold that the notice of motion application dated the February 7, 2022 filed by and in the name of the subject as the applicants, is fatally incompetent and legally untenable.
14. On whether the Kadhi's Court had jurisdiction to grant the orders sought, the Kadhi's Court is a creation of article 170 of the Constitution. Under article 170(5) the jurisdiction of that court is 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 court.
15. Article 169(1) (b) of the Constitution characterizes the Kadhi's Court as one of the subordinate courts in this country. Under article 169(2), Parliament is empowered to enact legislation conferring jurisdiction, functions and powers of such courts. The legislation envisaged under article 169(2) is the Kadhi's Courts Act, cap 11 of the laws of Kenya. Section 8 of the said Act provides as follows: -

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- (1) The Chief Justice may make rules of court providing for the procedure and practice to be followed in Kadhi's Courts.
 - (2) Until the 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 (cap 21).”
16. Counsel for the applicants had challenged the jurisdiction of the Kadhi's Court in granting the impugned orders. However, before I consider the said issue it is important to refer to section 63 of the Civil Procedure Act which grants all courts inherent powers to grant appropriate reliefs.
 17. Arising from the foregoing, I do not agree with the applicants that the Kadhi's Court could not grant the orders sought. The court like any other had an obligation to grant the same.
 18. On the issue of the breach of the rules of natural justice and right to be heard, by filing this judicial review application, the applicants ought to have demonstrated how in the process of reaching that decision, the Honourable Kadhi had breached the rules of natural justice or how his decision was irrational, made in bad faith, against public policy and/or constituted errors of facts and law. They did not do so. The proceedings before the Kadhi's Court were not attached herein neither was this court furnished with the same. In the circumstances I am not convinced that the applicants have made out a case to warrant the grant of the orders sought herein.
 19. Having addressed and resolved the issues that were outlined herein before, it must have become obvious that the judicial review proceedings herein are not only misconceived, but are legally untenable.
 20. Accordingly I decline to grant the orders sought herein and dismiss the motion dated February 7, 2022 with costs to the interested party.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF OCTOBER, 2022.

E.K WABWOTO

JUDGE



In the presence of: -

N/A for the Applicants.

N/A for the Respondent.

Ms. Wadegu for the Interested party.

E.K WABWOTO

JUDGE

