



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**

**Civil Appeal 163 of 2006**

**MOHAMOUD NUH HUSSEIN MOGHE:.....APPLICANT**

**VERSUS**

**KHADIJA NUH HUSSEIN**

**AHMED NUH HUSSEIN:.....RESPONDENT**

**R U L I N G:**

The Respondents filed Eldoret Kadhi's case No.12 of 2006 before the Kadhi. It was a Petition in the respect of the Estate of the late NUH HUSSEIN who died in 1987. The said deceased had left several properties among them plot No. LR.BLOCK 2/68 Eldoret Municipality, LR.BLOCK 5/267 and LR.BLOCK 5/66265. In the said petition they asked the Khadhi to distribute the Estate to the beneficiaries in accordance to the Islamic Law, an order for the applicant to account for rent from the properties and distribution of such rent. The applicant attempted to stop the hearing of the Petition arguing that there was Eldoret High Court Succession cause No. 1900 of 1994 where he and two others were the petitioners. A grant in that cause had been issued and only distribution remained. The Kadhi however rejected the argument and proceeded to hear the petition which culminated in his judgement dated 1<sup>st</sup> December,2006 in which he stated how the beneficiaries should utilize the properties. The applicant filed an application before the Khadhi to stay execution of that order pending appeal but the application was rejected. The applicant filed an appeal against the said judgement and simultaneously filed this application.

There are seven prayers in the application but Mr. Njuguna who prosecuted the application told court that they were seeking orders in prayers 2, 3, 4 and 5. Court assumes that he abandoned the rest. Prayer 2 sought orders of stay pending the hearing of this application and the appeal. That prayer was granted partly. In prayer 3 they sought the setting aside of the order made on 6<sup>th</sup> February 2007 which the order rejecting the applicants prayer for stay of execution. In prayer 4 applicant sought for orders restraining the Khadhi from conducting any other proceedings or issuing orders in Kadhi's case No. 12 of 2006 pending the hearing of this application. This prayer will be spent on delivery of this ruling.

In prayer 5 the applicant sought court to declare Kadhi's case No. 12 of 2006 as nullity ex-debeto justice for being sub-judice success cause No.190 of 1994 pending distribution by this court.

It was submitted and deponed in the supporting affidavit that there Eldoret High Court succession cause No. 190 of 1994 in this court. The Kadhi's court therefore had no jurisdiction to hear the petition before it. A grant was issued and confirmed and only distribution remain. Respondent therefore could not have gone to the Kadhi's court to seek distribution. The orders made therefore were a nullity.

The application was opposed. Court was told that grant in the high court was issued in 1995 and later confirmed. However the applicants have never distributed the Estate. The respondent and other administrators have transferred some of the properties into their names and have been collecting rent from the others without accounting to the other beneficiaries. The deceased and the parties are all Muslims and therefore had a right to make an application before the Kadhi.

I have carefully considered the application Prayer No.5 in the application seeks court to declare all the

proceedings and judgement by the Kadhi in case No. 12 of 2006 to be a nullity. The court cannot do that at this interlocutory stage. To do so would compromise the appeal as there will be no other issue remaining to be heard. That prayer at this stage is misconceived.

As to granting stay of execution of the Kadhi's judgement this court has evaluated the submission and all the circumstances surrounding the whole dispute. There is no denying that there exists succession cause No. 190 of 1994 before the high court. Grant was issued and confirmed. That was way back in 1999. However since then it is clear that the applicant and his co-administrators never took any steps to distribute the estate to the beneficiaries. Instead court was told that they have transferred some properties to themselves and have been collecting rent from others without accounting. According to proceedings in the Kadhi's court they had chased the respondent from the premises of one of the assets. It is clear that though the applicant and other are holding a grant they have unclean hands as it seems that they had no interest in distributing the Estate of the deceased. They are the only one benefiting from it.

The deceased and all the parties involved are of the Islamic faith. S.66 of the constitution provides for establishment of Kadhi's courts and this was done under the Kadhi's Courts Act cap 11 L.O.K S.5 of the Act provides:-

**“ A Kadhi's court shall have and exercise the following jurisdiction, the determination 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 proceedings which comes before it”.**

It is clear from those provisions that High Court has jurisdiction to hear any matter even if they touches on parties who are Muslim. However the parties who are Muslim and whose dispute touches an issue of marriage, divorce or inheritance should file their matters in the Kadhi's courts. The applicant chose to file the succession cause before the High Court but the Respondent went before the Kadhi for distribution. At this stage I would say there is nothing wrong with that. The Kadhi was right to hear the parties and made the orders that he made. The applicant is not denying that he is a Muslim just like the others and the deceased. Infact the Kadhi who is more versed in the Muslim and Mohammed law could be said to have been better placed to deal with the issue of distribution. The court finds that there is no prejudice which will be suffered by the respondent if orders of stay are not granted. He does not even deny that the applicants are not beneficiaries of the Estate. No loss will he suffer which cannot be atoned.

The upshot of the above therefore is that I find no merit in the application and the same is dismissed with costs.

Dated and Delivered at Eldoret on 11<sup>th</sup> July,2007.

**KABURU BAUNI**

**JUDGE**