

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 31 OF 2000

FATMA YAGHUT SALIM PLAINTIFF

VERSUS

NURU MAHFUDH & OTHERS..... DEFENDANTS

JUDGEMENT

This appeal related to the decision of the Sheikh Ali Mwinzangu Kadhi sitting on Kadhis court at Mombasa.

The complaint is that the learned Kadhi failed to apply the provisions of section 6 of Civil Procedure Act Cap 21 Laws of Kenya when it was drawn to his attention that there were two similar suits pending. One in his court, number 20 of 1999 and High Court Probate and Administration cause number 64 of 1997. Both suits relate to the succession and distribution of the estate of one SAID SWALEH who died on 17/7/96.

Provisions of section 6 aforesaid states as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue on a previously initiated suit or proceeding between the same parties or between parties under whom they or any of them claim litigating under the same title where such suit or proceedings is pending on the same or of other court having jurisdiction in Kenya to grant the relief claimed.”

The term suit is defined as all civil proceedings commenced in of manner prescribed.

The learned Kadhi did find that these are two cases in respect of the same estate but he erred in failing to find that appointment of administrators is done in High Court.

The High Court has also jurisdiction to determine the heirs and their shares except in the case of Muslim estate, these issues are determined under Muslim Law. It is only in case of disputes between the parties that the matter may be resolved in the Court of Kadhi.

In the present case the Probate and Administration suit in the High Court is the first in time. Therefore the suit before the Kadhi’s Court must be stayed pending the determination of the High Court suit.

The appeal is therefore allowed. This court orders that succession suit before Kadhi’s Court being number 20 of 1999 is hereby stayed pending hearing and determination of High Court Civil case Probate and Administration number 64 of 1997.

Each party shall pay own costs.

Dated this 29th day of October 2002

HON. J. KHAMINWA

LADY COMMISSIONER