



**Juma v Machakos Jamia Mosque Association (Civil Appeal
E026 of 2023) [2024] KEHC 4792 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4792 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E026 OF 2023**

FROO OLEL, J

MAY 9, 2024

BETWEEN

KHADIJA NANA JUMA APPELLANT

AND

MACHAKOS JAMIA MOSQUE ASSOCIATION RESPONDENT

*(Being an Appeal from the ruling and order of Kadhis court at Machakos by
Honourable Khamis Ramadhan dated and delivered on the 17th day of January
2023 in Machakos Principal Kadhis court Miscellaneous Application No 63 of 2021)*

JUDGMENT

A. Introduction

1. This appeal arises from the judgment of Hon Khamis Ramadhani dated 17th January 2023, delivered in Machakos Principal Kadhi's court Miscellaneous Application No. 63 of 2021 where the Hon Kadhi did order the Appellant and her sister one Jamila Masoud Juma to release and surrender to the respondent herein, through their advocate on record several items, to wit;
 - a. Post office keys of the Machakos Jamia Muslim Association
 - b. Title deeds to the Machakos Jamia Mosque.
 - c. Title Deeds of two waqf plots Adjacent to the Mosque in Machakos.
 - d. Title Deeds of the Machakos Muslim Association plot of Alfurqan Madrassa.
 - e. Title Deed of the plot in front of the Jamia Mosque in Machakos.
 - f. The Muituni plot documents.
 - g. The registration certificate of the Machakos Jamia Mosque Association.



7. The Appellant further was clear that she was not the administrator or legal representative of the estate of the late Masoud Juma, and had been wrongly sued. On issues touching on IKHLAS NURSERY SCHOOL, to her knowledge her late father was the sole owner of the said school and had employed one MARY MUMBUA KIOKO to run the school and would be pay her monthly salary. If the Mosque committee felt that the school should be paying them rent, then the estate of the deceased was willing to continue to pay rent upon a proper identification of the person responsible to collect the same and proof of pervious payment of rent. It was therefore her contention that this suit had been brought in bad faith, the orders sought were misplaced and the Application ought to be dismissed.
8. The respondent herein through their advocate did file a supplementary Affidavit dated 15.02.2022, where he did depone that the matters under consideration were within his knowledge and that the notice to cross examine him was a form of intimidation and the same lacked merit. The Appellant was being economical with the truth by feigning ignorance about the documents sought, but on the other hand conveniently had privileged information relating to the ownership of IKHLAS NURSERY SCHOOL. This shows that she was being insincere and there was proper basis upon which the court could order her to produce documents in her custody, as her late father only held them as a trustee of the respondent. The issues raised herein involved the larger Muslim community and it was just and proper for the court to grant the orders sought.
9. The Learned Kadhi did consider the merits of the said application and proceeded to grant the orders sought in favour of the respondent. Being wholly aggrieved and dissatisfied by the Ruling/Order issued, the appellant did prefer this appeal and raised thirteen (13) grounds of Appeal namely;
 - a. That, the learned Kadhi erred in law by making a finding that an affidavit sworn by an individual who is not a party to a suit is competent and admissible;
 - b. That the learned Kadhi erred in law by making a finding that, since the advocate on record for the respondent is an advocate of the high court of Kenya, the Honourable court could not take away the fact that he was a commissioner for oaths and that an oath made by him on behalf of any client is admissible before the court, contrary to the rules on competency of Affidavits.
 - c. That the learned Kadhi erred in law by failing to consider the express provisions of order 19, Rule 3 of the civil procedure Rules, 2010 on the matters to which affidavits shall be confined.
 - d. That the learned Kadhi seriously erred in law by making a determination in a matter not within the jurisdiction of the Kadhi's court contrary to Article 170(5) of *the constitution* of Kenya, 2010 and the Kadhi's court Act.
 - e. That the learned Kadhi erred in law by making a finding that the Applicant together with her immediate family members were culpable for the allegations levelled against them, when the Appellant was not the legal representative of the Estate of the late Masoud Juma;
 - f. That the learned Kadhi seriously erred in law in holding that the respondent had proved its case to the required standard when no evidence was tendered before the court to prove the respondent's allegations contrary to the provisions of the *Evidence Act*;
 - g. That the learned Kadhi seriously erred in law by making a finding that the appellant was liable in this matter solely based on the fact that the Appellant is a family member of the deceased and she lived in the same house with the deceased prior to his demise;
 - h. That, the learned Kadhi erred in law by failing to consider the affidavit evidence of the Appellant on record.



- i. That, the learned kadhi erred in law by arriving at a decision based on mere allegations and statements not supported by any form of evidence;
 - j. That, the learned Kadhi erred in law and fact by holding the late Masoud Juma had been in custody of the document's sought by the respondents when there was no evidence on record to prove that the said documents had been placed in his custody prior to his demise;
 - k. That the learned Kadhi seriously erred in law in making prejudicial and false findings against the Appellant without any basis in the Application or affidavit filed;
 - l. That, the learned Kadhi made such fundamental errors in the analysis of the evidence before the court, the interpretation of *the constitution*, the Kadhi's court Act and the *Evidence Act* as to lead to a miscarriage of Justice.
10. The appellant prayed that this appeal be allowed, the finding of the trial magistrate with respect to the ruling dated 17th January 2023 be set aside in their entirety and that this Appeal be allowed with costs.

C. Submissions

(i)Appellant's Submissions

11. The appellant filed their submission dated 28th July 2023, wherein it was submitted that the supporting affidavit sworn by one Gulam Ali Advocate should be struck off, for it was sworn by a person who is not a party to the proceedings and made averments on matters to which he was not conversant/contested matters. Further the said advocate never attached any authority from the respondent's which gave him permissions to swear affidavits on their behalf and crucially the said averments were not within his knowledge nor did he disclose the source of his information. The said affidavits thus offended provisions of Order 19 rule 3 of the civil procedure rules and should have been struck out. Reliance was placed in the case of Magnolia PVT Limited Vs Synermed Pharmaceuticals (K) ltd 2018 eKlr, Republic Vs Attorney General (Sued for and on behalf of the ministry of lands & 2 others Ex parte south and central (Thika) Investment ltd (2015) eKlr and Regina Mwangi Gitau Vrs Boniface Nthenge (2015) eKlr where it was emphasized that advocates acting for parties should not depone on contested matters.
12. The Appellant further submitted that the trial magistrate erred in law by holding that she was culpable and should produce items and documents outlined in the said application, yet she was not the legal representative/administrator to the Estate of the late Juma Masoud as defined by section 3 and read together with section 79 of the *law of succession Act*. She therefore had no locus standi to represent the estate of the deceased in any suit and/or be compelled to deal with matters relating to the said Estate. Reliance was placed on Julian Adoyo Ongunga Vrs Francis Kiberenge Abano Migori civil Appeal No 119 of 2015 , Veronica Njoki Wakagoto (Deceased),(2013) eKlr & Melickzedeck shem Kamau Vs Beatrice Waithera Maina & 2 others (2020) eKlr to buttress this point.
13. Further, the learned kadhi had also erred in in issuing orders as against Jamila Masoud, yet she was neither a party to the suit or a legal representative of the late Juma Masoud. Reliance was placed on Apex International Limited & Anglo- Leasing and Finance International limited Vs Kneya Anti-corruption commission (2012) Eklr and Zephir Holding Ltd Vs Mimosa Plantations Ltd , Jeremiah Maztagaro and Ezekiel Misango Mutisya (2014), where it was held that when proper parties were not before the court, the court lacked jurisdiction to make adverse orders as against parties who were not sued. The orders to search the homes of the Appellant and her sister also violated Articles 24(1),(2),31 and 47(1) of *the constitution* of Kenya, which prohibited their persons, home or property from being searched, their possession being seized and having their private and family affairs being revealed. To the extent that an adverse order was made as against a party, who was not party of the suit, also violated



provisions of Article 47(1) &(2) of the constitution of Kenya and to that extent the said orders was void abinitio.

14. The final issue raised by the Appellant was that the learned Kadhi did make orders which were in excess of his jurisdiction as conferred by Article 170(5) of the constitution of Kenya and section 5 of the Kadhi's Act, Cap 11 laws of Kenya. The learned Kadhi by law is only seized to handle personal matters/status marriages, divorce and inheritance matters where parties profess the Muslim religion. The subject matter of the suit touches on land and therefore was a matter not within the jurisdiction of the court to determine. If the respondent had an issue with ownership of the deceased parcels of land, the right forum was to move the Environment and land court, which had the power to deal with issues relating to the use and occupation of and title to land. The decision made to that extent was null and void as the learned Kadhi did make orders in excess of his jurisdiction. Reliance was placed on Samuel Kamau Macharia & Another Vs Kneya commercial Bank Ltd and others (2012) eKlR & Mohamed Ali Elmi & 3 others Vrs Suleiman Ogola Mundhwe (2018) eKlR.
15. The Appellant therefore urged this court to find that this Appeal had merit and proceed to allow the same by setting aside the orders issued on 17th January 2023.

(ii) The Respondent Submissions.

16. The respondent filed his submissions on 15th September 2023, and deponed that the Khadi's court had jurisdiction to hear and determine the dispute herein as it related to items and documents that belonged to the respondent, which were kept by the deceased – Juma Masoud as their trustee. Both parties professed Muslim faith and therefore the right forum to address the issues raised was the Kadhi's court. The prayers sought in the application related to surrender of documents and items which belonged to the respondent and they had not made any claim with regard to use, occupation of and title to land. The Kadhi's court was therefore the right forum to determine the issues raised and not the Environment and land court. Reliance was placed on Motor Vessel "Lillian" S Vrs Caltex oil (Kenya) ltd 1989 Eklr, Samuel Macharia & Another Vrs Kenya commercial Bank Ltd & 2 others (2012) eKLR, Genevieve Bertrand Vs Mohammed Athman Maawiya & Another (2014) Eklr & Timothy Njoya case (High court Miscellaneous Application No 82 of 2004 (OS).
17. The respondent also submitted that the Supporting and supplementary affidavit's sworn by Gulam Ali, was proper as he deponed to matters related to the affairs of Muslim community in Machakos, for which he was a member and therefore was conversant with the facts as deponed to. The Appellant had also not specified the particular paragraph's which offended the provisions of order 19 of the civil procedure rules and Rule 9 of the Advocates (practice) rules. Reliance was placed on Factory Guards Limited Vrs Factory Guards Limited (2014) Eklr, John Muli & Another Vs Thomas Nzioka Wambua & Another (suing as Administrators of the Estate of Micheal Makau Nzioka (Deceased) (2021) & Kenya commercial Finance co Ltd Vrs Richard Akuesera Onditi(A) 329/2009.
18. The Appellant resided with the late Juma Masoud under the same roof and had access to the documents sought. The Appellant had admitted ownership of IKHLAS NURSERY SCHOOL and how her late father operated the said school and therefore could not feign ignorance about issues related to her father's Estate. They had on a balance of probability proved that indeed she were aware of the documents sought for and the court was justified in issuing the orders Appealed against. This Appeal therefore was not merited and they prayed that the same be dismissed with costs.



D. Analysis and Determination

19. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See *Santosh Hazari Vs Purushottam Tiwari (Deceased) by L.Rs (2001) 3 SCC 179*.
20. Further the first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See *Kurian Chacko Vs Varkey Ouseph AIR 1969 Keral 316*.
21. Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as present in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial court had the advantage of hearing the parties. The issues that arise in this Appeal are as follows;
 - a. Whether the Respondents supporting Affidavit and supplementary Affidavit ought to have been stuck out for offending provision of Order 19 rule 3 of the civil procedure rules and Rule 9 of the Advocates (Practice) Rules.
 - b. Whether the learned Kadhi erred in issuing orders as against Jamila Masoud, who was not a party to the suit.
 - c. Whether on a balance of probabilities the Respondents did prove that they had a prima facie case warranting issuance of the orders Appealed Against.
 - d. Whether the learned Kadhi had jurisdiction to issue the orders sought
 - e. Who should bear the costs of this Appeal
 - i. Whether the Respondents supporting Affidavit and supplementary Affidavit ought to have been stuck out for offending provision of Order 19 rule 3 of the civil procedure rules and Rule 9 of the Advocates (Practice) Rules.
22. The application dated 26th October 2021 was supported by the supporting affidavit dated 26th October 2021 and supplementary Affidavit dated 15th February 2022 both sworn by on Gulam Ali, counsel for the respondent, where he extensively deponed to matter of fact in dispute, without stating the source of his information nor did he state who gave him authority to so depone. Order 19 Rule 3 of the civil procedure Rules provides that;

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove; Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.



23. In the case of Republic Vs Attorney General (sued for and on behalf of the Ministry of lands & 2 others Ex parte South and central (Thika) Investment Limited (2015) Eklr, Justice G.V Odunga (As he was then) eloquently stated that

“In this case, the deponent of the supporting affidavit, Antony Murithi Kireria, did not even pretend to be acting on information obtained from the client. Similarly in Small Enterprises Finance Co Ltd Vrs George Gikubu Mbutia, Nairobi HCC No 3088 of 1994, it was held that advocates should not depose to contested matters of facts.

It has been held and it is the law that an Affidavit based on information and belief without disclosing the source of information and the grounds for holding the belief are worthless.

This rule was also eloquently propounded by East African court of Appeal In Life Insurance Corporation of India Vrs Panesar (1967) EA 614(Sir Charles Newbold,P), Where he held that;

“Affidavits are intended to be probative of the facts which the parties filing the affidavits seeks to prove before the court in the particular proceedings in which the affidavits are filed. The accumulated wisdom of the court’s over time has laid down that any attempt to prove facts save in accordance with such rules as the experience of the court’s has shown to be essential is worthless.”

24. In East Africa Foundry works (K) Ltd Vrs Kenya commercial Bank Ltd (2002)1 klr 443, Justice Ringera (As he was then) did state that;

“..... I have always deprecated depositions by advocates on contentious matters of fact in suits or Application which they canvass before courts..... The unseemly prospect of counsel being called upon to be cross examined in matters in which they appear as counsel must be avoided by striking out such affidavits as a matter of good practice.” Also See Justice L. Kimaru finding, In Albany Taylor & Another Vrs Christopher Taylor & Another (2008) Eklr.

25. From the averments made in the both the supporting affidavit and supplementary Affidavit, there is no doubt, whatsoever that the deponent counsel Gulam Ali made averments on contested issues without disclosing the source of his information, nor did he annex the authority given to him by the respondent to depone to facts on their behalf. While the respondent did submit that the deponent is a member of the Machakos Muslim community and was therefore conversant with the facts of the case, the same was not specified in any of the offending affidavits. The trial Kadhi, thus erred in skittling around this issue by stating that Islamic law, allowed for evidence taken under oath to be considered in absence of secondary evidence. In law that is incorrect and I do therefore find that both the supporting affidavit and supplementary affidavit filed by the said counsel was incompetent for making averments on contested issues, without disclosing the source of information.

26. Having made a determination that both the supporting affidavit and supplementary affidavit were incompetent and ought to have been struck out. There is no need to belabor other issues for consideration as the foundation the basis upon which the orders were issued has been wiped off. The application as filed has no legs to stand on and would definitely collapse. Be that as it may, and to do justice to the parties herein, it is also obvious that no adverse orders can be issued as against a party, who was not sued and did not take part in the proceedings. The orders issued as against one Jamila Masoud Juma, were thus void ab initio.



27. The Appellant is also not the legal representative of the late Juma Masoud, and it is not axiomatic that since she is his daughter, she must be aware of his dealing with the respondent as their trustee, nor can any obligation be placed on her, regarding the affairs of the Estate unless legally appointed as an administrator thereof. It is trite law that pleadings filed in court against a person with no locus standi are void ab initio and the court would have no jurisdiction to issue orders as against them in such actions. In *Ibrahim V Hassan & Charles Kimenyi Macharia*, [2019] eKLR the Court observed as follows:-

“Locus standi is basically the right to appear or be heard in court or other proceedings. That means if one alleges the lack of the same in certain court proceedings, he means that party cannot be heard, despite whether or not he has a case worth listening. The issue herein is whether the Applicant lacks the requisite locus standi to seek relief from the court to revoke the grant in question issued to the Respondent. In my view, issues as regards locus standi are critical preliminary issues which must be dealt with and settled before dwelling into other substantive issues”.

28. The position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In *Otieno v Ougo* [1986-1989] EALR 468, the Court rendered itself thus:

“... An administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”

29. Also in the Case of *Rajesh Pranjivan Chaudasama Vs Sailesh Pranjivan Chaudasama* (2014) eKLR, the court did address itself on the issue of Locus Standi and did hold that;

“.....But in our view the position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited grant or a full grant of letters of administration in the case of intestate succession.”

30. The Appellant in this suit was not the legal representative and/or administrator of her father’s estate. Further evidence lead to support the contention that she had custody of her father’s documents in relation to his duties as the Mosque trustee were not proved and amounted to mere suspicion, hearsay and speculation. The learned Kadhi had absolutely no basis to hold her to account for the same and his findings to that extent was a clear misdirection in law.

31. Finally, Article 170 (5) of *the constitution* of Kenya as read with Section 5 of the Kadhi’s court Act, Cap 11 limited the jurisdiction of the Kadhi’s court to deal with and determine 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 Kadhi’s court. The prayers sought in the application dated 26.10.2024 did not deal with matters concerning the personal status of the deceased one Juma Masoud, regarding his Marriage, divorce or inheritance.

32. The respondent sought documents and property belonging to Machakos Jumia Muslim Association and listed the same post office keys, Keys to two shops Masoud kept closed, Keys to Ikhlas Madrass, Keys to Kyulu High school, Title deed of the Mosque and two waqf properties, Title deed to MMA plot Alfurqan Madrasa, Title deed of Mosque plot in front of Mosque, Mutituni plot documents, Registration certificate of MJMA and cheque book. All these are claimed as property of the Machakos Jumia Mosque Association. The same (according to the respondent) did not belong to the deceased Juma Masoud and automatically do not form part of his Inheritance. That being the position it goes



without saying that the learned Kadhi did not have jurisdiction to determine the same and such a claim ought to have been filed before the Magistrate court of competent jurisdiction as against the legal representative of the estate of the late Juma Masoud. Accordingly, the jurisdiction of the Kadhi court was ousted by the pleading herein and he did not have locus to issues the orders Appealed against.

E. Disposition

33. The upshot is that I find that this Appeal has merited. The orders issued by the learned Kadhi vide his ruling dated 17th January 2023 in Machakos Kadhi's court Misc civil Application No E26 of 2023 are hereby all set aside and substituted with an order dismissing the Notice of Motion Application dated 26th October 2021 and the said suit.
34. Since the Appellants father, was a trustee of the respondent, and considering the larger interest of both parties, who are bound by common faith, I direct that each party to bear their own costs of this Appeal and the suit filed before the Kadhi's court.

PARA 35.

It is so ordered.

Judgment written, date and signed at Machakos this 9th day of May, 2024

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 9th day of **May, 2024**

In the presence of: -

No appearance for Appellant

No appearance for Respondent

Sam Court Assistant

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