



REPUBLIC OF KENYA



**KENYA LAW**  
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**Shosi v Siaka & 2 others (Civil Appeal 33 of 2021)  
[2024] KEHC 8836 (KLR) (10 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8836 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL 33 OF 2021  
SM GITHINJI, J  
JULY 10, 2024**

**BETWEEN**

**MOHAMED SHAIBU SHOSI ..... APPELLANT**

**AND**

**SAID SEIF SIAKA & 2 OTHERS ..... RESPONDENT**

*(Being an Appeal from the Judgment and/or Decree of the Senior Resident Kadhi's Court at Lamu (Hon Swaleh Mohamed Ali) issued on the 1st day of December, 2020 in Lamu Succession Cause No.01 of 2020)*

**JUDGMENT**

1. This Appeal emanates from the judgment of Honourable Swaleh Mohamed Ali delivered on December 1, 2020 wherein judgment was entered in favour of the respondents.
2. Aggrieved by the judgment, the Appellant lodged the instant appeal on the following grounds;
  1. That the trial Kadhi erred in law and in fact in unreasonably, injudiciously and wrongly dismissing the Appellant's Preliminary Objection dated October 30, 2020 seeking to challenge the jurisdiction of the Kadhi's court to hear and determine the Application and Petition filed against the Appellant herein.
  2. That the learned trial Kadhi, Hon. Swaleh Mohamed Ali erred in law and in fact by failing to find that he had no jurisdiction to hear the matter and further failed to take into cognizance that the appropriate court vested with the jurisdiction to hear and determine the matter is the High Court which conclusively determined the issue of distribution of the Estate of the late Mohamed Siaka Ali (Deceased) in Nairobi Environment and Land Case No. 663 of 2005 *Mohamed Siaka Ali v Sunpalm Ltd & 3 Others*.



3. That the learned trial Kadhi erred in law and in fact and fatally misconceived the law in making a drastic decision of delivering a judgment in an interlocutory Application thus exercising his discretion wrongfully, capriciously and injudiciously by determining the interlocutory application with finality without hearing the main petition on merit.
  4. That the learned trial kadhi erred in law and fact by allowing the Respondent's Application and determining the petition without due recourse to the law and failed to take cognizance of the parties' right to fair administrative action and fair hearing as provided for under Article 47 and 50 of the *Constitution* of Kenya 2010 as well as the provisions of the *Fair Administrative Actions Act, 2015*.
  5. That the learned trial kadhi erred in law and in fact and grossly misdirected himself in making a finding that the Respondents were the rightful heirs of the late Mohamed Siaka Ali without hearing the evidence of the parties and with undue regard to the issues in Nairobi Environment and land case No. 663 of 2005 as well as in Nairobi Civil Appeal No. 240 of 2015 (*Sunpalm Limited V Mohamed Siaka Ali (through Mohamed Shaibu Shosi personal representative) & 3 Others*) hence the trial court sat on an appeal of the decision of the High Court a superior court that conclusively determined the issue raised before him.
  6. That the learned trial kadhi erred in law and in fact and thereby reached an unjust determination in failing to properly analyze the nature of the case before him with regard to the reliefs sought before the honourable court thereby misdirecting himself in law and fact.
  7. That the learned trial kadhi failed to properly evaluate the evidence and submissions on record and took into consideration irrelevant facts and in the end came to a wrong decision in the matter.
3. The matter at the trial court was canvassed by way of written evidence. In support of their petition at the trial court, the Applicants; Said Seif Siaka, Soud Seif Siaka and Ali Seif Siaka swore an affidavit stating that they are the nephews of the deceased and beneficiaries and/or heirs of the Estate of the deceased who died with no ascendants or descendants. That the Respondent purports to be the representative of the Estate of deceased and is illegally holding ownership documents of the said properties and the deceased's certificate and has refused to surrender the same and there is a looming danger of intermeddling. They stated that the deceased died on August 5, 2005 and his estate has not been distributed as per the Islamic law.
  4. In support further, they filed an affidavit sworn by David Pius Mugambi who stated that he was the advocate of the deceased Mohamed Siaka Ali. That at the time of his death, HCCC No. 663 of 2005 was pending in court and after his death, he applied to court to have Mohamed Shaibu Shosi to be appointed as a legal representative for the purposes of finalizing HCCC No. 663 of 2005 between the deceased and Sunpalm limited to which the court gave a limited grant of letters ad litem and upon finalization of the case in July 2016, he registered the property in the name of Mohamed Shaibu Shosi as the legal representative. He stated that in July 2017, the said Mohamed Shaib Shosi transferred Kilifi/Jimba to him which parcel he holds for the beneficiaries (the Applicants) of the estate of Mohamed Ali Siaka and himself in equal shares. He further stated that the Respondent Mohamed Shaibu Shosi is not a beneficiary of the estate of Mohamed Siaka Ali nor is he a relative of the deceased.
  5. In response, the Respondent filed an affidavit stating that the Application is vexatious as the suit property has already exchanged hands and not available for distribution. He stated that the suit property is also a subject of litigation concerning proprietary dispute between one Eleanora Cozzi and David Pius Mugambi in Malindi Environment and Land Court Case No. 20 of 2020 between *Afrika*



*Kivulini Management Limited v David Pius Mugambi and 2 others* which case is still ongoing and pending determination.

### Analysis and Determination

6. The Appeal was canvassed by way of written submissions. I have considered the submissions on record. From the memorandum of appeal, though several grounds have been raised, I find they all narrow down to one issue which is whether the Kadhi acted in excess of his jurisdiction in determining that the Respondents were the heirs of the estate of Mohamed Siaka Ali (deceased).
7. I do not wish to overstate on the subject of jurisdiction. I will, however, briefly reiterate what the Court of Appeal stated in Nakuru Civil Appeal No. 119 of 2017 *Public Service Commission & 2 Others vs. Eric Cheruiyot & 16 Others* consolidated with Civil Appeal No. 139 of 2017 *County Government of Embu & Another vs. Eric Cheruiyot & 15 Others* (unreported) in a decision rendered on February 8, 2022 on the doctrine of jurisdiction in general as follows: -
  36. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in “*Words and Phrases Legally Defined*”, Volume 3 at Page 113 defines court jurisdiction as follows:

” By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”
  37. The *locus classicus* on jurisdiction is the celebrated case of *Owners of the Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd* [1989] KLR 1. Nyarangi, JA. relying, *inter alia*, on the above cited treatise by John Beecroft Saunders held as follows:

...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.
  38. A decision made by a court of law without proper jurisdiction amounts to a nullity *ab initio*, and such a decision is amenable to setting aside *ex debito justitiae*.
  39. The Supreme Court in *In the Matter of Interim Independent Electoral Commission* [2011] eKLR, Constitutional Application No. 2 of 2011 held that jurisdiction of courts in Kenya



is regulated by the Constitution, statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows:

...a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.

40. In Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others [2012] eKLR, Application No. 2 of 2011, the Supreme Court reiterated its holding on a court's jurisdiction. In the matter of the Interim Independent Electoral Commission (*supra*) at paragraph 68 of its ruling, the Supreme Court held as follows:
  - (68). A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.
8. Article 169 of the Constitution creates the Kadhi's court as a subordinate court in Kenya while Article 170 (5), confers jurisdiction on the Kadhi's court in the following terms:

" The jurisdiction of a Kadhi's court shall be 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 Kadhi's courts."
9. As regards the statutory provisions, section 5 of the Kadhi's Court Act, Cap 11 Laws of Kenya, reiterates the jurisdiction of the Kadhi's Court as follows:

" A Kadhi's court shall have and exercise the following jurisdiction, namely 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; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it."
10. Section 2 (1) of the Law of Succession Act declares the Act to constitute the universal law of Kenya in respect of all cases of intestate or testamentary succession to the estate of deceased persons dying after the commencement of the Act and to the administration of their estates. However, section 2(3) delivers a qualification worded as follows:
  - (3) Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.
  - (4) Notwithstanding the provisions of subsection (3), the provisions of Part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim dying before, on or after the 1st January, 1991."
11. From the above provisions, it is clear to me that the Constitution confers powers to the Kadhi's court to determine under Islamic law matters of personal property, marriage and succession. In the present case, from the impugned judgment, the learned Kadhi made a determination that the Respondents were the heirs of the estate of Mohamed Siaka Ali (deceased). It has not been demonstrated by the Appellant how this finding is at fault. What seems to be the crux of the Appellant's case is the property Kilifi/



Jimba/669. From the judgment the Kadhi did not make any determination as regards this property. He limited his determination as to who the heirs of the estate of the deceased were. In my view, I find that he acted within his mandate in so finding. As to whether the suit property is part of the estate of the deceased, in my view is an issue that is before the competent court which is the Environment and Land Court which deals with the question of ownership.

12. That said, I find that the Appeal lacks merit and the same is dismissed with no orders as to costs.

**JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 10<sup>TH</sup> DAY OF JULY, 2024.**

.....

**S.M. GITHINJI**

**JUDGE**

In the absence of; -

Mr Kilonzo for the Appellant

Mr Michira for the Respondent

Parties be notified.

