



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Marenga v Mbwana (Family Miscellaneous Application
E006 of 2022) [2023] KEHC 18876 (KLR) (12 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18876 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY MISCELLANEOUS APPLICATION E006 OF 2022**

**G MUTAI, J
JUNE 12, 2023**

BETWEEN

ROBERT STEPHEN MARENGA APPLICANT

AND

MARRIAM MOHAMED MBWANA RESPONDENT

RULING

1. The matter before the Kadhi in the Kadhi's Court Succession Cause No E357 of 2021; In the Matter of the Estate of Rashid Kibwana Saku (deceased) proceeded without the involvement of the Applicant. The Applicant avers that he is the son of the deceased person. In his judgment then Chief Kadhi, the Hon Al Mudhar AS Hussein found that the deceased had 3 heirs to wit:-
 1. Mariam Mohamed Mbwana(widow);
 2. Mayasa Taabu (mother); and
 3. Mayasa Rashid (daughter).
2. The Applicant is aggrieved by the said decision and seeks to appeal against it. With a view to doing so he filed summons dated February 28, 2022 vide which he sought the following orders: -
 1. This application be certified urgent and be heard ex-parte in the first instance;
 2. That pending the hearing and determination of this application inter-parties there be a stay of execution of the judgment delivered on the November 29, 2021 in Mombasa Kadhi's Succession Cause No E357 of 2021 the Estate of the Late Rashid Kibwana Saku;
 3. That leave be granted to the applicant herein to file an appeal against Judgement of the Honourable Court delivered by Hon. Al Muhdhar AS Hussein (Chief Kadhi) on November



29, 2021 in Mombasa Kadhi Succession Cause No E357 of 2021 the Matter of the Estate of the Late Rashid Kibwana Saku out of time.

4. That pending the hearing and determination of the intended Appeal herein there be a stay of execution of the judgment delivered on the November 29, 2021 in Mombasa Kafhi's Succession Cause No E357 of 2021 the Matter of the Late Rashid Kibwana Saku
5. The costs of this application be in the cause.
3. In support of his application he annexed various documents. Of note, in my view, are two letters from the provincial administration, in which he is indicated to be the son of the deceased and a copy of Title No New Taveta Town/2868.
4. I have considered the said application the Replying Affidavit of Mariam Mohamed Mbwana as well as the Submissions of the parties. Having done so I have come to the conclusion that the application has no merit and should be dismissed. This is so for the reasons I shall give in the succeeding parts of this ruling.
5. Section 2(3) and (4) of the Law of Succession Act provides that: -
 - ' (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 this 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 January 1, 1991.'
6. The foregoing provisions of the Law of Succession Act is given effect by Rule 164(1) of the Kadhi Court (procedure) Rules, 202 which provides that
 - ' (1) The provisions of Part VII of the Law of Succession Act relating to the administration of a deceased person's estate where they are not inconsistent with those of Muslim law shall apply in the case of a deceased Muslim.'
7. It is not in dispute that the deceased was a Muslim. That being the case the devolution of his estate is governed by the Muslim Sharia law.
8. Part VII of the Law of Succession Act begins from section 44 and ends at section 95 of the said Act. Section 76 thereof, which makes provisions for revocation or annulment of grants, falls within this part. Thus in a situation such as this where the Applicant feels either that the proceedings to obtain the grant were defective in substance or that the grant was obtained fraudulently by the making of a false statement or by the concealment from the Court of something material to the case or that the grant was obtained by means of an untrue allegation of fact essential in a point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently or for other reasons given in the said section, the option available to him is to apply to revoke the grant before the Kadhi's Court as that is the court currently seized of the matter. In the event that he is dissatisfied with the orders made by the said Court, he would then be within his right to appeal to this Court pursuant to Rule 86 of the Rules of that Court.



9. Filing an appeal against a decision one did not participate in would appear to me to be ill-advised. As submitted by the Respondent it does appear that the impugned judgment was set aside in any case. The Respondent's averment that the court below stay the impugned judgment, made in paragraph 18 of her Replying Affidavit was not rebutted.
10. I have previously indicated that the application has no merit. I am therefore left with no choice but to dismiss it with costs.

Orders accordingly.

DELIVERED, DATED, AND SIGNED THIS 12TH DAY OF JUNE 2023 AT MOMBASA VIA MICROSOFT TEAMS

.....

GREGORY MUTAI

JUDGE

In the presence of:-

Mr. Mutinda for the Applicant

No appearance for the Respondent

Ms. Gillian Mutamba – Court Assistant

