



**Mjambili & another v Amri (Civil Appeal E012 of 2020)
[2023] KEHC 21675 (KLR) (6 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 21675 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E012 OF 2020**

SM GITHINJI, J

JUNE 6, 2023

BETWEEN

WINNIE MWAKA MJAMBILI 1ST APPELLANT

MARK FANDE MJAMBILI 2ND APPELLANT

AND

AISHA SAID AMRI RESPONDENT

*(An Appeal from the Ruling of the Principal Kadhi at Malindi Hon.
Kadhi Twalib B. Mohamed delivered on 10th September, 2020 at Malindi)*

JUDGMENT

1 The appellants Winnie Mwaka Mjambili and Mark Mjambili have appealed to this Court against the ruling of the Honourable Principal Kadhi on the following grounds;

1. That the learned Principal Kadhi erred in law and fact in dismissing the Notice of Motion dated June 16, 2020 despite being informed that a decree had been extracted on June 24, 2020 in favour of the Appellant in HCCC No. 150 of 2015 on property LR No. 17/13/202 and the Principal Kadhi had no jurisdiction to deal with the said property in the proceedings of July 9, 2017 which deliberately misled the Court that had no jurisdiction to deal with the property.
2. That the Learned Principal Kadhi erred in law and in fact in ordering that the Land Registrar Mombasa to effect transfer of ownership of the piece of land (45. 31 acres) L.R. No. Plan Group XV11, No. 13 situated at Mida Kilifi County to Aisha Said AMIR ID No. 3xxxxx3 whilst the same property is registered in the name of the Appellant and lacked jurisdiction to make such orders.



3. That the Learned Principal Kadhi erred in law and in fact in deciding that once Judgment has been entered the advocate seeking to pursue such matter has to seek the leave of court which is erroneous in the face of Order 12 rule 7.
 4. That the Learned Principal Kadhi erred in law and in fact by deciding that the Appellant should be enjoined in the proceedings and specifically make such a prayer which is contrary to Order 1 Rule 10 (2).
 5. That the Learned Principal Kadhi erred in law and in fact in deciding that the court is ‘functus officio’ when the Order made by the Court directly affect both the Appellant’s property and conflicts with a decree of the High Court in HCCC No. 150 of 2015.
 6. That the Learned Principal Kadhi erred in law and in fact in concluding that there are no proceedings for the matter when the application before the court was seeking for orders to set aside the Judgment brought under Order 12 rule 7.
- 2 The appellant sought to have the appeal allowed and the Judgment delivered on August 16, 2017 by the Principal Kadhi Malindi Sheikh Salim S. Mohamed be set aside and all consequential orders thereto and the costs of the appeal be granted. It is however important to note that grounds No. 2 and 3 of the Memorandum of Appeal cannot be dealt with as the appellants cannot appeal against the Judgment of the Honourable Kadhi as they were not parties in the said proceedings.
- 3 I have considered the present appeal, the history of the matter and the submissions by the parties. I am of the view that the issue for determination is whether the learned Principle Kadhi misdirected himself on the matter of law and fact as to occasion miscarriage of justice as against the appellants by dismissing the application dated June 16, 2020. It is noted that Judgment in this suit was delivered by the Honourable Kadhi on August 16, 2017. The Interested Parties/ Applicants later filed an application dated June 16, 2020 seeking to set aside the Judgment delivered on August 16, 2017 on grounds that the property in question was registered in the name of the Appellant and at the time the Kadhi was delivering the judgment, the property belonged to the Appellants and not to the Respondent. The Respondent on the other hand contends that there was no application for leave for the interested parties to be joined in the proceedings and in fact, under Section 8 (2) of the *Kadhi’s Court Act*, the Civil Procedure Rules were applicable at the time the application was being made.
- 4 I am of the position that the main objective of any court of law is to ensure that justice is done and in pursuit of the same, both substantive and procedural laws come into play. Achieving the ends of justice is equally an objective in our succession laws, as well as the Islamic law. The primary duty of the court to do justice cannot be fettered by procedural technicalities. The *Constitution* under Article 159 on judicial authority has urged courts to do justice without undue regard to procedural technicalities. Article 159(2)(d) states:
- “Justice shall be administered without undue regard to procedural technicalities.”
- 5 The Court has inherent powers to give orders which are necessary to meet the ends of justice. Section 3A *Civil Procedure Act* provides:
- “Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”



6 This is further buttressed by Section 1A & 1B of the *Civil Procedure Act* which provides for overriding objectives of the Act which is to facilitate the just, expeditious resolution of disputes.

7 Order 1 rule 10(2) of the *Civil Procedure Rules* empowers the court, at any stage of the proceedings, upon application by either party to summon, or order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectively and completely adjudicate upon and settle all questions involved in the suit, to be added as a party. Commenting on this provision, the learned authors of Sarkar's Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P 557, states that:

“The section should be interpreted liberally and widely and not be restricted merely to the parties involved in the suit but all persons necessary for a complete adjudication should be made parties.”

8 I am guided by The *Kadhi's Court (Procedure and Practice) Rules, 2020* which provides at Rule 10(1) on Joinder of Parties, the proviso provides as follows;

1. One or more persons may be joined to an existing petition or motion as petitioner or respondent without the leave of the Court before the close of pleadings, but in any other case, the leave of the Court shall be obtained.
2. The Court may, on its own motion, enjoin further parties in the interests of justice.

9 Similar sentiments were also echoed in *Central Kenya Ltd v Trust Bank & 4 others*, CA. No. 222 of 1998, when it affirmed that the guiding principle in amendment of pleadings and founder of parties is that:

“All amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or founder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

10 The above authorities demonstrate the importance of joining a party to a suit whose rights will in one way or another be affected by a court's ruling or judgment. In the instant suit since the rights of the interested parties over the suit property have been affected, it is proper for the interested party to institute proceedings in this court. In addition, the Kadhi Rules and Procedure 2020 at Rule 78 empowers the Kadhi to review his own judgment *suo moto*; the provision provides as follows; “Kadhi may review his own judgment upon notice to both parties on the Kadhi's own motion if he discovers that he has misapprehended the facts, the law or both”.

11 A close glance at the record of appeal, makes it evident that the Respondent was a party in another case Malindi High Court Miscellaneous Civil Appeal No. 10/2017 and from her Replying Affidavit sworn on May 9, 2017, it is clear that she was well aware that the appellants had vested interest in the property as they are both cited as Plaintiffs. This information was not considered by the Learned Kadhi in his ruling as he proceeded to apportion shares of the estate to beneficiaries in land that is registered in the names of the appellants.

12 Essentially, the provisions of Rule 171 (1) which provide that; -

“Nothing in these Rules shall be deemed to limit or affect the inherent power of the court to make any order as may be necessary to apply the relevant principles of Muslim law and to prevent injustice or abuse of the process of the Court were not considered by the trial court.



13 In the end and in the interest of justice, this court finds the appeal merited. It's allowed. Costs be in the cause.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 6TH DAY OF JUNE, 2023.

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S.M. GITHINJI

JUDGE

In the Absence of;

1. Mr. Tindi for the Appellant
2. Mr Ole Kina for the Respondent.

Parties be notified.

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S.M. GITHINJI

JUDGE

6/6/2023

