



**Tabulo v Tabulo (Family Appeal E032 of 2024)
[2024] KEHC 15800 (KLR) (13 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15800 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E032 OF 2024
G MUTAI, J
DECEMBER 13, 2024**

BETWEEN

JASMIN MBOTO TABULO APPELLANT

AND

BARE ALEX TABULO RESPONDENT

RULING

1. On 22nd May 2024, the Hon Kadhi delivered a ruling in Mombasa Kadhi’s Court Succession Cause No E075 of 2024; In the Matter of the Estate of Joko Alex Tabulo (deceased) in which he dismissed the Notice of Motion and the Preliminary Objection, both dated, 4th April, 2024.
2. The Appellant was aggrieved by the said decision and filed a Memorandum of Appeal dated 22nd May 2024, vide which he seeks to have the impugned decision reversed in its entirety and substituted with the orders allowing his application and Preliminary Objection dated 4th April 2024 and the striking or dismissed of the Succession Petition dated 24th February 2024.
3. The Appellant Applicant also filed a Notice of Motion application dated 24th May 2024 vide which be sought the following orders:-
 1. Spent;
 2. Spent;
 3. That the honourable Court stay the proceedings of the Kadhi’s Court in Mombasa Kadhi’s Court Succession Cause No E075 of 2024 in the matter of the estate of the late Joko Alex Tabulo pending the hearing and determination of the Appeal; and
 4. That the costs of this application be awarded to the Appellant.



4. The application is premised on the submission that the Court below has no jurisdiction to determine the Succession cause before it since the Appellant did not submit to the jurisdiction of the Kadhi's Court and that the said Court was wrong when it required her to provide a reason for not submitting. It was averred that the intended appeal is arguable and that should the Kadhi's Court proceed with the hearing of the impugned cause on 29th May 2024 (now past) or on any other date during the pendency of the appeal, the appeal would be rendered nugatory otiose and or a mere academic exercise.
5. The application was certified urgent, and interim conservatory orders were issued on 27th May 2024. This Court (per Anne Ong'injo, J) stayed the proceedings before the Court below pending the hearing and determination of this application.
6. The Respondent filed a replying affidavit sworn on 27th June 2024 in which he contended that no evidence of a written will was presented before the Court below and that the impugned decision was right. He deposed that the Appellant was intermeddling and stalling the distribution of the estate.
7. The Respondent filed a Notice of Motion application dated 19th July 2024, vide which he sought the appointment of an independent agent to collect rental income from the tenants pending hearing and determination of the appeal, provision of a statement of account from March 2022 to date and ownership documents.
8. The Respondent averred that the deceased died on 2nd February 2022 and was survived by one widow and seven children. The estate of the deceased comprises properties with paying tenants. He urged that the Appellant had been collecting rental income since March 2022 for her own personal use. Since the estate had no administrator, it was necessary to appoint one.
9. The Appellant filed a Replying Affidavit dated 27th September 2024, vide which she averred that she was the executrix of the will of the deceased. She deposed that it was the Respondent who was intermeddling with the estate of the deceased.
10. The two applications were canvassed by way of Written Submissions.
11. The Appellant submitted, in respect of the application dated 24th May 2024, that the same ought to be allowed. Relying on the case of *Benjamin Momanyi v Joash Nyakaru Mayieka & another* [2022]eKLR, it was urged that the Appellant/Applicant had to show that there was an arguable appeal, that the appeal was filed without undue delay and that the said appeal would be rendered nugatory if it wasn't allowed. Reliance was also placed on the case of *Port Florence Community Healthcare v Crown Healthcare Ltd* [2022]eKLR. Counsel thus urged that the application be allowed.
12. In opposing the said application, the Respondent submitted in his written submissions dated 12th September 2024 that the Appellant had to show that the appeal was arguable, that the appeal was filed expeditiously and whether there was sufficient cause to allow the appeal. Reliance was placed on the decision of the Court in *Kenya Power & Lighting Ltd v Esther Wanjiru Wokabi* [2014]eKLR.
13. The Respondent denied that the Appellant had arguable appeal. He urged that she failed to present the alleged will before the Kadhi and actively tried to prevent the hearing of the matter on merit and that she did not fully disclose what transpired in the Court below. It was urged that the Appellant hadn't shown that she would suffer substantial loss if a stay of execution were not granted. Counsel, therefore, urged that the application be dismissed with costs to the Respondent.
14. On the application dated 19th July 2024, the counsel for the Respondent/Applicant submitted that the properties comprising the estate had tenants and that it would, therefore, be prudent for the Court



to intervene and have the rental income deposited in Court for the benefit of all the beneficiaries of the estate. It was also urged that the Appellant provide a statement of account of the deceased's estate.

15. The Appellant/Respondent submitted that the jurisdiction to issue the orders sought lay with the Courts below, either the Chief Magistrate Court in P&A No E117 of 2023 or the Kadhi's Court from where the instant appeal emanates. It was urged that to allow the application would amount to a usurpation of the jurisdiction of the Court below and that the said orders could not, therefore, be issued.
16. I have considered both applications, the responses thereto, and the parties' Written Submissions. I note that the main ground of appeal is that the widow of the deceased and her son aren't Muslims, weren't included in the succession proceedings and did not submit to the jurisdiction of the Kadhi's Court.
17. Jurisdiction is a fundamental issue. If the Kadhi's Court had no jurisdiction, it should not have taken further steps. The Supreme Court of Kenya, in the case of [*Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others*](#) [2012] eKLR stated that:-

“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 to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

18. The jurisdiction of the Kadhi's Court is stated in Article 170(5) of the [*Constitution*](#) of Kenya 2010 and Section 5 of the Kadhi's Court's Act, which provide as follows: -

Article 170(5) of the [*Constitution*](#): -

“(5) The jurisdiction of a Kadhis' 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.”

The provision of the Constitution is echoed in Section 5 of the [*Kadhi's Courts Act*](#) which provides 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 any subordinate court in any proceeding which comes before it.”

19. From the foregoing provisions of the Constitution and the law, it is clear that
 1. Kadhi's Courts determine questions of Muslim law relating to personal status marriage, divorce or inheritance;
 2. In which all the parties profess Muslim religion; and
 3. Have submitted to the jurisdiction of the said Court.



20. The Appellant avers that two beneficiaries are Christians and did not submit to the jurisdiction of the said Court and there is a Will which was disregarded by the Court below. Both these two issues are quite fundamental. It does not appear to me as if the appeal is idle.
21. It is true that stay of proceedings is an exceptional remedy which is granted in very exceptional circumstances. Ringera J in *Global Tours & Travel Ltd* (Nairobi HC Winding up Cause No 43 of 2000) stated as follows:-

“ As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice.....the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilisation of judicial time and whether the application has been brought expeditiously.”
22. In my view, the appeal is arguable. The jurisdiction question is weighty. The application thus passes the arguability test.
23. On whether the appeal will be rendered nugatory, I note that if the Hon Kadhi proceeds with the matter, the parties who are said to be non-Muslims may be greatly prejudiced. Further, the appeal and the application under consideration were filed promptly. In the circumstances, I am persuaded that the application has merit and consequently allow the application dated 24th May 2024 in terms of prayer 3 thereof.
24. Can this Court issue the orders sought in the Notice of Motion dated 19th July 2024? In my view, this Court is sitting as an appellate Court to consider an appeal before it. An appeal lies to this Court in respect of any order or decree of the Kadhi's Court in respect of the estate of a deceased Muslim under Section 50(2) of the *Law of Succession Act*.
25. I note that the deceased's estate is currently not administered. There is, therefore, grave danger that the same will be wasted.
26. In my view, since this Court can determine appeals arising out of the orders of the Kadhi's Court, it has jurisdiction to entertain the application dated 19th July 2024 and to grant orders in the interest of justice.
27. In the circumstance I direct that the Appellant and the Respondent mutually agree on which real estate agent shall collect rent within 30 days of the date hereof. If they cannot agree within the said time frame, rent will be collected by an agent appointed by the Deputy Registrar of this Court. All the rent proceeds shall be deposited in the Court's account.
28. In the interest of justice, I order the Appellant to provide a statement of account for the rent she has collected, in respect of the deceased's estate, since March 2022, within 30 days of the date hereof.
29. Since this is a dispute between close family members I make no orders as to costs.
30. Orders accordingly



DATED AND SIGNED AT MOMBASA THIS 13TH DAY OF DECEMBER 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Mr Omondi for Appellant;

Mrs Kyalo for the Respondent; and

Arthur - Court Assistant.

