REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA NAROK

JUDICIAL REVIEW NO. 2 OF 2019

ESTATE OF FARUK ESSAK MUSA

FARZILA HASHAM.....*EX PARTE* APPLICANT

VERSUS

THE KADHI'S COURT, NAROK/KERICHO.....1st RESPONDENT

The Hon. ATTORNEY GENERAL.....2ND RESPONDENT

KHATIJABAI ESSAK MUSA.....INTERESTED PARTY

RULING

The case for the *ex parte* applicant

Pursuant to the provisions of article 165 (6) and (7) of the 2010 Constitution of Kenya, Order 53, Rule 1 (2), (3) and (4) of the 2010 Civil Procedure Rules, sections 1A (1), 3, 3A and 63 of the Civil Procedure Act (Cap 21) Laws of Kenya, sections 8 and 9 of the Law Reform Act (Cap 26) Laws of Kenya and all enabling laws, the *ex parte* applicant has applied for the following orders.

1*) Spent*

2) An order to grant the *ex parte* applicant an order of certiorari to remove to this court the decision and orders of the 1st respondent in Succession Cause No 4 of 2019 Kericho delivered on 28th November 2019 for purpose of being quashed.

3) An order be granted to the *ex parte* applicant to apply for an order of prohibition prohibiting the 1st respondent from proceeding with the Kadhi's Court Succession Cause No 4 of 2019.

4) that the grant of leave herein to operate as stay of the 1st respondent's decision made on 28th November 2019 pending the hearing and determination of the judicial review proceedings.

5) An order to be made for costs to be costs in cause.

6) Any other order that the court may deem fit to grant.

The application is supported by fifteen grounds that are set out on the face of the notice of motion. The major grounds are as follows. On 28th November 2019the 1st respondent in Succession Cause No 4 of 2019 delivered a decision and issued a certificate of confirmation of grant and distributed the estate of the deceased without the knowledge and/or consent of all beneficiaries. The 1st respondent acted without jurisdiction or in excess of jurisdiction in purporting to issue a certificate of confirmation of grant in respect of the estate of Faruk Essa Musa; yet the court had not appointed administrators in the first place despite the *ex parte* applicant having applied for substantive letters of administration intestate in Narok Kadhi's Court Succession No. 1 of 2019.

Furthermore, the judgement and /or orders granted on 28th November 2019 are ultra vires and offends the statutory provisions of Part VII and section 45 of the Laws of Succession, which orders could only have been made after the grant of representation had been issued by a competent court under the Law of Succession Act (Cap 160) Laws of Kenya.

The orders of the court made on 28th November 2019 were without jurisdiction, and are tainted with illegality, irrationality and procedural impropriety. Additionally, the court had earlier on in Narok Kadhi's Court Succession No 1 of 2019 granted a special limited grant Ad

Colligenda bona to the *ex parte* applicant for collecting and preserving the estate of the deceased, which limited grant still subsists.

Furthermore, the presiding Kadhi demonstrated bias and partiality in the unprecedented speed at which he heard and determined the matter without the participation of all beneficiaries thereby prejudicing the widow and the son; while knowing very well that there is a registry and a Kadhi's Court in Narok, hence the interested party was forum shopping.

The *ex parte* applicant's affidavit evidence.

The *ex parte* applicant has deposed to a fifteen (15) paragraphs supporting affidavit in support of the application. She has deposed to the following major matters. She is the widow of the deceased and was married to the deceased under Islamic law on 6th April 2002. They had one child of the marriage namely Fazal Faruq. Fazal Faruq is a minor. On 15th October 2019 the Kadhi's court sitting in Narok issued to her a special limited grant *ad Colligenda bona*. The deponent has deposed that she is aggrieved with the decision of the Kadhi court of 28th November 2019, which proceedings were conducted without her knowledge, to which the deponent has annexed the judgement and the certificate of confirmed grant marked as annex "FH. (a) and (b)."

The deponent has deposed that on 15th October 2019 she was issued with a special limited grant Ad Colligenda bona by Hon. M. Mohammed Sambul, Resident Kadhi, Narok, for purposes of collecting and preserving the estate of the late Faruk Essa Musa.

The estate of the deceased is worth Kshs 165,730,000/=, which is way above the pecuniary jurisdiction of the 1st respondent.

Based on the advice of his advocate, which she believes, the deponent has averred that the decision of the 1st respondent is arbitrary and offends articles 47, 50 and 159 of the 2010 Constitution of Kenya, which decision denied her the right to be heard contrary to the rules of natural justice. That she also believes that her legitimate expectation of fair hearing and justice from the 1st respondent was contravened and violated by the 1st respondent's decision to hear and determine the matter without her participation and consent. She also believes following legal advice from her advocate that the provisions of Part VII and section 45 of the Law of Succession are mandatory.

The deponent also believes following legal advice from her advocate that the 1st respondent acted without jurisdiction, was ultra vires, was irrational, was unreasonable and was tainted with illegality.

The deponent has also deponed that it is only fair and in the interests of justice and equity that the court protects her by allowing the instant application by setting aside the decision of the 1st respondent.

It is for the foregoing reasons that the *ex parte* applicant seeks the issuance of the orders of certiorari and prohibition by this court.

The submissions of the *ex parte* applicant

The *ex parte* applicant has filed written submissions in support of the application. Mr Kamwaro, counsel for the *ex parte* applicant has submitted that his client has made out a case for the grant of orders sought. He has made his submissions under the following three headings. First, he has posed the question whether the notice of motion date 17th December 2017 is fatally defective. In this regard, counsel has submitted that the application of the *ex parte* applicant is not defective as alleged by the interested party. It is the contention of the interested party that the application offends the provisions of Order 53 rule 1 (2) of the 2010 Civil Procedure Rules. The interested party has submitted that the application as filed is defective in that the applicant should have been cited as the Republic and not the *ex parte* applicant. In this regard counsel cited article 159 (d) of the 2010 Constitution of Kenya which requires the courts to administer substantive justice. He cited article 159 (d) of the Constitution which provides that:

> "*justice shall be administered without undue regard to procedural technicalities*."

In addition to the foregoing, counsel has cited section 10 of the Fair Administrative Actions Act which provides that an application for judicial review shall be heard and determined without regard to procedural technicalities. Counsel therefore submits that a statute and rules made thereunder therefore cannot override the constitutional provisions of article 47 of the Constitution; for the Fair Administrative of Actions Act was enacted to give effect to the provisions of article 47 of the 2010 Constitution of Kenya.

Counsel has also in addition cited *Seaford Court Estates Ltd vs Asher [1994] All ER 155 at 164* in which that court stated in part "*that it is well settled that rules of procedure cannot be allowed to become the mistress of justice; it is the handmaid of justice. Rules of procedure are not themselves an end but the means to achieve the ends of justice. Rules of procedure are tools targeted to achieve justice and are not hurdles to obstruct the pathway of justice…A judge must think of himself as an artist who, although he must know the handbooks, should never trust them for his guidelines; in the end he must know rely upon his almost instinctive senses of where the line lay between the word and the purpose which lay behind it……..*"

Furthermore, counsel has also cited *James Gacheru Kariuki & 22 Others v Kiambu County Assembly & 3 Others [2017] e-KLR,* in which the court observed that the 2010 Constitution of Kenya took a decidedly anti-formalist approach in favour of an approach of adjudicating substantive claims especially those involving public interest. The Constitution also introduced two important provisions namely articles 47 and 23. Article 47 constitutionalizes administrative justice as a right and removes it from the clutches of the common law and the Fair Administrative of Actions Act is the act of Parliament that is required to implement article 47 of the Constitution. Second, article 23 of the Constitution spells out the authority of the High Court to enforce the Bill of rights and allows the court to grant any appropriate relief including an order of judicial review under article 23 (3) (1) of the 2010 Constitution of Kenya.

Based on the foregoing submissions counsel has submitted that the application as filed is not defective.

Counsel for the *ex parte* applicant has further submitted that the 1st respondent in its judgement and orders offended the provisions of Part VII and section 45 of the Law of Succession Act (Cap 160) Laws of Kenya. The said submission is based on the following matters. Counsel has submitted that Part VII of the Law of Succession Act deals with administration of estates in matters such as the appointment of a person to oversee the administration of the estate, preservation of the estate, payment of debts and the distribution of the net estate among the rightful heirs; amongst other matters.

Furthermore, counsel submitted that section 45 (1) of the Law of Succession Act directs that no person shall take possession or dispose of, or otherwise intermeddle with, any free property of a deceased, except as authorized by a grant of representation, or by any other written law. In terms of section 45 (2) (a) of the Law of Succession Act, any person who contravenes the provisions of section 45 (1) of the act commits an offence that is liable to a fine not exceeding ten thousand shillings or a term of imprisonment not exceeding one year or both such fine and imprisonment. Furthermore, in terms of section 45 (2) (b) of the same act, any person who contravenes the provisions of this act is answerable to the lawful executor or administrator to the extent of the assets with which he has intermeddles after deducting any payments made in the due course of administration.

Based on the decision of Yano, J in *Najma Sumar Rizik Sumur v Mansur Said & 8 Others, ELC No. 234 of 2004 (Eldoret*), counsel submitted that Part VII of the Law of Succession Act cannot be said to be in conflict with Muslim law where the question revolves around the making of the grant only, for the obtainment of a grant of representation merely facilitates the distribution of property to the heirs.

Furthermore, counsel submitted based, on the decision of Ali-Aron, J in *Zulekha Salim Bantushi & Another v Shehuna Mohammed Modhihiri, Ahmed Modhihiri Mohamed (Interested party) [2019] e-KLR, that* intention of Part III of the Law of Succession Act is not to oust *the* application of Islamic law on distribution but to complement that law in the administration of the estate to avoid disorder and greed by unscrupulous heirs to the detriment of others and that section 45 of the act is not inconsistent with Sharia law.

Additionally, counsel has submitted that the High Court has supervisory jurisdiction over subordinate courts, where such courts have acted in excess of jurisdiction or acted irrationally. He cited *Equity Bank Ltd v West Link MBO Ltd, Civil Application (Appeal) No 78 of 2011,* in which the court held that courts administer justice and in the process they must of necessity balance competing rights and interests of the different parties but within the confines of the law and to ensure that the ends of justice are met. That court further held that the inherent power is the authority possessed by a court implicitly without being derived from the constitution or statute. Counsel for the *ex parte* applicant did not attach the authorities cited in his submissions. It is good practice to do so.

The *ex parte* applicant has therefore urged the court to allow the application with costs.

The case for the Interested party.

The Interested party has filed a notice of objection, a replying affidavit and written submissions in opposition to the application; which matters will be dealt with in that sequence as follows.

Grounds of objection by the Interested party.

The interested party has raised six (6) grounds of objection. Those grounds in a condensed form are as follows. Under Order 53 rule 1 (2) of the 2010 Civil Procedure Rules requires an application for judicial review ought to be grounded on an affidavit and has to be supported by affidavit in verification of the facts. And that any additional affidavit may be filed with leave of the court pursuant to Order 53 rule 4 of the 2010 Civil Procedure Rules. The supporting affidavit of the *ex parte* applicant is an abuse of the court process and should be expunged from the record. All applications for judicial review to be commence in the name of the Republic, since the Republic is the applicant and the persons affected by the impugned decision are the subjects.

Finally, the interested party has stated that the applicant commenced the application in her name, while she was granted leave to commence the said application in the name of the Republic and therefore the application is incompetent and should be struck out. These defects are not curable under article 159 of the 2010 Constitution of Kenya.

Replying affidavit of the interested party.

The interested party has deponed to a twenty-five (25) replying affidavit in opposition to the application. The major averments are as follows.

The applicant is the mother of the deceased. In paragraphs 1 to 4 the deponent has deposed to the same matters raised as grounds in her preliminary notice of objection and I do not need to reproduce them again.

Furthermore, in paragraphs 6 to 7 the deponent has deposed to matters of law to the effect that a prayer for an order of prohibition does not lie as the order of prohibition looks into the future and what is sought to be prohibited has already been done namely the court of the Kadhi has already heard and determined the matter in Succession Cause No 4 of 2019 sitting at Kericho and issued a certificate of confirmation of grant. The remedy of prohibition that is sought is not grantable in the circumstances of this instant cause.

In paragraphs 8 to 25 the interested party has deposed to matters in respect of as to why the order of certiorari is not in law grantable. She has deposed in opposition to grounds 3,4,6,12 and 14 of the supporting affidavit in which it was averred that the judgement and orders offend the provisions of the Law of Succession Act, that article 170 of the Constitution of Kenya establishes the Court of the Kadhi and clothes it with jurisdiction to determine, among other matters, matters of inheritance between persons who profess the Muslim faith. She therefore avers that the deposition that the Kadhi's court fell afoul of the Law of Succession Act is improperly made.

Furthermore, the averment of the *ex parte* applicant she applied the wrong provisions of the law goes to the merit of the decision and not procedural impropriety. She has averred that the merits of the matter are well outside the province of judicial review.

In reply to the averment that the matter was filed in Kericho and that the court had acted with dispatch in resolving the dispute; the interested party ha averred that as at that time there was no Kadhi in Narok, since he had been transferred to Mandera, and has also averred that matters of succession are not subject to territorial/geographical jurisdiction under Islamic law.

Furthermore, in reply to the averment that there was in place an application in Narok Succession Cause No. 2 of 2019 in which letters of administration *ad colligenda bona* had been issued, when the impugned judgement and order was issued; the interested party has deposed that this is no ground for judicial review; for judicial review is concerned with want of jurisdiction, irrationality (unreasonableness), illegality and procedural impropriety, which matters are outside the purview of judicial review. She has deposed that the purpose of letters of administration *ad colligenda bona* is to collect and preserve the estate pending distribution. The issuance of these letters can never be a ground of stopping the Kadhi from distributing the estate.

In response to the averment that the judgement and order were issued without the knowledge of the *ex parte* applicant, the interested party has deposed that the judgement and order of the Court of the Kadhi states that the *ex parte* applicant failed to appear in person or through an advocate in the Kadhi's court. As a result, the Kadhi's court proceeded with the matter after it confirmed that an affidavit of service was filed, which clearly indicated that the *ex parte* had been served.

The *ex parte* applicant has averred that the value of the estate is beyond the pecuniary jurisdiction of the Kadhi's court. This deposition is misconceived as the jurisdiction of the Kadhi's court is not governed by the monetary value of the subject matter. It is governed by the religious faith of the parties under article 170 (5) of the Constitution of Kenya and the central focus is whether the parties profess the Muslim faith.

The *ex parte* applicant has averred that the Kadhi's court acted outside its jurisdiction and also acted irrationally. The *ex parte* applicant has failed to demonstrated that the court was not possessed with the requisite jurisdiction. Additionally, the *ex parte* applicant has not demonstrated that the Kadhi's court arrived at a decision that was so unreasonable that no reasonable court come up with such a decision. The decision was not irrational.

The *ex parte* applicant at paragraph 16 of the supporting affidavit deposed that it is in the interests of justice and equity that this court protects her. This deposition is misplaced. An application for judicial review proceeds from the premise that the decision made falls within the established categories for intervention by the court. Judicial review is not a proceeding in the law of equity. It falls within the administrative law.

If the *ex parte* applicant was dissatisfied with the findings of the Kadhi's court, she ought to have filed an appeal against the decision.

Counsel for the Interested party has therefore urged the court to dismiss the application with costs.

The submissions of the Interested Party.

Messrs Githui & Co. Advocates have filed submissions in opposition to the application**.** They cited *Republic v The Industrial court of Kenya, ex parte Oserian Development Co Ltd, Nairobi Misc Civil Application No 121 of 2009,* in which the High Court observed that judicial review is concerned with the decision making process and not with the merits of the decision itself. Based on this decision, counsel submitted that the court should not act as a court of appeal over the decision sought to be reviewed.

Again counsel submitted on the basis of *Republic v Kenya Revenue Authority, ex parte Yaya Towers Ltd [2008] e-KLR*, that in judicial review, the court will not step into the shoes of the inferior tribunal to determine issues based on the facts; for the court will only intervene if the inferior tribunal overstepped its statutory or constitutional mandate.

If a tribunal commits errors of law but which are within its jurisdiction such errors cannot form the basis of judicial review. On the other hand, if a tribunal commits errors outside its jurisdiction, such errors are subject to review, for the tribunal has acted outside its jurisdiction. Counsel also submitted that where a tribunal decides on matters that it is not authorized to decide, the tribunal is deemed to have acted ultra vires, or in excess, or in total lack of jurisdiction. On the other hand, the inferior tribunal may make errors of law or fact and in such a case, the tribunal is deemed to have made errors within jurisdiction. Such errors according to counsel ca only be dealt with by way of an appeal. The issue of errors committed within and outside jurisdiction was clearly spelt out in *Anisminic Ltd V Foreign Compensation Commission & Another [1969] 2 AC 147 (HL).*

Furthermore, bias, partiality, illegality and irrationality are grounds for judicial review. Bias and partially are based on the grounds that justice must not only be seen to be done but it must be seen to be done.

Illegality according to counsel means the decision was contrary to statute.

Irrationality as a ground of judicial review means the decision made by the inferior tribunal is so unreasonable that no rational inferior tribunal can make such a decision. *Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223* is the leading authority in respect of irrationality as a ground of review. A party relying on this ground must demonstrate that the decision made by the tribunal was outside the range of the decision that was open to the decision maker.

Counsel submitted that an applicant has a duty not only to plead, but demonstrate in the grounds in support of the application as well as the affidavit and submissions that there was bias, partiality, illegality and irrationality.

Counsel submitted that the Kadhi's court has jurisdiction in the matter at hand citing article 170 (5) of the 2010 Constitution, which clothes that court with jurisdiction to determine matters of Islamic 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. Section 5 of the Kadhi's courts Act further defines the scope of the powers of Kadhi. The applicant has failed to demonstrate that the Kadhi's court lacks jurisdiction.

Furthermore, the *ex parte* applicant has in the grounds in support of the application and in paragraph 8 of the supporting affidavit deposed that the subject matter of the succession cause, which was before the Kadhi was Kshs. 165, 730,000/=; which she contends is beyond the monetary jurisdiction of the Kadhi. Counsel has submitted that the jurisdiction of the Kadhi both under the Constitution and the Kadhi's Courts' Act is not limited in respect of monetary jurisdiction.

Monetary jurisdiction is a limitation under the Civil Procedure Act (Cap 21) Laws of Kenya, which act does not apply to succession matters that are governed by Muslim law.

Counsel submitted that the issuance of a certificate of a confirmed grant by the Kadhi's court without a grant of letters of administration and before the appointment of administrators did not divest the court of its jurisdiction. This error did not take the Kadhi's court out of its jurisdiction. Counsel cited *Maimuna Kenyi Suleiman v Amina Ibrahim, Civil Suit No. 36 of 1999,* which was cited with approval in *Zuleika Salim Bantushi &Another v Shehuna Mohammed; Ahmed Modhihiri Mohamed (Interested Party) [2019] e-KLR* in which the court stated that: "*Sincerely speaking, Islamic law of succession did not recognize the concept of administration of estate of the deceased Muslims. It merely laid down machinery for the distribution of the estate of the deceased among the legatees and the heirs*." Based on this authority counsel submitted that the Kadhi's court was not under any legal duty under Islamic law to appoint an administrator before he could issue a certificate of confirmation of grant. He therefore acted within his jurisdiction. The Kadhi did not commit any error, which took him outside his jurisdiction.

For a party to succeed in an application for judicial review on the ground of unreasonableness or irrationality, such party has to show that the decision made by the Kadhi was so unreasonable that no court seized of the facts could arrive at such a decision. Counsel cited *Republic v Betting Control and Licensing Board &Another, ex parte Outdoor Advertising Association of Kenya [2019] e-KLR,* in support of his submission. In that case also the court stated that the Wednesday unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably.

The *ex parte* applicant's prayer for the issuance of an order of prohibition is not efficacious as there is nothing pending before the Kadhi. The Kadhi became *functus officio*; after he issued the judgement and a certificate of confirmation of the grant.

Furthermore, counsel submitted that an application for judicial review is commenced by Republic on behalf of the party who is aggrieved against a public body. The aggrieved party in seeking leave of the court is essentially seeking permission for the state to remedy the mistakes of a public body. The proper party who has the *locus standi* to commence a motion for judicial review is the Republic. Counsel therefore submits that the application is bad in law for lack of *locus standi*.

Finally, counsel has submitted that article 159 of the 2010 Constitution of Kenya is not a panacea that cures all ills as it does not oust the substantive and procedural requirements.

He therefore prays that the application be dismissed with costs.

Issues for determination.

I have considered the affidavit evidence of the parties and their submissions. I have also considered the applicable law. As a result, I find the following to be the issues for determination.

1. Whether or not the application is fatally defective

2.Whether or not the *ex parte* applicant has made out a case for the grant of the order of certiorari.

3. Whether or not the *ex parte* applicant has made out a case for the grant of the order of prohibition.

4. Whether the special limited grant in favour of the *ex parte* applicant still subsists?

5. Whether or not the interested party was forum shopping in filing and prosecuting the succession cause in Kericho Kadhi's court

6. Who bears the costs of this application?

Issue 1

The *ex parte* applicant was required to institute the application in the name of the Republic, who the law recognizes is the proper applicant. I agree with counsel for the *ex parte* applicant that the rules of procedure are hand maidens of justice. In this regard, I find as persuasive *Seaford Court Estates Ltd vs Asher [1994] All ER 155 at 164,* in which that court stated in part:

> "*that it is well settled that rules of procedure cannot be allowed to become the mistress of justice; it is the handmaid of justice. Rules of procedure are not themselves an end but the means to achieve the ends of justice. Rules of procedure are tools targeted to achieve justice and are not hurdles to obstruct the pathway of justice…*"

The interested party submitted that the defect was fatally defective.

After considering the matter seriously, I find that the defect in omitting to institute the application in the name of the Republic is a curable defect in terms of article 159 of the 2010 Constitution of Kenya; in view of the clear pleadings in this application.

Issue 2

The *ex parte* has submitted that the Kadhi's Court did not have jurisdiction to entertain and determine the instant succession cause; since the court acted ultra vires, irrationally and was biased. The interested party has submitted that the Kadhi's court had acted intra vires, was rational and was not biased.

In this regard, reference to article 170 (5) of the 2010 Constitution of Kenya is important. It provides that:

> *"(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 court."*

It is clear from the foregoing Constitutional provisions that the Kadhi's court is only limited in terms of the subject matter and the religion of the parties, who must profess the Muslim faith. Unlike magisterial courts whose jurisdiction is governed as to the place of filing by sections 11 to 15 of the Civil Procedure Act (Cap 21) Laws of Kenya; and section 5 of the Magistrates' Courts Act (Cap 5) Laws of Kenya in terms of pecuniary jurisdiction, the Kadhi's court is not limited in terms of both territory and pecuniary jurisdiction. The affidavit evidence of *the ex parte applicant* that the jurisdiction of the Kadhi's court is limited in terms of monetary jurisdiction; since the estate is worth Kshs. 165, 730,000/= is without legal basis. The Kadhi's court therefore had jurisdiction to entertain the instant succession cause.

Furthermore, the territorial (or geographical) jurisdiction of the Kadhi's court is not limited in any way. The succession cause was filed in Kericho; since there was no Kadhi's court here in Narok, as the one stationed in Narok had been transferred to Mandera. This is clear from paragraph 13 of the replying affidavit of the interested party. In the circumstances I find that the interested party was not forum shopping.

The next issue for determination is whether the Kadhi's court had jurisdiction to entertain and determine the instant succession cause, without having first appointed an administrator. In this regard, I find as persuasive the decision of the court in *Maimuna Kenyi Suleiman v Amina Ibrahim, Civil Suit No. 36 of 1999,* which was cited with approval in *Zuleika Salim Bantushi &Another v Shehuna Mohammed; Ahmed Modhihiri Mohamed (Interested Party) [2019] e-KLR* in which the court stated that:

> "*Sincerely speaking, Islamic law of succession did not recognize the concept of administration of estate of the deceased Muslims. It merely laid down machinery for the distribution of the estate of the deceased among the legatees and the heirs*."

Furthermore, the court in the same case approved the finding of a Kadhi in that case and pronounced itself in the following terms:

> "*Administration as understood by modern law was unknown to Islamic jurisprudence. In Islam there is mere distribution of the property of the deceased, by the state if not by the heirs themselves. Unlike other modern systems to dispose of the property of a deceased Muslim, neither there is a need of executor or/ and administrator nor probate or and letters of administration. In the absence of an executor appointed by the will of the deceased, heirs of a Muslim have a right and capacity to dispose of the estate of the propositus according to law. In case they fail or refuse to do so, the Qazi (magistrate) may appoint an executor."*

I therefore find that the Kadhi acted in accordance with the dictates of Islamic law, which did not require an appointment of an administrator before distributing the estate of the deceased.

Even if I were to find that the appointment of an administrator was necessary before distributing the estate, the said distribution would still have been within the jurisdiction of the Kadhi's court to distribute the estate. The reason being that it would have been an error committed within his jurisdiction, which is lawful. The decision of the House of Lords in *Anisminic Ltd V Foreign Compensation Commission & Another, supra*, pronounce itself in the following terms*:*

> "*If a tribunal while acting within its jurisdiction makes an error of law which it reveals on the face of its recorded determination, then the court, in the exercise of its supervisory, may correct the error unless there is some provision preventing a review by a court of law. If a particular issue is left to a tribunal to decide, then even where it is shown that in deciding the issue left to it the tribunal has come to a wrong conclusion, that does not involve that the tribunal has gone outside its jurisdiction. It follows that if any errors of law are made in deciding matters which are left to a tribunal for its decision such errors will be errors within jurisdiction*."

The next issue for consideration is whether the Kadhi distributed the estate in the absence of the *ex parte* applicant. The answer to this lies in the body of the judgement of the Kadhi. In his judgement and order the Kadhi stated that:

> "*This court allowed her (the mother of the deceased) to petition this matter since she has the right to do so under Islamic law because she is a biological mother to the court allowed to file for succession and also directed her to serve the respondent in due time something which was done and all necessary documents are within our files, this court was made to understand that the only beneficiaries to inherit from the late FARUQ estate are three……"*

On the same issue as to whether the confirmation proceedings were held in the absence of the *ex parte* applicant, the judgement and order of

the Kadhi shows that:

> *"For this reason this court finds that since there is no form of objection from other quoters (sic) it had to proceed and set a date for inter party hearing, the other parties has never appeared in person nor through a lawyer something which our side as a court after verifying the affidavit of service we had no option but to proceed on an ex party hearing on her side she KHATHUABAI requested the court to divide the estate of her late son amongst the three mentioned beneficiaries alone as per the Islamic law of inheritance."*

It is clear from the foregoing excerpts of the judgement and order that the *ex parte* applicant was served with notice of the confirmation hearing and failed to attend the court. It is also clear that she never lodged any objection in court. In those circumstances, she cannot now complain that the hearing proceeded in her absence. She also cannot be allowed to have the judgement set aside based on her failure to attend the court. I therefore find that the rules of natural justice were complied with. The fact that she was not present did not divest the Kadhi's court of its jurisdiction.

The submissions of the *ex parte* applicant that the Kadhi's court acted outside its jurisdiction in issuing a certificate of confirmation of grant lack merit as the Kadhi's court is vested with jurisdiction to issue such grants by virtue of article 170 (5) of the 2010 Constitution of Kenya. And by virtue of the supremacist provisions of article 2 (1) of the Constitution, Islamic law of succession supersedes the provisions of the Law of Succession Act (Cap 160) Laws of Kenya in Part VII and section 45 whenever the provisions of that act are in conflict with the Constitution. In the instant succession cause, the interested party cannot be said to be intermeddling with the estate of the deceased, since she was appointed the administrator by the Kadhi's court sitting at Kericho in accordance with Islamic law. In view of this the authority cited by counsel for the *ex parte* applicant namely in *re estate of Veronica Njoki Wakagoto (deceased) [2013] e-KLR,* is not useful. In that succession cause the court held that the property of a deceased person cannot be dealt with by any person unless such person is authorized to do so by law, which authority emanates from a grant of representation, and any person who handles such property without authority is guilty of intermeddling, which is a punishable criminal offence.

I further find that issues such as the alleged intermeddling with the estate of the deceased by the interested party and the disentitlement of the *ex parte* applicant and the son are matters of fact which are within the province of the trial court namely the Kadhi's court (or in limited cases by the High Court as an appeal court which has to sit with the Chief Kadhi or two Kadhis as assessors in terms of section 65 (1) (c) of the Civil Procedure Act) to hear and determine. They are not matters for judicial review, since judicial review is concerned with the process of decision making and not with the merits of the decision.

I find as persuasive *Republic v Kenya Revenue Authority, ex parte Yaya Towers Ltd*, *supra*, in which it is stated that in judicial review, the court will not step into the shoes of the inferior tribunal to determine issues based on the facts; for the court will only intervene if the inferior tribunal overstepped its statutory or constitutional mandate. In this regard, the Kadhi's court in its judgement found that there were three beneficiaries namely the mother of the deceased (Khatijabai Essak Musa), the son of the deceased (Fazal Faruq) and the wife of the deceased (Farzila Hasham). Citing verses of the Quran (NISSA 12, Quran 4 (11)), the Kadhi's court found that the mother was entitled to a sixth (1/6) of the net estate of the deceased, while the wife of the deceased was entitled to one eight (1/8) of the net estate of the deceased, after paying the debts of the estate. The son of the deceased was entitled to the remaining part of the net estate.

It is clear from the foregoing that the Kadhi's court acted within its jurisdiction. It decided what was committed to it for hearing and determination. The court acted rationally and reasonably in rendering its judgement and orders.

In the premises, I find the *ex parte* applicant has not made out a case for the grant of an order of certiorari.

Issue 3

The order of prohibition lies to stop an intended future conduct of the respondent. In the instant cause after delivering its judgment and issuing the confirmed grant, there was nothing left for the 1st respondent to do again. It had become *functus officio*. In the circumstances, issuance of the order will not be efficacious. It is a rule of law that courts do not issue orders in vain.

Issue 4

Counsel for the *ex parte* applicant has submitted that that there was in place an application in Narok Succession Cause No. 2 of 2019 in which letters of administration *ad colligenda bona* had been issued, when the impugned judgement and order was issued; which still subsists. The limited grant issued at Narok in Succession Cause No. 2 of 2019 by the Kadhi were extinguished by the issuance of the confirmed grant by the Kadhi's court at Kericho in Succession Cause No 4 of 2019. Moreover, the issuance of letters of administration *ad colligenda bona* (or limited grant) cannot be a ground for judicial review as this is a matter that was within the jurisdiction of the Kadhi's court**,** whose judgement and order is now the subject of the instant application.

Issue 5

The *ex parte* applicant has submitted that the interested party was forum shopping in filing and prosecuting the instant succession cause in Kericho Kadhi's court**.** In this regard**,** the interested party in her replying affidavit has averred that as at that time there was no Kadhi in Narok, since the resident Kadhi in Narok had been transferred to Mandera. This is clear from paragraph 13 of the replying affidavit of the interested party. I find as legally sound the averment of the interested party that matters of succession are not subject to territorial/geographical jurisdiction under Islamic law. I therefore find that the interested party did not engage in forum shopping.

It is important to point out that since there is a Kadhi's court registry here in Narok town, the Kadhi at Kericho should have come here in Narok on circuit to hear and determine causes that are registered here. This will less the burden of the litigants in terms of cost and convenience as opposed to them travelling to Kericho and back. This I understand is the purpose of opening a registry, which is intended to enable Narok residents to access justice cheaply and conveniently.

Issue 6

This succession cause is a family dispute and an order for costs will not serve the interests of justice. There will therefore be no order for costs.

In the premises, the *ex parte* applicant's application fails and is hereby dismissed in its entirely.

Judgment signed, dated and delivered at **Narok** this **7th** day of **May**, **2020** in the absence of both counsel via posting the ruling in the e-mail addresses of both counsel.

J. M. BWONWONG'A.

J U D G E

07/05/2020.