



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL 41 OF 2014

MUSTAQ ALIMOHAMED.....APPELLANT

VERSUS

MOHAMED IQBAL MOHAMED

NIZAR ALIMOHAMED

MEHMOOD ALIMOHAMED.....RESPONDENT

JUDGMENT

(An Appeal from the decision Judgment of Hon. Sheikh Abdulhalim H. Athman,

Kadhi delivered on 9.10.14 in Mombasa Kadhi Succession Case No. 62 of 2014)

1. The Appeal herein filed by Mustaq Alimohamed, the Appellant arises from the decision of Hon. Kadhi Abdulhalim H. Athman, delivered on 9.10.14 in Mombasa Kadhi Succession Case No. 62 of 2014. The 1st Respondent, Mohamed Iqbal Mohamed had filed the succession cause against his brothers, Nizar Alimohamed, Mehmood Alimohamed, the 2nd and 3rd Respondents herein, the Appellant and their mother, Aishabhai Alimohamed (Aishabhai), seeking a determination of the estate and heirs of Ali Mohamed Suleiman (the deceased) and distribution thereof to the heirs in accordance with Islamic law. He also sought that all documents of ownership of the estate and the accounts be deposited in Court. The parties are children of the deceased.

2. The record shows that the deceased was survived by his widow (now deceased), 5 sons including the parties hereto and 6 daughters. In the petition in the Kadhi's Court, the 1st Respondent stated that the estate of the deceased comprised of 3 godowns, on Plot No. 267/I/MI at Industrial Area, Shimanzi, Mombasa, Masionette on Plot No. 2302 of subdivision No. 1505/VIII/MN, Links Road, Nyali, and other properties sold by the respondents therein. The 1st Respondent had also filed an application dated 27.3.14 in the succession cause, seeking injunctive orders against the respondents therein restraining them from collecting rents and otherwise dealing with the estate of the deceased. The Appellant and their mother Aishabhai, opposed the application by way of a preliminary objection and grounds of opposition dated 19.5.14. The grounds were that a grant of probate had already been issued to Aishabhai in High Court Succession Cause No. 9 of 1992 and confirmed on 26.10.98. As such, the reliefs sought in the application were contrary to Section 76 of the Law of Succession Act. Further, the Application was time barred and brought contrary to Section 21 of the Limitation of Actions Act. Moreover, Aishabhai had not submitted to the jurisdiction of the Court. As such, both the petition and application contravened Article 170(5) of the Constitution and hence the Kadhi's Court lacked jurisdiction to entertain the same.

3. In his ruling of 9.9.14 (and not 9.10.14 as indicated in the amended memorandum of appeal) the Hon. Kadhi dismissed he preliminary objection. The Hon. Kadhi found that since only one of the respondents objected to the jurisdiction of the Kadhi's Court, his wishes could not override those of the majority, and further that this was not the intention of the Constitution. He further found that the grant of probate does not oust the jurisdiction of the Kadhi's Court to determine the heirs of the deceased and their respective shares in the estate under Islamic law.

4. The Appellant being aggrieved by the decision of the Hon. Kadhi preferred this Appeal on grounds that the Hon. Kadhi erred in law and fact by:

i) misinterpreting of Article 170(5) of the Constitution of Kenya, 2010.

ii) failing to hold that he lacked jurisdiction to hear the petition.

iii) failing to dismiss the petition.

5. The Appellant prayed that the ruling of the Hon. Kadhi be set aside and that his preliminary objection dated 19.5.14 be allowed with costs.

6. Directions were taken for the filing of submissions. However, only the Appellant and the 1st Respondent filed submissions and participated in the hearing. The Hon. Chief Kadhi sat as assessor in compliance with Section 65(1)(c) of the Civil Procedure Act which provides as follows:

“(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—

(c) from a decree or part of a decree of a Kadhi’s Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.”

7. After considering the appeal, the record and rival submissions, I find that the only issue that falls for determination is whether the Kadhi’s Court has jurisdiction to entertain Succession Case No. 62 of 2014 before it.

8. The Appellant contends that the Kadhi’s Court had no jurisdiction to entertain the succession cause in relation to the deceased’s estate as the same had already been dealt with by the High Court in Succession Cause No. No. 9 of 1992. A grant of probate which had been issued to Aishabhai was confirmed and she discharged her duties and settled the estate. It was further submitted that the Hon. Kadhi’s interpretation of Article 170(5) erroneously suggests that professing the Muslim faith is synonymous with submission to the Kadhi’s Court, thereby limiting the constitutional right of a Muslim to choose the forum for resolving disputes.

9. For the 1st Respondent, it was submitted that the Hon. Kadhi found that the framers of the Constitution did not intend the ouster of the jurisdiction of the Kadhi’s Courts in matters of inheritance. Further, where, as in this case, 11 members of a family have submitted to the jurisdiction of the Kadhi’s Court, the refusal of 1 family member to submit, cannot oust the jurisdiction of the Kadhi’s Court. Citing Article 259 of the Constitution and Section 48(2) of the Law of Succession Act (LSA) the 1st Respondent argued that it is only the Kadhi’s Court that has jurisdiction to deal with and administer the estate of deceased Muslims. It was also submitted that wherever an inheritance matter is filed, a Kadhi must be present to interpret and make a determination. To the 1st Respondent therefore, the Hon. Kadhi was right in his interpretation of Article 170(5) of the Constitution. It was further submitted that Section 48(2) of the LSA removed the applicability of the LSA in the determination and distribution of the estate of a Muslim. It was also submitted that

10. It is trite law that a Court’s jurisdiction is conferred and not inferred. A Court therefore may only exercise such jurisdiction as has been conferred upon it by the Constitution, statute or both. In Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR the Supreme Court succinctly stated as follows:

“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.”

11. The jurisdiction of Kadhi Courts flows from the Constitution of Kenya, 2010 and from the Kadhi’s Court Act. Article 170(5) of the Constitution provides:

“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.”

Section 5 of the Kadhis’ Court Act is couched along similar terms.

12. There are 3 factors that are necessary to establish the jurisdiction of the Kadhi’s Court. The first is the subject matter, the second is profession of Islamic faith by all parties and the third is submission by all parties, to the jurisdiction of the Court. This was the holding by the Court of Appeal in Genevieve Bertrand v Mohamed Athman Maawiya & another [2014] eKLR which stated:

“Thus the jurisdiction of the Kadhi’s Court is determined by the existence of three factors. That is the subject matter of the claim or dispute, the party’s Muslim faith, and the party’s submission to the jurisdiction of the Kadhi’s Court.”

13. In addition to the subject matter relating to personal status, marriage, divorce or inheritance, all parties must profess the Muslim faith and all parties must submit to the jurisdiction of the Kadhi’s Court. Where the subject matter is outside what is stipulated, the Kadhi’s Court would not have jurisdiction. The Kadhi’s Court would also be devoid of jurisdiction if any of the parties was not a Muslim. Likewise, where any party declined to submit to its jurisdiction, the Kadhi’s Court would be stripped of jurisdiction to deal with the matter.

14. In the present case, the subject matter is inheritance and thus within the purview of the Kadhi’s Court’s. The parties also are all Muslim. However, the 4th respondent declined to submit to the jurisdiction of the Kadhi’s Court and this was within her right. No unwilling party may be compelled to submit to the jurisdiction of the Kadhi’s Court against their will. In this regard, I follow Muriithi, J in R.B & R.G.O v H.S.B & A.S.B [2014] eKLR where he observed:

While the parties before the Kadhi’s Court must all be Muslims, no party who has not submitted to the jurisdiction is compelled

to litigate before that court.

15. In the present case, the Hon. Kadhi stated in his ruling:

“The part and submit to the jurisdiction of the Kadhi’s courts had not been there in all the drafts during the constitutional making process. It had not been there in the old constitution. It was never a contentious issue. It was added by the team of experts to avoid any doubts on the Muslims right of choice of forum for determination of their disputes on inheritance, marriage and divorce. It was never intended to be the first line of defense. strangely in this case, only one respondent objects to submit, the other one is deceased. The dead cannot make such decisions. Other respondents do submit to the jurisdiction of this court. In a democratic country such as ours, will the will of one person override that of the majority? The constitution never intended such a scenario.”

16. The finding of the Hon. Kadhi that the submission of the majority is what determines jurisdiction, is clearly a misapprehension of the import of Article 170(5) of the Constitution. The 3 factors on jurisdiction of the Kadhi’s Court are not disjunctive but conjunctive. They must all exist together for the Court to have jurisdiction. Where they do not, the Kadhi’s Court is stripped of jurisdiction. In the present case, the 3rd factor is missing. As such, the Kadhi’s Court was devoid of jurisdiction to deal with the matter before it. It matters not that majority of the parties submitted to the jurisdiction of the Kadhi’s Court and only one declined to so submit.

The jurisdiction of the Court is not conferred by a majority vote! Where just one party in a matter declines to submit to the jurisdiction of the Kadhi’s Court, the Court must down its tools. This is what the Hon. Kadhi ought to have done in the matter before him. The case of Zog’llo Zolleyyn Also Known As Ali Said Ahmed v Abdalla Said Ahmed [2014] eKLR, cited by the 1st Respondent is distinguished because in that case, the matter was already in progress before the Kadhi’s Court and parties did not object to that Court’s jurisdiction.

17. Section 48(2) of the LSA does not in any way take away the High Court’s jurisdiction over estates of deceased’s Muslims. The provision simply reiterates that the jurisdiction of Kadhi’s Court’s over the estates of Muslims is retained. It provides:

“For the avoidance of doubt it is hereby declared that the Kadhi’s courts shall continue to have and exercise jurisdiction in relation to the estate of a deceased Muslim for the determination of questions relating to inheritance in accordance with Muslim law and of any other question arising under this Act in relation to such estates.”

18. The fact that Article 170(5) states that the Kadhi Courts shall have jurisdiction in proceedings in ***which all parties submit to the jurisdiction of the Kadhi’s courts*** is clear that parties, though Muslim, have a choice of the forum in which they would wish their matters determined. The Court of Appeal stated as much in Saifudean Mohamedali Noorbhai v Shehnaz Abdehusein Adamji [2011] eKLR, as follows:

“Kenyan Courts have held in past judgments that every litigant, of whatever religious persuasion, has the option of going directly to the High Court, and a Muslim is not necessarily restricted to the jurisdiction of the Kadhi’s Court.”

19. In the present case, the parties herein chose to go the High Court and filed Succession Cause No. 9 of 1992.

20. It is well settled that whether parties opt for the Kadhi’s Court or the High Court for determination of inheritance matters, the applicable law is Islamic law. Section 2 of the Law of Succession Act provides in part:

“2 Application of Act

(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.

Subsection 4 provides:

(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.”

21. While dealing with the estate of a deceased Muslim, this Court is required by Section 2(3) of the Act to apply Islamic law in the devolution of the estate. Under Subsection (3), substantive provisions of the Act are not applicable to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim. In lieu of these provisions, the devolution of the estate of a Muslim shall be governed by Islamic law. The only provisions of the Act that are applicable to the estate of the Muslim as per Section 2(4) are the procedural provisions contained in Part VII of the Act relating to administration of estates.

22. In Re the Estate of Ismail Osman Adam, deceased, Noorbanu Abdulrazak v. Abdulkader Ismail Osman, Mombasa Civil Appeal No. 285 of 2009, the Court of Appeal while upholding the choice of parties to either file succession proceedings in the Kadhi’s Court or the High Court had this to say:

“...if the High court assumes jurisdiction to the estate of a deceased Muslim, then by virtue of Section 2 (3) of the [Law of Succession Act] the law applicable in the High Court as to devolution of the estate is the Muslim law and not the LSA.”

23. The 1st Respondent further opposes the Appeal by submitting that there is nothing to suggest that the High Court matter had been instituted. The Appellant countered this by arguing that that this was not raised in the Kadhi's Court. I agree with the Appellant that this issue was not raised in the proceedings in the Kadhi's Court. Indeed the Hon. Kadhi did not reject the preliminary objection on the ground that there was no evidence of the proceedings in the High Court. This issue cannot be therefore be raised now. In Thomas Openda v Peter Martin Ahn [1982] eKLR, the Court of Appeal found that issues cannot be raised for the first time on appeal and stated:

“We think that the objections to these grounds of appeal are well-founded and order that grounds 7, 8 and 9 be struck out as raising issues for the first time on appeal. The same considerations apply to grounds 13, 14 and 15 which raised the point of “impossibility” or “well-high” impossibility on the part of the defendant in carrying out his obligations under the agreement. Impossibility of performance was not pleaded, nor did it become an issue at the trial. We order that these grounds of appeal be struck out.

24. Our Court system is established by Article 162 of the Constitution, which provides:

(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(2) ...

(3) ...

(4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.

25. The Courts established under Article 169 are the subordinate Courts, which include the Kadhis' Courts. Kadhi Courts are constitutional creatures and must exercise that jurisdiction only bestowed to them by the law. Section 4(3) of the Kadhis' Courts Act provides that each of the Kadhis' Courts shall be a court subordinate to the High Court. All Courts must operate within the hierarchical parameters set out in the Constitution. In Michael Mungai v Housing Finance Co. (K) Ltd & 5 other [2017] eKLR, the Supreme Court had this to say of judicial hierarchy:

“Justice is sought and delivered within the set down legal parameters. This Court will not contravene the judicial hierarchy which is at the core of our judicial independence and competence in decision making... The powers of this Court have to be exercised within and in accordance with a specific jurisdiction as provided for in Article 163(3) of the Constitution. One cannot ask the Court to exercise its powers in a carte blanche manner.

26. The matter of the estate of the deceased had been dealt with by the High Court in Succession Cause No. No. 9 of 1992. As such, the Kadhi's Court had no basis to assume jurisdiction over a matter that has been dealt with by a Court superior to it. By dealing with the matter before his Court, the Hon. Kadhi clearly violated the Constitution and breached the judicial hierarchy set out therein.

27. The Hon. Sheikh Al Muhdhar A. S. Hussein, Chief Kadhi was of the view that the Appellant's PO ought to have been upheld. In his opinion with which I concur, he stated in part:

“The above opinion is based on judicial hierarchy in Kenya legal system, now thjere was a P&A Case No. 9 Of 1992 at Mombasa High Court ans the same was finalised and the 4th appellant (sic) was confirmed at this point, the lower court shall have no jurisdiction to entertain such matter and ought to have downed its tools and advise the parties to follow up the arising issues at the High Court on lack of jurisdiction... On this ground I find the trial kadhi erred in assuming that the majority are always right and the minority are always wrong...the Hon. Kadhi erred in not allowing the P.O which is based on the supreme Law of the Land that all parties must submit to the jurisdiction of the kadhi court, and I will opine that this appeal be allowed...”

28. Having taken the law and all factors into account, I find and hold that the Appeal is merited and I make the following orders:

- i) The Appeal herein is allowed.
- ii) The ruling of the Hon. Kadhi of 9.10.14 is hereby set aside.
- iii) The preliminary objection dated 19.5.14 is hereby upheld.
- iv) This being a family matter, I direct that each party bears own costs.

DATED, SIGNED AND DELIVERED IN MOMBASA THIS 5TH DAY OF MAY 2020

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M. THANDE

JUDGE

In the presence of: -

..... for the Appellant

..... for the 1st Respondent

..... for the 2nd and 3rd Respondents

..... Court Assistant