



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL 28 OF 2015

ALI ABDALLAH ALI aka ALI NDEGE.....APPELLANT

VERSUS

FATUMA ALI.....RESPONDENT

JUDGMENT

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

Kadhi delivered on 6.8.15 in Mombasa Kadhi Succession Case No. 192 of 2007)

1. The Appeal herein arises from the Ruling of Hon. Sheikh Abdulhalim H. Athman, Kadhi delivered on 6.8.15 in Mombasa Kadhi Succession Case No. 192 of 2007 relating to the estate of Ali Abdalla, deceased. The Ruling was in respect of an application dated 8.1.15 by Fatuma Ali, the Respondent, seeking:

- i) That Ali Abdallah Ali aka Ali Ndege, the Appellant, be enjoined in the matter.
- ii) That the Appellant vacates the deceased's house without land on Plot No. 105/XI/33 (the property).
- iii) That Mohamed Amani, the Respondent therein, be confirmed as dead and his advocate be discharged from representing him.
- iv) That the said house be sold to any willing and able heir, or to any other person and the proceeds be distributed to the heirs in accordance with the judgment of 25.8.09.

2. In the impugned ruling, Hon. Kadhi enjoined the Appellant in the proceedings, declared him a trespasser of the property and ordered him to vacate the same within 48. The Hon. Kadhi further directed the OCS Tudor to ensure compliance.

3. The Appellant was aggrieved by the decision of the Hon. Kadhi and has filed the appeal herein. The summarized grounds of the Appeal are that the Hon. Kadhi erred in law and fact in that he:

- 1. granted orders not sought by the Respondent, thereby becoming partisan in the proceedings;***
- 2. made findings that were not based on any pleadings or affidavits;***
- 3. enjoined the Appellant purely for the purpose of evicting him from the property.***
- 4. found that the Appellant had abandoned his preliminary objection and thus failed to make a ruling thereon, yet the same was argued;***
- 5. found that the Appellant was a trespasser to the property and ordered that he should vacate the same within 48 hours and further directing the OCS, Tudor to ensure compliance;***
- 6. he disregarded and dismissed the submissions made for the Appellant.***

7. made personal attacks against the Appellant's counsel and was partisan.

4. The Appellant prayed that the ruling of the Hon. Kadhi be set aside and that the Respondent's application be dismissed and costs thereof and of the Appeal be awarded to him.

5. The matter proceeded to hearing by way of oral submissions. The Appellant was represented by Mr. Tindika Advocate while the Respondent was unrepresented. At 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.”

6. It was submitted for the Appellant that he is a beneficiary of the estate, the subject of the succession matter before the Hon. Kadhi. The Hon. Kadhi had no jurisdiction to enjoin the Appellant as an interested party for the purpose of eviction. It was further submitted that the Court cannot determine that a person is a trespasser in an application without hearing him. The application did not have a prayer that the police be involved in enforcing the order. As such, the Court did not have any basis for directing that the police be involved. It was further submitted that the Hon. Kadhi did not consider the Appellant's submissions in the matter. The Appellant urged the Court to allow the Appeal and set aside the ruling of the Hon. Kadhi.

7. The Respondent opposed the Appeal. She submitted that the Appellant is not a child of the deceased. According to the Respondent, the Hon. Kadhi did not err in his decision to enjoin the Appellant. Further, the Appellant's counsel was in Court representing him. As such, the Appellant was heard.

8. I have considered the Appeal, the record and supplementary record and submissions. The issues that fall for determination are:

i) Whether the Kadhi's Court has jurisdiction to enjoin the Appellant as an interested party for the purpose of eviction.

ii) Whether the Kadhi's Court determine that a person is a trespasser in an application without hearing him.

iii) Whether the Kadhi's Court had any basis for directing that the police be involved in enforcing the order issued.

iv) Whether the Kadhi's Court considered the Appellant's submissions in the matter.

9. As a first appellate Court, this Court is required to subject the evidence to a fresh and exhaustive scrutiny and draw its own conclusion, giving due allowance to the fact that it has neither seen nor heard the witnesses. This duty of the Court was set out in Selle & another –vs- Associated Motor Boat Co. Ltd.& others (1968) EA 123 in the following terms:

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should made due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif –v- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).

10. I have carefully looked at the record of appeal filed on 26.7.17 and the supplementary record of appeal filed on 23.10.17. Neither record has any of the proceedings that took place in the Kadhi's Court after 2011. The Application, the subject of the impugned ruling is dated 8.1.15. The Hon. Kadhi referred in his ruling to the date of first hearing. It would therefore appear that there was more than 1 hearing. The Appellant's counsel's arguments on his oral preliminary objection are missing from the record as are the Respondent's arguments in support of the Application.

11. The proceedings leading to the impugned ruling are critical if this Court is to make any finding as to whether the Hon. Kadhi misdirected himself or not. An appellate Court is required to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. It is only upon reviewing such evidence that this Court can make a considered determination one way or the other.

12. In Kenya Power & Lighting Company Ltd v E K O & another [2018] eKLR, Ngugi, J. had this to say on the duty of the appellate Court to re-evaluate and reconsider the evidence in the trial Court:

“This same position had been taken by the Court of Appeal for East Africa in Peters –vs- Sunday Post Limited [1958] EA 424 where Sir Kenneth O'Connor stated as follows:-

“...If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight.”

13. In order for this Court to make a determination as to whether the conclusion arrived at by the Hon. Kadhi, after hearing the rival submissions, was justified, this Court must have the benefit of seeing the proceedings. In the absence of the proceedings leading to the impugned decision, the Court would have no basis to pronounce itself on the rightness or wrongness of the trial Court's decision.

14. Hon. Sheikh Al Muhdhar A. S. Hussein, Chief Kadhi was of the opinion that the Appeal should be allowed. The Hon. Chief Kadhi's opinion is reproduced in part:

“It's my observation that the trial kadhi would have allowed the appellant to be enjoined and gave him chance to prove his interests in the Succession case as a fair deal, but with his refusal had led to this appeal.”

15. With profound respect I disagree with the finding of the Hon. Chief Kadhi. Without the record of the proceedings, it is not possible to make such a finding. Accordingly, I find and hold that the Appeal lacks merit and the same is hereby dismissed. I direct that each party bears own costs.

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

.....

M. THANDE

JUDGE

In the presence of: -

..... **for the Appellant**

..... **for the Respondent**

..... **Court Assistant**