



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**FAMILY DIVISION**

**CIVIL APPEAL 41 OF 2019**

**ISM.....APPELLANT**

**VERSUS**

**JRG.....1<sup>ST</sup> RESPONDENT**

**MRG (minor suing through JRG).....2<sup>ND</sup> RESPONDENT**

**ARG.....3<sup>RD</sup> RESPONDENT**

**MRG.....4<sup>TH</sup> RESPONDENT**

**KA.....5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**(An Appeal from the Ruling of Hon. Wendo S. Wendo, Kadhi delivered on 24.9.19 in Kwale Kadhi Succession Case No. 192 of 2014)**

1. The Appeal herein arises from the Ruling of Hon. Wendo S. Wendo, Kadhi, delivered on 24.9.19 in Kwale Kadhi Succession Case No. 192 of 2014 (the succession cause), relating to the estate of FMM (the deceased). The Ruling was in respect of an application by the Respondents herein, dated 13.8.19 seeking in the main:

- i. joinder of the Respondents in the matter and of the Appellant herein in place of Said OM (deceased).
- ii. stay of execution and setting aside of the orders of the Court of 11.6.14.
- iii. stay of execution of orders issued in Mombasa Kadhi Court Succession Cause No. 175 of 2019 (estate of SOM) on 6.8.19.
- iv. that all transactions done in respect of Kwale/Ng'ombeni/\*\*\* pursuant to the vesting orders of 11.6.14 be nullified.

2. The background of the matter is that SOM (S), the petitioner in the succession cause is the father of the Appellant. The deceased had only one son known as RG, now deceased. The Respondents are the surviving widow and children of the said RG. It is said that as a child, Said was taken in by the deceased, who took care of him until he became an adult. Said filed the succession cause claiming he was the only heir of the deceased. A vesting order in respect of Plot No. Kwale/Ng'ombeni/\*\*\*\*, the property forming the estate of the deceased, was issued in favour of Said on 11.6.14. Said subdivided the land into 2 portions and sold 1. The other was compulsorily acquired by the National Land Commission for construction of the Dongo Kundu bypass and an award of KShs. 3,858,815.80 was given as compensation on 16.3.17. Said died on 5.3.19 and the Appellant filed Succession Petition No. 175 of 2019 in Mombasa Kadhi's Court in which he listed the land and the compensation as forming the estate of Said.

3. The Respondents' contention is that they are beneficiaries of the estate of the deceased. Said filed the succession cause behind their back and misrepresented to the Court that he was the only heir of the deceased. The Respondents therefore moved to Court by their application dated 13.8.19. In the impugned ruling, the Hon. Kadhi set aside the order of 11.6.14 and ordered a fresh hearing of the matter.

4. It is this decision that has prompted the Appeal herein. The summarized grounds of the Appeal are that the Hon. Kadhi erred in law and

fact in that he:

1. allowed the application without considering the applicable law
2. exceeded his jurisdiction by setting aside the orders of 11.6.14 and ordering a fresh hearing.
3. failed to consider the Appellant's submissions and cited authorities
4. failed to consider the suit before him had abated on account of the death of the petitioner and the Appellant was not an administrator of the petitioner's estate.

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

6. Parties filed their written submissions which were highlighted 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.”**

7. I have considered the submissions and find that the following issues fall for determination:

- i. Whether the Appellant was granted an opportunity to be heard
- ii. Which between the Law of Succession Act or the Civil Procedure Act should guide the Kadhi's Court.
- iii. Whether the original suit had abated.
- iv. Whether the Appellant could be legally enjoined in the original suit.

#### **Whether the Appellant was granted an opportunity to be heard**

8. The Appellant's contention is that he was not given an opportunity to be heard. According to him, the application, the subject of the impugned ruling was filed on 15.8.19 and on the same date, the Hon. Kadhi issued *ex parte* orders substituting the Appellant for SMM. Citing Articles 25(c) and 50 of the Constitution of Kenya, 2010, the Appellant submitted that the Kadhi's Court must operate within the provisions of the Constitution especially as regards the rules of natural justice and the right to a fair trial. The Hon. Kadhi erred in denying the Appellant an opportunity to be heard and the right to a fair trial. For the Respondent, it was submitted that at the *inter partes* hearing, the Appellant raised the issue of the *ex parte* order enjoining him. After a hearing both sides, the Court rejected the objection. The Appellant cannot therefore be said to have been denied an opportunity to be heard.

9. The Constitution of Kenya, 2010 guarantees to every person the right to a fair trial. This is one of fundamental rights and freedoms that may not, under Article 25(C) be limited. The right to a fair hearing is a critical aspect of the right to a fair trial. Article 50(1) provides:

**Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.**

10. The record herein shows that when the matter first went for *inter partes* hearing on 27.8.19, the Appellant sought and was granted time to instruct an advocate to represent him and to file a response. The response was filed and the matter proceeded to hearing on 10.9.19. Both parties were represented at the hearing by their respective counsel. I am therefore satisfied that the Appellant was given an opportunity to be heard.

#### **Which between the Law of Succession Act or the Civil Procedure Act should guide the Kadhi's Court.**

11. The Appellant submitted that the Application dated 13.8.19 was anchored on the Law of Succession Act (LSA). Citing Section 8(2) of the Kadhis' Courts Act, he argued that the applicable law in the Kadhi's Court is the Civil Procedure Act (CPA) and not LSA. The Appellant further submitted that the original suit had abated as at 5.3.18, following the death of Said. No attempt was made to have Said substituted within the time stipulated in Order 24 Rule (3) of the Civil Procedure Rules (CPR). The Appellant faulted the Hon. Kadhi for not dealing with the issue of abatement in the ruling yet the same was raised by the Appellant's counsel.

12. For the Respondents, it was submitted that the applicable law to the original suit is the LSA. Citing Section 2(4) of the LSA, the Respondents argued that Part VII of the Act relating to administration estates shall, unless contrary to Muslim law, apply to deceased Muslims. The Respondents further contended that Section 8(2) of the Kadhis' Courts Act does not provide that the CPA Act is applicable in the Kadhi's Court. According to the Respondents, subordinate Courts, including the Kadhi's Court should follow the procedure specified by the law for different matters and no law provides that the CPR shall be applied to all matters before these Courts. CPR applies to civil matters

while the LSA and its rules apply to probate and administration matters.

13. The LSA defines Court as follows:

**"court" means a court having jurisdiction under this Act in the matter in question.**

14. The LSA then proceeds to set out the jurisdiction of the Courts having jurisdiction under the LSA. The Courts indicated are the High Court and the Magistrates Courts.

15. Section 47 provides for the jurisdiction of the High Court as follows:

**The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:**

**Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.**

16. Section 48 provides for the jurisdiction of the Magistrates' Courts as follows:

**1. Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of [section 49](#), a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under [section 7\(1\) of the Magistrates' Courts Act, 2015](#).**

**2. 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.**

17. My reading of the above provisions is that the Act applies to the High Court and the Magistrates Courts. The LSA provides that the High Court and the Magistrates Courts shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders as may be expedient. It is instructive that no such provision has been made in respect of the Kadhis' Courts. Section 48(2) simply reiterates that, notwithstanding the powers conferred upon the Magistrates' Courts by subsection (1), the jurisdiction of Kadhis' Courts to determine matters concerning estates of Muslims in accordance with Muslim law, is retained.

18. It is to be noted that in succession matters in the Kadhis' Courts, no grant of representation is ever issued to a petitioner. Indeed, in the succession cause the subject of these proceedings, no grant of representation was issued to Said in respect of the estate of the deceased. This is because Kadhis' Courts, unlike the High Court and the Magistrates' Courts are not clothed with powers or jurisdiction to issue grants of representation. Kadhis' Courts make a determination as to the estate of a deceased person, the lawful heirs and their entitlement to the estate and issue orders accordingly.

19. Section 8 of the Kadhis' Courts Act provides:

**1. The Chief Justice may make rules of court providing for the procedure and practice to be followed in Kadhis' courts.**

**2. Until rules of court are made under subsection (1) of this section and so far as such rules do not extend, procedure and practice in a Kadhi's Court shall be in accordance with those prescribed for subordinate courts by and under the Civil Procedure Act ([Cap. 21](#)).**

20. Under Section 8(1) of the Kadhis' Courts Act, the Hon. Chief Justice is required to make rules of procedure and practice for the Kadhis' Courts. The obligation is however not couched in mandatory terms. Where such rules have not been promulgated, as is the case currently, the procedure and practice to be followed in the Kadhis' Court shall be in accordance with those prescribed for subordinate courts by and under the CPA.

21. It would appear from submissions, that the Respondent seeks to make a distinction between the CPA and the CPR; that Section 8(2) of the Kadhis' Courts Act refers to the CPA and not the CPR. This in my view, is a misapprehension of the law. Section 2 of the CPA provides that the Act, includes the Rules. As such, and contrary to the assertion by the Respondent, the rules of procedure and practice to be followed in the Kadhis' Courts are those prescribed under the CPA, which includes the CPR. From the foregoing therefore, it is clear that the provisions of the LSA are not applicable in the Kadhis' Courts.

### **Whether the original suit had abated**

22. The Appellant contended that the original suit had abated as at 5.3.18, following the demise of Said. The Respondents on the other hand argued that while ordinary civil suits abate, the same is not true in probate matters when an administrator dies. According to the Respondents, a substitute is appointed to take the position of the deceased administrator and the proceedings continue.

23. Under the LSA, there is no provision for substitution of an administrator who dies. Upon the demise of an administrator, the grant issued to him becomes useless and inoperative. In such circumstances, where there is need to move the proceedings forward, an application is made under Section 76(e) of the LSA, for the revocation of grant issued to the deceased administrator and issuance of a fresh grant to another

person.

24. The law relating to abatement of suits is contained in Order 24 of the CPR. Rule 3 provides:

**1. Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.**

**2. Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:**

**Provided the court may, for good reason on application, extend the time.**

25. The procedure set out in Order 24 Rule 3 relates to substitution of a deceased plaintiff for the purposes of proceeding with a suit. Where no application for substitution is made within 1 year of the demise of the plaintiff, the suit shall abate. It is clear from the provisions, that substitution of a deceased plaintiff is contemplated where the suit is still live before Court and where a suit is concluded, abatement of the same cannot arise.

26. In the present case, the order in the original suit which was set aside by the Hon. Kadhi was issued on 11.6.14 thus concluding the matter before the Kadhi's Court. Said died on 5.3.18 about 4 years after conclusion of the original suit. The suit having been concluded prior to the demise of Said, abatement of the same does not arise. In the premises, I find and hold that the suit did not abate.

#### **Whether the Appellant could be legally enjoined in the original suit**

27. On this point, the Appellant submitted that he is not the legal representative of the estate of Said. The Respondents have given no reason why they picked him out of 16 beneficiaries to represent the estate of Said. Not being the appointed representative, the Appellant argued that he ought not be held to account for the estate of Said without the consent and knowledge of the other beneficiaries.

28. For the Respondent, it was submitted that upon the demise of Said, the Appellant filed Mombasa Kadhi's Court Succession Cause No.175 of 2019 in respect of his estate. He also wrote a letter to the Kadhi's Court introducing himself as the duly nominated family representative of Said. The Respondents were of the view that the Appellant as the nominated representative of the family of Said, would be interested in their application for review of the vesting order in favour of Said. This is why they sought joinder of the Appellant. He is however at liberty not to participate in the proceedings.

29. It is to be noted that the Appellant does not deny that RG was a son of the deceased. His contention however, is that RG predeceased the deceased. As such, under Islamic law, he was not entitled to the estate of the deceased. What is not stated by the Appellant however, is his own or Said's entitlement to the estate of the deceased. It was submitted on behalf of the Appellant as follows:

**“We submit the late RG (deceased) died before his mother FMM is therefore under the law of inheritance (sic). The late RG will not inherit his mother since he died before her.”**

30. A reading of the impugned ruling makes it clear that the Hon. Kadhi found, and rightly so, that it was in the interest of justice that the Respondents be heard in the matter concerning the estate of the deceased. The Hon. Kadhi stated:

**“Should this Court allow the proposed respondents/applicants a fair hearing as guided by Article 50(1) and (2) to prove their entitlement to the estate in this matter? The issue is whether or not SOM was a legal heir of FMM. The proposed petitioners/respondents did not state at any point in the pleading the relationship between the deceased in this matter and SOM (deceased) the petitioner...The applicants also alleged that they were not aware of this matter at the time of the trial. There is a dispute on this matter the proposed respondents/applicants being not aware of this matter and for the interest of justice and considering the nature of the dispute (sic). It is to hear all parties to enable fair and just determination of this matter.”**

31. It is noteworthy that the Appellant has not indicated Said's and by extension his relationship with the deceased. Further, in the petition in Succession Cause No.175 of 2019, the Petitioner stated that Said had in his oral will, provided that the grandchildren of the deceased should be given a share in the National Land Commission Award. The grandchildren listed are the 1<sup>st</sup> – 4<sup>th</sup> Respondents. This to my mind is an acknowledgement of their entitlement to the deceased's estate. It follows therefore that the Respondents ought to have been involved in the succession cause the subject of the proceedings herein.

32. The Appellant has questioned why the Respondents picked him out of all the beneficiaries of the estate of the deceased. It is on record that the Appellant filed Succession Cause No.175 of 2019 in respect of the estate of Said, in which he and others are beneficiaries. My view is that it would not be farfetched to conclude that Said's family nominated the Appellant to file the succession cause. The Appellant having filed that succession cause cannot turn around and ask why the Respondents picked on him out of all the beneficiaries of Said's estate.

33. The property forming the estate of Said belonged to the deceased. Said obtained a vesting order in respect thereof without the involvement and participation of the Respondents. The Appellant does not dispute this fact. Justice requires that this question as to the rightful heirs of the deceased and their entitlement to her estate be determined with the involvement and participation of all parties, each stating their claim. It is likely that the orders that will be made in the retrial will affect the Appellant in one way or the other. The legal

imperative of hearing a person who is likely to be affected by a decision before the decision is made cannot be overemphasized. The Court of Appeal in Mbaki & Others v. Macharia & Another [2005] 2 EA 206, at page 210, stated as follows:

**“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be *prejudiced* or affected without the party being afforded an opportunity to be heard.”**

34. The matter to be retried in the Kadhi’s Court relates to the estate of the deceased. It is therefore imperative that all persons who have an interest in the estate and are likely to be affected by orders issued in the retrial be heard. The Appellant may of course elect to participate in the retrial or not.

35. Moreover, the facts show that there was a miscarriage of justice in the succession cause. The Appellant cannot rely on a technicality to evade justice, when the Respondents are seeking to right the wrong that was perpetrated by his father Said, by excluding the Respondents in the proceedings. By dint of Article 159(2)(d) of the Constitution of Kenya, 2010, justice shall be administered without undue regard to procedural technicalities. To allow the Appeal on a technicality would be to facilitate the Appellant to benefit from an illegality, which is against public policy.

36. Hon. Sheikh Al Muhdhar A. S. Hussein, Chief Kadhi was of the opinion that the Appeal should be allowed, and I agree. The Hon. Chief Kadhi stated in part:

**“From the record of appeal and from the response of the respondents seems they were not involved in the petition at first instance to the delivery of the judgment on 11/6/14 in KSC NO: 192/2014... It’s my take that this appeal be NOT allowed and the ruling of Kadhi Wendo S. Wendo delivered on 24/9/2019 be upheld and fresh hearing be preferred (sic) by the Kadhi hon Wendo who understood the case well.”**

37. Having considered and reevaluated the matter herein, I draw the conclusion that the Appeal lacks merit and the same is dismissed. Each party shall bear own costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 5<sup>th</sup> day of June 2020**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

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

..... **for the Respondents**

..... **Court Assistant**