



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CIVIL APPEAL NO. 21 OF 2018

HUSSEIN HASSAN MAALIM.....APPELLANT

VERSUS

OSMAN HASSAN MAALIM.....RESPONDENT

JUDGMENT

1. By a claim filed on 20/9/2017 the claimant Osman Hassan Maalim initiated same as a succession matter in Kadhi Court Wajir.
2. The subject was plot in Wajir Township measuring 50 x 100 left behind by the deceased. He claimed the plot belonged to the deceased who was his father. He testified and confirmed the plot was his father property. He called PW1, PW2 and PW3 who supported his case.
3. The respondent/defendant in his response claimed that, the subject plot No. 738 was owned by the deceased Hajir Maalim Ibrahim his uncle who died in October 2003 and had given him (defendant) same plot which he registered it in his name in 2014. That the deceased and his (defendant) father were brothers.
4. The respondent testified as first witness. He testified and claimed to own the plot. He called DW1, DW2, DW3 and DW4 on his side.
5. The contest centred on the ownership of land between the deceased beneficiaries and the respondent.
6. The trial court determined the ownership of the land subject matter and awarded same to the beneficiaries of the deceased.
7. The Kadhi's Court is mandated under section 5 of Kadhi's Court Act Cap 11 Laws of Kenya, section 48 (2) of Law of Succession Act/Cap. 160 and Cap. 10 plus Article 170 (5) of the Constitution to adjudicate on matters on personal law but not title/ownership to land which under Article 162 and ELC Act reserved to the ELC Court and gazetted magistrate courts.
8. Section 5 of Kadhi's court states;

“Jurisdiction of Kadhis’ Courts

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 of any subordinate court in any proceeding which comes before it.”

9. Thus for the Kadhi's Court to adjudicate on the matter on land ownership, the same acted *ultra-vires* and thus the verdict a nullity. The moment the contest shifted from administration of estate of deceased to ownership contest of land the kadhi court jurisdiction ended there and could not move any step further.
10. Jurisdiction is thus the power vested in the court by law to adjudicate upon, determine and dispose of a matter. In the Kenyan case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Limited, Justice Nyarangi** explained the importance of jurisdiction in the following terms:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”

11. Before adopting the above quoted words, the Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & Others** observed that ;

‘[i] It is trite that the jurisdiction of any court provides the foundation for its exercise of judicial authority. As a general principle, where a court has no jurisdiction, it has no basis for judicial proceedings much less judicial decision or order.’

Because of the importance of jurisdiction, a court of law must determine the question of jurisdiction upfront before embarking upon matters of the merits of the case. Justice Nyarangi emphasized in this respect that ‘I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it’. If the court determines that it has no jurisdiction, it downs the tools and must not proceed with the case any further. To proceed where there is no jurisdiction is a waste of time as the eventual decision will be of no consequence. In *Speaker of the Senate and another v Attorney General and another*, the Supreme Court correctly observed that:

The consequence of a Court proceeding without jurisdiction is stated, in unambiguous terms, in *Words and Phrases Legally Defined, Vol 3: 1 (at p. 113): “Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing.”*

12. The Supreme Court in *Re the Matter of the Interim Independent Electoral Commission* noted that, ‘assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The court made reference to the case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Limited** and observed that this case ‘establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity.’

13. The court ought to have stayed proceedings and refer parties to the ELC Court either mandated magistrate court in Wajir or Garissa or ELC Judge at Garissa to determine ownership and then thereafter proceed with succession matter depending on the outcome of the ELC Court verdict.

14. The court therefore makes the following orders –

1. That judgement and orders of Kadhi’s Court in Kadhi Court Civil Case No. 2 of 2017 at Wajir dated 31/5/018 is hereby set aside and declared a nullity.

2. The proceedings are stayed to await parties to go to ELC Court to determine ownership of suit property and thereafter the lower court file before Kadhi Court at Wajir to proceed therefrom.

3. To avoid doubt and delay, the respondent /defendant Osman Hassan Maalim is given 30 days to file claim in ELC court in Wajir or Garissa for the plot subject herein failure to do so, the Wajir case to proceed on distribution of same to beneficiaries of the deceased.

4. No orders as to costs.

Dated, signed and delivered in open court at Garissa this 21st day of May, 2019.

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C. KARIUKI

JUDGE