



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**FAMILY DIVISION**

**CIVIL APPEAL 27 OF 2018**

**ALI OMAR ALI ABDULRAHMAN.....APPELLANT**

**VERSUS**

**MOHAMED ALI ABDULRAHMAN.....RESPONDENT**

**JUDGMENT**

***(An Appeal from the Ruling of Hon. Abdulla M. Salim, Senior Resident Kadhi delivered on 17.5.18 in Kadhi Court Succession Cause No. 133 of 2016)***

1. Omar Ali Abdulrahman, the deceased, died in Mombasa on 13.11.89. He was survived by his widow, 5 sons and 2 daughters. The widow died thereafter. On 28.6.16, the Appellant Ali Omar Ali Abdulrahman, a son of the deceased filed a petition in Kadhi Court Succession Cause No. 133 of 2016 against the Respondent Mohamed Ali Abdulrahman, a brother of the deceased. The Appellant accused the Respondent of taking control of the estate of the deceased pursuant to a grant of letters of administration issued to him on 25.5.90 in High Court Succession Cause No. 206 of 1989. The Respondent did not follow the deceased's will dated 4.11.78 which provided that the estate be distributed to his heirs in accordance with Islamic law. The Respondent did not involve any of the heirs but instead did as he wished and favoured some heirs over others. No valuation was done to ascertain the heirs' rightful share entitlement.

2. The Appellant sought a determination as to whether the Respondent had distributed the estate of the deceased according to Islamic law. He also sought an order that the Respondent do produce full accounts of the estate. The Appellant further sought a fresh determination of the estate, heirs and their respective shares therein and a distribution and vesting of the estate to the rightful heirs in their determined shares. In his judgment of 17.5.18, the Hon. Kadhi found that the petition lacked merit, the Appellant having failed to prove the allegations therein and proceeded to dismiss the same.

3. The Appellant being dissatisfied with the decision of the Hon. Kadhi has filed the appeal herein, the grounds of which are reproduced hereunder:

***1. THAT the Learned Kadhi erred in law and in fact in making a finding that the Appellant did not prove his case despite the learned Kadhi finding whimsical distribution of the estate of the deceased, contrary to Islamic law.***

***2. THAT the learned Kadhi erred in law and in fact making a finding that the Appellant concealed information yet every valuation report and share of the estate of the deceased given to the Appellant was availed in court.***

***3. THAT the learned Kadhi erred in law and in fact by giving due consideration to extraneous matters of lapse of time yet the sole issue was whether the distribution of the estate of the deceased was in accordance with Islamic law or not, time factor notwithstanding***

***4. THAT the learned Kadhi erred in law and in fact in dismissing the Appellant's suit in total is regard of the plausible and cogent evidence adduced by the appellant in support of the case.***

***5. THAT the Learned Kadhi erred in law and in fact in failing to severe Kadhi Court Succession Cause No. 133 of 2016 from High Court Succession Cause No. 206 of 1989 yet the two cases are fundamentally different.***

***6. THAT the Learned Kadhi erred and in fact in failing to appreciate the impeceable evidence made from his own and thereby arriving at a wrong and erroneous conclusion in dismissing the petitioners suit.***

4. The Appellant prayed that the judgment of the Hon. Kadhi be set aside and that the appeal be allowed. He aslo prayed for costs.

5. Without proceeding any further, the Court notes that the estate of the deceased was dealt with in High Court Succession Cause No. 206 of 1989. Grant of probate was issued to the Respondent by this Court on 25.5.90 and confirmed on 23.9.92 and the estate distributed. The Appellant filed the petition in Kadhi Court Succession Cause No. 133 of 2016 on 28.6.16 seeking the orders set out above. During the pendency of the matter in the Kadhi's Court, he moved to this High Court and filed Summons dated 5.10.16 seeking revocation of the grant of probate issued to the Respondent on grounds *inter alia* that the Respondent did not distribute the estate of the deceased in accordance with his will. These are the very issues raised and prayers sought in the Kadhi's Court. The Court in its ruling of 6.10.17 found that the Appellant did not prove that there was unfair distribution of the estate and further found that the Appellant got his fair share of the estate. The summons was dismissed. The petition in the Kadhi's Court was dismissed on 17.5.18. Undeterred, the Appellant has come back to this Court on appeal, raising the very same issues.

6. It instructive to note that in paragraph 7a of the petition, the Appellant averred as follows:

***The Respondent through a grant of Letters of Administration dated 25.5.90 granted by the Mombasa High Court on (sic) in High Court Succession Case No. 206 of 1989, the Respondent took full control of all Deceased's properties.***

7. The foregoing averment by the Appellant was sufficient notice to the Hon. Kadhi that the High Court had dealt with the matter of the estate of the deceased. At that point, the Hon. Kadhi ought to have downed his tools as he had no jurisdiction to deal with matter of which the High was seized or had been concluded by the High Court. The Kadhi's Court is subordinate to the High Court. The Court therefore finds that the filing of the matter in the Kadhi Court by the Appellant after the High Court had concluded the case relating to the estate of the deceased is a clear abuse of the Court process. The filing of the summons for revocation of grant in the High Court during the pendency of the Kadhi Court's case is a further abuse of the Court process. What makes the abuse even worse is that the issues before the Kadhi's Court are substantially the same as those in the summons for revocation of grant before the High Court as well as in this appeal.

8. In the case of Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR, the Court of Appeal set out the following as instances that constitute abuse of the Court process:

***“ In the Nigerian Case of KARIBU-WHYTIE J Sc in SARAK v KOTOYE (1992) 9 NWLR 9pt 264) 156 at 188-189 (e) the concept of abuse of judicial process was defined:-***

***The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice ...”***

***The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-***

***(a) “Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.***

***(b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds...”***

9. The conduct of the Appellant of instituting a multiplicity of actions on the same subject matter falls within the ambit of the above illustrations. Further, oscillating between the High Court and the Kadhi's Court over the same matter is improper use of the judicial process by the Appellant and is intended to interfere with the administration of justice. This Court disapproves the filing of the matter in the Kadhi's Court after the determination of the succession cause in the High Court, the summons for revocation of grant during the pendency of the Kadhi Court's matter and the appeal herein. In this regard, the Court is guided by the holding in Niazsons (K) Ltd v China Road & Bridge Corporation Kenya [2001] eKLR, where Bosire, JA observed:

***The policy of the law, as I understand it, is that concurrent proceedings before two or more fora is disapproved.***

10. In Republic v Sacco Societies Regulatory Authority Ex Parte Joseph Kiprono Maiyo & 3 others [2017] eKLR, Odunga, J. observed:

***Accordingly, if what is sought to be achieved by the appeal is substantially the same as what is sought in the judicial review proceedings, a party ought not to be allowed to have a double-pronged attack on the same decision. In my view even without the provisions barring such a course, to proceed in that manner would amount to playing lottery with the Court and render legal proceedings a circus. That clearly is an abuse of the Court process.***

11. I agree with the tenor of Odunga, J. The institution of parallel proceedings by the Appellant over the same matter is tantamount to forum shopping and playing lottery with the Court which would render legal proceedings a circus. In order to prevent abuse of the court of process this Court must stop the Appellant from seeking a multiple-pronged attack on the same issue.

12. The Court finds, for the reasons stated, that Kadhi Court Succession Cause No. 133 of 2016, having been filed after the determination of High Court Succession Case No. 206 of 1989 is an abuse of the Court process. It follows therefore that the Appeal herein arising from the said cause in the Kadhi's Court is also an abuse of the Court process. Having so found, it is not necessary in my view, to interrogate the merits of the Appeal. In the premises the Appeal is hereby dismissed. Although this is a family matter, the conduct of the Appellant renders him liable to be condemned to pay costs. The Respondent shall therefore have costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 7<sup>th</sup> day of June 2019**

---

**M. THANDE**

**JUDGE**

**In the presence of: -**

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

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

..... **Court Assistant**