REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

PETITION NO. 20 OF 2017

IN THE MATTER OF CHAPTER FOUR ON THE BILL OF RIGHTS, OF THE

CONSTITUTION OF THE SOVEREIGN REPUBLIC OF KENYA, 2010

AND

IN THE MATTER OF CONSTITUTION OF KENYA (SUPERVISORY) JURISDICTION

AND THE PROTECTION OF THE FUNDAMENTAL RIGHTS OF THE INDIVIDUAL

HIGH COURT PRACTICE AND PROCEDURE RULES 2006

AND

IN THE MAATTER OF ARTICLES 1, 2, 3, 10, 12 (1), (A), 19, 20, 21, 22, 23, 27 (4), 35 (2),

40, 47, 50, 64, 73 (1) (A) AND 129 OF THE CONSTITUTION OF THE SOVEREIGN

REPUBLIC OF KENYA 2010

AND

IN THE MATTER OF CONTRAVENTION OR BREACH OF

THE CONSTITUTION OF KENYA to wit ARTICLE 258

AND

IN THE MATTER OF INTERPRETATION, IMPLEMENTATION AND

ENFORCEMENT OF THE CONSTITUTION OF KENYA TO wit ARTICLE 259

AND

IN THE MATTER OF KADHI'S COURT AT MALINDI; SUCCESSION CAUSE NO. 87 OF 2008;

IN THE MATTER OF THE ESTATE OF THE LATE BATUL OMAR MAHENDA (DECEASED)

AHMED MOHAMED HONEY..PETITIONER

AND

IN THE MATTER OF KADHI'S COURT AT MALINDI SUCCESSION CAUSE NO. 35 OF 2016;

IN THE MATTER OF THE ESTATE OF THE LATE MARIAM SALIM ALI

SHARIF SALIM ALI...PETITIONER

AND

IN THE MATTER OF THE KADHI'S COURT AT MALINDI SUCCESSION CAUSE NO. 27 OF 2017;

IN THE MATTER OF THE ESTATE OF THE LATE SHARIF SALIM ALI (DECEASED)

FATMA SHARIF SALIM (PETITIONER)

BETWEEN

FATMA SHARIF SALIM...1ST PETITIONER

MARYAM SHARIF SALIM..2ND PETITIONER

ALI SHARIF SALIM..3RD PETITIONER

ELVINA KIBIBI BAIMU...4TH PETITIONER

KAMARIA SHARIF SALIM..5TH PETITIONER

ZUHURA SHARIF SALIM.. 6TH PETITIONER

OMAR SHERIF SALIM..7TH PETITIONER

TWAHA SHERIF SALIM...8TH PETITIONER

VERSUS

AHMED MOHAMED HONEY...1ST RESPONDENT

NURU OMAR MAHENDAN...2ND RESPONDENT

MARIAM OMAR MAHENDAN...3RD RESPONDENT

FARIDA OMAR MAHENDAN..4TH RESPONDENT

ANZUN OMAR MAHENDAN...5TH RESPONDENT

MALKIA OMAR MAHENDAN...6TH RESPONDENT

FERRUZ OMAR MAGHRAM...7TH RESPONDENT

KADHI COURT MALINDI...8TH RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Michira Messah Advocates for the Petitioners

A. A. Mazrui Advocates for the 1st Respondent

Richard O. Advocates for the 2nd, 3rd, 5th & 6th Respondents

JUDGMENT

Before this court is a constitutional petition by the petitioners against the respondents seeking the following orders:

1. ***An order of prohibition be issued against the 1st – 7th respondents prohibiting them, their agents, employees, servants and or any other person acting on their behalf interfering in a manner with Land portion No. 332 – Malindi which form part of the Estate of Sharif Salim Ali – Deceased.***

2. An order of certiorari be issued against the 8th respondent and to quash the Judgment and order of distribution dated 28.12.2016 in the Kadhi's Court at Malindi Succession Cause No. 87 of 2008 in the matter of the alleged Estate of Batul Omar Mahendan.

3. A declaratory order be issued that the petitioners are rightful heirs of the Estate of Sharif Salim Ali and are entitled to inherit the parcel No. 332 of Malindi.

Historical Background

As indicated from the procedural history of the claim since it was first registered at the Kadhi's Court and as maintained all the way to the Court of Appeal the contest can be properly captured in the Judgment by the Court of Appeal.

Essentially the legal contest involves the Estate of the **Late Batul Omar Mahendan** who passed on in the year 2006. He was alleged to have been survived by the widower one – **Ahmed Mohamed Honey.** Following the death of the deceased Ahmed Mohamed Honey filed a Succession Cause No. 35 of 2016 in respect of the Estate of the deceased comprising Plot No. 332/6377 Malindi to be declared site beneficiary. In that succession cause – **Ferruz Omar Maghram**, **Malkia Omar Mahendan, Anzun Omar Mahendan, Nuru Omar Mahendan, Mariam Omar Mahendan** lodged an objection on grounds the suit property upon demise of the parties devolved to their children.

It was also averred that the respondent then Ahmed Mohamed Honey had relinquished his interest on eh basis that he was not blessed with any children.

The Kadhi's Court on consideration of the matter ruled as follows on 26.2.2016 that:

Ø **Ahmed Mohamed Honey** be entitled to a share of the estate in the ratio of 7/4/ of 1/8 of the entire estate.

Ø **Swaleh Omar** brother 2/4 of 1/8 of the entire estate

Ø ¼ of 1/8 of the whole estate to **Mariam , Anzun, Farida and Malkia.**

Further the Kadhi ordered that the rest of the estate including the already sold property Manuz Hotel and land at Kisumu Ndogo that on the basis of such valuation the heirs exact share be given. That cross-petition by **Nuru Omar Mahendan, Miriam Omar Mahendan, Anzun Omar Mahendan, Malkia Omar Mahendan** and **Ferruz Omar Maghram** be dismissed with costs to the petitioner.

In Judicial Review No. 3 of 2016 **Nuru Omar Mahendan, Anzun Omar Mahendan, Malkia Omar Mahendan, Ferruz Maghram,** hereinafter the respondents in the instant petition prayed for the orders of prohibition and certiorari against the respondent **Ahmed Mohamed Honey**. The judicial review petition was to quash the decision of the **Kadhi's Court Succession Cause No. 87 of 2008** and in the matter of Land parcel plot No. 686 on 25.10.2016 **Chitembwe J** dismissed the application for a vesting order in respect of **Plot No. LR 686** – situated at Barani in favor of Ahmed Mohamed Honey. By a decree of the court the claim on the suit property was dismissed in essence affirming the Judgment by the Kadhi's court.

The petitioners now have a petition for court orders that Parcel of Land Thalatha met No. 332 No 6377 belongs to Sharif Salim Ali – as per the decision of the **Kadhi in Succession Cause No. 35 of 2016**. That the Kadhi's Court has issued two contradictory Judgments on the suit property.

The 2nd, 3rd, 5th & 6th respondents through Learned counsel **Mr. Nyongesa** submitted the property by the in question number 332 – Malindi was a subject of investigations by the National Land Commission and in their report, the disputed land belongs to all 13 family members and not the Late Salim – Mahendan family. That the parcel of land so claimed by the petitioners has no title deed. Therefore, the properly registrable interest and rights is yet to be as curtained.

By a summary provided by Learned Counsel **Mr. Michira** for the petitioners the borne of contention is the decision by the Kadhis Court vesting parcel of Land 332 – Malindi to the respondents by virtue that it originally belonged to **Batul Omar Mahendan.**

In the said submission Learned counsel contends that the petitioners are entitled to a declaration under Article 40 of the Constitution on right to property by questioning the decision by the Kadhis Court.

Analysis

I have considered the petition, affidavit evidence and skeleton submissions by both counsel. Its now my task to determine the petition.

Principles

From the onset, the petitioners, and respondents have been virtually litigating before the various courts ostensibly on one issue. The inheritance with regard to the Estate of the Late Sharif Salim Ali. The subject matter of the property as identified in the petition is referenced as **LR Plot Number 332/group 6377.**

Before I proceed to consider the merits of the petition, I wish to state the claimants herein in one way or another have been involved in a litigation in several cases and a determination made. She said cases confirmed by this court dealing with the suit land are **JR NO. 2 OF**

2017 at Malindi, JR NO. 6 OF 2017 at Malindi, JR NO. 13 OF 2017 at Malindi. Misc. Application NO. 13 OF 2014, ELC NO. 25 OF 2019, CMC SUCCESSION CAUSE NO. 60 OF 2018, Kadhis Court NO. 87 OF 2008 Malindi Land Commission decision dated 13.3.2018.

From the order of this court, this is an intermeddled petition. The applicants moved the court under a constitution petition whereas the orders sought are principally under the review of Judicial Review to on writs of prohibition and certiorari, one such rule of pleadings is full disclosure of the facts upon which the dispute is based without any ambiguity or vagueness is fundamental to reinstitution of the claim. The implication of the petitioners avoided scrutiny under Order 53 Rule 3 of the Civil Procedure Rules which provides that one cannot move the court for judicial review without leave of the court which is either granted or declined depending on the pleaded facts of the case.

A court of Law should be slow in resorting to Judicial review procedure unless the application is clear, plain and obvious. I think that is the objective for a pre-condition threshold for grant of leave before one is admitted to assert his or her claim in terms of Order 53 of the Civil Procedure Rules.

In **RSC 1999 – Edition**, the Learned authors stated as follows:

> ***"No application for Judicial Review can be mad (whether in civil or criminal matter) unless leave to apply for Judicial Review has been obtained. Applications for leave are normally dealt with exparte by a single Judge, in the first instance without a hearing. The purpose of the requirement of leave is (a) Eliminate frivolous, vexatious or hopeless applications for judicial review without the need for a substantive interparte judicial review hearing and***
>
> ***(b) To ensure that an applicant is only allowed to proceed to a substantive hearing if the court is satisfied that there is a case fit for further investigations at a full interpartes hearing."***

In the persuasive authority **Regina v Industrial Disputes Tribunal & Claim No. 2009 HCV 0478** the Jeremiah case examining the provisions of Order 53 of their Civil Procedure with similar provisions with our Order 53 of the Civil Procedure Rules had this to say:

> ***"The point then is that leave for application for Judicial Review is no longer a per functioning exercise which turns back hopeless cases alone. Cases without a realistic prospect of success are also formed away. The Judges regardless of the opinion of the litigants are required to make an assessment of whether leave should be granted in light of the now stated approach. This, also means that an application cannot simply be dressed up in the correct formulation and hope to get by. An applicant cannot case about expressions such as ultra vires null and void erroneous in Law, wrong in Law. Unreasonable without adducing in the required affidavit evidence making these conclusions arguable with a realistic prospect of success. These expressions are really conclusions."***

The basis upon which the petition is brought is firstly, that the 1st – 7th respondents have violated the petitioners right to a fair hearing under Article 50 (e) of the constitution.

Secondly, that the 8th respondent mandated to deal with inheritance matters has issued two contradictory inheritance orders in regard to the estate property No. 332/6377.

Thirdly, that the respondents 1 – 7 without color or legality basis have been claiming interests and rights, over the suit land to intermeddle with it in contravention to the rightful owners.

It is clear that the relief sought is Order 53 of the Civil Procedure Rules which in essence requires leave of the court to bring the claim under judicial review. From the record I presume that claim was frivolous and vexatious hence the reason it was sugar coated as a constitutional petition to avoid the scrutiny in Order 53 of the rules.

The other substantial procedural requirement is to apply for judicial review is on time prescription of six months and locus standi.

In the text book **on applications for judicial review Law and practice of the common office** by **Grahame Aldous and John Alder 2nd Edition.** The Learned authors stated:

> ***"The most important procedural features of judicial review are the requirements to obtain leave, the short time limits and the rules on locus standi. These features reflect the fact that judicial review extends to persons without legal rights in the ordinary sense and also the range of third parties potentially affected when government action is challenged. Judicial review proceedings are sui generis. They are not strictly speaking civil proceedings between parties."***

Section 9 (3) of the Law Reform Act provides that:

> ***"In the case of an application for an order of certiorari to remove any Judgment, order, decree, conviction or other proceedings, for the purpose of its being quashed, leave shall not be granted, unless the application for leave is made not later than six months after the date of that Judgment, order, decree, conviction or other proceedings is subject to appeal and a time is limited by Law for the bringing of the appeal, the court or Judge may adjourn the application for leave until the appeal is determined or the time for appealing expired."***

(See also Order 53 Rule 2 of the Civil Procedure Rules) There is no statutory exemption to this rule on essence of time to file an application

for judicial review. As a general rule the time limitation condition stated in the statute and Order 53 Rule 2 of the Civil Procedure Rules will be treated as jurisdictional so that the court will not consider any admissible evidence for its non-fulfillment. However, an important step in jurisprudential development principled on a practical approach anchored in Article 47, on right to a fair Administration Act and Article 48 on right to access courts have the legal effect of extending time to remedy the required six months' period.

The fundamental principles to extend time are as discussed in the **Nicholas Salat case v IEBC.** The important question to be answered is whether the delay has been sufficiently explained and that the relief would not cause substantial hardship or prejudice or is detrimental to fair administration of justice.

In instant case, it follows that the petitioners though seeking judicial review remedy avoided compliance with the Law Reform Act Section 9 (3) and Order 53 Rule (2) of the Civil Procedure Rule as to the constitution on time. Obviously, the power this court is being asked to exercise is supervisory jurisdiction on the basis of the impugned Judgment by Kadhis Court in Succession Cause No. 27 of 2017 and 87 of 2008. The importance of the petition being a judicial review matter can be illustrated from the background text and pleadings by the petitioners considering the historical facts of this litigation. Succession Cause No. 87 of 2008 in the Kadhis Court was determined on 26.2.2010.

It is apparent from the Judicial Review Application No. 3 of 2016 the High Court determined material issues in the matter of Malindi Kadhis Court Succession Cause No. 87 of 2008. The application sought by five of the current respondents to this petition to be granted the relief of certiorari was declined in toto for want of merit.

The petition so called falls on two fronts first on the essential requirement of the rule as to time that it must be made promptly before the six months period or earlier. Secondly, in the event there was a justice need on application to seek leave of the court to extend the time for making the application.

What the petitioners are seeking is to apply for the second time for this court to review and quash the Kadhis decision on inheritance and distribution of the estate of the deceased.

The fundamental question is whether the petitioners have satisfied an element which is essential for a lawful exercise of discretion to grant the judicial review remedies in the petition.

As to whether the petitioners rights under the constitution more specifically Article 40 and 27 had been violated by the decision of the 5 th respondent. as to the standing of judicial review the case of **Rita Biwott v Council of Legal Education 1122 of 1994 (OR)** the court held:

> ***"My power is not like that of an appellate authority to override the decision of the council for legal education. Mine is that of directing my mind to the issue as to another or not the council for legal education has acted on the principles of natural justice and fairness in this particular matter, on the facts before it and in the circumstances prevailing at the material times."***

As the court correctly observed in the Indian Case of **Partup Singh v State of Purjab AIR [1964] SC 72**

> ***"The basic principle is that the courts would not interfere with the probe into the merits of the exercise of discretion by an authority, as it is not a forum to near appeals from the decisions of the authority. They would not go into the question whether the opinion followed by the concerned authority is right or wrong. The court does not substitute its own views for that of the concerned authority."***

See also the principles in **R v Attorney General & 4 others Exparte – Diamond Hashim Lalji [2014] eKLR, Commissioner of Lands v Kunste Hotel Ltd CA No. 234 of 1995**

The dispute before the Kadhis court in Succession Cause 87 of 2008 was essentially between **Ahmed Mohamed Honey** and **Omar Mahendan, Nuru Omar Mahendan, Anzun Omar Mahendan, Farida Omar Mahendan, Malkia Omar Mahendan** and **Ferruz Omar Maghram.** The petitioners are strangers in so far as the litigation in Succession 87 of 2008 prima facie parcel of land No. 332 Malindi was a subject of succession and inheritance determined by the Kadhis court in his Judgment dated 26.2.2010. The Law required of the Kadhi to determine the cause on the issues that flow from the pleadings and the evidence presented by the parties and to pronounce Judgment on the issues arising from the claim as framed by the parties or the court.

On the basis of the material placed before this court can the petitioner be entitled the remedies of judicial review the case so stated in the petition is prima facie valid in **Sharma v Brown – Antolve and others 2006 UKPC 780** the court held:

> ***"The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy."***

See **R v Legal aid Board Ex Hughes [1992] 5 ADMINI LR 623, 628** and **Fordhan judicial Review Hand book 4th Edition 2004 Pg 426** – But arguability cannot be judged without reference to the nature and gravity of the issue argued. It is a test which is flexible in its application.

As the English Court of Appeal recently said with reference to the Civil Standard of Proof in **R (N) v Mental Health Persons Tribunal (Northern Region 2006 QB 468 Paragraph 52** in a passage applicable **Mutatis Mutandis** to arguability:

"The more serious the allegation, or the more serious the consequences if the allegation is proved, the stranger must be the evidence before a court will find the allegation proved on a balance of probabilities. Thus the flexibility of the standard lies not in any adjustment, to the degree of probability required for an allegation to be proved such that a more serious allegation has to be proved to a higher degree of probability but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."

The emphasis from the above case law is one of elevating judicial review not to be determined merely by the decision making process but more on the substance than form.

In the present petition going beyond the decision making process the scrutiny of the evidence on record shows the following: it cannot be said with certainty the parcel of land known as 332 Malindi is owned by the petitioners.

According to the National Land Constitution Report of 13.3.2018 **"the decision was reached LR No. 332 Malindi rightfully belonged to all the thirteen families but not the Late Mahfudh's family and Fatma Sharrif Salim &other only"**

The commission directed the process of subdivision for the benefit of the **Mahfudh's families** to obtain title deed for their land. In short the petitioners named are or not perceived to be rightful owners of the land. Under Article 40 of the constitution does not correspond with the real threatened interest or rights on the ground.

It is a reality for whatever reason that the land rights claimed by the petitioners also has been confirmed to have other interested parties to the legal or equitable interest besides the petitioners. The constitutional petition was really a collateral challenge against other interested parties who apparently claim superior right to that of the petitioners.

The issue inherent in this constitutional petition is in regard of the doctrines of res judicata and estoppel. Under Section 7 of the Civil Procedure Act for a plea of res judicata to succeed the following conditions must exist:

> ***(a). The matter directly and substantially in issue in the subsequent suit or issue must be same matter which was directly and substantially in issue in the former suit. A matter directly and substantially in issue is every matter in respect of which relief is claimed in a suit. A matter cannot be said to be directly and substantially in issue unless it was alleged by one party and denied or admitted, either expressly or by implication, by the other side. It is not enough that the matter was merely alleged by one party.***
>
> ***A suit may involve matters collaterally or incidentally in issue. To constitute res judicata a matter must be in issue 'directly and substantially' as distinguished from 'collaterally or incidentally' in a former suit. A matter 'collaterally or incidentally' in issue is a matter in respect of which no relief is claimed, but which is put in issue to enable the court to decide on another matter which is 'directly and substantially' in issue.***
>
> ***(b). The matter must be between the same parties or parties under whom they or any of them claim. Since Judgments and decrees bind only parties and their privies (those claiming under them) it must be that besides a repeat of the issues litigated previously, there is also a repeat of the parties to the action. Parties to an action are those whose names are on the record at the moment a decision is passed and it does not matter that such party was not on the record at commencement of proceedings. Similarly, if in the course of proceedings but before decision, a party is struck off the record or dies then he ceases to be a party and a plea of res judicata cannot be sustained if the parties are different.***

The essence of res judicata is bring an end to litigation. Either to the persuasive case in **Belize Port Authority v Eurocaribe Shipping Services Limited and Another Civil Appeal No. 13/2011** adopted the passage from the landmark case of **Henderson v Henderson** said as follows:

> ***"On the basis of these authorities, I would therefore conclude that the doctrine of res judicata in the modern law comprehends three distinct components, which nevertheless share the same underlying public interest that there should be finality in litigation and that a party should not be twice vexed in the same matter. The three components are: (i) cause of action estoppel, which, where applicable, is an absolute bar to relitigation between the same parties or their privies; (ii) issue estoppel, which, where applicable, also prevents the reopening of particular points which have been raised and specifically determined in previous litigation between the parties, but is subject to an exception in special circumstances; and (iii) <u>Henderson v Henderson</u> abuse of process, which gives rise to a discretionary bar to process, which gives rise to a discretionary bar to subsequent proceedings, depending on whether in all the circumstances, taking into account all the relevant facts and the various interests involved, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before' (per Lord Bingham, in <u>Johnson v Gore Wood & Co (a firm)</u>, at page 499). There can be no doubt, in my view, that in Johnson v Gore Wood (a firm), the House of Lords was concerned to circumscribe somewhat more closely the limits of <u>Henderson v Henderson</u> abuse of process and to confine its applicability to cases of real misuse or abuse of the court's processes, or oppression." (Emphasis as in original).***

In the case of **Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] eKLR**, the Court of Appeal captured the doctrine as follows:

> ***"The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome***

nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

Giving the above principles efficacy to the instant constitutional petition parties continued to litigate on the same outstanding issues in the following court cases **JR NO. 2 OF 2017 at Malindi, JR NO. 6 OF 2017 at Malindi, JR NO. 13 OF 2017 at Malindi. Misc. Application NO. 13 OF 2014, ELC NO. 25 OF 2019, CMC SUCCESSION CAUSE NO. 60 OF 2018, Kadhis Court NO. 87 OF 2008**

For whatever reason the executory Judgments declared the irrespective rights of the parties in respect to the suit property. In my respective view the main contention remain to be **LR No. 332/group 6377**. The many question to be asked is where the circumstances have so changed to elevate the final decision made on the merits of the claim to a constitutional petition. On these same facts it is difficult to understand what new issues have arisen for the petitioners to invoke Article 22 and 23 of the Constitution to enforce infringement of a right to private property under Article 40. As to whether the petitioners' dissatisfaction with the Kadhis Court Judgment is a breach of the constitution has not been established on balance of probabilities on account of the evidence so far presented to this court.

In this petition, if the National Land Commission decision is anything to go by there is no right or interest over property which is exclusively owned by the petitioners which warrant protection by the constitutional court.

There may be some plausible interest and rights but they cannot be addressed under the fundamental breach in the constitution. For the above reasons the petitioners are not entitled to any of the reliefs and declarations under Article 22, 23 and 40 of the Constitution. The doctrine of estoppel and res judicata applies to this petition. Of course, the petition, is dismissed due to its invalidity and merit with no orders to costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF DECEMBER 2019.

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R. NYAKUNDI

JUDGE

<u>In the presence of:</u>

1. The Petitioners

2. The Respondents