



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL 14 OF 2016 (formerly 135 of 2015)

MUMTAZ ALI KHAN

NURU MOHAMED ABDALLA

GULAM OSMAN RAMCHARAN.....APPELLANTS

VERSUS

MUSHTAK YAKUB KALU

SHAFIU ALI MOHAMED.....RESPONDENT

JUDGEMENT

(An Appeal from the Ruling and Order of Hon. Sheikh Abdulhalim H. Athman, Principal Kadhi delivered on 27.8.15 in Mombasa Kadhi Succession Cause No. 41 of 2015)

1. The Respondents herein filed Succession Petition No. 41 of 2015 dated 20.2.15 against the Appellants in respect of the estate of Nyamwanzi Salim Mzuri (the deceased) who died on 6.7.78 at Majengo, Mombasa. The parties are all grandchildren of the Deceased. The deceased left a house on Plot No. Mombasa/Block XVI/1366 (the Property) situate in Majengo in Mombasa County. The Respondents claimed that the Appellants conspired and forged signatures of other heirs and unlawfully sold shares of the Property and thereby locked out other heirs from benefitting from the same. The Respondents therefore sought a declaration that Property remains the part of the estate of the Deceased and that the purported sale of the same by the Appellants is null and void. The Respondents further sought a determination of the estate, the heirs and their shares and a vesting of the estate in the heirs in their determined shares.

2. The Appellants filed a Notice of Preliminary Objection dated 12.6.15 objecting to the jurisdiction of the Kadhi's Court to entertain the matter. They argued that the Petition does not involve inheritance but the dispute is over the transaction of sale of the Property over which the Kadhi's Court lacked jurisdiction.

3. In the impugned Ruling, the Hon. Principal Kadhi dismissed the preliminary objection. The Hon. Principal Kadhi and found that the question as to whether the estate of the Deceased was properly distributed amongst his heirs is a question of inheritance that falls within the jurisdiction of the Kadhi's Court as set out in Article 170(5) of the Constitution and Section 5 of the Kadhis Court Act.

4. The Appellants were aggrieved by the decision of the Hon. Principal Kadhi and preferred the Appeal herein. The grounds of appeal are that the learned Principal Kadhi erred in law and fact in that he:

1. Found that the cause of action was a succession suit and that the Petition did not involve sale of shares of the Property.
2. Held that he had jurisdiction to entertain the matter.
3. Disregarded the Appellants' submissions and misapprehended the law thereby arriving at a wrong decision.
4. Delved into issues not raised by the Appellants and dismissed the Preliminary Objection.

The Appellants prayed that the appeal be allowed and that the Ruling be set aside and the Preliminary Objection upheld and the Petition

dismissed. They also prayed for costs.

5. Parties filed their submissions which were highlighted before me with the Hon. Chief Kadhi sitting as assessor as required by Section 65(1)(c) of the Civil Procedure Act which provides:

“(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. I have considered the appeal and the rival submissions. The issue for determination is whether the Hon. Principal Kadhi erred in dismissing the Preliminary Objection raised by the Appellants challenging his jurisdiction to entertain the Petition before him.

7. To begin with the Respondents submitted that Section 75 of the Civil Procedure Act, and Order 43 of the Civil Procedure Rules list the orders in respect of which an appeal shall lie as of right. An appeal against an order dismissing a preliminary objection is not one of them. As such the Appeal herein against the order dismissing the Preliminary Objection is incompetent having been filed without prior leave of the Court and the same ought to be struck out.

8. The matter filed in the Kadhi’s Court was a Succession Petition and thus the applicable law is the Law of Succession Act and not the Civil Procedure Act. Section 50 (2) of the Law of Succession Act provides:

“50. Appeals to High Court

(1) ...

(2) An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi’s Court in respect of the estate of a deceased Muslim and, with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.”

9. From the foregoing provision, it is clear that an appeal in respect of any order or decree by a Kadhi’s Court shall lie to the High Court (emphasis mine). Any order or decree includes an order dismissing a preliminary objection. It is only an appeal to the Court of Appeal on a point of law that requires prior leave. Accordingly my finding is that the Appeal is properly before this Court.

10. The Appellants fault the Hon. Principal Kadhi for dismissing the Preliminary Objection. The Appellants had challenged the jurisdiction of the Kadhi’s Court to deal with a matter concerning a sale agreement the nullification of which the Respondents sought. The Respondent argued that the subject matter before the Court was a house without land belonging to the Deceased and the alleged transaction for the purchase of land upon which the house stands. They claimed that the property was sold without the consent or notice to the rightful heirs. The Court had to make a finding on the disputed facts as such it was not a proper case in which a preliminary objection could be raised.

11. The jurisdiction of any Court is derived from the Constitution or statute or both. This was well articulated by the Supreme Court in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR as follows:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

12. The Kadhi’s Court derives its jurisdiction from Article 170(5) of the Constitution of Kenya 2010 which provides:

“The jurisdiction of a Kadhis’ court shall be limited to 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 and submit to the jurisdiction of the Kadhi’s courts.”

Section 5 of the Kadhi’s Court Act replicates the above provision.

13. In the Petition, in addition to standard prayers in a succession petition before the Kadhi’s Court for a determination of the estate and heirs the deceased and their respective shares therein, the Respondents made the following 2 other prayers:

a) A declaration Order that Property that the purported Sale of the Deceased’s Estate/ House on Plot No. MOMBASA/BLOCK XVI/1366 (ORIG. NO. MSA /XVI/22/250) situated at Majengo area within Mombasa County was and is Null and Void.

b) A further Declaration Order that the House on Plot No. MOMBASA/BLOCK XVI/1366 (ORIG. NO. MSA /XVI/22/250) situated at Majengo area within Mombasa County was and still remains the Deceased’s Estate.

14. The Hon. Principal Kadhi while dismissing the Preliminary Objection stated in his Ruling thus:

“In this case the parties agree the property originally belonged to the estate of the deceased herein but the dispute is whether or not the heirs had consented on the transaction and distribution of proceeds. The transaction was done on 11th February 1999 when most primary heirs were alive. The title is already transferred to third parties... The question of whether or not the estate of Nyamwanzi was properly distributed among primary heirs is a question of inheritance of estate of a deceased Muslim. It falls within the meaning of Article 170(5) of the Constitution of Kenya, 2010 and Sec. 5 of the Kadhis court Act, Cap 11.”

15. The jurisdiction of the Kadhi’s Court is limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance. This Court appreciates that the question as to whether or not the estate of the Deceased was properly distributed among primary heirs relates to the issue of inheritance. However, the Property is now registered in the name of a third party and the validity of the agreement pursuant to which the property changed hands is being challenged. The Respondents also sought a declaration that the said agreement be declared null and void. The question as to the validity of and prayer for nullification of the sale agreement is clearly outside the ambit of the Kadhi’s Court and any attempt to entertain the same would be tantamount to the Kadhi’s Court arrogating to itself jurisdiction exceeding that which is conferred upon it both by the Constitution and by statute.

16. Hon. Sheikh Al Muhdhar A. S. Hussein, Chief Kadhi was of the opinion that the appeal should be allowed and stated in part:

“Ground (1, 2) of appeal is correct, that the Hon. Kadhi treated the case before him as a Succession Case which it is not. I therefore support this one...”

The learned Kadhi erred in his findings that the Kadhi Court has jurisdiction to entertain matters of sale and Purchase.”

17. With respect, I disagree with the Hon. Chief Kadhi that the matter before the Hon. Principal Kadhi was not a succession matter. Save for the question regarding the validity of the sale agreement and the prayer for nullification of the same, the matter was properly before the Kadhi’s Court as a succession matter. I do however concur with the Hon. Chief Kadhi that the Hon. Principal Kadhi erred in assuming jurisdiction over the question relating to the sale and purchase of the Property. In the circumstances, my conclusion is that the Appeal succeeds in part. The matter before the Hon. Principal Kadhi may therefore proceed to hearing save for the matters touching on the sale and purchase of the Property in respect of which the Hon. Principal Kadhi is devoid of jurisdiction. There shall be no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 4th day of May 2018

M. THANDE

JUDGE

In the presence of: -

..... **for the Appellants**

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

.....**Court Assistant**