



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC CIVIL APPL. NO. 20 OF 2014**

**SALIM ABDALLA.....APPLICANT**

**VERSUS**

**SWABRA ABDULLA.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The applicant filed a Notice of Motion dated 16<sup>th</sup> May 2014 under sections 18(1) (b) (i) of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules and Section 1 (A) and (B) of the Civil Procedure Act and all other enabling provisions of the law, seeking the following orders:

*a) That the application be certified as urgent and its service be dispensed within the first instance.*

***b) That the court be pleased to transfer Kadhi's court case No. 131 of 2013, Mombasa to the High Court for adjudication and final determination.***

*c) That there be a stay of proceedings in Kadhi's Court Case No. 131 of 2013 Mombasa pending the hearing and determination of the application and/or further orders of the court.*

*d) That the honorable court makes an order as may be expedient and just to meet the ends of justice.*

2. The application was based on the grounds set out in the application as follows:

*a) The court lacks Jurisdiction to adjudicate and dispose of the matter.*

*b) That the respondent and other beneficiaries are tainted with fraud and or criminal activities to wit forgery, making a false document of title and outright corruption at the land registry.*

*c) That the petition is a red herring calculated to hood-wink the public and the applicant thus give credence to title illegally obtained.*

*d) That justice of the case demands that there be rectification of title and then distribution to the rightful heirs, which may not be achieved by pendency of the petition before the Kadhi's court.*

*e) That it is just and equitable in the circumstances of the case.*

3. The application was further supported by the affidavit of Salim Abdalla setting out the facts of the case as follows:

*a) He is the eldest son in the family of his Father Abdalla Ahmed Uwed (deceased) and his other siblings were; Abdulhakim Abdalla (brother), Abdu Salama Abdalla (brother), Amer Abdalla ( deceased brother), Abdul Munem Abdalla (brother), Murad Abdalla(brother), Naima Abdalla(sister), Swabra Abdalla(Sister).*

*b) That his father died on the 28<sup>th</sup> June 1981, leaving the following properties; Cash deposit Kshs. 50,000/- or so, Ganjoni Butchery, at Ganjoni Mombasa, Super Meat Butchery at Kadherboy building Mombasa, Premises on Plot No. xiii/238 at Kingorani, xv/723 at*

Majengo, where the entire family resided when both parents were still alive, XVII/1332 at Sega Mombasa, XIII/136 situated at Kingorani, XV/430 Majengo Mvita.

- c) That when his father passed away in 1981 leaving the properties in the hands of his mother, and being the eldest son he opted not to disturb the status quo that his father had left.
- d) That his mother died in the year 2000 and he also had an accident severing his hand at shoulder level leading to hospitalization for so long.
- e) That he used to run the butchery business namely Ganjoni Butchery at Ganjoni, Kizingo Butchery and Super Meat Butchery jointly with Rubea brothers.
- f) That his father incorporated him as a partner as early as 1973. That he was served by the respondent with a Petition No. 131 of 2013, list of witness and list of documents sometime in August 2013.
- g) The estate of his father had been shared out as a wedding cake and the residential premises which he used to stay had become the property of his brother.

#### **RESPONSE**

4. Swabra Abdalla swore a replying affidavit in response to the application. She averred that the following were the properties that formed part of the deceased's estate.

- a) Cash deposit at Bank ksh 50,000,000/=
- b) Motor-vehicles Peugeot, Renault and a canter
- c) Butchery at Ganjoni (super meat) equipped with cold storage, meat display counters, furniture, fittings machines and implements.
- d) Half share Ganjoni Butchery
- e) Half share in Kizingo Butchery
- f) House at Kingorani on plot No. 18/73
- g) Two shambas at Vanga (bought by the respondent from the deceased's money)
- h) Two houses at Vanga (bought by the respondent from the deceased's money).
- i) Plot No. Mombasa/Block XV/723
- j) Plot No. Mombasa/ Block XII/238
- k) Plot No. Mombasa/Block VV/430
- l) Plot No. Mombasa/Block XII/236
- m) Plot No. Mombasa/Block XVII/1332
- n) Plot No. Mombasa/Block XXII/138
- o) House on Plot No. 455/21 at Tangana Road Ganjoni (Half Share)
- p) Plot in Sanaa-Hudeida in Yemen (Half share).

5. She further stated that the applicant ran the business for his own benefit and misappropriated the proceeds. The deceased's estate is yet to be shared out amongst all beneficiaries. All the properties had been listed in the petition before the Kadhi and some of the properties had been registered in the beneficiary's names for safety purposes and not individual gain. She urged this court to dismiss the application.

6. This response prompted the applicant to file another application dated 30<sup>th</sup> January 2015 asking this court to determine the application since the Kadhi's court did not have jurisdiction to hear the matter.

#### **Submissions**

##### **Applicant's submission**

7. Mr. Gichana, learned counsel for the applicant urged as follows;

*“Section 15 of the Civil Procedures Act, where there is a question of law, the matter should be brought before the court. Page 16 of the Application lists of documents and the titles are enclosed. The titles do not belong to the deceased. They belong to the petitioners before the Kadhi. They have already changed the ownership. They want the Kadhi’s court to rectify. They ask the court to ratify the offence. There is a point of law whether a party can come to court with tainted hands. There is need to rectify the title back to the deceased’s name and then be distributed in accordance with Islamic Sharia. The court with jurisdiction under Article 162 is Environment & Land Court. The High Court should transfer the matter to itself and subsequently to the land court, which has jurisdiction over matter. The rectification of the titles can only be done by the court under Article 162. After the rectification the Kadhi court can distribute it to the heirs, before the Kadhi’s court cannot rectify a title. The Kadhi’s court has no jurisdiction to deal with property registered in other persons other than the deceased.*

*The proceedings should be stayed pending determination of the proceedings before the court. The matter is scheduled for 17/8/15 for mention.”*

8. Mr. Hamza, learned counsel for the respondent urged as follows:

*“Application lacks merit and has no basis in law section 15 of the CPA does not apply. Where a party raises a point of law, the court constitutes a bench for the determination of the particular law not the transfer of the entire suit. The High court has jurisdiction to transfer suits to another subordinate court but not to transfer a suit for the subordinate to a High Court.*

*If the Kadhi’s court has no jurisdiction, the suit does not exist. It cannot be transferred. The applicant has not challenged the Kadhi’s court jurisdiction in defence. He has only said that the titles be rectified and the shares be given to the beneficiaries. The applicant is not challenging all the prayers if the suit. He only challenges title not registered in the name of the deceased.*

*The petitioners went to the Kadhi’s stating that the properties although registered in our names do not belong to us. They belong to the deceased. They were given a stay further to give a reason why they registered the properties in their names. The registered proprietors have said that the properties are not theirs. They have sought that the properties be distributed in accordance with the Islamic Sharia.*

*If the Kadhi finds that the property should belong to a different person he can direct the registered owner to transfer it to the person entitled. Rectification can only arise if there is an error in the title.*

*The High court cannot order a transfer from the Kadhi’s court to itself. The Kadhi’s court is a Constitutional court. It is not formed by legislation. It is formed by the constitution. The High Court is also a constitutional court. A party can only come to the Kadhi’s court when a party refuses to be under a kadhi’s court. The party may opt not to submit to jurisdiction of the Kadhi’s court.*

*There is nowhere in the pleadings of the applicant that he refuses to submit to that jurisdiction of the court.*

*I pray that the application for transfer be dismissed with costs.”*

9. In reply, Mr. Gichana submitted that:

*“Section 11 of CPA provides for situation where a point of law. The petitioners agree that the properties are in their names and seeks orders reversing. The Kadhi’s court has no jurisdiction to determine land matters.*

*I refer to Karanja v. Kinyanjui per Waweru J. HCC 357 of 2010 at Nairobi. Court has power to transfer a matter where the court has no jurisdiction to hear the matter.”*

### **Issue for Determination**

10. The court has to consider and determine whether the suit before the Kadhi’s Court shall be transferred to the high Court for hearing and disposal.

11. It is indoutable that the High Court has power under section 18 of the Civil Procedure Act to transfer suits from subordinate courts in proper cases as follows:

#### **“18. Power of High Court to withdraw and transfer case instituted in subordinate court**

*(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—*

*(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or*

**(b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—**

**(i) try or dispose of the same; or**

(ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or (iii) retransfer the same for trial or disposal to the court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.”

### **Determination**

12. The applicant urged that the Kadhi court does not have jurisdiction to hear and determine the case. Our Kenyan courts are guided by the Constitution. In case of **Lillian 'S' [1989] KLR 1** the Court succinctly set out the principles and context for determination of jurisdiction. Nyarangi, JA stated, *inter alia*:-

“Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

13. Also in **Lillian 'S' Case** as restated by the Supreme Court in **In the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of the Constitution-** Constitutional Application No. 2 of 2011:-

“The Lillian ‘S’ case [[1989] KLR 1] establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a 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.”

14. Jurisdiction is granted either by the Constitution or Statute as the Supreme Court of Kenya has held in **Samuel Kamau Macharia & another – vs- Kenya Commercial Bank & 2 Others-** Supreme Court Civil Appeal (Application) No. 2 of 2011:-

“A court’s jurisdiction flows from either the Constitution or legislation or both.”

15. With regard to the jurisdiction of the Kadhi’s Court, Article 170 provides as follows:

(2) A person shall not be qualified to be appointed to hold or act in the office of Kadhi unless the person—

1. (a) professes the Muslim religion; and

2. (b) possesses such knowledge of the Muslim law applicable to any sects of Muslims as qualifies the person, in the opinion of the Judicial Service Commission, to hold a Kadhi’s court.

(3) Parliament shall establish Kadhis’ courts, each of which shall have the jurisdiction and powers conferred on it by legislation, subject to clause (5).

(4) The Chief Kadhi and the other Kadhis, or the Chief Kadhi and such of the other Kadhis (not being fewer than three in number) as may be prescribed under an Act of Parliament, shall each be empowered to hold a Kadhi’s court having jurisdiction within Kenya.

(5) **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.

16. The applicant herein professes the Muslim faith together with the respondent. He however does not agree to the issues being determined before the Kadhi’s court. Once one party fails to agree then pursuant to Article 170(5) the court cease to have jurisdiction and it has to down its tools. The applicant raises issues on fraud and forgery in relation to the title deeds in question. At ground ii of the Notice of Motion dated he stated as follows:

“That the respondent and other beneficiaries are tainted with fraud and or criminal activities to wit forgery, making a false documents of title and outright corruption at the Land Registry.”

17. Further, in the Defence and Counterclaim filed by the applicant herein on 29<sup>th</sup> August 2013 at paragraph 16 (b) the applicant prayed as follows:

“The title fraudulently transferred be rectified, valued and distributed according to Islamic Sheriah”

18. The issues raised above are criminal in nature that the Kadhi’s Court which are beyond the jurisdiction conferred by the Constitution as per Section 5 of Article 170. Similarly Section 5 of the Kadhi’s Court Act Cap 11 sets out the jurisdiction of the Kadhi as;

*“A Kadhi’s court shall have and exercise jurisdiction, namely the determination of questions of Muslim Law relating to personal status, marriage, divorce or inheritance in proceedings in which all parties profess the Muslim religion.”*

19. The applicant further pleaded at paragraph 9 of his Defence and Counterclaim as follows:

*“The respondent is agreeable to the distribution of the Estate in accordance with the Islamic Sheria to which he belonged but avers that there had been intermeddling in the Estate to an extent that it is practically impossible to achieve the distribution provided by Sheriah and shall contend that the matter be remitted to High Court for disposal.”*

20. The applicant in their submission concedes to professing the Muslim faith and they did not object to the distribution of the property by the Kadhi’s Court. Their only problem was that the properties, which had been listed for distribution, had been registered under the beneficiaries’ names and not the deceased. Further the applicant had urged that the issue on title was better handled before the court established under Article 162 of the Constitution.

21. On the other hand the respondent had urged that if the Kadhi’s Court did not have jurisdiction then there was no suit at all to transfer. With respect, the court is unable to agree in view of imperative of Article 159(d) of the Constitution that justice shall be administered without undue regard to procedural technicalities. A matter must be transferred to the court with jurisdiction or that which is best suited to hear the matter, without requiring the litigant to file fresh proceedings in the proper court.

22. The High Court is the succession court under section 47 of the Law of Succession Act, which provides as follows:

47. Jurisdiction of High Court

*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:*

23. The jurisdiction of the Kadhi’s Court is reserved under section 48 (2) of the Act as follows:

*“48. (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.”*

24. In addition, the Kadhis’ Courts Act, cap 11 Laws of Kenya, itself acknowledges the limit of the Kadhi’s Court to determination of questions of Muslim law and the unlimited jurisdiction of the High Court in succession matters that come before it as follows:

“5. Jurisdiction of the 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.”*  
[Emphasis added]

25. In the case of **Genevieve Bertrand v. Mohamed Athman Maawiya and Anor.**, Malindi Civil Application No. 24 of 2013 [2014] eKLR of 20<sup>th</sup> March 2014 the Court of Appeal (Okwengu Makhandia and Ouko, JJA), considered Article 170 (5) of the Constitution on the jurisdiction of the Kadhi’s Court and held that –

*“23. In the case of the Kadhi’s Court, it is a creature of the Constitution (section 66 of the retired Constitution and article 169 of the current Constitution). The jurisdiction of the Kadhi’s Court is specifically defined under Article 170 (5) of the Constitution and section 5 of the Kadhi’s [Court] Act, as “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 Court”. Thus the jurisdiction of the Kadhi’s Court is determined by the existence of three factors. That is the subject matter of the claim or dispute, the party’s Muslim faith, and the party’s submission to the jurisdiction of the Kadhis Court.”*

[Emphasis added]

26. It is clear that while the High Court has unlimited jurisdiction in succession matters, the Kadhi’s Court’s jurisdiction is limited on basis of the subject matter of the dispute to **questions of Muslim law** with regard to personal status, marriage, divorce or, as relevant here, inheritance.

**Conclusion**

27. While the Kadhi’s Court has jurisdiction to deal with the matter of inheritance of the estate of the deceased herein under Article 170 of the Constitution, and whereas the applicant does not object to its dealing with the estate for purposes of distribution, the registration of the estate properties into the names of the beneficiaries before distribution may call for rectification of land registers which only the High Court as a succession court, or in a suit in that behalf the Environment and Land Court, may lawfully order. Hence the need for hearing and determination of the matter by the High Court, and consequently, the necessity to transfer the suit to the High Court, pursuant to section 18 (1) (b) (i) of the Civil Procedure Act, for hearing and final disposal.

28. Additionally, the issues of fraud and forgery alleged by the applicant against the petitioners in the Kadhi's Court suit are not within the jurisdictional competence of the Kadhi's Court.

29. Moreover, the parties have made counter-accusations of intermeddling. If any offence against protection of the estate by the intermeddling acts of any of the beneficiaries who have registered estate property in their names for whatever motivation – whether “for protecting the plots from land grabbers and the applicant” as alleged by the petitioner or outright fraud as alleged by the applicant - is established, it is the High Court as the succession court with unlimited jurisdiction that is best placed to implement the remedy of section 45 (2) (b) of the Law of Succession Act.

30. Section 45 of the Act is in the following terms:

“45. No intermeddling with property of deceased person

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

**(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”**

31. Section 2 (4) of the Law of Succession Act applies the Act to succession of deceased Muslims Part VII of the Act, which is on Administration of Estates including the provisions on intermeddling as follows:

“2. Application of Act

(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.

(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.

(3) Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.

**(4) Notwithstanding the provisions of subsection (3), the provisions of Part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim dying before, on or after the 1st January, 1991.**

[Act No. 16 of 1977, Sch., Act No. 13 of 1978, Sch., Act No. 21 of 1990, Sch.]”

**Orders**

32. Accordingly, for the reasons set out above, the court makes the following order:

1. The Mombasa Kadhi's Court Succession Case No.131 of 2013, **Swabra Abdulla v. Salim Abdulla** be transferred to the High Court of Kenya at Mombasa for hearing and final determination.

2. There shall be no order as to costs.

Order accordingly.

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 11<sup>TH</sup> DAY OF OCTOBER 2018**

**E.K. OGOLA**

**JUDGE**

**APPEARANCES:**

M/S Gichana Bw'Omwando & Co. Advocates for the Applicant.

M/S A. O Hamza & Co. Advocates for the Respondent.