



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
MISCELLANEOUS CIVIL APPLICATION NO. 113 OF 2010 J.R
IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF AN APPLICATION BY IBRAHIM ALI OMAR AND AHMED ALI OMAR FOR AN ORDER OF CERTIORARI TO REMOVE TO THIS COURT FOR CHIEF KADHI OF THE 15TH APRIL, 2010 VESTING ONE QUARTER (1/4) OF THE APPLICANTS PARCEL OF LAND MOMBASA/BLOCK XX1/275 TO ONE KHALID ALI OMAR AND ORDERING THE REGISTRAR OF LANDS TO EFFECT THE SAID VESTING ORDER

AND

MOMBASA KADHIS COURT CIVIL CASE NO. 212 OF 2007 KHALID ALI OMAR VS IBRAHIM ALI OMAR AND AHMED ALI OMAR

BETWEEN

REPUBLIC

VS

THE CHIEF KADHI.....RESPONDENT

EX-PARTE IBRAHIM ALI OMAR

AHMED OMAR.....APPLICANTS

AND

KHALD ALI OMAR.....INTERESTED PARTY

RULING

THE APPLICATION

1. The substantive application before the Court is a judicial review application in which it is contended by the ex parte applicant that the Kadhi's Court has no power to issue vesting orders. By a Notice of Motion dated the 22nd April 2014 therein expressed to brought under section 1B and 3A of the Civil Procedure

Act, the ex parte applicant seeks an order for the hearing of matter by a bench of three judges as follows:

1. *THAT this honourable court be pleased to order **that the hearing of the application for Judicial Review do proceed before more than one Judge** in view of the conflicting decisions of the High Court in respect of the power of the lower court to sign vesting order.*

2. *THAT the costs of this application be in the cause.*

2. The application was based upon grounds as follows:-

(a) *“That there are two decisions on whether the subordinate courts do have power to sign vesting order.*

(b) *That it is important that the issue to be settled once and for all so that the law with regard thereof can be clear.”*

3. The application was supported by the affidavit of the counsel for the ex parte applicant, Mr. KIARIE KARIUKI as follows:

2. *THAT at the time of filing the application for Judicial Review herein, the law with regard as to whether (sic) the lower court has power to sign a vesting order was settled in Mombasa High Court Miscellaneous Civil Case No. 69 of 1990 – In the matter of the application by Dr. Sylvester Ng’ang’a and Anne Brunise. Chief Justice A R W Hancox and Justice F Shields had decided that the subordinate courts do not have the power to sign a vesting order as witness the attached copy of the Judgment marked ‘A’*

3. *THAT thereafter in the matter of estate of Saidi Abdalla (deceased) Justice Muriithi ruled that the Chief Kadhi has a power to sign a vesting order as Witness the annexed copy of the said Judgment marked “B”.*

4. *THAT again Justice Ibrahim (as he then was) made a finding that letters of administration is not a requirement under Islamic Law for the purpose of inheritance or succession proceedings as witnessed in the annexed copy of the said judgment marked ‘C’.*

5. *THAT from the foregoing, it is clear that the law is in such a confusion and since one of the issue to be decided is this matter is whether the Chief Kadhi can sign a vesting order, it is important that a decision be reached and for all so that the confusion caused from the above stated authority is cleared and for all.*

6. *THAT it would be in the interest of justice that this matter be heard by three judges so that the said issue can be decided.*

4. The respondent filed a replying affidavit challenging the merits of the application as follows:

“REPLYING AFFIDAVIT OF ABDALLAH AHMED ABDALLAH DATED 21ST MAY, 2016

2. *That I have read the ex parte-Applciant Application (hereinafter referred to as the Application) dated 22nd April 2014, filed on the 23rd April and served upon us on the 20th May, 2014 and wish to reply as follows-*

3. *THAT pursuant to this Honourable court orders of 9th April 2014, the Application has been filed out of time hence the same should be expunged from the court records.*

4. *THAT without prejudice to the foregoing, the entire Application is hypothetical solely meant to further delay the determination of this matter.*

5. THAT the issue of the requirement of letters of Administration as a prerequisite for filing suits before the Kadhi's Court was neither an issue before the Kadhi's Court nor was the same pleaded by the ex parte Applicant both at the leave and the substantive stages of his Application.

6. THAT it would therefore be a fishing expedition to raise the issue now and this Honourable court should not entertain the ex parte Applicant delaying tactics.

7. THAT the substratum of the ex parte Applicant Application was based on an assumption of an alleged decision which is contrary to this Honourable court ruling and position in **Miscellaneous Application Number 736 of 2011 {In the matter of the Estate of Saidi Abdalla (Deceased)}**.

8. THAT the decision in **Miscellaneous Civil Case Number 69 of 1990 In the matter of Civil Suit Number 355 of 1988** attached to the Application is totally substantiated with the ruling of this court hence the interested party finds no reason for the construction of a bench consisting of more than one judge to hear the judicial review application.”

SUBMISSIONS

5. Counsel for the parties – Mr. Kiare Kariuki _for the ex parte applicant and Mr. Mwadzogo for the Interested Party - made oral submissions and ruling was reserved. It is with deep regret that the ruling on this short matter was lost in the maze of heavy workload of the Court and disruption caused by intervening transfer of the court.

6. While the counsel for the applicant emphasized the alleged conflicting decisions of the Court on the question of vesting orders as set out in the supporting Affidavit, the counsel for the respondent pointed out to the lack of such substratum and objected to the delay occasion by such a motion as follows:

“The substratum of the application is lacking. On 9/4/14, the ex parte applicant was granted leave and the issue was the existence of conflicting decisions on whether the Kadhi's Court could issue a vesting order. There are no conflicting decisions. The decision of Hancox, CJ and Shields, J. related to a judgement that was irregularly entered and that is the basis for the holding of the vesting order as illegal. There are no conflicting decisions. The ex parte applicant is delaying the case. The ex parte applicant agrees that the application for reference to three judge bench was filed out of time [after] the Interested Party had filed submissions on the matter on 29/1/2013.”

ISSUE FOR DETERMINATION

7. The Court has no power to order as requested by the ex parte applicant that “**that the hearing of the application for Judicial Review do proceed before more than one Judge**”. Or any other suit, application or proceeding. The order for hearing of a matter by more than one judge may only be made in accordance with the constitutional provisions granting jurisdiction of the High Court under Article 165 of the Constitution of Kenya 2010.

8. The provision for reference to three judges or larger benches is made under Article 165 (4) of the Constitution provides for reference to a bench of uneven number of judges in terms as follows:

“165 (4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.”

Clauses (3) (b) and (d) relate to –

“(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution....”

9. The issue before the Court is, therefore, whether the court will certify the matter as raising substantial question for reference to Chief Justice for empanelment of a three judge bench pursuant to Article 165 (4) of the Constitution of Kenya.

10. There was no contest as to whether the issue of vesting orders in the Kadhi's Court was a matter falling under the interpretative jurisdiction of the High Court under Article 165 (3) (b) or (d) so as to qualify for purposes of Article 165 (4) of the constitution for reference to the chief Justice for empanelment of a three judge bench. I am prepared to accept that the matter touches and concerns the exercise of the jurisdiction of the Kadhis' Court which is squarely a matter for the interpretative jurisdiction of the High Court. Moreover, vesting orders may impact on right to property which is the province of Bill of Rights the subject of the **Bill of Rights** jurisdiction of the Court under Article 165 (3) (b) of the Constitution.

DETERMINATION

11. The only ground herein is that there are conflicting decisions of the Court, one of which was made by this court while serving in Mombasa on the question of vesting orders in property disputes adjudicated by the Kadhi's Court in accordance with the Constitution.

12. This Court had occasion to rule on a similar application for reference to the Chief Justice for creation of a three judge bench in **County Government of Migori & 4 Ors. V. Privatization Commission & 2 Ors.** Nairobi HC Consolidated Petition No. 187 OF 2016 and held as follows:

19. For my part, I consider that 'a substantial question of law' within the meaning of Article 165 (4) of the Constitution of Kenya, 2010 must involve an issue of law relating to the Bill of Rights and Interpretative Jurisdiction of the Court under Article 165 (3) (b) and (d) the determination of which requires an extra-ordinarily or exceptionally wide and in-depth examination of multifaceted factors of both law and fact so that a larger bench of judges has the benefit of efficient and full consideration of the issues arising so as to facilitate the purposes of judicial authority under the Constitution in achieving substantive justice expeditiously and in accordance with the purpose and principles of the Constitution.

*20. That a unanimous (or majority) decision of the larger bench may discourage challenges by appeals to the two higher courts is only a fringe benefit to the core concern for the timely, comprehensive and in-depth consideration of the dispute. The dispute need not be novel, complex or weighty, or one for which there is no precedent of a higher court, or one which is of great importance to the parties or the general public. These can only be added justification for the certification and not the primary movers. In my view, the larger bench that heard the **Boundaries** case involving some 80 the constituencies and 1450 electoral wards in Kenya was properly constituted in view of its huge and varied hinterland of the factors affecting its determination.*

21. It must always be remembered that the High Court judge has the same authority to determine the issue of constitutional interpretation under Article 165 (3) (b) and (d) as with the larger bench of judges and that both are equally subject to appeal to the Court of Appeal whose decision on constitutional interpretation or application is in turn appealable as of right to the Supreme court (Art.163 (4) (a)). Only the Supreme Court's decision binds all other courts save itself (Art. 163 (7)), and that is where considerations of novelty, public importance and finality of decision ought to hold sway in considering whether to enlarge its regular bench of five judges to all the seven judges of the court for determination of a worthy matter."

13. While I would readily find that the issue of vesting orders in proceedings had before the Kadhi's Court is a matter of public importance which affects the whole of the litigation process in matters of inheritance lodged before the Court in accordance with its mandate under the Constitution, I do not accept that the issue of vesting order of any complexity in terms of legal arguments and/or bulk of factual materials to be considered such as to call for the assembly of a bench of three judges. I would reiterate my decision in the **County Government of Migori** case that a single judge of the High Court has the

mandate, responsibility and wherewithal to make such determinations even in matters where there is huge public interest, in accordance with the Constitution and under his or her oath of office.

Other considerations - no risk of bias

14. There is no danger that the matter will be heard by a court whose view on the matter is already known through its previous rulings on the question of vesting orders before the Kadhi's Court. Having transferred from Mombasa this Court will sit to hear the substantive application, which now falls to be heard by any of the other judges of the Court station. The applicant may then not be heard to fear that he would be prejudiced should the Court apply its own previously held views on the issue to the situation presented in his pending application.

CONCLUSION

15. As the full bench of the High Court made up of an uneven number of judges has the same authority as the single judge of the Court, with no powers to overrule the decisions of the single judge, the rationale of existence of conflicting decisions of the Court alone cannot justify a decision to refer the matter for creation of a bigger bench which will have the same authority as the single judge. It is only an appellate court that can settle the question of conflicting decision on a point taken before the High Court. It would therefore be a waste of judicial time to employ three judges of the Court to make the same determination as the single could make, and with no possibility of overruling the previous decisions of the Court, conflicting though they may be.

16. Accordingly, for the reasons set out above, the Notice of Motion for the hearing of the substantive application herein by a bench of three judges for determination of the question of vesting orders by the Kadhi's Court is declined.

17. Costs in the Cause.

EDWARD M. MURIITHI

DATED AND DELIVERED THIS 21ST DAY OF MARCH 2017.

E. K. OGOLA

M/S. Kiarie Kariuki & Co., Advocates for the Applicant.

M/S A. A. Mazrui, Advocates for the Interested Party.