



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 1307 OF 2013

IN THE MATTER OF THE ESTATE OF ABDUL NASSAR

ALIAS NASSAR A. CHANDU (DECEASED)

NAZIMA JANMOHAMMED NASSAR.....OBJECTOR/APPLICANT

VERSUS

NASREEN KAUSER.....PETITIONER/RESPONDENT

RULING

PLEADINGS

The Applicant/Objector filed an application by Chamber Summons under **Section 47 of the Law of Succession Act** and **Rules 59 and 73 of the Probate and Administration Rules** on 28th November 2014 before this court seeking review of the order that was made on 11th March 2014 by this court to transfer the matter to Kadhis' court. The application is also seeking to restrain the Respondent from doing any dealings with the property LR. No. 209/4685. The deceased died testate on 21st of March 2013 as per death certificate no. 0034683. The Applicant/Objector is one of the widows of the deceased. The Applicant and the deceased had one daughter M N, who is four years old. The deceased had another wife Rahat Nassar who had six children S N, S N, F N, A N and N N. The Respondent is a sister to the deceased who was appointed as an executrix in the will.

The Respondent filed a petition for grant of probate and court issued a temporary grant pending confirmation in the High Court. Upon knowledge of the grant, the Applicant filed an application for its annulment/revocation of grant. When the matter came up for hearing on 11th March 2014, Hon. Justice Kimaru gave an order that the matter be transferred to the Kadhis' court for it has jurisdiction to entertain such matters. During the hearing at Kadhis' courts, the Applicant raised a preliminary objection that she had not submitted to the jurisdiction of the court. A ruling by Kadhi A.I. Hussein stated that the Applicant submitted herself to the jurisdiction of court when she filed a replying affidavit to the application made by the Respondent in the Kadhi's courts.

The Respondent stated in her replying affidavit that the matter was referred to Kadhis' courts following the order of this court. The parties to the case profess Islamic/Muslim faith and so was the deceased. The Respondent further stated that the deceased's wishes were to distribute the property according to the Islamic faith. The estate of the deceased is also indebted to four institutions namely;

1. City Council of Nairobi for rates amounting to Kshs. 83,496/=
2. Land Rent amounting to Kshs. 85,774/=
3. Kenya Railways amounting to over Kshs. 2 million
4. Surrender Singh Matharu amounting to 1.2 million as a judgment debt.

The Respondent avers that the estate will be disposed off to the creditors if not paid. The estate has no other funds and it was prudent for her to sell some of the assets and pay off the creditors than disposing off the whole estate.

SUBMISSIONS

The Applicant's position is that the Respondent has not submitted to the jurisdiction of the Kadhi's Court as required under **Article 170(2)** of the Constitution and relied on the following case which states;

1. **Mbogoh Vs Muthoni & another Civil Appeal No. 311 of 2002.**
2. **Peter Amollo Akumu Gould Vs KCB Civil Case No. 616 of 1999.**

The Respondent's position is that the Applicant's application is incompetent as the Kadhis Court heard the preliminary objection and the order by Hon. Justice Kimaru is a valid, legal and regular court order. The respondent relied on the following authorities;

1. **Sophia Mustafa & Others Vs Zufangasia Juma and another Misc No. 84 of 2008.**
2. **In the Matter of the Estate of Ali Shitalo Succession Case No. 151 of 1994.**
3. **In the matter of Maryam Juma Kibanda Succession Cause No. 689 of 2010.**

In the Respondent's submissions in court was that the order for review was not extracted and attached to the application. Therefore there was nothing to warrant a review (**see Trust Bank Ltd Vs Geoffrey Makana Asnayo Civil Case No. 118 of 1998**). The Respondent further submitted that the application did not warrant review. The Applicant in her application did not specify as to whether the review was based on discovery of new and important evidence or an error apparent on the face of record.

The Respondent stressed that the order made by Hon. Justice Kimaru was proper as the same and relied on a case by Hon. Justice Odera **in Zag'llo Zolleyen alias Ali Said Ahmed Vs Abdallah Said Ahmed (2014)e KLR** that;

"...the parties to the case concede that the deceased was Muslim and the advocate of the Applicant confirms that they do not challenge the jurisdiction of the Kadhis' court. That being in line with Article 170(5) of the Constitution, I find that the matter is proper before the Kadhis' courts.....the matter ought to precede on the first instance before the Kadhi and only if any party is dissatisfied with the manner of probate in the Kadhis' court, the matter may move upon appeal into the High Court."

In **Sophia Mustafa & Others Vs Zufangasia Juma and another Misc No. 84 of 2008** Hon. Justice Ibrahim stated that the Kadhis' court was the court best placed to deal with succession matters where the parties were all Muslims. And **In the Matter of the Estate of Ali Shitalo Succession Case 151 of 1994**, Hon. Justice Ibrahim directed the matter be dealt with by the court as all parties were Muslims and held Muslim names. This application was brought after one year from the date when the order was made. There was unreasonable delay on the part of the applicant in this case. In the **matter of Maryam Juma Kibanda Succession Cause No. 689 of 2010** Hon. Justice Kimaru held that Article 170(2) of the constitution does not necessarily require a party to submit to the jurisdiction of the Kadhi's Court.

The Applicant relied on the decision by Hon. Justice Serگون in **Peter Amollo Akumu Gould Vs KCB Civil Case No. 616 of 1999**, where he held that inadvertent failure to annex the decree or order to the motion is not fatal if the order or decree is readily available in the court file. Failure to annex the order by the Applicant was a procedural technicality that did not suffer any prejudice to the Respondent in this matter. The Court of Appeal in **Mbogoh Vs Muthoni & another Civil Appeal No. 311 of 2002** accepted the application when a copy of decree that was intended to be reviewed was not annexed on the application.

ISSUES

The court has evaluated the pleadings and submissions filed by both parties. It has raised two issues for determination;

1. Whether this court can review its orders?
2. If the first issue is answered in the affirmative, whether the order made by Hon. Justice Kimaru can be reviewed?

DETERMINATION

As regards the first issue, this being a civil matter, **Order 45 rule 1 of the Civil Procedure Rules 2010** applies. It provides;

1(1) any person considering himself aggrieved-

a. By a decree or order from which a appeal is allowed, but from which no appeal has been preferred; or

b. By a decree or order from which no appeal is hereby allowed,

And whom from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

This order derives from **section 80 of the Civil Procedure Act** which gives court power to review its own orders or decrees it had previously passed.

From the above provisions, it is evident that this court can review its orders that it has passed based on the 3(three) conditions that have been highlighted above.

Regarding the second issue, an order was made on 11th March 2014 by Hon. Justice Kimaru to refer the matter to Kadhis' courts for distribution of the estate of the deceased. An application to review this order was filed by the Applicant on ground that she did not submit to the jurisdiction of Kadhis' courts and the exercise of the jurisdiction in this matter would be in contravention of Article 170(5) of the Constitution. According to **Order 45 rule 1 of the Civil Procedure Rules**, review is based on 3(three) conditions as highlighted above; first being discovery of new and important matter or evidence and the second being on account of error or mistake apparent on the face of the record and any other sufficient reason . The Applicant did not specify the condition under which she based her application. However, the Applicant affirmed in her application that she did not submit to the jurisdiction.

The court record confirms that the order to transfer the matter to the Kadhi's Court was made in the presence of the Counsel for the Applicant and the Respondent none of the parties raised any issue at the time. In the absence of any of the parties raising issues of submission to the jurisdiction of court, the court

was right in transferring the case to the Kadhi's Court by virtue of the annexed will. The parties in the will have Muslim names and it is to be executed under Sharia law. So it is at the Kadhi's Court that for the first time that the issue of submission to the jurisdiction of court was raised. This is therefore a new issue that had not been raised before therefore the High Court so as to make a determination a review is merited in the circumstances.

Article 170(5) of the Constitution stipulates as follows with regard to the jurisdiction of the Kadhis' courts;

“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 Kadhis’ courts.”

The jurisdiction of the Kadhis' courts stretches as far as all the parties are Muslims and submit to it. It is not spelt out what constitutes submission to the Court, and in the instant case the Applicant has declared she does not submit to the Kadhi's Court Jurisdiction. The Applicant is at liberty to refer their matter to the High Court. Previously, **the Constitution of 1969(repealed), in section 66(5)** provided that;

“The jurisdiction of a Kadhis’ court shall extend 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.”

With the 1969 Constitution, the Kadhis' courts had exclusive jurisdiction regardless of whether or not all the parties to the matter submitted to its jurisdiction. The parties were subject to the jurisdiction for as long as they professed the Muslim religion. This explains why the Hon. Justice Ibrahim In **Sophia Mustafa & Others Vs Zufangasia Juma and Another Misc No. 84 of 2008**, stated that the Kadhis' court was the court best placed to deal with succession matters where the parties were all Muslims. And also **In the Matter of the Estate of Ali Shitalo Succession Cause 151 of 1994**, where he directed the matter be dealt with by the Kadhis' court as all parties were Muslims and held Muslim names. The judge followed the law as it was then and made relevant orders.

In the present case, the Applicant argued in her application that she did not submit to the jurisdiction of Kadhis' courts and the matter being referred to a Kadhis' court contravened with Article 170(5) of the Constitution. Looking at Article 170(5) of the current Constitution as stated above, the Muslims are given liberty to take their matters in the High Court if they so wish since it can entertain any application and determine succession disputes as per **Section 47 of the Law of Succession Act**. The High Court's original jurisdiction is not even ousted by **the Kadhis' Courts Act** and reference is made to **Section 5** of the Act, which states;

“A kadhis’ 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 surbordinate court in any proceeding which comes before it.”

*The Court of Appeal in **Re Estate of Ismai Osman Adam(Deceased); Noorbanu Abdul Razak Vs Abdulkader Ismail Osman, Mombasa Civil Appeal No. 285 of 2009**, ruled that its the choice of muslim parties to submit to a Kadhis' court or to file succession proceedings in the High Court.*

This being a Court of Appeal ruling, delivered in 2013, binds this court.

*The muslims are also subjects of the Bill of rights provided under the Constitution and therefore have the right to submit to the jurisdiction of their own choice. The Constitution being the supreme law as envisaged by Article 2, we have to adhere to the notions prescribed in the Bill of rights. The same was highlighted by Hon. Justice Edward M. Muriithi **in the Matter of the Estate of S.P.B (Deceased); R.B***

and another Vs H.S.B and another, Succession Cause No. 301 of 2014, stated that

“This right of choice is consistent with the constitutional values of liberty of the person embodied in the principles of human dignity, equality, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised under Article 10(2) of the Constitution. To compel all muslims to subject themselves to the jurisdiction of the Kadhis’ court would be contrary to all notions of choice which is the basis of rights and freedoms in the bill of rights....”

Though the parties have the choice to submit to the jurisdiction of the High Court, this does not preclude the High Court from applying the Islamic law to the matter. In this matter, it was the wish of the deceased to distribute his property according to sharia law (Islamic law). Submitting to the jurisdiction of the High Court does not imply the law to be applied must be varied. I am persuaded by the Court of Appeal decision made by Githinji JA in ***Re Estate of Ismail Osman Adam(Deceased); Noorbanu Abdul Razak Vs Abdulkader Ismail Osman, Mombasa Civil Appeal No. 285 of 2009***, pronounced himself as follows;

“There should not be any confusion between the jurisdiction of the High Court to entertain a dispute relating to testamentary or intestate succession to estates of Muslims and the substantive law applicable in the High Court in such disputes.....however if the High Court assumes jurisdiction to the estate of a deceased muslim, then by virtue of section 2(3) of the Law of Succession Act, the law applicable in the High Court as to the devolution of the estate is the Muslim law and not the law of succession law. As an example, disputes relating to the validity of a will made by a Muslim and ascertainment of heirs and shares of each will be determined in accordance with Muslim law.....”

This Court is bound by this Court of Appeal decision and agrees with the position highlighted by the Justices.

FINAL ORDERS

1. The application filed on 12th June 2014 is allowed, the applicant is free to choose whether to submit to either Kadhi’s court or High Court but whatever choice of forum, the choice of law to execute the will shall be Sharia Law.

2. There shall be no order as to costs.

It is so ordered.

SIGNED, DELIVERED AND DATED AT NAIROBI THIS 5TH DAY OF JUNE, 2015.

M. MUIGAI

JUDGE