



IN THE MATTER OF THE CONSTITUTION OF KENYA

PETITION NO 67 OF 2014

FATUMA MOHAMED SHARIFAPPLICANT

VERSUS

THE PRINCIPAL MAGISTRATE

COURT KAJIADO.....1ST RESPONDENT

THE KADHI'S COURT AT KAJIADO2ND RESPONDENT

AND

HAMDUN SHERIFFINTERESTED PARTY

JUDGMENT

Introduction

1. The petitioner has lodged this petition to challenge the jurisdiction of the Kadhi's Court in **Succession Case No 2 of 2014 HamdunShariff vs Fatuma Mohamed** and that of the Chief Magistrate's Court in Kajiado in **Kajiado CMCC No 1 of 2014HamdunShariff vs Fatuma Mohamed Shariff**. She asks the Court to quash the proceedings in both cases in which her son, HamdunShariff, has lodged claims against her in respect of certain properties which he claims belong to his father (now deceased).
2. The matter was filed under a certificate of urgency and interim orders were granted on 11th February 2014 staying proceedings in both cases.

The Petitioner's Case

3. In her affidavit sworn on 11th February 2014, the petitioner describes herself as a business woman and a senior citizen of this republic. The Interested Party is her second born child. The Interested Party filed a case against her in January 2013 in Khadis' Court Succession Cause No 2 of 2013. The following year, in January 2014, he again sued her in the Principal Magistrate's Court at Kajiado in Civil Case No 1 of 2014.
4. She alleges that prior to the suits, the Interested Party has been extremely cruel to her and his other siblings and she has had to report him to the police for trespassing on her land. She avers that the land and property in dispute, namely Kajiado Plot No 9923/32, Kajiado/Meto/136, Kajiado/Shapashina/3/166, camels and motor cycle registration number KMCU 715A belong to

her as her deceased husband, Sharriff Omar Noor who passed away in May 1998, had distributed his property during his lifetime.

5. The petitioner has gone into some detail with regard to the somewhat troubled relationship between herself, her deceased husband, and the Interested Party which are not germane to the matters before me.
6. In presenting the petitioner's case, Learned Counsel, Mr. Ongegu, contended that the two Courts seized of the disputes between the petitioner and the Interested Party do not have the jurisdiction to entertain the two matters, yet the Courts have issued blanket orders against the petitioner; and that the matters in dispute pertain to issues of title which the Kadhi's Court has no jurisdiction under Article 170(5) to entertain. The petitioner concedes that she has not appealed against the decision of either of the two Courts.
7. The petitioner alleges that the cases at the two Courts violate her right to liberty and her right to property guaranteed under Article 40 of the Constitution, and that she is entitled to relief under Articles 19-23. She contends that it is only the Land and Environment Court which can deal with these matters.
8. Counsel conceded that while the petitioner raised the issue of jurisdiction before the Kadhi's Court and it ruled that it has jurisdiction, a similar challenge has not been made before the Chief Magistrate's Court. The petitioner contends that she has not acquiesced to the jurisdiction of the Kadhi's Court.

The Interested Party's Case

9. The Interested Party opposed the petition. His Counsel, Mr Masinde, relied on an affidavit sworn by the Interested Party on 11th March 2014 and written submissions dated 12th May 2014.
10. In his affidavit sworn on 11th March 2014, the Interested Party deposes, among other things, that when his father died, he left various properties under the direct control and management of the petitioner for the benefit of all the beneficiaries of his estate but that the petitioner has unilaterally and without any justification assumed ownership of the entire estate of her deceased husband.
11. He alleges that while on the face of it the petitioner may appear as the registered owner of the subject property, Kajiado Plot numbers 9923/112 and 9923/32 as well as Kajiado/Meto/136; Kajiado/Shapashina/3/166 and 64 camels, she is not the absolute owner thereof within the meaning of Article 40 of the Constitution as read together with Sections 24, 25 and 28(b) of the Land Registration Act, 2012. He contends that this is so because she holds the properties in trust for all the beneficiaries of the estate of the deceased. It is on this basis that he has filed a suit before the Kadhi's Court to determine the issue of inheritance, and another suit in the Principal Magistrate's Court to restrain the petitioner from dealing with the property in dispute.
12. Mr. Masinde, Learned Counsel for the Interested Party, submits that the jurisdiction of the Magistrate's Court has not been challenged and is in fact admitted at paragraph 10 of the petitioner's statement of defence in that case. He contends that if the petitioner was dissatisfied with the orders of injunction issued by the Chief Magistrate's Court, she should have applied to set aside or vary the orders as provided under Order 40 Rule 7 of the Civil Procedure Code instead of filing the present petition.
13. With regard to the jurisdiction of the Kadhi's Court, it is the Interested Party's case that the Kadhi has jurisdiction under Article 170(8) to entertain matters relating to Muslim Law on marriage, divorce and maintenance where parties submit to its jurisdiction, and that what is before the Kadhi's Court is within its jurisdiction.
14. The Interested Party contends that the question of the jurisdiction of the Kadhi's Court under

Article 175(5) had never been raised, the preliminary objection before the Kadhi being confined to the jurisdiction under Article 40 and 162 of the Constitution. Since the Court had overruled the petitioner's objection in relation to Article 40 and 162, and there had been no objection to jurisdiction under Article 170(5), the petitioner had acquiesced to the jurisdiction of the Kadhi's Court over the dispute.

15. The Interested Party submitted therefore that if the petitioner was dissatisfied with the decision of the Kadhi on the preliminary point, she should have appealed against it. He therefore asked that the petition be dismissed.
16. Mr. Kakoi, Counsel for the 2nd respondent, asked that the State be excused from the proceedings as the dispute involved a family dispute.

Determination

17. I have read the parties' respective pleadings in this matter and their submissions filed in support of their respective cases. In her petition, affidavit in support and the submissions filed on her behalf, the petitioner goes into some detail about her ownership of the property the subject of the dispute between her and her son. She alleges that the suit before the Kadhi's Court and the Chief Magistrate's Court at Kajaido are a violation of her right to liberty and property.
18. It must be borne in mind that in dealing with the present matter, the Court is not inquiring into the merits or otherwise of the dispute between the petitioner and the Interested Party currently pending before the two Courts in Kajiado. Rather, its role is limited to an inquiry whether, by entertaining the two matters, the Courts have breached the petitioner's constitutional rights.
19. The gravamen of the petitioner's claim is that neither the Kadhi's Court nor the Chief Magistrate's Court have jurisdiction to entertain the matters before them. The petitioner concedes that she has not appealed against the decisions of the two Courts—the Kadhi's Court's rejection of her preliminary objection with regard to its jurisdiction; and the ex parte injunction issued by the Magistrate's Court.
20. It is, I believe, trite law that where a party is dissatisfied with a decision of a lower court, the remedy lies in an appeal or an application for review of that decision. It does not lie in a constitutional reference alleging violation of Constitutional rights.
21. In **Kemrajh Harrikissoon–v- Attorney General Of Trinidad And Tobago, (1979) 3WLR 63**, The Court Observed As Follows:

“The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress than any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action....The mere allegation of a human right or fundamental freedom of the applicant has been is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

22. The dicta of the Court in *Harrikissoon* has been cited with approval in many decisions by our Courts- see **Alphonse Mwangemi Munga & 10 Others -v- African Safari Club Ltd Petition No 564 of 2004**; **Towhida Awo Shariff & Others -vs- The Registrar of Titles & Others High Court Petition No. 302 of 2011**. I agree totally with the sentiments expressed by the Courts in the matters cited above as general expositions of law on this issue. If the law provides other forums and processes to a litigant, then such processes ought to be followed. Litigants cannot be permitted to disguise every matter as a constitutional issue and bring it for adjudication before the Constitutional and Human Rights Division.
23. I sympathize with the situation of the petitioner. She has been placed in the painful position of litigating with her son over property she claims to have lawfully acquired.
24. It is also possible that the Kadhi's Court was mistaken in concluding that it has jurisdiction to deal with issues under Article 40 and 162, especially given that Article 170(5) gives the Kadhi jurisdiction where all parties submit to such jurisdiction, and that the Magistrate's Court was mistaken in issuing an injunction in the matter. On the face of it, and as the Interested Party tacitly concedes, as the property in dispute is registered in the petitioner's name, the proper forum for determining such claim as he may have would be the Environment and Land Court in which the Constitution vests jurisdiction to hear and determination questions relating to title to land. The Interested Party may be well advised to reconsider the suits now pending before the two lower Courts to avoid a situation in which he and his mother spend time and resources in legal processes the outcome of which may be reversed on appeal. That, however, is a decision for the Interested Party and his Counsel.
25. In so far as the present petition is concerned, the process provided by law for the petitioner is to either ask the Courts to review their decisions, or file an appeal in the High Court. The fact that the decision of the judicial officers in the two matters may be mistaken does not give rise to a constitutional violation. As the Court observed in the oft quoted case of **Maharaj-v- Attorney-General of Trinidad and Tobago (No 2) [1979] AC 385**:

“In the first place, no human right or fundamental freedom recognised by Chapter I of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. When there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by s 1(a), and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice.” (Emphasis added)

26. The petitioner has a right of appeal against the decisions made by the Kadhi's Court and the Magistrate's Court. This is the option she ought to have followed, and still should follow.
27. In the circumstances, this petition has no merit and is hereby dismissed. Each party shall bear its own costs of the petition.

Dated, Delivered and Signed at Nairobi this 8th day of July 2014

MUMBI NGUGI

JUDGE

Mr. Ongegu instructed by the firm of Ongegu & Associates Advocates for the Petitioner.

Mr. Kakoi instructed by the State Law Office for the Respondents

Mr. Masinde instructed by the firm of Boniface Masinde & Co. Advocates for the Interested Party