



REPUBLIC OF KENYA

High Court at Mombasa

Judicial Review 9 of 2013

MARIAM S. SWALEH & 4 OTHERS.....APPLICANTS

VERSUS

THE CHIEF KADHI & 3 OTHERS.....DEFENDANTS

JUDGMENT

The *Ex-parte* applicant has brought this chamber summons seeking inter alia,

“2. THAT this Honourable court be pleased to issue an order granting leave to the Ex-parte applicant herein to apply for an order in the nature of certiorari to bring to this Honourable court for purposes of quashing the orders issued by the 1st respondent on the 8th day of February, 2013.

3. THAT this Honourable court be pleased to issue an order in the nature of mandamus compelling the first respondent forthwith administer in terms of Islamic Law the ESTATE OF SALLEH OMAR SWALLEH ASSAFI (Deceased) in Kadhi Succession Cause No. 218 of 2012 and further to reinstate such conservatory orders as are necessary for the presentation of the ESTATE pending the administration Ante.

4. THAT this Honourable court be pleased to order that such application for leave to institute Judicial Review proceedings do operate as a stay of any further proceedings in Kadhi Succession Cause No. 218 of 2012.”

MR. EGUNZA Advocate argued the application on behalf of the *Ex-parte* applicant. **MR. MOGAKA** who had been served acted for the respondents. The estate in question is that of the late Swalleh Omar Swalleh Assafi who passed away in 2006. His estate remains unadministered to date as no letters of Administration have been issued to any party. The *Ex-parte* applicant is a son of the deceased and one of the beneficiaries of his estate.

The point of contention in this matter are the proceedings before the Kadhi’s Court relating to this estate. The *Ex-parte* applicant and others had filed succession proceedings before the Kadhi’s court vide **Succession Cause No. 218 of 2012**, seeking to have the estate of the deceased administered in accordance with Islamic Sharia Law as it was stated that during his lifetime the deceased was a devout Muslim. On 20th December, 2012 the Kadhi made interim conservatory orders to protect the estate of the deceased from inter-meddling and/or plunder. However, on 8th February, 2013 the Kadhi discharged the said interim orders, an act which is now the subject of these Judicial Review proceedings. The *Ex-parte*

applicant submits that this action of the Kadhi “is ultra vires, in excess of jurisdiction of the Kadhi and contrary to natural justice.”

Judicial Review is a remedy which concerns itself with the decision making process and **not** with the merits of the decision itself. Where a public officer like the Kadhi does an act which is

- (a) Ultra vires (or outside) of his legal powers or
- (b) Goes against the tenets of natural justice

then such an act and/or order is subject to Judicial Review. In addition the applicant must satisfy the court that he has sufficient *locus standi* to bring the application for Judicial Review.

On the question of *locus standi*, the applicant being a son to the deceased and a beneficiary to his estate undoubtedly would be affected by any decision made regarding the distribution of the estate of the deceased. As such I am satisfied that he is possessed of sufficient locus in this matter.

The act complained of and alleged to be *ultra vires* is the act of the Kadhi in discharging the conservatory orders which he had earlier made. **Mr. Mogaka** for the respondents argues that there was nothing *ultra vires* in this act. The Kadhi merely upheld the law regarding the validity of interim orders. I am in agreement with the submissions of counsel. Conservatory orders are interim in nature and cannot exist in perpetuity. If the Kadhi could be said to have acted properly in issuing such conservatory orders then he certainly had similar powers to discharge the same. The conservatory orders were made on 20th December, 2012. The same were discharged on 8th February, 2013 almost 1 ½ months later. Order 40 rule 4(1) of the Civil Procedure Rules clearly provides that any *ex-parte* injunction shall be in effect for **only fourteen days**. This is the position in law unless such an order is extended by the court. Therefore as things stand the conservatory orders made on 20th December, 2012 would have automatically lapsed fourteen days thereafter and the Kadhi’s order of 8th February, 2013 was only a restatement of the obvious. The applicant may take issue with the decision made by the Kadhi and its consequences but these concerns ought to be raised within the Succession Cause in question and **not** by way of Judicial Review. I find that the Kadhi did not act *ultra vires* and on this ground the prayer for leave must fail.

The *Ex-parte* applicant also seeks an order of mandamus to compel the Kadhi to distribute the estate of the deceased in accordance with Islamic Law, on the basis that the deceased and all his beneficiaries profess the Muslim faith. Article 170(5) of the Constitution of Kenya which sets up the Kadhi’s court provides:

“The jurisdiction of a Kadhi’s 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 court. [my own emphasis]

What this means is that there must be consensus between the parties that a matter of inheritance be determined in the Kadhi’s court. The fact that one is a Muslim does not obligate such a person to have a matter concerning inheritance determined in the Kadhi’s court. In this case whilst the applicant appears to desire that distribution be done in accordance with Islamic Law the respondents in sworn affidavits have clearly expressed a desire **not** to subscribe to the jurisdiction of the Kadhi’s court. This is a choice which they are entitled to make. To grant orders of mandamus as prayed would in these circumstances go contrary to the provisions of Article 170(5). It would be futile to grant the applicant leave to seek orders which the court cannot properly make.

Finally, therefore I find no merit in this application for Judicial Review. The *Ex-parte* applicant is directed to seek appropriate remedy either in the Kadhi’s court or before the High Court. This application is dismissed in its entirety. Costs to be met by the *Ex-parte* applicant.

Dated and delivered in Mombasa this 8th day of May, 2013.

M. ODERO

JUDGE

In the presence of:

Mr. Nabwana h/b Mr. Mogaka

Mr. Mutiso h/b Mr. Egunza for Ex-parte Applicant

Court Clerk Mutisya