In re Estate of Mohamed Karama (Deceased) (Succession Cause 167 of 2015) [2024] KEKC 10 (KLR) (2 May 2024) (Ruling)

Neutral citation: [2024] KEKC 10 (KLR)

REPUBLIC OF KENYA

IN THE KADHIS COURT AT MOMBASA

SUCCESSION CAUSE 167 OF 2015

AH ATHMAN, CK

MAY 2, 2024

BETWEEN

ALI MOHAMED KARAMA ..... PETITIONER

AND

AMINA SHEIKH MOHAMED ..... RESPONDENT

RULING

1. This is a ruling on petitioner's oral preliminary objection for the court to recuse itself from hearing this matter and that it lacks jurisdiction on the issue of mode of distribution of the estate.

2. For perspective, judgment in this succession matter was given on 25th April, 2017 by myself then as Principal Kadhi. The judgment was delivered on my behalf by Hon. Ahmed Hussein Al Muhdhar, (chief Kadh retired) as I had just been transferred to serve in Isiolo Kadhi's Court. An appeal (HCFA No. 167 OF 2017) was preferred against the judgment. The High Court (Musyoka J) in his judgment made on 19th October, 2020 found merit and allowed the appeal. The finding of the High court stated thus:

   'Overall, I do hereby find merit in the appeal herein. The principal Kadhi exercised a jurisdiction that he did not have, to the extent of determinating of ownership of the landed property that is subject of the instant appeal. The resultant orders were nullities. I hereby accordingly, allow the appeal herein and set aside the orders made in the judgment delivered on 25th April, 2017 in Mombasa KCSC No. 167 OF 2015 with respect to the assets the subject of the instant appeal.'

3. The respondents filed a Notice of Motion for distribution of the uncontested properties. The petitioners stated he did not submit to the jurisdiction of the court. The court (Hon. Habib S. Vumbi) agreed and did not proceed to hear the application. The respondent moved to the ELC and then back to the High Court in Miscellaneous Application NO 40 of 2022 for distribution of the undisputed assets. The High Court (Mutai J) ordered:

'all the undisputed assets of the estate of the late Mohamed Karama be distributed to the rightful heirs in accordance with their respective shares as set out in the judgment of the Honourable Kadhi's (judgment) dated 25th April, 2017 in the Kadhi Succession Cause No. 167 of 2015.'

4. With this order they came back to court for mention for directions on the same. The court invited parties to make written proposals on distribution. The respondent did but the petitioner did not and made the objection when the matter was coming up for consideration of the proposals.

5. It is noted that this oral preliminary objection was previously made by made Mr. Asige for the petitioner on 23rd October, 2023. Mr. Asige proposed, which proposal was granted by court, that the parties' counsels be given another opportunity to find a way forward on the issue.

6. Mr. Asige for the petitioner argued that the court is having entered judgment in this matter and is thus functus officio and that the court cannot sit on appeal of its own judgment or that of the High court. It was further submitted that the High court found the Kadhi's court had no jurisdiction to deal with disputes of ownership and registration of titles. He suggested there are three (3) other Kadhis in the station who are able to sit to determine the issue.

7. Ms. Faiza for the respondent submitted for the respondent that the court acknowledged the courts jurisdiction to handle the undisputed properties and that it allowed the respondent's application for distribution of the undisputed properties. It was submitted that the trial court was principal Kadhi when he made the judgment and now is sitting in another position as the Chief Kadhi, and therefore can hear and determine the issue.

8. Mr. Asige submitted that the petitioner was not a party to the application that allowed distribution of undisputed assets. He alluded it could be a fake order.

9. The issues for determination in this oral preliminary objection are:

    i. Whether or not the issue for determination is one on property ownership or distribution of estate of deceased Muslim

    ii. Whether or not the court has is functus officio; that is, in succession disputes before Kadhi's courts, does the Kadhi court have jurisdiction to make orders on distribution after pronouncement of judgment.

    iii. Whether or not the court should recuse itself from hearing and determination of any issue in this matter.

10. On whether the issue currently before court involves land ownership dispute; the Kadhi's court is subordinate to the High Court. We are bound and obliged to comply with decisions and directions of the superior courts. The court was very clear we lack jurisdiction on disputes involving ownership of landed properties. The estate of the deceased herein consisted of about nineteen (19) properties. The disputed properties were those listed in the Memorandum and subject of the appeal were according to the judgment of the High court and now before the ELC. The court was clear not all the properties were disputed or all orders set aside. It emphasised the orders set aside were those 'with respect to the assets the subject of the instant appeal.' The Kadhi's court clearly was not estopped from dealing with the distribution of the other undisputed properties of the estate.

11. On whether or not the court is functus officio; succession and inheritance of estates of deceased Muslims are governed by Islamic law of inheritance. The law of succession does not apply to estates of deceased Muslims. Probate rules apply so far as they are not inconsistent to Islamic laws of inheritance. The process of inheritance of estates of Muslims involves determination of what constitutes the estate,

the heirs and their respective shares. However, the process is not merely declaratory, it is only complete upon each heir actually receiving and getting his or her share according to Islamic law.

12. The doctrine of functus officio provides that a judicial officer can exercise his judicial function with respect to a particular matter only once. Once he or she has delivered the judgment on the merit, he or she cannot vary or revoke it. The Supreme Court expounding on the concept in Election Petitions Nos. 3, 4 & 5 RAILA ODINGA & OTHERS vs. IEBC & OTHERS [2013 eKLR (of functus officio) cited with approval an excerpt from an article by Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832:

> " The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

13. However, a judicial officer is allowed to handle applications on a decided matter for review and directions necessary to perfect the decision. The Supreme Court in Election Petitions Nos. 3, 4 & 5 RAILA ODINGA & OTHERS vs. IEBC & OTHERS [2013 eKLR cited with approval the case of JERSEY EVENING POST LIMITED VS A1 THANI [2002] JLR 542 at 550 that:

> " A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available. [emphasis supplied]"

14. The High Court in the case of Silvanus Kizito v Edith Nkirote Mwiti [2021] eKLR stated that the court is not functus officio merely because it has pronounced itself. It stated:

'the court does not become functus merely because it has delivered a final decision in civil proceedings. The court retains its power to undertake several actions including but not limited to stay, review, execution proceedings and such other acts and steps towards closure of the file...In any event a court of law cannot shut its eyes to an impropriety or indeed injustice just because it has rendered a judgment.'

15. The court in Leisure Lodge Ltd v Japhet Asige & Another [2018] eKLR emphasized that upon delivery of judgment, courts retain the duty and powers to handle other issues consequent, complimentary, supplementary, necessary and facilitative relating to the matter.

16. In succession cases before the Kadhi's courts the courts are still seized with the matter until the estate is fully distributed, devolved and received by the heirs. It is the established practice and general rule. In this case, there is a determination of the estates, heirs and their respective shares. The heirs are joint owners in specific shares in all the properties. No property has been devolved to a particular heir and no heir has actually received a property of the estate. The work of the administrators was limited to access of funds in the banks for sustenance and education of the children. Further there is no new dispute that would merit the court to be functus. The issue is on actual distribution of the undisputed properties of the estate, which issue has not been finalised. The cannot be said to be functus officio.

17. On the issue of recusal; an applicant has to demonstrate real or perceived bias by the judicial officer due to pecuniary interest, relationship with one of the parties e.t.c. The apprehension of bias must be reasonable from a right-minded person. The threshold required is very high because of the presumption of impartiality of judicial officers in the discharge of their duties. In the Court of Appeal in the case of Uhuru Highway Development Ltd. vs. Central Bank Of Kenya & 2 Others Civil Appeal No. 36 of 1996 held:

> " Except where a person acting in a judicial capacity had a pecuniary interest in the outcome of the proceedings, when the Court would assume bias and automatically disqualify him from adjudication, the test applied in all cases of apparent bias was whether having regard to the relevant circumstances, there was a real danger of bias on the relevant member of the tribunal in question, in the sense that he might unfairly regard or unfairly regarded with favour or disfavor the case of a party to issue under consideration by him: the real test is in terms of real danger rather than real likelihood to ensure that the Court is thinking in terms of possibility rather than probability of bias... Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duties to sit and do not, by acceding too readily to the suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a Judge, they will have their cases tried by someone thought to be more likely to decide the case in their favour... Although most litigants would much prefer that they be allowed to shop around for judges that would hear their cases, that is a luxury which is not yet available under our law to litigants."

18. The principles relating to recusal were discussed in details in the President of the Republic of South Africa vs. The South African Rugby Football Union & Others Case CCT 16/98, where it is stated:

'A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to quasi-judicial and administrative proceedings. Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes.....In applying the test for recusal, courts have recognised a presumption that judicial officers are impartial in adjudicating disputes. This is based on the recognition that legal training and experience prepare judges for the often difficult task of fairly determining where the truth may lie in a welter of contradictory evidence...This consideration was put as follows by Cory J in R. v. S. (R.D.):37 'Courts have rightly recognized that there is a presumption that judges will carry out their oath of office... This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with 'cogent evidence' that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias.'

19. Relying on Committee for Justice and Liberty et al vs. National Energy Board the Court agreed that:

> ". . . the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information...[The] test is what would an informed person, viewing the matter realistically and practically - and having thought the matter through – conclude.

20. In conclusion the court held:

'While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to

their cases being heard by particular judicial officers simply because they believe that such persons will be less likely to decide the case in their favour, than would other judicial officers drawn from a different segment of society. The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to administer justice to all persons alike without fear, prejudice, in accordance with *the Constitution* and the law. To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined, and in turn, *the Constitution* itself.'

21. The petitioner's application not submitting to the jurisdiction of this court was allowed by this court. However, the High court in its order made on 27th April, 2023 ordered the issue of distribution of the undisputed properties to be done by this court. It was alluded, without evidence, that the order could be fake. The lack of authenticity of that order has not been proven; the right forum to prove the same would be the court that issued the order. The order stands and we are obliged to comply thereto.

22. The basis for recusal was two-fold, that I was functus officio and had heard and entered judgment in the matter. Having found the remaining issue in this matter is a finalization and perfection of the judgment in the succession matter and that the court is not functus officio, the preliminary objection has no limbs to stand on. The petitioner has failed to demonstrate reasonable apprehension of bias on the required threshold. I would not hesitate to recuse myself if this was a new matter between the same parties. I was tempted to allow the preliminary objection, it would be easier for me, but on the analysis of the grounds and submissions made, it would be contrary to the oath of office I took and a dereliction of duty.

    The preliminary objection fails. It is hereby dismissed.

23. In the interest of justice, the petitioner is granted another ten (10) days to put in his affidavit of proposal on distribution of the undisputed properties. The matter shall be listed for mention for consideration of the same.

Dated, signed and delivered virtually on 2nd May, 2024.

HON. ABDULHALIM H. ATHMAN

CHIEF KADHI

In the presence of

Mr. Salim Kerrow, court assistant

Mr. Asige for petitioner

Ms. Faiza for the respondent

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