



REPUBLIC OF KENYA

IN THE KADHI'S COURT OF KENYA

AT HAMISI

MCL CASE NO. 3 OF 2018

IN THE MATTER OF ESTATE OF ASMAN SIVA MUDACHI (DECEASED)

RULING

1. This matter was referred to me by Kadhi DS Ratori, of the Vihiga Kadhi's Court, through an order that was made herein on 2nd December 2019. The order recorded by Kadhi Ratori stated as follows:

“- The matter was initiated with no pleadings (suo moto) by letter dated 29th Jan 2019, heard and concluded through ruling dated 7th Feb 2019 in which the complainant/applicant was awarded half of N. Maragoli/Bugina/1286 measuring 0.14 ha i.e. 0.07 ha among others things

- According to the complainant/applicant letter dated 13th Nov. 2019, the distribution of her husbands estates was made fraudulently and or using unknown oral will of the deceased.
- She therefore requested a retrial (revisit) of the matter to get justice.
- Since there existed a ruling of the kadhi, I direct that the file be placed before the Presiding Judge - Kakamega for directions.”

2. Kadhi DS Ratori was acting on an application made by Fatuma Taabu, who I shall refer to as the applicant, through a letter addressed to him, dated 13th November 2019, and lodged at the registry in the cause on 2nd December 2019. In the letter she had sought that the Kadhi, Vihiga Law Courts, retries or revisits the matter on the grounds that the land she had been awarded by the Kadhi's court had a caution which was placed by her co-wife, and that she had nowhere to stay. She had added that the distribution of the deceased's estate was done through an unknown oral will and part of the estate was fraudulently transferred to one of the heirs before succession, that is to say North/Maragoli/Chavakali/1733, transferred to Abdulmalik Chanzu Siva. She also raised an issue that the deceased had money in Mbale Post Bank, Account No. 9162X and at the National Social Security Fund (NSSF), Account No. 053256.

3. Do I have jurisdiction to intervene in the matter, to give directions in it, as proposed by the Kadhi, in the absence of an appeal? I believe Article 165(6) (7) of the Constitution of Kenya, 2010, read together with Article 169, which defines the Kadhi's court as a subordinate court, provides an answer to that question. Article 165(6)(7) reads as follows:

“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

4. I find, from the above constitutional provisions, that I do have sufficient constitutional authority to intervene in a matter pending before a subordinate court in order to ensure fair administration of justice. I may either call for the relevant file, or the same can be forwarded to me by the judicial officer seized of it, for purpose of perusal and appropriate directions.

5. Having disposed of the matter of jurisdiction, I shall now to turn to consider the matter that has been placed before me on its merits. The only issue for me to address is whether I should order a re-trial of the matter by the Kadhi's court, in light of the grounds given by the applicant.

6. From the record of the Kadhi's court, the applicant stated that she was the third wife of the deceased, and that the estate was distributed in her absence based on a oral will. From the record, the fact that the applicant was the deceased's wife was not disputed. The record of proceedings further indicates that there was neither an agreement on division of North/Maragoli/Bugina/1286 nor cash exchange between the

applicant and Abdi Mudaki, to enable the applicant vacate the property. The record further indicates that the applicant did not testify at the hearing. There was a letter by the Kadhi, Ally W. Bakari, dated 29th January 2018, which appeared to summon “the three families of the late Asman Siva Mudachi,” and which stated that “Note that the two wives Mr. Abdi Mudachi and the children of the fast (sic) wife must attend the court.” It would appear that these summonses to attend court were directed to everyone else, but the applicant. The ruling of Ally W. Bakari Kadhi partly affects the applicant and, as such, her views ought to have been considered before distribution was ordered. There is also an issue of some properties which the applicant stated belonged to the estate, which do not appear to have been distributed. Additionally, the Kadhi’s court ought to have determined what properties made up the estate of the deceased before distribution of the same.

7. The proceedings that Kadhi Ally W. Bakari conducted raise serious questions. In the first place, there were no pleadings. No documents were filed that would have formed the basis of the proceedings that the Kadhi conducted. It is, therefore, not clear from the record how the cause was initiated. The very first step appears to be a letter dated 29th January 2018, written by the Kadhi Ally W Bakari to Asma Siva Mudachi, informing him that the families of the late Asma Siva Mudachi were being summoned to attend court on 1st February 2018. It is curious that that letter was addressed to the deceased person, the subject of the succession proceedings. The record of the proceedings on 1st February 2018 does not indicate the persons or parties who were present or in attendance, what is known in court language as Coram, even though there is a record of what those in attendance informed the court. There is no record at all of who the survivors of the deceased person were, that is the persons who were entitled to a share in his estate under Muslim law.

8. The Kadhi’s court is a court established under the Constitution of Kenya. It is a court like any other. The principles that guide the other courts in Kenya, be they subordinate or superior courts, also apply to it. It is expected that fair hearing principles, stated in the Constitution, are observed. The Kadhi’s court is bound by the established rules of procedure, for it is through these rules that the constitutional provisions and principles find expression. I find it odd that proceedings can be carried out by a court before they have been properly initiated by a pleading, which is subsequently brought to the notice of all affected, through service, and a hearing is conducted before evidence of service has been provided. The Kadhi’s court, being a court of law, in the proper sense of the word, must abide by the established rules of procedure, for justice to be properly served to all. The procedural rules governing conduct of proceedings before a Kadhi’s court are not as fluid, or in a state of flux, as may be imagined, there is relevant statutory or written law that should be applied.

9. I have stated above that the Kadhi’s court is a creature of the Constitution. This is at Articles 169 and 170, which state as follows:

“Part 3—Subordinate courts

169. (1) The subordinate courts are—

(a) ...

(b) the Kadhis’ courts;

(c) ...

(d) ...

(2) Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1).

170. (1) ...

(2) ...

(3) Parliament shall establish Kadhis’ courts, each of which shall have the jurisdiction and powers conferred on it by legislation, subject to clause (5). (4) ...

(5) 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 Kadhi’s courts.”

10. Both Articles 169 and 170 of the Constitution talk about Parliament passing legislation to confer jurisdiction, functions and powers on the Kadhi’s court. The jurisdiction of the Kadhi’s court is stated by the Constitution itself at Article 170(5). The legislation in place is the Kadhis’ Court Act, Cap 11, Laws of Kenya. The legislation has been in force since 1967. It would appear that Parliament is yet to re-enact the said statute, or pass a new one, to align it to the Constitution, 2010, or, at any rate, to comply with Articles 169(2) and 170(3) of the Constitution. Nonetheless, the jurisdiction of the Kadhis’ court stated in Article 170(5), is word for word that in section 5 of the Kadhis’ Courts Act, which states:

“The Kadhi’s 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 subordinate court in any proceeding which comes before it.”

11. Of course, the Muslim law referred to here is the substantive one, and that then would beg the question, which procedure is to be followed by the Kadhis’ courts? The answer to that question is to be found in section 8 of the Kadhis’ Courts Act, which provides as follows:

“8. Procedure and practice

1. The Chief Justice may make rules of court providing for the procedure and practice to be followed in Kadhis’ courts.

2. Until rules of court are made under subsection (1), and so far as such rules do not extend, procedure and practice in a Kadhi’s court shall be in accordance with those prescribed for subordinate courts by and under the Civil Procedure Act.”

12. Clearly, therefore, it cannot be said that there is no prescribed procedural law to be applied by the Kadhis’ courts. Neither should it be argued that the procedure with respect to proceedings conducted at the Kadhis’ court is in a state of flux. There can be no excuse for Kadhis’ courts to conduct proceedings that do not adhere to the prescribed procedural law. The law of procedure that the said courts ought to apply is clearly spelt out in section 8 of the Kadhis’ Courts Act. Section 8(1) of the Kadhis’ Courts Act has not been complied with to date, for the Chief Justice is yet to make rules of procedure for the court. However, that has not left the said court hamstrung, for section 8(2) states that in such event the Civil Procedure Act, and by extension, the Civil Procedure Rules, would apply. There is no vacuum so far as rules of procedure are concerned.

13. It is common ground that the Civil Procedure Act, and the Rules made under it, envisage that all civil proceedings are commenced by way of some pleading. Plaints, petitions, statements of claim, originating summonses and defences are the most prominent. Commencement of proceedings without any originating pleading is not contemplated at all by the Civil Procedure Act. Other critical processes that are addressed in that law relate to service of court processes, framing of pleadings, conduct of hearings or prosecution of suits, summoning and attendance of witnesses and their examination, judgements and decrees, among others. When section 8(2) of the Kadhis’ Court Act means by applying the Civil Procedure Act to proceedings conducted by the Kadhi’s court, is that the said court is bound to apply the rules of procedure as set out in the Civil Procedure Act and Civil Procedure Rules to their fullest. There is no exception.

14. The jurisdiction that the Kadhis’ courts exercise, as stated in Article 107 of the Constitution and section 5 of the Kadhis’ Courts Act, is civil in nature, hence the provision in section 8(2) of the Kadhis’ Courts Act, that the Civil Procedure Act should govern the proceedings of that court in the event the Chief Justice does not make the rules envisaged in section 8(1). However, that is not the only civil process that the Kadhis’ courts may apply. Section 3 of the Civil Procedure Act saves special jurisdictions and powers, and through this provision the Kadhis’ courts may find themselves applying other processes quite apart from those in the Civil Procedure Act. Section 3 says:

“In the absence of any specific provision to the contrary nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law of the time being in force.”

15. The proceedings that Kadhi Ally W Bakari conducted related to inheritance or succession. Succession law in Kenya is governed by the Law of Succession Act, Cap 160, Laws of Kenya. That statute provides for a special jurisdiction with respect to succession matters, and it has, through its own provisions and the Probate and Administration Rules, prescribed procedures and special forms. It is such forms and procedures that are saved under section 3 of the Civil Procedure Act. The civil process is, therefore, not limited to that prescribed by the Civil Procedure Act, courts can quite properly apply other processes as may be provided for in other statutes and which are validated by section 3 of the Civil Procedure Act.

16. Section 2(1) of the Law of Succession Act makes the said statute the universal law with respect to testate and intestate succession of estates of persons dying after it came into force in 1981. However, the statute makes exceptions with regard to estates of various categories of persons, including Muslims. Section 2(3) of the Law of Succession Act exempts estates of persons who die Muslims from the substantive provisions of the Act, that is to say Parts II, III, IV, V and VI of the Law of Succession Act. Section 2(4), however, applies Part VII of the Law of Succession Act, to estates of Muslims. The provisions in Part VII largely deal with matters of procedure – protection of estates, grants of representation, among others. The detailed processes are, of course, spelt out in the Probate and Administration Rules.

17. Section 2(3)(4) of the Law of Succession Act provides as follows:

“2. Application of Act

(1) ...

(2) ...

(3) Subject to subsection (4), the provisions of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.

(4) Notwithstanding the provisions of subsection (3), the provisions of Part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim dying before, on or after the 1st January, 1991.”

18. Part VII of the Law of Succession Act applies to the estates of Muslim, and the processes in Part VII and the Probate and Administration Rules ought to have been observed in the proceedings that Kadhi Ally W Bakari conducted, and especially, as they related to conduct of the proceedings, particularly concerning all persons beneficially interested in the estate being heard before distribution.

19. The proceedings that were conducted by Kadhi Ally W, Bakari ought to have been guided by the law as set out in the Kadhis’ Courts Act, the Civil Procedure Act, Law of Succession Act, the Civil Procedure Rules and the Probate and Administration Rules. I shall reiterate,

that there is no vacuum so far as the procedure to be followed by the Kadhis' courts is concerned. I repeat too that the Kadhis' courts are directed by the Kadhis' Courts Act to apply the Civil Procedure Act. They should apply the whole of it without exception. I am unaware of any exceptions to the application of the Civil Procedure Act with regard to processes at the Kadhis' court. The Civil Procedure Act applies to these courts in much the same way as it applies to the magistrates' courts. That is the purport of section 8(2) the Kadhis' Courts Act. There can be no excuse for a Kadhi's court to avoid applying to the Civil Procedure Act since section 8(2) is in very clear language.

20. The same applies to the provisions of the Law of Succession Act and the Probate and Administration Rules. The provisions of section 2(4) of the Law of Succession Act are in mandatory terms, the procedures set out in Part VII of the Law of Succession Act must be followed with respect to estates of deceased Muslims, except where they are inconsistent with Muslim law. What that means is that all proceedings relating to the estate of a dead Muslim must be commenced by way of a petition for a grant of representation intestate, and the grant issued must be taken through the processes of confirmation as envisaged in the Probate and Administration Rules. I have not found any exemption to section 2(4) of the Law of Succession Act.

21. The totality of it all, is that it is not contemplated anywhere in the Kenyan law that proceedings in Kadhis' courts are to be conducted following processes other than those set out in the relevant Acts of Parliament and the relevant subsidiary legislation. Individual Kadhis are not to make their own rules of procedure. All causes before the Kadhis' courts must be commenced by way of the pleadings that are envisaged under the Civil Procedure Act and Rules, and where it is a matter of inheritance, under the Law of Succession Act and the Probate and Administration Rules.

22. It could be innovative to adopt a procedure that does not require filing of pleadings. It could be a good idea, for it reduces formality, and thereby making the courts more accessible. Unfortunately, the same is not supported by any of the laws of procedure that are currently in operation. Informality may have its benefits, but it does also have serious drawbacks. There are no guarantees that the safeguards to fair hearing or fair trial, inherent in the formal rules of procedure, are observed where proceedings are conducted in the informal manner adopted by Kadhi Ally W. Bakari in this case. Since such informality is not supported by any approved rules of procedure, it would be well for Kadhis to stay well clear of conducting court business in that fashion, lest they are accused of operating outside of the law.

23. On last thing, I would emphasize that Kadhis' courts are courts like any other. They should adhere to strict rules of procedure, by ensuring that proceedings before them are properly commenced by way the prescribed pleadings, that those pleadings are properly served on all the persons affected, the persons who should be heard in those proceedings are properly notified and proper records kept of service of court processes, proceedings are properly recorded, each person who should be heard should be given the opportunity to express themselves, those entitled to challenge evidence are given that chance, among other things. Court proceedings should be taken seriously, for they are about determination of people's rights. They should not be handled in a casual manner. Proceedings must be conducted in a manner that inspires confidence, for conducting them otherwise would expose courts to disrepute.

24. In the end, I shall give the following final directions:

- a. That all the proceedings that were conducted before Kadhi Ally W. Bakari, in this matter, are hereby nullified, inclusive of the orders made on 7th February 2018, which are hereby vacated;**
- b. That I direct that there shall be a re-trial of the matter, in proceedings to be regularized through the filing of the relevant pleadings and to be conducted through the applicable law;**
- c. That the Kadhi, in addition to whatever else he shall do within his jurisdiction during the re-trial, shall -**
 - i. determine whether the oral will allegedly made by the deceased was valid,**
 - ii. ascertain all the assets making up the estate, including North/Maragoli/Chavakali/1733, inclusive of ascertaining the circumstances under which it was transferred from the estate to Abdulmalik Chanzu Siva; and**
 - iii. Ensure that all the beneficiaries of the estate, including the applicant, Fatuma Athuman, are be given an opportunity to be heard before distribution is ordered and undertaken.**

25. Finally, let the Deputy Registrar cause the file herein to be returned to the relevant Kadhi's court registry, for the Kadhi to act as directed above.

PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 14th DAY OF February, 2020

W MUSYOKA

JUDGE