



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

MIS APPLICATION NO. 4 OF 2018

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS IN

THE NATURE OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: ARTICLES 23(3) (3) (F) ARTICLE 47 AND 170(5) OF

THE 2010 CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: SECTION 5 OF THE KADHIS COURT ACT, 2011

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTIONS ACT

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND SECTION 8, 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

BETWEEN

EX PARTE

SWALHA SAID FARAJ

(suing on behalf of the estate of SAID FARAJ SAID.....APPLICANT

VERSUS

1. SENIOR RESIDENT KADHI AT MOMBASA

2. THE HON ATTORNEY GENERAL.....RESPONDENTS

AND

YAHYA MOHAMED SULEIMAN.....INTERESTED PARTY

RULING

1. By a Chamber Summons application dated and filed herein on 2nd May 2018, the Ex parte Applicant Swalha Faraji prays for leave to be granted to enable her to apply for Judicial Review orders of certiorari to quash the orders of the 2nd Respondent dated 29th November 2017 in regard to a parcel of land known as Portion No. 151/MN/IV situated within Kilifi County. In addition, the Applicant prays for leave to file an application for judicial review orders of prohibition against the Respondents and the Interested Party in regard to the same parcel of land.

2. When the application was first presented before me under certificate of urgency, the Court noted that there had been extensive proceedings that had been on going since 2014 before the Honourable Principal Kadhi at Mombasa (the 1st Respondent herein). Accordingly, prior to the grant of leave, the Court directed that all parties be served with the Chamber Summons application.

3. Upon being served with the said application, the Honourable the Attorney General (the 2nd Respondent herein) entered appearance on his own behalf as well as for the 1st Respondent. Subsequently and by a Notice of Preliminary Objection dated 18th May 2018 but filed herein on 21st May 2018, the 1st and 2nd Respondent gave notice that they were opposed to the application on the grounds:-

i) That this Court lacks jurisdiction to hear and determine the present application by virtue of the provisions of Section 15 of the Civil Procedure Act.

4. Similarly, the Interested Party took out another Preliminary Objection also dated 18th May 2018 and filed on 21st May 2018 objecting to the Chamber Summons for reasons that:-

1. The Applicant Swalha Said Faraj has been found to be in contempt of Court and a warrant of arrest has been issued.

2. By virtue of being found to be in contempt of Court the Applicant Swalha Said Faraj has no locus standi before this Court until she purges the contempt.

3. That a person adjudged to be in contempt of Court has no audience until such a time she/he will have purged the contempt and in this case she can only do that by paying the decretal amount against her in Mombasa Kadhi's Court Case No. 143 of 2014 which now stands almost in excess of Kshs 4 Million.

5. When this matter came up for hearing, the parties agreed that the two Preliminary Objections be disposed off first. Accordingly the parties filed written submissions in regard to the same. I have considered the objections and the submissions filed in regard thereto by the Learned Advocates for the parties.

6. The importance of obtaining leave in a Judicial review application was eloquently stated by Waki J(as he then was) in the case of ***Republic –vs- County Council of Kwale & Another Ex-Parte Kondo & 57 Others*** where the Learned Judge stated that:-

“(The purpose) is to eliminate at an early stage any applications for Judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case for further consideration. The requirements that leave must be obtained before making an application for Judicial review is designed to prevent the time of the Court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for Judicial review of it were actually pending even though misconceived.”

7. In ***Mexner & Another –vs- A-G (2005)1KLR 189***, it was held that the leave of the Court is a prerequisite to making review with a view to filtering out frivolous applications and the grant or refusal involves the exercise of judicial discretion. The Court further stated that the test to be applied in such circumstances is whether the applicant has an arguable case.

8. Thus at the leave stages, the applicant has the burden of demonstrating that the decision giving rise to the application is illegal, unfair and irrational. The Court must in that regard be persuaded that the application raises a serious issue that can only be resolved by a full hearing of the judicial review application. If the Court is not persuaded as aforesaid, leave will be denied and the matter proceeds no further.

9. In the matter before me, leave is being sought for orders of certiorari to quash the decision of the 2nd Respondent dated 29th November 2017. A perusal of the decision however reveals that those orders were made instead by the 1st Respondent herein. A further prayer being sought is for both Respondents to be prohibited from entertaining any further applications by the Interested Party and making orders in respect of the portion of land known as No. 151/MN/IV situated in Kilifi County.

10. From the material placed before me, it is apparent that the Ex-parte Applicants and the Interested Party are presently embroiled in a Succession dispute in Mombasa Kadhi's Court ***Succession Cause No. 143 of 2014; In the matter of the Estate of Omar Mohamed (Deceased)***.

11. It is further apparent that the said Kadhi's Court (Sued herein as the 1st Respondent) has made certain orders including those made on 29th November 2017 which the Ex-parte Applicant considers contradictory and unfair to herself. Accordingly she accused the said Court of abusing the powers donated to it under Article 170(5) of the Constitution and Section 5 of the Kadhi's Courts Act.

12. The objections raised to the application relate to the right registry to which the application ought to have been filed and the fact that there is in existence a matter pending before the Respondent in which the Ex-Parte Applicant has already been cited for contempt.

13. Section 15 of the Civil Procedure Act provides as follows:

“Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction:

a) The defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or

b) Any of the Defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on a business, or personally works for gain, provided either the leave of the Court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or

c) The cause of action, wholly or in part, arises.

14. In this regard, it was submitted by the Respondents that this matter ought to have been filed before the Environment and Land Court at Mombasa, as the subject matter of the Petition falls within Mombasa. I did not find any basis of the said submission and the attendant objection as the suit property is clearly stated in the application to be situated within Kilifi County.

15. On the other hand, the Interested Party objected to these proceedings on the basis that the Applicant has been found to be in contempt of Court in the proceedings before the Kadhi's Court which she seeks to have quashed herein. It is the Interested Party's submission that having been so adjudged to be in contempt, the Ex-parte Applicant has no audience until such a time that she purges the contempt.

16. The Ex-parte Applicant did not deny that she had been found to be in contempt. It was however her submissions that the Ruling that found her to be in contempt was delivered without her knowledge and that the Orders given by the Kadhi's Court in Mombasa in relation to this matter have been unfair, injudicious and made in bad faith.

17. As it were, the Kadhi's Court is a subordinate Court established under Article 170 of the Constitution. The said Article 170 provides; that:

“The jurisdiction of the 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 parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's Court.”

18. From the material placed before me, it is evident that the Kadhi's Court had jurisdiction to determine the matter and give appropriate orders as the parties in the Succession Cause all professed the Muslim religion and the Estate in dispute belonged to a deceased Muslim.

19. The Kadhi's Court is a creature of the Constitution and its decisions are legally binding on the parties before it. It follows therefore, if a party is aggrieved by such a decision he/she should either seek a review of the same or lodge an appeal against the decision.

20. In the matter before me, it is evident that the Ex-parte Applicant has neither applied for review nor appealed the decisions that she is questioning. Indeed, it is apparent that she seeks to run away from an order of contempt of Court that has been made against her in the Succession matter by filing these proceedings.

21. In the circumstances, I find merit in the Preliminary Objection as raised by the Interested Party. The Ex-parte Applicant has not in any way demonstrated that the decision giving rise to the application is illegal, unfair and irrational as to warrant the grant of leave as sought herein. Leave is accordingly denied.

22. The Interested Party shall have the costs of the Application.

Dated, signed and delivered at Malindi this 29th day of May, 2019.

J.O. OLOLA

JUDGE