



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC APPEAL CASE NO. 10 OF 2014**

**ABUBAKAR M.B. KUCH.....APPELLANT**

**VERSUS**

**MIDHE alias SUPAR OMAR.....1<sup>ST</sup> RESPONDENT**

**AMIN MOHAMED BOI.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Before me for determination is an Appeal from the Judgment of the Honourable Kadhi Mshali Hamisi Mshali, delivered at Lamu in Lamu ***Kadhi's Succession Cause No. 8 of 2012***. The Appellant herein Abubakar Mohamed Bahero Kuchi had by the said Succession Cause sought an order of vacant possession of property described as a Plot in Kiunga Township and an order of official inheritance of the Plot as against the two Respondents Midhe Omar Supa Omar and Amini Mohamed Boi.

2. Upon considering the matter and after hearing the parties, the Honourable Kadhi proceeded on 7<sup>th</sup> March 2014 to dismiss the case for want of jurisdiction.

3. Aggrieved by the Honourable Kadhi's decision, the Appellant has vide a Memorandum of Appeal filed herein on 22<sup>nd</sup> June 2018 urged this Court to overturn the said decision on the basis of four Grounds listed as follows: -

***1. That the Learned Kadhi erred in law in and in fact by failing to appreciate that the land in issue is the Appellant's ancestral land;***

***2. That the Learned Kadhi erred in law and in fact in failing to acknowledge that the Appellant has acquired the land through adverse possession and be declared the rightful owner of the parcel of land;***

***3. That the Learned Kadhi erred in law and in fact in not observing that the Appellant's ancestors have been in actual occupation of the said parcel of land since time immemorial and that the Appellant should be given vacant possession; and***

***4. That the Learned Kadhi erred in law and in fact in failing to take judicial notice that the location where the plot in issue is(is) in Kiunga within Lamu County and that there are no title documents issued yet by the Government of Kenya.***

4. The Record of Appeal filed by the Appellant in person contains an Amended Petition dated 13<sup>th</sup> May 2013 and filed before the Kadhi's Court on the same day, his Verifying Affidavit and a Notice of Motion application dated the same day seeking a temporary order of injunction as well as the Respondents Answer to the Petition and a Replying Affidavit to the application sworn by the 2<sup>nd</sup> Respondent. A copy of the impugned Judgment is also attached thereto. It is not clear from the record whether there were any proceedings recorded before the Honourable Kadhi.

5. In response to the Appeal, the 1<sup>st</sup> Respondent has sworn a Replying Affidavit filed herein in person on 27<sup>th</sup> September 2018 in which she objects to the Appeal.

6. I have considered the Appeal and the response thereto. From the scant information available from the Record of Appeal and the response thereto, it is apparent that the Appellant is a former husband of the 1<sup>st</sup> Respondent Supa Omari Bwanahamadi sued herein as Midhe Omar alias Supa Omar. It is also apparent that the 2<sup>nd</sup> Respondent was also at one time the husband of the 1<sup>st</sup> Respondent.

7. Having heard the parties, the Honourable Kadhi states from paragraph two of his short as Judgment follows: -

***“Upon reading the Petition and the answer to the Petition and upon perusal of all the documents exhibited herein, and upon hearing the parties with their witnesses, this Court has taken judicial notice for the prayers of the parcel of land in question.***

***It is the Court’s Learned opinion that for the deceased to be inherited, there must be an estate for distribution to his/her legal heirs.***

***In case the claim is for (a) parcel of land, the Claimant must produce title documents and certificate of official search bearing the name of such deceased person.***

***In this matter no search documents of ownership have been produced but rather, the evidence on record before this Court clearly shows that the alleged parcel of land is Government land.***

***Accordingly, as there is no title of ownership in the deceased’s name, this Court does not see anything due for inheritance and/or distribution as the deceased estate as much as the Petitioner herein is the legal heir to the deceased.***

***It is the stand of this Court(that) the parties have to clarify with the relevant authorities on the issue of ownership and title to this land.***

***From the foregoing, this case is not a succession matter and it be and is hereby dismissed for want of jurisdiction.***

***Having dismissed this case, the orders granted to the petitioner earlier are hereby vacated.***

***Each party to bear their own costs.”***

8. Arising from the foregoing, it is evident that the Honourable Kadhi was not satisfied on the material placed before him that this was succession issue falling within his jurisdiction for determination.

9. While the actual proceedings of what took place before the Kadhi and the evidence that was before him has not been reproduced on record, it is clear from a reading of the Petition that the Appellant brought this suit seeking to compel the Respondents to vacate the plot of land in dispute. This can be discerned from paragraph 8 of the Petition where he states that: -

***‘6’. The facts constituting this Succession Petition is that the Respondents have refused to give vacant possession of the said plot to the Petitioner as the heir.”***

10. While he does not say how the Respondent came to be on the land, it is apparent that the Appellant and the 1<sup>st</sup> Respondent was a husband and wife before they divorced and the 1<sup>st</sup> Respondent married the 2<sup>nd</sup> Respondent. Again it is apparent that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have also since gone their separate ways.

11. And while the Petitioner seeks an order of vacant possession on the basis that the land being occupied by the 1<sup>st</sup> Respondent belonged to his ancestors, the 1<sup>st</sup> Respondent asserts that he had left her with the land on account that they had been a husband and wife for long during which period their union brought forth 8 children in consideration of which the Petitioner left her with the parcel of land as their children needed a place to call home.

12. From those facts as gathered, I would agree with the Honourable Kadhi that this was not a Succession matter revolving around the Appellant’s inheritance of a parcel of land belonging to his father. On the contrary, the Petitioner was seeking to recover a parcel of land which had once comprised their matrimonial home and which he left to the 1<sup>st</sup> Respondent in circumstances which he has not fully disclosed to the Court.

13. As it were, Article 170(5) of the Constitution provides as follows: -

***“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 Courts.”***

14. In my view, while all the parties in the proceedings before the Kadhi may have been of the Muslim faith, the dispute before him did not relate to the personal status, marriage, divorce or inheritance. This was a dispute relating to the use and occupation of, and title to the Plot of land in Kiunga and that was the reason the Honourable Kadhi sought to find out who among the parties had the documents of ownership thereof.

15. In the circumstances herein, I am unable to fault the Honourable Kadhi in his finding in the decision delivered on 17<sup>th</sup> March 2014 at Lamu.

16. Accordingly, this Appeal is dismissed with costs to the 1<sup>st</sup> Respondent.

**Dated, signed and delivered at Malindi this 20<sup>th</sup> day of September, 2019.**

J.O. OLOLA

JUDGE