



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC JUD. REVIEW CASE NO. 4 OF 2018

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO COMMENCE

PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW

= AND =

IN THE MATTER OF: SECTIONS 8 AND 9 OF THE LAW REFORM ACT,

CAP 26 LAWS OF KENYA

= AND =

IN THE MATTER OF: KADHI'S COURT ACT, CAP 11 LAWS OF KENYA

= BETWEEN =

REPUBLIC.....APPLICANT

= VERSUS =

HON. KHAMIS RAMADHANI,

SENIOR RESIDENT KADHI, MOMBASA..... RESPONDENT

= AND =

SAID AHMED JAAFAR.....INTERESTED PARTY

EX-PARTE

JAAFAR AHMED JAAFAR

J U D G E M E N T

1. The ex-parte applicant pursuant to the leave granted by this court on 23rd March 2018 filed the substantive motion dated 5th April 2018. The applications prays for orders that:

(i) An order of Certiorari do issue to remove to this Honourable Court for purposes of quashing the Respondent's Judgment/decision delivered on 1st March, 2018 in the Kadhi's Court Succession Cause No. of 72 of 2016 at Mombasa.

(ii) Cost of this application be provided for.

2. The application is supported by the grounds set out in the statutory statement dated 20/3/2018, the verifying affidavit and documents annexed thereto. Mr. Jaafar Ahmed Jaafar deposed that he was aware of the succession Cause No. 72 of 2016 filed by the Interested Party in the Kadhi's Court seeking determination of the deceased estate, the legal heirs and their shares. He deposed that the Succession Cause

proceeded to full trial but in the cause of the hearing, the issue of ownership, use and occupation of the various pieces of land owned by him and his son were illegally, without and in excess of jurisdiction made the subject of those said proceedings. The applicant annexed copies of the proceedings at pages 64 – 119 of his bundle of exhibits.

3. The ex-parte applicant avers that the jurisdiction of the Kadhi's court is limited to the determination of questions of Muslim law relating to personal status, marriage, divorce and inheritance. Further that the applicant summoned additional witnesses who had not recorded any statement contrary to the right to fair trial provided under article 50 of the Constitution.

4. The applicant deposed further that the judgment/decision of the Kadhi was made without jurisdiction in revoking the land titles and sale agreements. He therefore urged the court to reverse the decision as prayed in the motion.

5. The application is opposed by the Replying Affidavit sworn by Said Ahmed Jafaar, sued as the Interested Party. Mr. Said deposed that this court has no jurisdiction to hear and determine this application for the reasons that:

(i) The Kadhi's Court by virtue of article 170(5) of the Constitution of Kenya, 2010 and Section 5 of the Kadhi's Court Act Chapter 11 of the laws of Kenya had the jurisdiction to hear and determine KCCC No. 72 of 2016 Said Ahmed Jaafar Vs Jaafar Ahmed Jaafar as the cause of action was inheritance of the parties deceased father's estate.

(ii) By virtue of article 170 (5) of the Constitution of Kenya, 2010, Section 5, 6 and 8 of the Kadhi's Court Act, Chapter 11 of the laws of Kenya and Section 2 (3) and (4) and 48 (2) of the Law of Succession Act, matters both before the Kadhi's Court and in the High Court is the Islamic law to the exclusion of all other laws.

(iii) Entertaining these proceedings would be tantamount to sitting on appeal of the Kadhi's Court judgment without following the procedure provided for by Section 65(I) (C) of the Civil Procedure Act, Chapter 21 of the laws of Kenya.

(iv) The issues raised in these proceedings do not concern an administrative decision but it concerns a judicial decision which is not amenable to judicial review proceedings.

6. The Interested party argues that it was wrong to grant the ex-parte applicant leave to file these proceedings hence he urged the Court to set aside the said leave. That the ex-parte applicant has misapprehended the provisions of law which gives the Kadhi's Court power to determine the estate of the deceased. That the ex-parte applicant has not specified which title of his has been revoked contrary to the Islamic law. That the issues raised in these proceedings should be raised in appeal. The Interested Party urged the Court to dismiss the application with costs.

7. To respond to the claims by the Interested Party, the ex-parte applicant filed a supplementary affidavit on 28th June 2018 where he itemised the properties which belonged to him as:

(i) House without Land at Bondeni area, Mombasa [Plot No. 54] XLV, sale agreement dated 21/01/1988;

(ii) House without Land at Magogoni area, Kisauni Mombasa sale agreement dated 19/05/1995;

(iii) House at Lamu Township, Plot No. LAMU/BLOCK/I/1358, Title Deed dated 21/05/1999;

(iv) Two [2] parcels of land at Pate Township – Lamu sale agreement dated 19/02/2003 and 15/02/2001;

(v) A shamba full of coconuts at Bori, Pate – Lamu sale agreement dated 30/12/2002;

(vi) A shamba full of coconuts at Siyu – sale agreement dated 27/02/1987.

8. That title No. MN/II/13782 belongs to his son Mohamed Jafar Ahmed. The applicant maintained that determination of ownership, occupation and use of land is not within the jurisdiction of the Kadhi's Court.

9. The ex-parte applicant and the Interested Party filed their respective submissions. The ex-parte applicant submitted that the Kadhi's Court did not have jurisdiction to determine disputes relating to the environment, the use and occupation of the title to land which purely vests in this court and Magistrates so appointed in accordance with the law. He cited several authorities *inter alia*:

(i) **Samuel Kamau Macharia & Another Vs Kenya Commercial Bank & 2 others [2012] eKLR** where the Supreme Court expressed itself as follows:-

“A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law ...”

(ii) **Nyeri Civil Appeal No. 310 of No. 1997 Karanja Vs The Attorney General** the Court of Appeal stated:-

“Any order made without jurisdiction is a nullity and no amount of legal ingenuity can turn that into a valid order. What is a nullity remains a nullity. We say so now and it has been said so before ...”

(iii) **Genevieve Bertrand Vs Mohamed Athman Maawiya & Another [2014]** – the Court of Appeal stated that:

“In the case of the Kadhi’s Court, it is a creature of the Constitution (Section 66 of the retired Constitution and article 169 of the current Constitution). The jurisdiction of the Kadhi’s Court is specifically defined under Article 170 (5) of the Constitution and Section 5 of the Kadhi’s Act, as 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 ...”

10. The ex-parte applicant also submitted that the Kadhi’s Court acted in breach of its adversarial status by entering the arena of parties and summoning witness who had not recorded statements; which action amounted to litigation by ambush which defeated the spirit of article 50 of the Constitution and Order 2 rule 5(2) of the Civil Procedure Rules 2010.

11. The Interested party on his part submitted that this court lacks jurisdiction to entertain this dispute in so far as the provisions of article 165 (6) of the Constitution which states thus:

“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”.

12. The Interested Party submitted in the alternative that parties are bound by their pleadings. That the applicant not having objected to the Kadhi’s Court jurisdiction cannot now do so by way of judicial review proceedings. The Interested Party cited the provisions of Section 120 of the Evidence Act and case law of **Dakianga Distributors (K) Limited Vs Kenya Seed Company Civil Appeal No. 168 of 2011**.

13. The Interested Party contended that the Kadhi’s Court had jurisdiction to hear and determine the petition before him in accordance with Article 170 (5) of the Constitution, Section 5 of the Kadhi’s Court Act and Section 48 (2) of the Law of Succession Act in so far as the dispute related to the question of inheritance. The Interested Party further relied in the decision of **Bernard Muchiri Mutugi Vs Stephen Muchiri Succ. Cause No. 642 of 2014** where Gitari L.W. J. held thus:-

“I have considered the application. The jurisdiction of the Subordinate courts in Succession matters is provided under Section 48 of the Law of Succession Act. Before that under section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules the court has wide powers to make appropriate orders deemed appropriate in the interest of justice and for preservation of the deceased’s estate. The Court had held that it was highly prejudicial and disrespectful to the court. That the court had for all intents and purpose to make orders to preserve the estate. He relied on Mombasa High Court Succession Cause No. 367/2006, Khairu Mohamed -V- Shumi Ali Mustafa where the court held that, “the transfer of the property known as Lamu/Block/1/582 Hasuni Alawi Husuni Mohamed be and is hereby revoked. The property is restored to the estate of the deceased”. The court had held that it was highly prejudicial and disrespectful to the court. That the court had for all intents and purpose to make orders to preserve the estate. He relied on Mombasa High Court Succession Cause No. 367/2006, Khairu Mohamed -V- Shumi Ali Mustafa where the court held that, “the transfer of the property known as Lamu/Block/1/582 Hasuni Alawi Husuni Mohamed be and is hereby revoked. The property is restored to the estate of the deceased” which was transferred to a 3rd party who had purchased it Section 47 of the Law of Succession Act provides: The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient. Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”

“The section donates powers to the High Court as well as the Resident Magistrate’s to make such orders as may be expedient. The court has power to make orders as in this case where there was intermeddling with the estate, make orders to preserve the estate and to restore the estate where it has been sold or transferred fraudulently where the court is seized of the matter. The word expedient must be given a wide interpretation for the court to be able exercise the powers under the section.”

14. Two issues arise for my determination:

- (1) Whether this Court is clothed with jurisdiction to hear and determine these proceedings. If yes;
- (2) Whether or not the Kadhi’s Court acted in excess of his jurisdiction in Succession Cause No. 72 of 2016.
- (3) What orders commends themselves to be given.

15. The Interested Party has raised both in his replying affidavit and submissions that this court lacks jurisdiction to hear and determine the Judicial Review proceedings in so far as the provisions of article 165 (6) of the Constitution of Kenya 2010; Section 5 of Kadhi’s Court and Section 48 of cap 160 of the Laws of Kenya.

16. Section 5 defines jurisdiction of Court as; **“A 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 proceedings which comes before it.”**

17. So what was the dispute that was presented before the Kadhi by way of Petition in Succession Cause No. 72 of 2016? In the Petition, the prayers sought were as follows:

(a) Determination of the deceased estate, his legal heir(s) and their rightful shares.

(b) Distributed of the Deceased estate/properties amongst his rightful heir(s) thereof according to the Islamic laws.

18. From the pleadings in the impugned Cause, the dispute related to the inheritance of the assets and liabilities of Ahmed Jaafar Mohamed. In the judgment of the Kadhi, he listed the issues that were up for his determination as:

(a) The legal heirs of the deceased and their legal shares;

(b) The estate of the deceased;

(c) Vesting orders;

(d) Distribution of the estate

19. The Kadhi proceeded to determine what constituted the estate and who the beneficiaries were. He concluded by stating that the estate was to be valued and beneficiaries to file proposals on the best mode of distribution. The appeals from the Kadhi's Court in matters of inheritance or personal law lie to the High Court and not the Environment and Land Court. Section 50 (2) of the Law of Succession Act provides that, ***“an appeal shall lie to the High Court in respect of any order or decree made by a Kadhi's Court in respect of the estate of a deceased Muslim and with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.”***

20. The proceedings complained of were undertaken in a Succession Cause which the Environment and Land Court is not clothed with jurisdiction to hear and determine by virtue of the provisions of article 162(2) of the Constitution and Sec 47 -50 of the Succession Act. Further under article 165 of the Constitution, the Kadhi's Court is not one of the courts and or tribunals that the Environment and Land is clothed with powers to supervise. In summary, this Court lacks jurisdiction to entertain the dispute as presented.

21. In asking the Court to quash the proceedings and decisions of the Kadhi's court the Ex-parte applicant wrongly assumed that this Court is vested with supervisory powers over the Kadhi's Court. The Ex parte applicant rightly submitted that a court draws its jurisdiction from either the Constitution or legislation or both as stated in the decisions of **Samuel Kamau Macharia & Ano Vs KCB & 2 Others 2012** and in the case **Owners of the Motor Vessel “Lilian S” Vs Caltex Oil Kenya Ltd (1989) KLR 1** where the Court of Appeal that *without jurisdiction a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings.*

22. For the reason of want of jurisdiction, I shall not delve into the second issue of whether the Kadhi's Court acted in excess of its jurisdiction as the law dictates that I down my tools. Consequently, the orders which commends to be made which I hereby make is the order striking out the notice of motion application dated 5th April 2018 with costs to the Interested Party.

Dated and signed at BUSIA this 8th day of October 2019.

A.OMOLLO

JUDGE

Delivered at MOMBASA this 17th Day of October, 2019

C. YANO

JUDGE