Musa v Mustafa & another (Civil Appeal E178 of 2023)
[2025] KECA 677 (KLR) (11 April 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL E178 OF 2023

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

APRIL 11, 2025

BETWEEN

MARIAM SAID MUSA ..... APPELLANT

AND

MIRAJ MUSTAFA ..... 1ST RESPONDENT

SWALEH MUSTAFA ..... 2ND RESPONDENT

(Being an appeal from the Ruling of the High Court of Kenya at Kakamega (Musyoka, J.) dated 13th May, 2022, and Order dated 3rd November, 2022 in HCCA No. 80 of 2019)

JUDGMENT

1. The genesis of this appeal is the judgment of the Resident Kadhi's Court at Vihiga in Kadhi's Court Civil Case No. 1 of 2019. The matter was a succession cause respecting the estate of late Amina Chepkemboi Mwalimu. The protagonists were Musa Chepkoech Said, Muhamed Said and Ibrahim Said who were petitioners; Miraj Mustafa & Swaleh Mustafa were interested parties while the appellant herein, and Mariam Said Musa, was the respondent in that cause.

2. The petitioners sought the following orders:

    a. Revocation of two title deeds namely: Plot. NO. 4393 Nandi/Kamobo and Plot. No. 5275 Nandi/Kamobo, held in the name of Mariam Musa Said.

    b. Proper distribution of the estate of the late Amina Chepkemboi Mwalimu under Islamic Sharia Law, among all the heirs left behind namely: Mariam Musa Said, Musa Said, Muhamed Said and Ibrahim Said.

    c. Any other orders that the court deems fit and just to grant.

3. Before the succession cause proceeded, two applications were made. The first one was by the appellant herein, who challenged the geographical jurisdiction of the Kadhi's court to entertain the matter. The second one was by the interested parties who sought to be enjoined in the matter.

4. The Kadhi dismissed the appellant's application on jurisdiction and allowed the application by the interested parties on the ground that they claimed that Plot. No. 5275 Nandi/Kamodo belonged to them.

5. The succession cause, then, proceeded before the Kadhi. However, the appellant did not attend the defense hearing which was scheduled on 27th June, 2019. Instead, she filed a Memorandum of Appeal, against the ruling of the court that it had jurisdiction to handle the case. However, the Kadhi concluded that the High Court had not issued any order to stay the proceedings and proceeded to issue a judgment dated 4th July, 2019.

6. Largely, the petitioners and interested parties prevailed as against the appellant herein. The final orders given by the Kadhi were as follows:

    1. The title deed No. 4393 Nandi/Kamobo be revoked from reading Mariam Said Musa and be reinstated to its original owner reading Amina Chepkemboi Mwalimu as it was corruptly changed.

    2. That all the issues left behind by the late Amina C. Mwalimu will inherit the same Plot No. 4393 Nandi/Kamobo as per the Islamic distribution as follows:

        1. Musa Said – 28.5%

        2. Ibrahim Said – 28.5%

        3. Muhamed Said – 28.8%

        4. Mariam Said – 14.5%

        This is per the above Quranic verse as Allah directed in Quran 4:11

    3. That the title deed No. 5275 Nandi/Kamobo be revoked from reading Amina Chepkemboi Mwalimu originally before corruptly being transferred to read Mariam Musa Said, as both of them corruptly acquired it and be reinstated to read Mustafa Ahmed Mohamed the rightful owner.

    4. That the Plot No. 5275 Nandi/Kamobo for Mustafa Ahmed Mohamed to be distributed amongst its heirs as follows:

        1. Ahmed Mustafa – 22.22%

        2. Swaleh Mustafa – 22.22%

        3. Miraaj Mustafa – 22.22%

        4. Ahmed Mustafa – 22.22%

        5. Kulthum Mustafa – 11.11% This is per the verse above (Q4:11)

    5. That all those living on Plot No. 5275 Nandi/Kamobo to be vacated to pave way to its rightful owners who are the above mentioned in order 4.

    6. That both owners of Plot No. 4393 and 5275 Kamobo to seek services of registered surveyor during the distribution.

7. That both the owners of the Plots No. 4393 and 5275 Nandi/Kamobo to seek the services of area OCS during all this exercise.

7. Aggrieved by the above decision, the appellant herein filed an appeal against the judgment and order of the kadhi's court. The record shows the existence of two appeals, that is, Kakamega High Court Civil Appeal No. 69 of 2019 – Mariam Musa Said vs. Musa Chepkoech Said; and Kakamega High Court Civil Appeal No. 80 of 2019 – Mariam Musa Said vs. Musa Chepkoech Said, Muhamed Said, Ibrahim Said, Miraj Mustafa and Swaleh Mustafa.

8. Kakamega High Court Civil Appeal No. 69 of 2019 was an appeal from the order of the Vihiga Resident Kadhi's Court in Vihiga Kadhi Court Succession Cause No. 1 of 2019 – Re. Musa Chepkoech Said vs. Mariam Said Musa dated 13th June, 2019 whereas Kakamega High Court Civil Appeal No. 80 of 2019 was an appeal against the judgment/decree/order of the Vihiga Resident Kadhi's Court in Vihiga Kadhi Court Succession Cause No. 1 of 2019 – Re. Musa Chepkoech Said vs. Miriam Said Musa dated 4th July, 2019.

9. It would appear that both appeals were progressing in parallel fashion. A consent order was recorded in Kakamega High Court Civil Appeal No. 69 of 2019, between Mariam Musa Said (the appellant therein) and Musa Chepkoech Said (the respondent therein). It was dated 17th July 2019 and read as follows:

> " By consent the appellant (Miriam Said Musa) and the respondent (Musa Chepkoech Said) do record the following consent order:
>
> 1. That the Notice of Motion Application filed in court on the 4th day of July 2019 praying for orders of stay against the order of Vihiga Resident Kadhi Honourable Ally W. Bakari given on the 13th day of June 2019 in the Vihiga Kadhi Court Succession Cause No. 1 of 2019 (Estate of Amina Chepkemboi Mwalimu – Deceased between Musa Chepkoech Said versus Mariam Said Musa) be and is hereby allowed in its entirety.
>
> 2. That the respondents do pay to the applicant the costs of the Notice of Motion Application."

10. There was a second consent order in Kakamega High Court Civil Appeal No. 80 of 2019 that was similar to a consent order that was recorded in Kakamega High Court Civil Appeal No. 69 of 2019, between Mariam Musa Said (the appellant therein) and the 1st, 2nd and respondents therein who were Musa Chepkoech Said, Muhamed Said and Ibrahim Said and it read as follows:

1. That the appeal against the respondent is allowed with costs to the appellant.
2. That the ruling/order of the Kadhi's Court is hereby set aside and substituted thereon an order dismissing Vihiga Court Succession Cause No. 1 of 2019 – Re. Estate of the late Amina Chepkemboi Mwalimu – deceased between Musa Chepkoech Said vs. Mariam Said Musa.
3. That the appellant is awarded costs of the Kadhi's Court.
4. That the adoption of the consent effectively disposes of the appeal and the file may now be closed.

11. These two consents were adopted as the orders of the High Court (W. Musyoka, J.) on 26th February, 2020.

12. Aggrieved by the consent orders, the respondents herein (Miraj Mustafa and Swaleh Mustafa) lodged a Notice of Motion dated 3rd March, 2020, seeking to stay said consent orders in Kakamega High Court Civil Appeal No. 80 of 2019 and Kakamega High Court Civil Appeal No. 69 of 2019, that had been issued on 26th February, 2020; for consolidation of both appeals; and for the appeals to be heard on their merits. The grounds upon which the orders were sought were that:

    1. Miraj Mustafa and Swaleh Mustafa were the decree holders after a successful trial at Vihiga Kadhi's Court Succession No. 1 of 2019.

    2. The appellant in collusion with the 1st 2nd and 3rd respondents in the said appeals entered a consent disposing off the appeals and dismissing the decision of the Vihiga Kadhi's Court.

    3. The said consent is detrimental to Miraj Mustafa and Swaleh Mustafa, the 4th and 5th respondents therein as they were not included or served but they are the rightful beneficiaries of the estate of the deceased.

    4. The orders sought are in the interests of justice as the 4th and 5th respondents stand to suffer irreparable harm/loss and be condemned unheard, thus be subjected to loss of properties/the estate.

    5. The 4th and 5th respondents are not party to the said consent neither do they agree with the consents thereof and ought to be heard before the Honourable Court.

13. In her response by way of a Replying Affidavit sworn on 5th May, 2020, to the above stated Notice of Motion, the appellant herein averred that she was the registered proprietor of the suit properties, the same having been transferred to her by the deceased and therefore the said suit properties were not available for distribution in Vihiga KCSC No. 1 of 2019. She also averred that the said court did not have territorial jurisdiction to handle the succession cause to the said assets, for the cause ought to have been filed at the Eldoret Kadhis Court. Therefore, the court had no jurisdiction to revoke the suit titles and the same was unlawful. She further averred that the said assets were subject to suits pending at the Eldoret Law Courts being, Eldoret ELC No. 39 of 2016 and Eldoret ELC No. 108 of 2015, which made the matter sub judice.

14. Additionally, the appellant herein averred that if the matter is res judicata in view of the determination on jurisdiction in Kisumu KCSC No. 16 of 2018, then the instant appeals after the decision in Vihiga KCSC No. 1 of 2019 nullifies the titles of the said suit properties. The appellant further alluded to: attempts to have the land matter in question placed before the Kadhi's Courts at Kisumu and Lodwar without success; various allegations relating to collusion between the respondents and the Kadhi who presided over Vihiga KCSC No. 1 of 2019; and the 1st respondent having been cheated that the suit properties could be sold to him hence Vihiga KCSC No. 1 of 2019 and he approached her with a view to compromise the appeals.

15. The 3rd respondent also responded by way of a Replying Affidavit sworn on 18th May, 2020, with claims which were more or else similar to that of the appellant herein, stated above.

16. Further, the appellant herein lodged a Notice of Motion dated18th May, 2020, seeking an order against the said 4th and 5th respondents to furnish security for costs within a prescribed period of time failing which their Notice of Motion dated 3rd March, 2020, be dismissed with costs on the grounds that:

    1. That the 4th and 5th respondents/applicants claim against the respondent in the appeal is fraudulent, corrupt and an abuse of the process of the court and there is therefore no error

apparent on the face of the records the details wherefore are particularized in the Replying Affidavit of the appellant/respondent, the 1st respondent and the 3rd respondent.

2. That the 4th and 5th respondents/applicants are persons of no known local or physical address or own properties within the jurisdiction of this Court or anywhere else within the Republic of Kenya and they are not likely in the event of the Notice of Motion Application being struck out or dismissed to pay the costs of the applicants/respondents resulting in their suffering irreparable damage and financial loss.

3. That the 4th respondent/applicant instituted the Eldoret Kadhi Court Succession Cause No. 27 of 2016 against Amina Chepkemboi Mwalimu the previous owner of the said NANDI/KAMOBO/527 which cause was dismissed with costs in the sum of Kshs. 300,000.00 which to date the 4th respondent/applicant has refused, failed, ignored and or neglected to pay to her Estate currently administered by the appellant/respondent.

4. That is just and fair in the circumstances that an Order against the 4th and 5th respondents/applicants do issue to furnish the security for the costs of the applicants/respondents be paid within a prescribed period of time failing which the Notice of Motion be and is hereby dismissed and struck out with costs.

17. In their response by way of an Affidavit sworn on 10th November, 2020, to above stated Notice of Motion, the respondents herein averred that the 1st, 2nd and 3rd respondents in Kakamega High Court Civil Appeal No. 80 of 2019, entered into a consent to dispose of the appeals without involving them and averred that the appellant should not benefit from her own irregularities.

18. The learned Judge heard the two applications – the one dated 3rd March, 2020 by the respondents herein and the one dated 18th May, 2020 by the appellant herein – simultaneously and issued a consolidated ruling respecting both. In his ruling dated 13th May, 2022, which is the subject of the present appeal, the learned judge allowed the application dated 3rd March, 2020 and dismissed the one dated 18th May, 2020.

19. The appellant is aggrieved by the ruling and order of the learned Judge and has raised a whooping fifty-four grounds of appeal. Most are prolix and/or irrelevant for consideration of the present appeal as they attack the kadhi's court's decision (which is not the subject of the present appeal). As such, we find it unnecessary to reproduce all the fifty-four grounds here.

20. The impugned ruling was specifically for stay orders with respect to the consent orders in Kakamega High Court Civil Appeal No. 80 of 2019 and Kakamega High Court Civil Appeal No. 69 of 2019, issued on 26th February, 2020, and consolidation of both appeals; and secondly, for an order against the said 4th and 5th respondents therein to furnish security for costs within a prescribed period of time failing which their Notice of Motion dated 3rd March, 2020, be dismissed with costs. As such, the only relevant grounds must flow from the aforestated consent orders, consolidation of the said appeals and the order against the 4th and 5th respondents therein to furnish security for costs.

21. A summary of the relevant grounds of appeal are that the learned judge failed: (a) in holding that all the respondents were named in both appeals; (b) to take judicial notice that Kakamega High Court Civil Appeal No. 69 of 2019 involved only the appellant and respondent who were the only parties to the cause as of 13th June, 2019, and 6th May, 2019, and consequently the consent judgment was lawfully entered into; (c) to note that as of 13th June, 2019, the Vihiga KCSC No. 1 of 2019 had been lawfully compromised by the lawful parties in accordance to the legal requirements under Order 25 Rule 5 of the Civil Procedure Code and hence the court became functus officio and the case was no longer

available for hearing as the same was spent; (d) to note that once he adopted the consents issued on 26th February, 2020, and made them an order of the court, the court became functus officio and could not purport to reopen the case since the 1st and 2nd respondents were not parties to the succession cause; (e) to take note that parties are at liberty to settle their disputes; (f) failed to take note that consolidation of appeals can only be done before hearing as provided for by Order 42 rule 13 of the Civil Procedure Rules as read with Order 11 Rule 3(2)(h), thus the order for consolidation of the two appeals was erroneous and unlawful; (g) to make a ruling on the Grounds of Opposition raised by the appellant in her Replying Affidavit which constituted her defense against the Notice of Motion dated 3rd March, 2020, wherein she stated that the review proceedings were not merited but were biased against the appellant; (h) as he exhibited extreme bias in dismissing the Application for the provision of security for costs; (i) as he was biased and failed to consider the Grounds of Opposition in the appellant's Affidavit dated 18th May, 2020; (j) to take note that the respondents did not offer evidence by way of affidavit of their means to settle costs of the applicant in the event that the court order was against them; and (k) in ordering the 1st, 2nd and 3rd respondents be made parties to the appeal against their wishes based on the basis that on 18th May, 2020, they filed affidavits denying having applied to be made parties in the Vihiga KCSC No. 1 of 2019 and the contents of their inclusion thereof was a forgery, criminal, corrupt and fraudulent.

22. The appeal before us was canvassed by way of written submissions by the parties. During the virtual hearing, learned counsel, Mr. Sego appeared for the appellant, whereas learned counsel, Mr. Wekesa appeared for the 1st and 2nd respondents. All the parties relied on their submissions.

23. First, the learned counsel, Mr. Sego argued that there was no evidence that supported the holding that the appellant colluded with the respondent in the entry of the consent orders issued on 26th February, 2020, as required under Order 2 Rule 4 and 10 of the Civil Procedure Rules. Counsel opined that collusion is in the realm of fraud and must be specifically pleaded and the particulars thereof supplied to enable the opposition to respond to the same in kind; which was not the case at the High Court. According to counsel, the respondent in the matter denied being privy to their being made parties in Vihiga KCSC No. 1 of 2019; and their inclusion was fraudulent, criminal and corrupt. In this regard, he relied on the case of Gatirau Peter Munya vs. Dickson Mwenda Githinji & 2 Others (2014) eKLR, wherein it was observed that a person who makes an allegation must lead evidence to prove the fact, as he/she bears the initial burden of proof which he/she must discharge. The legal burden in this regard is not just a notion which any party can hide. He also relied on the case of Nancy Kahoya Amadiva vs. Expert Credit Limited & Another (2015) eKLR; Vijay Morjaria vs. Namsingh Darbar & Another (2000) eKLR; and Central Bank of Kenya Ltd vs. Trust Bank Ltd & 4 Others (1996) eKLR; all of which state that the particulars of fraud must be specifically proved.

24. Second, counsel submitted that the appellant was not involved or given an opportunity by the court to present her view on the transfer of the appeals to the Vihiga High Court, contrary to the principles of natural justice as was held in the case of Onyango Oloo vs. Nairobi City Council & 4 Others E.A. 456. He argued that the unilateral decision by the learned judge disadvantaged the appellant in terms of expense, having been sued by the respondents and others in the Kisumu Kadhi's Court Succession No. 16 of 2018; and upon its dismissal, she was sued in Vihiga KCSC No. 1 of 2019. Further, now that the matter has been transferred to Vihiga High Court, the appellant will incur new costs which she cannot afford as she is homeless due to the respondents having demolished her house on 22nd July, 2019; and she is also jobless. To buttress his argument, counsel relied on the case of David Kabungu vs. Zikarenga & 4 Others, Kampala HCCS No. 36 of 1995; and Hangzou Agro Chemicals Ltd vs. Panda Flowers Limited (2012) eKLR, on the principles governing transfer of cases.

25. Further, counsel submitted that the said transfer of the appeals to the Vihiga High Court as per the order of the learned judge on 13th May, 2022; and which is currently in Vihiga High Court Probate and Administration Cause No. 2 of 2023, effectively, pursuant to a mutilated order of 4th July, 2019, rendered this appeal and the said Vihiga High Court Probate and Administration Cause No. 2 of 2023, nugatory for all intents and purposes, unless this Court by way of its powers, orders a mandatory interlocutory injunction to cancel the entries no. 9, 10 and 11 of the Land Register for the purposes of this appeal as the absence of the subject matter renders this appeal and the application before the lower court an academic exercise. For ease of reference, this Court was referred to page 110 of the record.

26. In this regard, counsel submitted that the said transfer was a question of the Kadhi Court stealing a match against the High Court and this Court. In other words, one arm of the Judiciary stealing a match against the other and in particular a lower court established under Article 169 of *the Constitution*. However, in such situations, the High Court and by extension this Court, have inherent jurisdiction to call for the Kadhi Court files namely Vihiga Kadhi Court Civil Case No. 1 of 2019 and Vihiga Kadhi's Court Succession Cause No. 1 of 2019, so as to inform itself in which was the illegal order made and make an appropriate order. For this proposition, he relied on this Court's decision in Kenya Breweries Limited vs. Okeyo, Nairobi Civil Appeal No. 332 of 2000. Additionally, counsel submitted that on 8th August, 2023, this Court granted an order of injunction against the respondents for having forcefully entered suit property NANDI/KAMUBO/5275 vide Kisumu Court of Appeal Civil Application No. E80 of 2023. Thus, he prayed that similar orders of eviction do extend accordingly, since the parties are in contempt of court.

27. Counsel for the applicant also argued that the learned judge failed to consider the appellant's defense contained in her Replying Affidavit sworn on 18th May, 2020. He also argued that the learned judge failed to consider the appellant's application for security for costs, thereby denying her the right to be heard as demanded contrary to the principles of natural justice as was held in the case of Onyango Oloo vs. Nairobi City Council & 4 Others (supra). He also relied on the case of Speaker of the National Assembly vs. James Njenga Karume (1992) eKLR, wherein it was held that where there is a clear procedure for redress of any particular grievance by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.

28. Counsel also alleged bias on the part of the learned judge. He contended that the 1st respondent in this matter informed the appellant that he had met the learned judge (Musyoka, J.) in connection with filing of the application for review upon the introduction of the Kakamega Court Kadhi, Zaharan Omar Mohamed, who assured him that he would set aside the said judgments, which predictably happened as promised and particularized at paragraph 45 of the appellant's Replying Affidavit. And to date, after over three years, the learned judge did not deal with the issue in his ruling but postponed it to a court with no jurisdiction when it was incumbent upon him to make a decision before the case was heard. In this regard, counsel submitted that the question of bias can only be determined by the accused learned judge and cannot be delegated to any other judge for determination. For this proposition, he relied on the case of Uganda Polybags Ltd vs. Development Finance Company Ltd & Others (2EA37 SCU).

29. Counsel also contended that the learned judge was biased in determining the application as he failed to consider any and all of the appellant's defenses contained in her Replying Affidavit sworn on 18th May, 2022, by "mathematically" avoiding the grounds which he enumerated in his impugned ruling; and which the learned judge in Vihiga High Court lacks jurisdiction in light of section 18(1)(a) of the *Civil Procedure Act* and any decision expected therefrom would be null and void ab initio for want of jurisdiction. He argued that since the Vihiga High Court is a Court of Equal status, it cannot in the circumstances be legally directed to hear the matter. Further, the purported transfer was not

transparent and the learned judge should have listed the appeal for directions in terms of Order 44 Rule 13 of the Civil Procedure Rules, whereby the appellant would have been afforded an opportunity to be heard as required by the principles of natural justice. Accordingly, the net result is that the decision of the learned judge was oppressive and inequitable against the appellant and was not based on sound principles of desecration as defined in Apondi Kanwaldi vs. Republic, 2005 1 EA 12. In that matter, it was held that where the court has to exercise desecration, there must be some reasonable basis in fact and in law to warrant an order made and it must be exercised judicially and not whimsically and capriciously. In this respect, counsel submitted that the learned judge did not exercise his discretion judicially on the transfer of the appeals to the Vihiga High Court and also in dismissing the appellant's application for security for costs.

30. Counsel argued that there was no application in terms of Order 45 Rule 1 of the Civil Procedure Rules as read with section 80 of the *Civil Procedure Act*, to set aside the consents issued on 26th February, 2020. Thus, the action to set them aside was an abuse of the court process and the further action of consolidating the appeals, was null and void as the same were never challenged by an application to review or an appeal. Thus, according to counsel, the said consent orders still stand to date and he prayed that this Court makes the same finding. He also argued that once the consent in Kakamega High Court Civil Appeal No. 69 of 2019 became a judgment on 26th February, 2020, the court became functus officio and could not on the 13th May, 2022, purport to re- open the same without an application for review.

31. Further, counsel submitted that for consolidation of cases to be lawful, they must bear the same character and in this case, Kakamega High Court Civil Appeal No. 80 of 2019 was via an application as provided for under Order 45 Rule 1 of the Civil Procedure Rules, whereas the latter was capricious, oppressive, inequitable and whimsically disadvantaged the appellant. In this regard, he relied on the case of Nairobi Civil Appeal No. 308 of 2012; and submitted that the parties in the two said appeals were different in character and subject matter namely; the non-existent estate in Vihiga KCSC No. 1 of 2019 and the non-existent fraudulently created Vihiga Kadhi's Court Civil Case No. 1 of 2019.

32. Additionally, counsel submitted that the respondents did not apply for certified copies of the decree or order, to enable them use the photocopy thereof in that application and in the letter of consent between the appellant and Musa Chepkoech Said dated 22nd August, 2019 and filed in Court on 13th September, 2019. Counsel opined that the law provides that a person applying for review must obtain a certified copy of the Order or Decree, which was not done by the respondents. Therefore, to that extent, the same was unlawful as was held in the case of Mohammed Shaf vs. Miriam Juma & Another, Malindi High Court Civil Appeal No. 7 of 2018; David Ombe vs. Opi; and Barnaba Githii vs. Guhuto Farmers Cooperative Society Limited, High Court Civil Case No. 32 of 1997.

33. Lastly, counsel submitted that the holding that all parties were in the two appeals is erroneous and factually untrue for the following reasons:

    a. The Kakamega High Court Civil Appeal No. 69 of 2019 involves the appellant and the applicant in Vihiga High Court Succession Cause No. 1 of 2019 Estate of Amina Chepkemboi Mwalimu, who are the only lawful parties to the case as of 13th June, 2019 and as of 6th May, 2019; and which resulted in the Kakamega High Court Civil Appeal No. 69 of 2019, and that the others should have been involved in the consent judgment is factually and lawfully erroneous.

    b. The parties such as the appellant and any other parties are at liberty to settle a case without judicial intimidations as it is the policy of the judiciary to encourage parties to settle the dispute outside court by way of arbitration and mediation process.

c. The parties in both appeals are different in character and arrangement whereby the 1st, 2nd and 3rd respondents are named in Vihiga Kadhi's Court Civil Case No. 1 of 2019, whereas the appellant and Musa Chepkoech are the only parties in Vihiga Kadhi's Court Succession Cause No. 1 of 2019.

34. Opposing the appeal, learned counsel, Mr. Wekesa for the respondents submitted that the appellant never raised the question of jurisdiction before the trial court. Failure to which she may not be heard to raise the same after the matter has been heard and determined; and no reason has been issued as to why she failed to raise that question during the court proceedings at the trial court.

35. Second, counsel submitted that there were no proper preliminary points of law arising from the pleadings filed in the trial court. As such, the same cannot be raised at this point as the introduction of the element of jurisdiction in the appeal would mean that this Court would be hearing the appeal de novo; and this would go against the primary question of whether the decision before it is reasonable and can be supported, and if that is the case, the decision of the trial court can be affirmed.

36. In the premise, counsel prayed that this Court affirms the decision of the trial court as was affirmed by the High Court; since the role of this Court is not to interfere with the findings of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the trial court arrived at its finding having relied on wrong principles.

37. Third, counsel submitted that the findings of the High Court were based on the fact that it was the first appellate court and was to consider evidence, assess it and make appropriate conclusion about the same remembering that it did not hear the witnesses and make due allowance for it.

38. Lastly, counsel submitted that this appeal is defective as the record of appeal is not accompanied by a certified copy of the decree, which is a primary document as it is not one of the documents under Rule 55(2A) of the Court of Appeal Rules, that may be brought in by filing a supplementary record of appeal or which is defective and may be amended and brought in via a supplementary record of appeal.

39. Having considered the pleadings in the record of appeal, the ruling and order of the High Court, the appellant's grounds of appeal, written submissions and the oral submissions of all the parties, three issues present themselves for determination in this appeal:

a. First, whether the learned judge erred in setting aside the consent orders issued on 26th February, 2020, and reinstating both appeals against the 1st, 2nd and 3rd respondents therein respectively, to enable the appeals to be heard on merit.

b. Second, whether the learned judge erred in consolidating the said appeals and transferring them to the High Court of Kenya at Vihiga for final disposal, on the ground that the decision challenged was that of a subordinate court sitting at Vihiga.

c. Third, whether the learned judge erred in dismissing the appellant's application for provision for security for costs against the respondents herein.

40. Before delving into the three issues, two preliminary issues call for clarification. The first one is the question of jurisdiction of the trial court and by extension, the jurisdiction of the High Court at Vihiga to deal with this matter – an issue the appellant has ponderously taken up. In his impugned ruling, the learned judge stated that even though the appellant raised the issue of jurisdiction of the trial court, he could not advert to the issue of jurisdiction at that stage as the application before him related to whether or not the consent orders were properly entered into to the extent that the respondents herein

were not involved. The learned judge also stated that whether the trial court had jurisdiction in the matter or not was a substantive issue to be taken up on the main appeal.

41. The second point is the issue of sub judice, res judicata, bias, collusion, registration of the suit properties, among others; which the learned judge stated that he could not advert to at that stage for the reasons already stated herein above.

42. We think that the learned Judge was correct in the position that he took on both these issues. As we have already indicated above, the impugned ruling was specifically for stay orders with respect to the consent orders in Kakamega High Court Civil Appeal No. 80 of 2019 and Kakamega High Court Civil Appeal No. 69 of 2019, issued on 26th February, 2020, and consolidation of both appeals; and secondly, for an order against the said 4th and 5th respondents therein to furnish security for costs within a prescribed period of time, failing which their Notice of Motion dated 3rd March, 2020 be dismissed with costs. As such, the only relevant grounds must flow from the afore stated consent orders, consolidation of the said appeals and the order against the 4th and 5th respondents therein to furnish security for costs. The question of the jurisdiction of the Kadhi's court as well as the question whether the matters the Kadhi dealt with were res judicata or sub judice are substantive issues to be taken up in the appeals filed against the Kadhi's ruling and orders.

43. We will now turn to the three issues on which this appeal turns.

44. The learned judge allowed the application to stay the consent orders in Kakamega High Court Civil Appeal No. 80 of 2019 and Kakamega High Court Civil Appeal No. 69 of 2019 primarily because he concluded that the respondents were keyparties in the appeals but were not involved in the consent judgment. This is how the learned Judge analyzed the issue:

> "7. The two applications are fairly straightforward. I shall start with the one dated 3rd March 2020. What the applicants are saying is that the appellant entered into a consent to dispose of the appeals with a section of the respondents to the appeals, but did not include the applicants, who are the key stake holders in the decree the subject of the appeal, and as such consent was to their detriment. I note that the appellant, in her lengthy replying affidavit, does not address that issue, whether or not she involved the 4th and 5th respondents in her consent to dispose of the appeals in the manner that they were disposed of.
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> 8. I have perused the record. I note that the applicants are named in both appeals as respondents, and the appellant was seeking that the appeals be allowed as against the 1st and 2nd appellants, and not the rest of the appellants, but I was informed that the orders appeals as (sic) against the rest of the respondents were not tenable, as the appeals were essentially against the 1st and 2nd respondents. Whereas the 1st, 2nd and 3rd respondents were in court the 4th and 5th respondents were not. I note that the allowing of the appeal meant that the judgment or decree of the Kadhi in Vihiga KCSC No. 1 of 2019 was set aside and the said succession cause dismissed. I have perused the judgment in Vihiga KCSC No. 1 of 2019, and noted that, at order 4, the court awarded 22.22% of Nandi/Kamobo/5275 each to the 4th and 5th respondents, and, therefore, the appeal was not going to affect only the 1st and 2nd respondents. The court was clearly misled, to the detriment of the two respondents. There is a clear case for the setting aside of the orders of 26th February 2020. The appeals against the 4th and 5th respondents cannot be determined in isolation, and, therefore, the appeals against the 1st, 2nd and 3rd respondents should all be reinstated.
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> 8. In her response to that application, the appellant raised a lot of substantive issues, relating to jurisdiction, res judicata, sub judice, bias, among others. I cannot advert to those at this stage.

The application before me relates to whether or not the consent orders were properly entered into, to the extent that the 4th and 5th respondents were not involved, and were not even in court. Whether there was jurisdiction for the Kadhi to handle the matter or he was biased or his orders were res judicata or the matter was sub judice, etc., are matters that ought to be canvassed at the hearing of the appeals."

45. In brief, we agree with the learned Judge in toto. There is no question that the respondents were parties to the succession cause at the kadhi's court. In fact, they had primarily prevailed there earning several positive prayers that:

    8. "That the title deed No. 5275 Nandi/Kamobo be revoked from reading Amina Chepkemboi Mwalimu originally before corruptly being transferred to read Mariam Musa Said, as both of them corruptly acquired it and be reinstated to read Mustafa Ahmed Mohamed the rightful owner.

    9. That the Plot No. 5275 Nandi/Kamobo for Mustafa Ahmed Mohamed to be distributed amongst its heirs as follows:

        6. Ahmed Mustafa – 22.22%

        7. Swaleh Mustafa – 22.22%

        8. Miraaj Mustafa – 22.22%

        9. Ahmed Mustafa – 22.22%

        10. Kulthum Mustafa – 11.11% This is per the verse above (Q4:11)

        That all those living on Plot No. 5275 Nandi/Kamobo to be vacated to pave way to its rightful owners who are the above mentioned in order 4."

46. There is no question that the respondents were primary parties in the appeal that was filed at the High Court challenging those orders of the Kadhi. It was, therefore, impermissible for the appellant and the other parties to the appeal to then purport to enter into a consent whose purport and purpose is to reverse the substantive orders of the kadhi which were in favour of the respondent without involving them. This position is too elementary to require any authority to support it. A consent order can only be valid if it involves all the parties to a suit if its effect would be to dispose the entire suit in a way that is adverse to other parties to the suit. This is essentially what happened here. The respondents were named parties in the succession cause at the kadhi's court. They ought to have been named parties in any appeal filed at the High Court challenging the decision at the kadhi's court. By parity of reasoning, they ought to have been involved in any consent compromising that appeal – especially if its effect would be to reverse the decision made by the kadhi in their favour.

47. There is simply no appeal to rules, regulations or judicial policy which would change the fact that the consent orders dated 26th February, 2020 were for setting aside for non-involvement of some of the parties to the appeal. A consent order can only be effective if it is signed by all parties to the appeal or suit if its effect is to compromise the whole appeal or suit as in this case. It matters not that the appellant and the other parties to the consent orders felt that the respondents were wrongly enjoined to the suit itself. Indeed, that was one of the main issues on appeal and they had a right to have it determined.

48. This Court enunciated the grounds upon which consent judgment may be set aside in Board of Trustees National Social Security Fund versus Micheal Mwalo [2015] eKLR as follows:

> "The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court."

49. Similarly, in the celebrated Flora N. Wasike vs Destimo Wamboko [1988] eKLR, Hancox JA cited Setton on Judgments and Orders (7th edition) Vol 1 page 124, and reiterated that:

> " Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement."

50. In the present case, it is enough ground to set aside the consent orders that essential parties to the appeal were not involved in drafting the consent order yet its purport was to compromise the entire appeal.

51. The consents in both appeals, that is, Kakamega High Court Civil Appeal No. 69 of 2019, and Kakamega High Court Civil Appeal No. 80 of 2019 are similar and had the effect of setting aside and dismissing the judgment in Vihiga KCSC No. 1 of 2018 dated 4th July, 2019, in which the respondents herein were enjoined as interested parties and were decree holders and had been awarded part of the suit property. Thus, the said consents which were made in their absence by the appellant and the 1st, 2nd and 3rd respondents therein, would have affected them; and this constituted sufficient cause for the learned judge to set them aside.

52. In the circumstances, it is our finding that the learned judge did not err in setting aside the said consent orders and reinstating both appeals against the 1st, 2nd and 3rd respondents therein respectively to enable the appeals to be heard on merit.

53. The second issue is whether the learned Judge erred in ordering the consolidation and transfer of the two appeals to the High Court of Kenya at Vihiga for final disposal on the ground that the decision challenged was that of a subordinate court sitting at Vihiga.

54. In Kenya, the courts use several key considerations when determining whether to consolidate appeals. The test for consolidation of appeals is similar to that used for consolidating suits and is primarily guided by Order 11 Rule 3(1) of the Civil Procedure Rules and case law. The main question is not simply whether the parties to the appeal or suit are exactly the same. The key principles include whether there are common questions of law or fact, that is, whether the appeals raise similar or substantially the same legal or factual issues. See, for example, Nyati Security Guards & Services Ltd v. Municipal Council of Mombasa [2004] eKLR where the court held that suits may be consolidated if they raise common questions of law and fact. In Law Society of Kenya v. Centre for Human Rights & Democracy & 13 others [2014] eKLR, the Supreme Court ruled that where multiple appeals arise from the same subject matter, consolidation may be ordered to avoid conflicting judgments. Finally, in Peter Odour Ngoge v. Francis Ole Kaparo & 5 others [2012] eKLR, the Supreme Court held that appeals should be consolidated if doing so serves the interests of justice and procedural efficiency.

55. Applying the above principles, we are of the view that the learned Judge was correct in ordering the consolidation of the two appeals. He was also correct, in our view, in transferring the consolidated appeal to Vihiga since the kadhi's court that made the impugned ruling and order is under the supervisory jurisdiction of the newly established Vihiga High Court. The appellant seems to question the legal propriety or authority of the High Court transferring a suit or appeal to another one. The appellant's difficulties in this regard seem to be based on her understanding of the geographical jurisdictions. Suffice to say that notwithstanding section 18 of the *Civil Procedure Act*, there is only one High Court in Kenya which enjoys unlimited geographical limitations but has different administrative units and sits in different places. As such, there is no legal difficulty whatsoever in the High Court sitting in one place to transfer a suit or appeal to be heard at the High Court sitting in another place if the ends of justice are better served that way.

56. Finally, on whether the learned judge erred in dismissing the appellant's application for provision for security for costs against the respondents herein, we have no hesitation in ruling that he did not. There were simply no good grounds for so ordering. The learned Judge was correct that the appellant had not sufficiently demonstrated that the respondents were not residents of Kenya; were persons of no fixed abode; were a flight risk; were unable or unwilling to pay costs of the appeal or that their application or appeal was merely vexatious or frivolous.

57. In the circumstances, we find no basis for interfering with the ruling and orders of the High Court. Accordingly, we are satisfied that this appeal lacks merit. It is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF APRIL, 2025.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR