



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: WAKI, VISRAM & KARANJA, JJA)

CIVIL APPEAL NO. 29 OF 2017

BETWEEN

HASSAN MOHAMED ABDALLA 1ST APPELLANT

FAYADH MOHAMED ABDALLA 2ND APPELLANT

MUNIB MOHAMED ABDALLA 3RD APPELLANT

AND

NADH'YA MOHAMED ABDULHUSSEIN RESPONDENT

(An appeal against the Ruling of the High Court of Kenya at Malindi (Chitembwe, J.) dated 29th March, 2017

in

H. C. Misc. Appl. No. 30 of 2016)

JUDGMENT OF THE COURT

1. The appeal herein revolves around the jurisdiction of the Kadhi's court and more particularly, the interpretation of **Article 170 (5)** of the Constitution which delineates the scope of the said jurisdiction.
2. The parties who happen to be siblings are disputing over Parcel no. **Lamu/Block/609** wherein a four storey building stands (*suit premises*). Apparently the suit premises is family property which has been passed down from generation to generation. Of relevance, is that following the demise of the parties' father, one Mohamed Abdala, the suit premises was inherited by his sons, namely the appellants and Assim Mohamed Abdalla (Assim) and subsequently, registered in their favour as joint proprietors.
3. It seems that the four of them had agreed on how they would occupy the suit premises; the 2nd appellant occupied the ground floor, the 1st and 3rd appellants occupied the 1st floor with Assim taking the second floor. Assim who is ordinarily resident in the Netherlands gave the respondent who is their youngest sister power of attorney over his affairs. It is in that regard that the respondent took care of the second floor on behalf of Assim.
4. Be that as it may, there were wrangles between the appellants and the respondent over the suit premises with respect to the use of common facilities and payment of utilities. It appears at one point a wall in the said suit premises was demolished and the respondent suspected that it was her brothers who were responsible. Ultimately, the respondent filed a suit at the Kadhi's court being **Succession Case No. 18 of 2015**, rather what the parties refer to KCCC No. 18 of 2015, wherein she sought *inter alia*, an order directing the appellants to rebuild the demolished wall and the 3rd appellant to install his own electricity meter.
5. The appellants filed their defence in the said suit. However, the appellants filed an application being Misc. Appl. No. 30 of 2016 asking the High Court to invoke its jurisdiction under **section 18** of the **Civil Procedure Act** and transfer the suit at the Kadhi's court to the magistrate's court at Lamu or Mpeketoni. They were of the view that the Kadhi's court lacked jurisdiction to entertain the suit before it since it didn't fall within the ambit of **Article 170 (5)** of the Constitution.

6. In response, the respondent maintained that the Kadhi's court was properly seized of the suit before it. Furthermore, the appellants had approached the High Court with unclean hands because they had failed to disclose that they had raised a preliminary objection at the Kadhi's court challenging its jurisdiction which was dismissed. Moreover, the appellant had also concealed the fact that they had filed a suit at the Environment and Land Court (ELC) being E.L.C No. 245 of 2015 over the same dispute.

7. In a ruling dated 29th March, 2017 the learned Judge (**Chitembwe, J.**) held that the Kadhi's court was well suited to determine the suit and that the appellants' application was simply intended to scuttle the determination of the said suit. In his own words the learned Judge expressed:

“It is therefore clear to me that the Kadhi is well versed with the issue in dispute and has dealt with it before. The succession petition was filed before the Kadhi's court and the applicants filed their response dated 16.5.2016. There was no issue raised by the applicants in relation to the jurisdiction of the Kadhi to handle the dispute. It is clear that the case is still pending before the Kadhi's court and the estate will be distributed. Upon hearing the parties, the Kadhi is well placed to determine the dispute. It is clear to me that Civil Suit No. 245 of 2015 pending before the ELC Court was filed after the suit before the Kadhi's court was filed. The best way forward would be to have the case pending before the Kadhi's court determined so that issues relating to inheritance can be determined. The fact that the dispute involves land cannot stop the Kadhi's court from hearing the matter. The properties in dispute were inherited and it has to be established how the share of each beneficiary is ascertained.”

8. It is that decision that provoked the appeal before us which principally faults the learned Judge's finding that the Kadhi's court has jurisdiction over the suit in issue. Learned counsel, Mr. Angima appeared for the appellants while learned counsel, Mr. Omwancha appeared for the respondent. Counsel relied entirely on the written submissions filed on behalf of the parties.

9. The appellants, begun by stating that the rationale behind the supervisory jurisdiction of the High Court under **section 18** of the **Civil Procedure Act**, that is, to withdraw and transfer suits instituted in subordinate courts, is to facilitate the efficient use of available judicial resources as well as just and expeditious determination of suits. In their view, the learned Judge misapprehended the foregoing by dismissing the application for transfer of the suit at the Kadhi's court to magistrates court at Lamu.

10. Elaborating further, it was submitted that it is the ELC which is clothed with the jurisdiction to entertain disputes relating to use and occupation of land pursuant to **Article 162 (2)** of the Constitution. Contrary to the learned Judge's finding the subject matter of the suit filed at the Kadhi's court related to the use of land as opposed to inheritance of the suit property. In point of fact, the orders sought at the Kadhi's court are injunctive in nature and are not in any way connected to the distribution of the estate of a person who professed the Islamic faith.

11. The scope of the Kadhi's court jurisdiction is clearly spelt out under **Article 170 (5)** of the Constitution and does not include any issue of use of land. Citing this Court's decision in ***Peter Gichuki King'ara vs Independent Electoral and Boundaries Commission & 2 Others - Civil Appeal No. 23 of 2013*** the appellants contended that the Kadhi's court had no jurisdiction to entertain the suit filed before it.

12. The respondent posited that the learned Judge correctly applied the law by dismissing the appellants' application. The issue of the Kadhi's court jurisdiction was first raised before the said court which ruled that it had the requisite jurisdiction to determine the dispute. The Kadhi's court is a creature of the Constitution hence its decision(s) is legally binding on the parties before it. It follows therefore, if a party is aggrieved by such a decision he/she should either seek review or lodge an appeal against the decision. We understood the respondent to argue that the Kadhi's court's decision was binding since neither an appeal nor an application for review had been filed by the appellants.

13. Besides, the appellants had approached the High Court with unclean hands by failing to disclose the existence of the aforementioned decision by the Kadhi's court and ELC case filed at their instance. Consequently, the learned Judge was justified in declining to exercise his discretion in their favour. In conclusion, the respondent urged that the Kadhi's court was properly seized of the suit before it.

14. We have considered the record, arguments put forth on behalf of the parties and the law. Jurisdiction is a fundamental principle which empowers /authorizes a court to entertain any matter before it. Without it a court can do nothing and any attempt to handle such a matter is futile. This much was appreciated by **Nyarangi, JA** in the *locus classicus* case of ***The Owners of Motor Vessel “Lillian S” vs Caltex Oil Kenya Limited [1989] KLR*** where he stated that;

“Jurisdiction is everything. Without it, 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 pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

15. It is common ground that the scope of the Kadhi's court jurisdiction is spelt out under **Article 170 (5)** of the Constitution 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.”

16. The aforementioned provision has received extensive consideration by the courts. In ***R. B. & R. G .O. vs H. S. B. & A. S. B. [2014] eKLR, Murithi, J.*** expressed himself as follows:

“It is clear from the textual provision of Article 170 (5) of the Constitution that the jurisdiction of the Kadhi's court is limited to questions relating to personal status, marriage, divorce or inheritance, in proceedings where all the parties profess Muslim religion and submit to the jurisdiction of the Court. It appears to me that the primary purpose of the Article 170 is to preserve a forum for the resolution of disputes as to personal law matters of Muslims as existed before the Constitution of Kenya 2010 under section 69 of the former Constitution. The new Constitution, however, recognised and gave effect to the right of Muslims

to choose to utilize the regular system of adjudication through the High Court.” [Emphasis added]

17. We agree with the above exposition which resonates with the position taken by this Court in *Genevieve Bertrand vs Mohamed Athman Maawiya & Another* [2014] eKLR as follows:

“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 [Court] 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”. Thus the jurisdiction of the Kadhi’s court is determined by the existence of three factors. That is the subject matter of the claim or dispute, the party’s Muslim faith, and the party’s submission to the jurisdiction of the Kadhi’s court.” [Emphasis added].

18. Applying the above principles to the case at hand, one issue that stands out as a sore thumb is that the appellants had not submitted to the Kadhi’s court jurisdiction. This is evident from the preliminary objection they filed at the said court as well as the application filed at the High Court seeking transfer of the suit in question to the magistrate’s court.

19. The fact that the appellants had filed a defence in the suit at the Kadhi’s court and that they professed the Islamic faith was not enough to infer that they had submitted to the Kadhi’s court jurisdiction. As Murithi, J. aptly put *in R. B. & R. G. O. vs H. S. B. & A. S. B.* (supra):

“For its part, this court takes the view that the issue of profession of Muslim faith is distinct from the necessary ingredient of submission to the jurisdiction of the Kadhi’s court to deal with the personal law matters of marriage, divorce and inheritance of Muslims. Profession of the Islam is not synonymous with submission to the jurisdiction of the Kadhi’s court.

...

While the parties before the Kadhi’s court must all be Muslims, no party who has not submitted to the jurisdiction is compelled to litigate before that court.” [Emphasis added].

20. A party’s right to choose whether to submit to the jurisdiction of the Kadhi’s court was further emphasized in the case of *Saifudean Mohamedali Noorbhai vs Shehnaz Abdehusein Adamji* [2011] eKLR wherein this Court held:

“Her concern about submitting to the jurisdiction of the Kadhi’s court is misplaced. Kenyan Courts have held in past judgments that every litigant, of whatever religious persuasion, has the option of going directly to the High Court, and a Muslim is not necessarily restricted to the jurisdiction of the Kadhi’s court. ... Indeed, section 170 (5) of the new Constitution of Kenya, affirms this right.”

21. Lack of submission by the appellants was enough to divest the Kadhi’s court of jurisdiction over the suit in issue. Therefore, we find that the learned Judge erred in not appreciating the foregoing and dismissing the appellants’ application to transfer the suit to the magistrate’s court.

22. Accordingly, we find that the appeal herein has merit and is hereby allowed with costs. We hereby set aside the learned Judge’s ruling dated 29th March, 2017 and substitute the same with an order allowing the appellants’ application dated 26th May, 2016 in part as follows:

The file comprised of KCC No. 18 of 2015 at Lamu is hereby transferred to the Senior Resident Magistrate’s court at Lamu.

The costs of the application shall abide the outcome of the main suit.

Dated and delivered at Mombasa this 20th day of September, 2018.

P. N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

*I certify that this is a
true copy of the original.*

DEPUTY REGISTRAR