



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, MAKHANDIA & OUKO, JJ.A)

CIVIL APPLICATION NO. 24 OF 2013

BETWEEN

GENEVIEVE BERTRAND.....APPELLANT

VERSUS

1. MOHAMED ATHMAN MAAWIYA

2. MOHAMED ATIQ.....RESPONDENTS

*(Being an appeal against the Order of the Resident Judge (Meoli J) dated 8<sup>th</sup> May, 2013*

*In*

*Malindi High Court Civil Appeal No. 37 of 2012)*

\*\*\*\*\*

JUDGMENT OF THE COURT

[1] What is before us is an appeal against the order made by the High Court at Malindi (*Meoli J*), in **Civil Appeal No. 37 of 2012** on 8<sup>th</sup> May 2013, summarily rejecting the appeal under **section 79B** of the Civil Procedure Act. **Genevieve Bertrand** who is now the appellant before us lodged the appeal before the High Court.

[2] The High Court appeal originated from **Kadhi Civil Suit No. 27 of 2002** filed in the Kadhi's Court at Lamu by the appellant. That suit had a checkered history, which has to be understood in order to appreciate the issue raised in the appeal before us. The appellant initiated the suit by suing **Mohamed Athman Maawiya** and **Mohamed Atiq** who are now the respondents in this appeal. The gist of the appellant's claim, was contained in paragraph 8, 9 and 10 of the undated plaint that was filed in Lamu Kadhi's Court on 15<sup>th</sup> July 2002.

[3] In a nutshell the appellant wanted to buy a house whose registered owner was deceased. She therefore sought to have the beneficiaries of the house ascertained and the legal capability of the respondents to transfer the house to her confirmed. The specific orders which she sought from the Kadhi's Court, were stated in the plaint as follows:

- a. For a declaration that the two defendants jointly and severally are in law and in fact

**capable under Islamic Law and under the Registered Land Act to transfer the plot of the deceased to the plaintiff for valuable consideration and to execute a valid transfer under the Registered Land Act in favour of the plaintiff.**

- b. That the defendants jointly and severally to distribute the share proceeds amongst the beneficiaries under Islamic Law and Inheritance through this Honourable Court.**
- c. All other relevant and incidental orders in furtherance of the prayer in (a), (b) above; and (d) costs of (sic) incidental to the suit.**

[4] Though both respondent entered appearance only the 1<sup>st</sup> respondent ended up filing a defence to the appellant's suit wherein he admitted the jurisdiction of the Court and confirmed that the appellant had offered to buy the house from the beneficiaries, and that the price was agreed. However, the 1<sup>st</sup> respondent maintained that he had incurred a sum of Kshs.80,000/- in renovating the house and therefore wanted the initial price renegotiated.

[5] **Mohamed Abdillahi Mahmoud** who was the Lamu Kadhi was the first to hear the suit. The record of appeal reflects the proceedings of 10<sup>th</sup> March 2003 as commencing with the appellant's advocate stating as follows:

*I did not file this suit to actually sue the defendant to complaint against them, but I wanted to ascertain the transaction on legal grounds by ascertaining the beneficiaries and their respective shares according to the Islamic Law of inheritance so that each of the beneficiaries gets her or his rights from the proceeds of the estate..... The most important thing is that the defendant to get the letter of administration to enable them to effect the transfer of the plot whereby I will be able to pay the amount or alternatively I get a certain percentage of the price amount to the defendant and when the transfer is completed I complete the payment through this Honourable Court ....*

[6] The respondents who were both in Court did not essentially object to the appellant's claim but indicated they were still making arrangements for the letters of administration. The Kadhi then made an order adjourning the matter "till further notice when the letter of administration is obtained by the defendants"

[7] It would appear that thereafter, no further action was taken in the matter until a new Kadhi **Ismail A. Abdalla** was transferred to Lamu from Eldoret. He issued notices under **Order XVI Rule 2(1)** of the former Civil Procedure Rules for parties to show cause as to why the suit should not be dismissed for want of prosecution. The appellant's counsel who maintained that the appellant had already prosecuted her suit objected to the notices. In his ruling made on 7<sup>th</sup> July 2005, Kadhi **Ismail A. Abdalla** noting the need to have the matter determined expeditiously, made orders as follows:

*"to sought (sic) this problem and bring this matter to an end once and for all, the plaintiff to deposit full amount as agreed to the Court, then the Court releases sufficient amount to obtain letters of administration. Once the letters of administration are surrendered to Court, then the defendants get their balance. If the parties are not going to agree with the opinion above stated, then this Court will have no option but to start the case de novo and be heard and determined as soon as possible'.*

[8] Being dissatisfied with the order, the appellant moved to the High Court at Malindi in **Civil Appeal No. 11 of 2005**. That appeal was resolved through a consent recorded by the parties, allowing the appeal with no orders as to costs, which order was adopted by the Court on 1<sup>st</sup> November 2011.

[9] Thereafter, the suit came before the then Lamu Kadhi, **Mshali Hamisi Mshali** on 26<sup>th</sup> April, 2012. The appellant's advocate complained that Kadhi **Mohamed Abdillahi Mahmoud** had signed some transfer in regard to the suit property and that the parties were not being given a fair hearing. **Kadhi, Mshali Hamisi Mshali**, then made an order for Kadhi **Mohamed Abdillahi Mahmoud** to appear before the Lamu Court to shed light on the issues raised.

[10] On 3<sup>rd</sup> August 2012, Kadhi **Mshali Hamisi Mshali**, reviewed his order summoning Kadhi **Mohamed Abdillahi Mahmoud**, explaining that he had realized that it was wrong for him to summon the Kadhi who had acted in a judicial capacity. Kadhi Mshali then fixed the matter for judgment.

[11] On the 3<sup>rd</sup> October 2012, Kadhi Mshali delivered a judgment in which he noted that the appellant did not profess the Muslim faith, and that therefore under the Kadhi's Court Act **Cap 11 section 5**, the appellant's claim did not fall within the jurisdiction of the Kadhis Court. Kadhi Mshali therefore referred the litigation to the Principal Magistrate's Court at Lamu.

[12] It is this judgment of 3<sup>rd</sup> October 2012 that provoked **High Court Civil Appeal No.37 of 2012**, in which the appellant complained: that the jurisdiction of the Kadhi's Court was not an issue before the Kadhi, as the parties had admitted the Court's jurisdiction; that the Kadhi had totally disregarded the Civil Procedure Rules, the Rules of Equity, and all the previous proceedings in the matter. The appellant urged the High Court to allow the appeal and implement the order made by the Kadhi Court on 10<sup>th</sup> March 2003, for the respondent to obtain letters of administration and the transfer of the suit property to be effected as pleaded in the plaint. This is the appeal that was summarily dismissed by the High Court resulting in the second appeal now before us.

[13] The appellant has raised six grounds in his memorandum of appeal contending that the High Court Judge erred in rejecting the appeal summarily without considering the substantive legal issues which were raised in the appeal, and which included Islamic Law of Inheritance, pleadings, evidence, procedures, and rules of natural justice. The appellant further contended that the judge erred in failing to consider the order made by the lower Court on 10<sup>th</sup> March 2003, and maintained that the rejection of the appeal amounted to a violation of the appellant's constitutional right to a fair hearing.

[14] In arguing the appeal, **Mr. Jiwaji** counsel for the appellant, maintained that jurisdiction was not an issue raised in the pleadings. He maintained that the Court was wrong in summarily rejecting the appeal as the appeal raised substantial issues of law.

[15] **Mr. Khatib** who appeared for the respondents submitted that the appellant having admitted that she was not a Muslim, the Kadhi's Court was not the right forum for her suit. Mr. Khatib further pointed out that the appellant's pleadings revealed that her claim was based on contract, and therefore it did not fall within the ambit of matters for consideration by the Kadhi's Court whose jurisdiction is restricted to matters concerning marriage, divorce and inheritance. Counsel argued that in the circumstances of this case, it was expedient for the High Court to dismiss the appeal.

[16] The main issue in this appeal is whether the High Court erred in summarily rejecting the appellant's appeal. **Section 79B** of the Civil Procedure Act states as follows:

***"...Before an appeal from a subordinate Court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily..."***

[17] This provision has been considered in several decisions. In ***Orero vs Oseko [1984] KLR 238***, the Court of appeal noted that the power granted by the Civil Procedure Act in **section 79B** should be exercised "*most carefully and only in the clearest case such as an appeal based wholly on matters of facts upon which proper findings would have been made*".

[18] In ***Mashere vs Walusala [1986] KLR 503***, it was held that: the summary rejection of an appeal under **section 79B** of the Civil Procedure Act is a power which should be exercised sparingly, and which should be made after a careful perusal of the record, and weighing of all the matters which a Court should take into account in exercising its discretion to deny a party his ordinary right of appeal.

[19] In ***Soor vs. Mohamed [2006] 1 EA 381***, the Court identified one of the factors to be considered in

summarily rejecting an appeal under **section 79B** as where the grounds of appeal could not possibly succeed, and the appellant's use of his constitutional right of appeal, amounted to abuse of the process of the Court.

[20] Thus, it is apparent that although the appellant had a right of appeal that right was subject to **section 79B** of the Civil Procedure Act. Nevertheless, the power of summary rejection of an appeal under **section 79B** of the Civil Procedure Act, is to be exercised sparingly and in cases where it is very apparent that the appeal basically amounts to abuse of the court process. In this case, the summary rejection of the appellant's appeal was anchored on the issue of jurisdiction, as the summary rejection of the appeal resulted in the upholding of the Kadhi's ruling that he had no jurisdiction to entertain the appellant's claim.

[21] It is evident from the pleadings that the defence filed by the 1<sup>st</sup> respondent, admitted jurisdiction of the Kadhi's Court, such that jurisdiction was not raised as an issue before the Kadhi. However jurisdiction is a crucial issue that cannot be ignored by the Court. As was stated by **Nyarangi JA** in **The owner of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KL R 1:**

*"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 down tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction".*

[22] Moreover as was held in **Allarakhia v Aga Khan 1969 EA 613**, parties cannot by mutual consent confer jurisdiction upon a Court which has no such jurisdiction. Thus it was appropriate that the issue of jurisdiction be addressed. In **Samuel K. Macharia & Another v Kenya Commercial Bank & 2 Others, Supreme Court Civil Appeal No. 2 of 2011**, the Supreme Court noted that the Court's jurisdiction flows from either the Constitution or the legislation or both.

[23] 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"*. 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.

[22] From the facts that emerged in the Kadhi's court it was evident that there was no dispute that the appellant was not a Muslim. It was also apparent from the pleadings that the appellant's claim did not relate to questions of Muslim law of personal status, marriage, divorce or inheritance but related to a contract of sale of a house. Although there was an issue of ascertainment of the beneficiaries of the house the appellant intended to purchase, the issue of inheritance was not the dispute before the Kadhi's Court. Moreover the ascertainment of beneficiaries was tied to the interest of the appellant a non Muslim. Further the appellant's interest arose out of a contractual transaction.

[23] There is no doubt that the issue of jurisdiction was one of mixed law and fact, and that the facts upon which the issue of jurisdiction was anchored were clear and uncontested. On those facts, it was obvious that the appellant's claim did not fall within the jurisdiction of the Kadhi's court, and the Kadhi could do no more than down his tools as he did. In light of such a clear position, the appeal before the High Court was no more than an academic exercise as no arguments could change this position. Thus, the High Court cannot be faulted for applying **section 79B** of the Civil Procedure Act and holding that there was no sufficient ground to interfere with the order of the Kadhi's Court regarding the issue of jurisdiction. The appeal was clearly an abuse of the process of the Court as the circumstances were obvious that the Kadhi's Court had no jurisdiction.

[23] For the aforesaid reasons, we find no merit in this appeal and do therefore dismiss it with costs.

**Dated and delivered at Malindi this 20<sup>th</sup> day of March 2014**

**H.M. OKWENGU**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**W.OUKO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**