JKK v SYW (Civil Appeal E161 of 2023) [2025] KEHC 950 (KLR) (31 January 2025) (Judgment)

Neutral citation: [2025] KEHC 950 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL APPEAL E161 OF 2023

M THANDE, J

JANUARY 31, 2025

BETWEEN

JKK ..... APPLICANT

AND

SYW ..... RESPONDENT

(An Appeal from the ruling of Hon. E. K. Usui, Chief Magistrate delivered on 13.10.23 in Malindi CM Succession Cause No. 80 of 2019)

JUDGMENT

1. The Appeal herein arises from a ruling delivered in Malindi CM Succession Cause No. 80 of 2019 on 13.10.23. The proceedings in the court below relate to the estate of MKM who died on 3.9.19. A petition for letters of administration dated 2.12.19 was filed by the Appellant in his capacity as son of the deceased. The Appellant averred that the deceased was survived by 1 widow and 6 children.

2. On 9.12.21, the Respondent filed an objection to the making of grant dated 6.12.21. The Respondent claimed that she and the deceased were married under Islamic law on 14.6.14 and lived together in their matrimonial home in Kilifi until his demise. Further, that she had contributed financially to the construction of the said matrimonial property. She added that AGK had divorced the deceased prior to his demise.

3. The objection proceeded to hearing culminating in the impugned ruling. In the said ruling, the trial Magistrate made a finding that the disputed question of the Respondent's marriage to the deceased under Islamic law fell within the purview jurisdiction of the Kadhi's court. The trial Magistrate thus declined jurisdiction and directed that the Respondent file an application within 60 days before the Kadhi's court for determination of the issue of marriage. The trial Magistrate proceeded to stay the proceedings pending such determination.

4. The Appellant being aggrieved by the said ruling filed the present appeal raising the following grounds:

1. The Learned Magistrate misdirected herself by failing to hold that there was no proper objection before the court as envisaged and provided for under sections 68 and 69 of the *Law of Succession Act* and rule 17 of the Probate and Administration Rules.

2. The Learned Magistrate erred in law and fact by holding that the lower court did not have jurisdiction to handle the succession proceedings and referring the succession case to the Kadhi's court when not all the parties to the dispute profess the Muslim faith and none of the parties had submitted to the jurisdiction of the Kadhi's Court.

3. The Learned Magistrate erred in law and in fact by finding that the lower court did not have jurisdiction to determine the validity of marriage of the respondent.

4. The Learned Magistrate erred in law and fact by referring the succession case to the Kadhi's Court when there was no evidence before her that the deceased was a Muslim and when she had not made any finding that the deceased was a Muslim.

5. The Learned Magistrate erred in law and in fact by disregarding the submissions and evidence by the Appellant.

6. The Learned Magistrate erred in law and fact by failing to hold that there was no marriage between the objector and the deceased.

5. I have re-examined the entire record and given due consideration to the parties' respective submissions. Being a first appeal, this Court is called upon to re-assess and analyze the evidence on record being mindful that it neither saw nor heard the witnesses testify. (See Selle v Associated Motor Boat Co. [1968] EA 123). The Court is also guided by the Court of Appeal in the case of Samuel Kalomit Murkomen v Telkom Kenya Limited [2017] eKLR, where it stated:

> Our role as the first appellate court is to re-evaluate the evidence tendered before the trial court and reach our own conclusion. However, we are conscious of the fact that unlike the trial court, we did not have the benefit of observing the witnesses as they testified. Accordingly, we ought not to interfere lightly with findings of fact by the trial court. This much was appreciated by this Court in J. S. M. v E. N. B. [2015] eKLR -
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> > We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions."

6. On failure to find that there was no valid objection before the court, the Appellant submitted that after filing the objection, the Respondent did not file an answer to petition and cross petition as required under Section 69 of the *Law of Succession Act*.

7. The Respondent countered this by submitting that the Appellant participated in the proceedings and did not at any time protest that the objection was not properly before the court. Relying on Article 159(2)(d) of the *Constitution*, the Respondent urged the Court to find that there was a proper objection before the trial court.

8. The substantive law on objections to the making of a grant is contained in Sections 68 and 69 of the *Law of Succession Act*, while the procedure is found in Rule 17 of the Probate and Administration Rules. Section 68 provides:

> 68 (1) Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by the notice, or such longer period as the court may allow.
>
> (2) Where notice of objection has been lodged under subsection (1) the court shall give notice to the objector to file an answer to the application and a cross-application within a specified period."
>
> 69 (1) Where a notice of objection has been lodged under subsection (1) of Section 68, but no answer or cross-application has been filed as required under subsection (2) of that Section, a grant may be made in accordance with the original application.
>
> (2) Where an answer and cross application have been filed under subsection (2) of Section 68, the court shall proceed to determine the dispute.

9. It is clear from Section 68, that after filing a notice of objection, an objector is required, upon notice being given by the court, to file an answer to application for grant and a cross application within a specified period. Section 69 stipulates the consequences of failing to file an answer or cross-application, namely that a grant may be issued. Hearing of the dispute may only proceed after the filing of an answer and cross-application. It is the objection, answer to application for grant and a cross application that together constitute a dispute capable of being heard and determined by a court.

10. In Jason Werimo Onyango v Patrick Onyango Sakwa [2019] eKLR, Musyoka, J. had this to say about failure to file and answer to petition and cross application:

> 15. The said provisions envisage the filing of a notice of objection, followed by an answer to the petition and a petition by way of cross-application. What constitutes the objection is the combination of the notice of objection, the answer to petition and the petition by way of cross-application. It would appear that where the objector files a notice of objection but does not file the answer and the cross-petition then the objection pleadings would be incomplete and the court ought to disregard the notice of objection and proceed to make a grant to the petitioner. According to section 69(2), the objection proceedings should only be heard after an answer and cross-application are filed under section 68 (2) of the Act. Under section 69(1) of the Act, where a notice of objection is filed but no answer or cross-application has been filed as required by section 68(1) of the Act, the court ought to make the grant in accordance with the petition.
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> 16. From the record of the trial court, the appellant filed a notice of objection dated 31st March 2017, in keeping with section 68(1) of the Act. I have perused through and pored over all the documents and processes filed in that record. I have not come across any document that would pass as answer to the petition or a petition by way of cross-application. It would mean, therefore, that the appellant did not comply with section 68(2) of the Act, the effect of which was that, as per section 69(1) of the Act, there was no objection that could be heard by the court. The court, therefore, conducted a trial that it ought not have conducted in the first place.

11. Similarly, in Re Estate of Amar Kaur Matharu- (Deceased) [2014] eKLR, the same JudgeJ opined:

> I reiterate that the Notice of Objection is not a pleading. It is not a reply to the petition for grant. It is the answer to the petition and the petition by way of cross-application which

reply to the petition for grant. It is these two twin processes that make up the objection. These two are pleadings. Technically, therefore, there is no objection on record.

12. The Respondent invoked the provisions of Article 159(2)(d) of the *Constitution* and urged the Court to find that there was a proper objection before the trial court. Article 159(2)(d) demands that procedural technicalities should not be an impediment to the administration of substantive justice. The filing of an answer or cross-application is a jurisdictional pre-requisite for the hearing of an objection. Failure to file the same is not a mere technicality of procedure that can be cured or remedied by invoking the said constitutional provisions. In this regard, I am guided by the decision in Patricia Cherotich Sawe v Independent Electoral & Boundaries Commision(IEBC) & 4 others [2015] eKLR where the Supreme court stated:

> (31) Although the appellant involves the principal of the prevalence of substance over form, this Court did signal in Law Society of Kenya v. The Centre for Human Rights & Democracy & 12 Others, Petition No. 14 of 2013, that "Article 159(2) (d) of the *Constitution* is not a panacea for all procedural shortfalls." Not all procedural deficiencies can be remedied by Article 159; and such is clearly the case, where the procedural step in question is a jurisdictional prerequisite.

13. In the instant case, there was no objection for consideration by the court below for want of an answer or cross-application. What was before the court was a hanging and unsupported notice of objection. The trial court thus conducted a trial that it ought not to have in the first place. On this ground alone, the appeal succeeds.

14. The foregoing notwithstanding, it necessary to address the finding of the trial Magistrate that she did not have jurisdiction to determine whether the deceased and the Respondent were married, which in her view is within the purview of the Kadhi's court. She then directed the Respondent to file an application before that court for determination of the said issue and stayed the proceedings before her.

15. A Court therefore may only exercise such jurisdiction as has been conferred upon it by the *Constitution*, statute or both. In Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR the Supreme Court succinctly stated 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. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

16. The jurisdiction of Kadhi Courts flows from the *Constitution* of Kenya, 2010 and from the Kadhi's Court Act. Article 170(5) of the *Constitution* provides:

> The jurisdiction of a Kadhis' 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.

17. Section 5 of the Kadhis' Court Act is couched along similar terms but goes on to provide that "nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it."

18. A clear reading of the above provision shows that the *Kadhis' Courts Act* does not limit or oust the jurisdiction of this Court or of subordinate courts. Put differently, this Court and subordinate courts have the jurisdiction to determine questions of Muslim law relating to personal status, marriage, divorce or inheritance of Muslims. The only rider is that when a court other than a Kadhi's court

assumes jurisdiction over personal law matters relating to Muslims, Islamic law shall apply. This was the holding in Re the Estate of Ismail Osman Adam, deceased, Noorbanu Abdulrazak v. Abdulkader Ismail Osman, Mombasa Civil Appeal No. 285 of 2009, where the Court of Appeal noted:

> [I]f the High court assumes jurisdiction to the estate of a deceased Muslim, then by virtue of Section 2 (3) of the [*Law of Succession Act*] the law applicable in the High Court as to devolution of the estate is the Muslim law and not the LSA.

19. It is noted that what was before the Court of Appeal was a succession matter. By parity of reasoning, where a subordinate court assumes jurisdiction over the question of validity of an Islamic marriage as in the present case, the law applicable is Islamic law. This goes to show that the trial Magistrate, by dint of Section 5 of the Kadhis' Court Act, had the requisite jurisdiction to determine the validity of the marriage between the Respondent and the deceased. As such, she misdirected herself in finding that she lacked jurisdiction.

20. In the end and in view of the foregoing, I find that the Appeal is merited and make the following orders:

    i. The judgment of the trial Magistrate delivered on 13.10.23 is hereby set aside with the result that the objection is dismissed.

    ii. Pursuant to the provisions of Section 69(1) of the *Law of Succession Act*, a grant may be made in accordance with the original application.

    iii. The Appellant shall have costs of this Appeal and of the objection in the trial court.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 31ST DAY OF JANUARY 2025.

M. THANDE

JUDGE