



**Republic v Wayu - Senior Resident Kadhi; Musa (Exparte Applicant); Ismail & 3 others (Interested Parties) (Judicial Review E001 of 2021) [2025] KEHC 1727 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1727 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
JUDICIAL REVIEW E001 OF 2021  
CM KARIUKI, J  
FEBRUARY 27, 2025**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**AB WAYU - SENIOR RESIDENT KADHI ..... RESPONDENT**

**AND**

**NASRIN AHMED MUSA ..... EXPARTE APPLICANT**

**AND**

**KHADIJAH MUSA ISMAIL ..... INTERESTED PARTY**

**SARAH MUSA ISMAIL ..... INTERESTED PARTY**

**NEEMO MUSA ISMAIL ..... INTERESTED PARTY**

**FAUZA MUSA ISMAIL ..... INTERESTED PARTY**

**RULING**

1. The Ex-parte Applicant herein filed the present Notice of Motion dated 22/03/2024 seeking for;
  1. An order of certiorari to remove into the high court for the purpose of its being quashed the decision of the honourable A.B. Wayu, senior resident Kadhi made vide ruling dated 24/09/2021 allocating property known as LR. No. 58 Block 4 Narok being the estate of Amina Gasi Farah(deceased) to the interested parties herein as a gift.
  2. An order of prohibition from the high court forbidding and/ or prohibiting the respondent from continuing with any court proceedings in the matter of the estate of Amina Gasi Farah(deceased) in Kericho Kadhi’s Court Miscellaneous Application No. E005 of 2021.



3. The interested parties be restrained from any form of interference with the estate of Amina Gasi Farah(deceased) and more specifically with property known as L.R. No. 58 Block 4 Narok.
  4. Orders of certiorari and prohibition operate as stay of ruling dated 24/09/2024 in Kericho Kadhi's Court Miscellaneous Application No. E005 of 2021.
  5. This court do issue any other order or relief as it may deem just and fair in the circumstances.
  6. An order for costs to be in the cause. Such further and other relief be granted to the applicant as this court deems fit.
2. The application is premised on sections 8 and 9 of the Law Reform Act and Order 53 Rule 3 (1) of the Civil Procedure rules.
  3. The application is based on the grounds set out on the face of the application and supporting affidavit of Nasrin Ahmed Musa, sworn on 22/03/2024.
  4. The grounds upon which the reliefs are sought are that; upon the death of Amina Farah Gasi(deceased), the beneficiaries had a dispute about the collection and distribution of rental income from the estate; an application was made to the Kadhi's court to determine the collection and distribution of rent over the property left by the deceased among the beneficiaries; it was during the hearing of this application that the interested parties alleged that their late mother, Amina Farah Gasi(deceased) had given them the suit property as a gift; there is no formal application seeking to establish the status of the suit property nor the administration of the estate of the deceased; a ruling was made with regard to the status of part of the estate of the deceased to the exclusion of the rest of the estate on 24/09/2021; and this ruling was made without the participation of all the beneficiaries to the estate of the deceased.
  5. in the supporting affidavit, the deponent averred that; she is the daughter and legal representative of the late Ahmed Musa Ismail(deceased) who approached this court on behalf of his sons, grandchildren of the late Amina Farah Gasi(deceased) vide the letters of administration ad litem issued on 26/04/2023 by the narok high court; Amina Gasi Farah(deceased) died domiciled in narok and was survived by 4 daughters, the interested parties herein and several sons one of whom is Ahmed Musa Ismail(deceased) father to the ex parte applicant and grandchildren all of whom are legal beneficiaries to the estate of Amina Farah Gasi(deceased); the property known as LR NO. 58 BLOCK 4 NAROK forms part of the estate of Amina Farah Gasi(deceased); upon demise of Amina Farah Gasi(deceased), Ahmed Musa Ismail(deceased) and other family members sought legal advice from the respondent, as a trusted religious leader and judicial officer on the fair administration and distribution of the estate of Amina Farah Gasi(deceased) for the benefit of all her dependants and beneficiaries in accordance to sharia laws due to the contentious issues of rent collection of the property of the deceased by the beneficiaries; the respondent in his capacity as he then was, a Kadhi in charge of mobile court in Kericho and Narok regions is believed to have drafted legal pleadings and filed the said pleadings in Kericho Kadhi's court being miscellaneous application no. e005 of 2021, in the matter of the estate of Amina Farah Gasi(deceased) on behalf of the interested parties; the respondent abusing the trust- am a-nah and his position as Kadhi asked the late Ahmed Musa Ismail for money allegedly to be used as filing fees and for disbursements for site visits, which money was sent to the respondent's personal m-pesa line, 0704178711 on diverse dates by various members of the family; the respondent further committed an illegality in asking for money from Ahmed Musa Ismail and other parties as filing fees and disbursements for site visits and accepting the same in his personal number without issuing receipts thus offending the provisions of the judicial service code of conduct and ethics for judicial officers, denied the judiciary and in general the people of Kenya of revenue an action that is both fraudulent and criminal as the said monies are to be paid to the court registry through official accounts and receipts



given yet no receipts were ever given as proof of payment of monies despite the same being advanced; the respondent delivered a ruling on 24/09/2021 and personally forwarded the said ruling to the late Ahmed Musa Ismail; the respondent without formal application purported to oversee proceedings with regard to the status of the suit property between some of the beneficiaries of the estate of the deceased; the respondent in addressing the applicants on 27/05/2021 gave orders that, inter alia that the family to subject the entire estate of Amina Gasi Farah(deceased) and Musa Ismail(deceased) to succession proceedings; the ruling made on 24/09/2021 made reference to an application allegedly registered on 11/06/2021 an application that cannot be trace and whose records is unknown; the respondent did not accord all beneficiaries the chance of participating in the said proceedings that resulted in the said ruling of 24/09/2021 before making a determination that has immense effect on their rights as beneficiaries of the estate of the deceased; the respondent committed an illegality in acting contrary to the laws of natural justice and provisions of *the constitution*, the laws of succession act and the Kadhi's court act and the Kadhi's court (procedure and practice) rules; as a Kadhi, judicial officer, overseeing the operations and cases presented before the court, the respondent's purported actions of giving advice, preparing pleadings, filing the said pleadings and rendering a decision on the same were unprocedural and therefore illegal; Ahmed Ismail Musa (deceased) filed a complaint with the judiciary ombudsman airing his frustrations at the actions of the respondent.

6. The application was opposed by the interested parties who filed a replying affidavit dated 17/05/2024 sworn by Khadijah Musa Ismail, the 1<sup>st</sup> interested party who deponed inter alia; that the deceased died domiciled in narok and was survived by 7 sons and 5 daughters; that LR No. 58 Block 4 Narok was bequeathed to them by their mother during her lifetime as a gift inter vivos and to affirm her commitment she a) surrendered the allotment letter to them, b) only allowed them to collect rent in respect of plot LR. No. 58 Block 4 Narok and c) forbade the applicants from interfering with the quiet and peaceful possession of the plot by them as the daughters and the applicants never raised any issue touching on the said parcel of land when their mother bequeathed them; that the averments that the chief Kadhi drafted the legal documents is false speculative and unsubstantiated and should be struck off the record; that they are strangers to averments that money was sent to the Kadhi as the money was sent by applicants not interested parties; that the applicants have unclean hands as they tried to approach the Kadhi to get judicial advantage; the ruling was sent to the parties as it was in line with the covid protocol; as which required matters to be handled remotely in observation of covid 19 protocols; that if the applicants felt the Kadhi was biased should have moved for his recusal therefore their claim is an afterthought; that if the applicants are dissatisfied with the ruling should file an appeal before this court and not judicial review application.
7. The ex parte applicant filed a further affidavit sworn by Nasrin Ahmed Musa on 28/06/2024. the deponent averred that there is no proof other than affidavits sworn by beneficiaries, who are the interested parties in this suit showing the alleged bequest. the deponent averred that the respondent received certain monies on diverse dates that collided with his scheduled site visits specifically the order of 08/07/2021 and the site visit of 05/08/2021.

#### **Directions of the court.**

8. During the pendency of the suit, the applicant, Ahmed Musa Ismail passed away, and an application for substitution dated 09/2023. Leave to substitute was granted vide letters of administration ad litem dated 17/04/2023.
9. The ex parte applicant was granted leave to file this application on 29/01/2024.
10. The motion was canvassed by way of written submissions.



### **The Ex Parte Applicant's Submissions**

11. The ex parte applicant submitted that Judicial Review seeks to examine the procedure taken while Appeals look to the merits of the case and in this case, the Applicant is more interested in the procedure that was taken to reach the decision and hence this approach to court. The ex-parte applicant relied on section 3 of the *Fair Administrative Action Act*, JR. MISC. Application No. E001 of 2021, R v The Kadhi's Court, Garsen, Hon Mohamed Mursal (Kadhi Garsen Kadhi's Court) and HGB, Virginia Wangari Njenga (Suing as administratrix of the Estate of Charles Njenga Mukuna) v Land Registrar, Murang'a, 192, Republic v Kenyatta University, Vice Chancellor - Kenyatta University ex parte Elena Doudoladova Korir, and Section 163,20,35, 37 of the Kadhi's Court (Procedure and Practice) Rules at PART XIV, and Article 169 of *the Constitution*.
12. The ex-parte applicant submitted that the alleged bequest fails as a valid gift inter vivos. The ex parte applicant relied on sections 9, 10, 13, and 42 of the *Law of Succession Act*, In Re Estate of The Late Gedion Manthi Nzioka (Deceased) [2015] eKLR, and In Re Estate of Godana Songoro Guyo (Deceased) [2020] eKLR
13. The ex-parte applicant submitted that the trust that the Applicant had in the Respondent was abused as the Respondent failed to honor the trust that comes with his office as both a religious leader and a judicial officer.
14. The ex parte applicant submitted that the costs need to be awarded to the Applicant as the said acts emanated from the conduct of a religious and judicial officer who was tasked to act in complete trust and transparency for the benefit of the general public. the ex parte applicant relied on Section 27 (1) of the *Civil Procedure Act* and DGM v EWG [2021] eKLR.

### **The interested parties' Submissions.**

15. The interested parties submitted that the ex parte applicant (Ahmed Musa Ismail) now deceased had no locus standi to institute the judicial review in the first instance and thus the entire judicial review application was incompetent and fatally defective. The interested parties contend that it is trite law that a party seeking to file a suit on behalf of an estate of a deceased person must first obtain a limited grant of administration ad litem. The interested parties relied on section 54 of the *law of Succession Act*, Julian Adoyo Ongunga & Another Vs Francis Kiberenge Bondeva (Suing As The Administrator of the Estate of Fanuel Evans Amudavi(Deceased) eKLR, Hawo Shank V Mohamed Uta Shanko [2018] eKLR
16. The interested parties submitted that the ruling of the Kadhi cannot be classified as an administrative action or decision but rather the ex parte applicant is hiding in the shadows of judicial review to appeal the decision of the Kadhi. The interested parties relied on section 7 of the Fair Administrative Act, Ahmad & Another V Kadhi Mombasa; Khalifa & Another (Interested Parties) Judicial Review 4 Of 2020.
17. The interested parties submitted that the decision by the learned Kadhi was judicially sound and not ultra vires. the interested parties relied on Article 170 of *the Constitution*.

### **The Ex Parte Applicant's Supplementary Submissions.**

18. The ex parte applicant submitted that the deceased former Ex-parte applicant, Ahmed Musa Ismail was a party to the suit at the Kadhi's Court and so brought this suit before this Honorable Court as he was dissatisfied with the process the Honorable Kadhi took and hence the application for Judicial Review. This court is limited to the issues raised in the pleadings filed, and the only issue raised for determination is the validity of the decision by the Kadhi. The subject matter in the Kadhi's court was



merely antecedent to this suit and not the subject matter of Judicial Review. the ex parte applicant relied on the Indian Supreme Court in Vallabh Das vs Dr. Madan Lal & Ors on 2 April 1970,

### **Analysis and Determination.**

19. This court considered the Pleadings and the submission by the respective parties.

### **Issues**

20. The main issues for determination: -

- i. Whether the ex parte applicant had the locus standi to institute judicial review.
- ii. Whether the best approach is by way of judicial review or appeal
- iii. Whether the kadhi acted ultra vires in making a declaration over LR NO. 58 BLOCK 4 NAROK as a gift inter vivos.
- iv. Whether the monies were meant to gain an unfair advantage.
- v. Who should bear the costs?

### **I. Whether the ex parte applicant had the locus standi to institute judicial review.**

21. It is not in dispute that the ex parte applicant, Ismail Ahmed Musa Ismail(deceased) is the son of Amina Gasi Farah(deceased)whose estate was the subject of the Kadhi's court ruling the subject herein. the ex parte applicant being a beneficiary was a participant in Kericho Kadhi's Court Miscellaneous Application No. E005 of 2021. In my humble view, the applicant is elevated to the category of persons whom the law regards as having 'sufficient interest' in the subject of litigation.

22. 'Sufficient interest' in these circumstances is that the applicant has a stake in the process of distribution of the estate of his deceased mother.

23. In R versus Thames Magistrates Court' ex parte; Greenbaum (1957) 55 LGR 129 Lord Denning LJ said of locus standi for judicial review orders as follows:

“When application is made to (the court) by a party or person aggrieved, it will intervene (it is said) ex debito justitiae, in justice to the applicant. When application is made by a stranger it considers whether the public interest demands its intervention. In either case, it is a matter which rests ultimately in the discretion of the court.”

24. And in an earlier case of R versus Liverpool Corporation, ex parte; Liverpool Taxi Fleet Operators' Association (1870) LR 5QB 446, the learned judge had this to say:

“The writs of prohibition and certiorari lie on behalf of any person who is a person aggrieved and that includes any person whose interests may be prejudicially affected by what is taking place. It does not include a mere busybody who is interfering in things which do not concern him: but it does include any person who has a genuine grievance because something has been done or may be done which affects him.” (Emphasis added).

25. I am satisfied the applicant's rights are likely to be affected, either directly or indirectly, if the law is not followed in the distribution of the deceased's estate. For these reasons, I would be hesitant to regard the applicant as lacking locus standi. I am, instead, satisfied that the applicant has a genuine grievance because the 1<sup>st</sup> respondent's impugned conduct affects the beneficiaries.



## II. Whether the best approach is by way of judicial review or appeal

26. The supervisory jurisdiction of the Court is derived from Article 165(6) and (7) of *the Constitution*, which provides:

(6) 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.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

27. By dint of Article 47 of *the Constitution*, judicial review as a remedy has been elevated and now has pride of place in *the Constitution*. Accordingly, in *Saisi & 7 others v Director of Public Prosecutions & 2 others* (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment), the Supreme Court held:

“74. It is our considered opinion that the framers of *the constitution* when codifying judicial review to a constitutional right, the intention was to elevate the right to fair administrative action as a constitutional imperative not just for state bodies, but for any person, body, or authority. It was a clarion call to ensure that the constitutional right to fair administrative actions permeated every aspect of the lives of Kenyans, from their engagements with educational facilities such as universities, to employer-employee relationships, to engaging with public bodies in whatever capacity, or any body, person or authority that exercises quasi-judicial functions.”

28. In exercising its judicial review jurisdiction, the Court is not concerned with the merit of the impugned decision. The judicial review process challenges the legality, reasonableness or procedural propriety of the decisions of subordinate courts or tribunals or persons as well as bodies or authorities exercising judicial or quasi-judicial authority. Accordingly, in *Municipal Council of Mombasa v Republic & another* [2002] eKLR, the Court of Appeal held:

“... The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review...”

29. Similarly, in *Pastoli v Kabale District Local Government Council and Others*[2008] 2 EA 300 it was held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without



jurisdiction *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.” (also see *Zachariah Wagunza & another v Office of the Registrar Academic Kenyatta University & 2 others* [2013] eKLR,)

30. The same position was reiterated by the Supreme Court in *Saisi* as hereunder:

“73 ...The Fair Administrative Actions Act provides the parameters of judicial review to be the power of the court to review any administrative or quasi-judicial act, omission or decision of any person, body or authority that affects the legal rights or interests of an aggrieved person. The judicial review court examines various aspects of an act, omission or decision including whether the body or authority whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required...”

31. I must hasten to add that it is now trite that, in undertaking judicial review, some measure of merit analysis may be apt, especially where the decision in question is impugned on the ground of irrationality. The Supreme Court made this clear in *Saisi* thus:

“75. In order for the court to get through this extensive examination of section 7 of the FAAA, there must be some measure of merit analysis. That is not to say that the court must embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly “in the circumstances of the case”, without examining those circumstances and measuring them against what is reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses...”

32. In the instant matter, the applicant did allege procedural impropriety or irrationality and that the respondent acted *ultra vires*, in hearing and determining Kericho Kadhi’s Court Miscellaneous Application No. E005 of 2021.



## **II. Whether the kadhi acted ultra vires in making a declaration over LR No. 58 Block 4 Narok as a gift inter vivos.**

33. The jurisdiction of the Kadhis' Court is provided for under Article 170(5) of *the Constitution* and Section 5 of the *Kadhis' Courts Act*. Article 170(5) of *the Constitution* provides:

(5) 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 Kadhis' courts.

34. Section 5 of the *Kadhis' Courts Act*, on the other hand, provides:

“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 proceeding which comes before it.”

35. The applicant has raised no issue as to the jurisdiction of the Kadhi. however, what has been challenged is the rationality in arriving at the decision to term the suit parcel as gift inter vivos without evidence.

36. In Kenya National Examination Council v Republic, Ex Parte Geoffrey Gathenji Njoroge & 9 others(supra) the Court of Appeal held:

“...Only an order of Certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons...”

## **II. Whether the monies were meant to gain an unfair advantage.**

37. The ex parte applicant has produced an m-pesa statement showing that money was sent to the respondent by the beneficiaries. The respondent did not respond to this claim. This court is unable to establish whether the monies were meant to gain an unfair advantage.

38. In the upshot, I find merit in the Notice of Motion dated 22/03/2024. The same is hereby allowed and orders granted as hereunder:

- a. An order of Certiorari be and is hereby issued quashing the decision of the honorable A.B. Wayu, senior resident Kadhi made vide ruling dated 24/09/2021 allocating property known as LR. No. 58 Block 4 Narok being the estate of Amina Gasi Farah(deceased) to the interested parties herein as a gift.
- b. An order of prohibition be and is hereby issued prohibiting the respondent from continuing with any court proceedings in the matter of the estate of Amina Gasi Farah(deceased) in Kericho Kadhi's Court Miscellaneous Application No. E005 of 2021.
- c. An order is hereby issued restraining the interested parties from any form of interference with the estate of Amina Gasi Farah(deceased) and more specifically with property known as L.R. No. 58 Block 4 Narok.
- d. As the principal parties are related, it is hereby ordered that each party shall bear its own costs of the Judicial Review Proceedings.



d. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS  
27<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**CHARLES KARIUKI**

**JUDGE**

