



In re Estate of Hamisi Shaban Ali (Deceased) (Family Miscellaneous Application E034 of 2023) [2024] KEHC 1972 (KLR) (23 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1972 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY MISCELLANEOUS APPLICATION E034 OF 2023**

G MUTAI, J

FEBRUARY 23, 2024

IN THE MATTER OF THE HIGH COURT'S SUPERVISORY JURISDICTION OVER THE SUBORDINATE COURTS AND THE INHERENT POWERS OF THE COURT

AND

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT
SHABAAN SHANDALLA.....1ST APPLICANT
DAVID MKUZI.....2ND APPLICANT
MWANAIDI SHABAN.....3RD APPLICANT
NEEMA MBEYU.....4TH APPLICANT**

VERSUS

**ALI HAMISI SHABAN.....1ST RESPONDENT
RAJAB HAMISI SHABAN.....2RD RESPONDENT
SHABAN HAMISIS ALI.....3RD RESPONDENT
RAWITYA HAMISI MISELEMANI.....4TH RESPONDENT**

BETWEEN

**SHABAAN SHANDALLA 1ST APPLICANT
DAVID MKUZI 2ND APPLICANT
MWANAIDI SHABAN 3RD APPLICANT
NEEMA MBEYU 4TH APPLICANT**

AND

**ALI HAMISI SHABAN 1ST RESPONDENT
RAJAB HAMISI SHABAN 2ND RESPONDENT**



SHABAN HAMISI ALI 3RD RESPONDENT

RAWITYA HAMISI MISELEMANI 4TH RESPONDENT

RULING

Introduction

1. Before me is a Notice of Motion application dated 5th September 2023. Vide the said application the Applicants seek the following nine orders:-
 1. This application be certified as urgent and service be dispensed with in the first instance;
 2. That this Honourable Court be pleased to exercise its supervisory jurisdiction over the Kadhi's Court and recall the file and all proceedings in Mombasa Kadhi's Succession Cause E126 of 2022; Estate of Hamisi Shaban Ali for purposes of making directions regarding the estate.
 3. That this Honourable Court be pleased to set aside the entire proceedings and judgment of Hon Habib S. Vumbi dated 13th April 2023 and all subsequential orders;
 4. That this Honourable Court be pleased to withdraw the file Mombasa Kadhi's Succession Cause E126 of 2022; Estate of Hamisi Shaban Ali from the Kadhi's Court and transfer it to the succession Court for re-trial, hearing and determination to the Magistrate Court and/or the High Court Family Division Mombasa.
 5. That this Honourable Court be pleased to grant injunctive orders against the Respondents, their agents, nominees and assigns jointly and severally from interfering, selling, subdividing, intermeddling and/or dealing with the Properties (as listed below) forming part of the Estate pending hearing and determination of the Application. The list of the properties are as follows:-
 - a. 3 storey building erected on Plot No. 21 at Migadini (Main House);
 - b. House with land on Plot No. 10/35 at Migadini;
 - c. Flat on Plot No. 62 CW at Migadini;
 - d. Butterfly Guest House at Magongo Kwa Sudi Area;
 - e. House adjacent to Butterfly Guest House;
 - f. Butterfly Guest House, Kwetu in Mtwapa;
 - g. Swahili House with Land on Plot No. 413/VI/MN situated at Magongo;
 - h. Swahili House with Land on Plot No. 2325/VI/MN at Magongo;
 - i. 2 houses at Muungano Magongo;
 - j. Swahili House with Land on Plot 211/VI/MN at Kwa Hola;
 - k. Unsurveyed property in Riata Taveta measuring 2.5 acres;
 - l. Unsurveyed land measuring 3 acres at Mariakani;
 - m. Unsurveyed land measuring 3.5 acres in Taita Taveta (Madarasani);



- n. House in Kitobo, Madarasani Taveta on 1 acre plot;
 - o. 8 by 8 meter plots at New Taveta Market;
 - p. 1 storey building Chaani Old Market;
 - q. Monies held in KCB Bank Account No. 11137222088;
 - r. Monies held at Faulu Microfinance Bank Account No. 10440474883;
 - s. Monies held at Absa Bank Account Nos. 164135961, 4531-8200-3860 and 464527583;
 - t. 1155 shares at the Standard Chartered Bank;
 - u. 33361 shares at Kengen;
 - v. 1700 shares at Safaricom;
 - w. Toyota Prado Land Cruiser Registration No. KCK 7171X;
 - x. Toyota Spade KDD 852X; and
 - y. Unsurveyed plot in Mtwapa.
6. That this Honourable Court be pleased to order and direct the Respondents to give an account of the estate and produce documentation how the properties and funds forming part of the Estate have been managed by themselves pending hearing and determination of the application;
 7. That any property of the estate that would have been sold or transferred to third parties that the said properties revert back to the estate of the deceased Hamisi Shaban Ali;
 8. That this Honourable Court be pleased to make any such orders that are necessary to secure the Estate of Hamisi Ali Shaban; and
 9. The costs be provided for.
2. The application is supported by the annexed affidavit Shaban Shandala (the 1st Applicant) sworn on 5th September 2023 and also on the grounds in the body of the motion. The grounds are that they (the applicants) are the children of the deceased, having been born by his second wife, Alice Florence Mukuzi (deceased). They aver that the Respondents filed a succession cause before the Kadhi's Court without involving them and obtained a judgement in their (Respondents') favour without full and frank disclosure of all the beneficiaries and properties of the deceased. They urged that the properties of the deceased were worth over Kes.50,000,000.00.
 3. The applicants further stated that they are not Muslims and had not submitted themselves to the jurisdiction of the Kadhi's Court. They argued that the chief's letter, which was used when filing the succession cause before the Kadhi, was obtained under suspicious circumstances. In any case, the same had been withdrawn. The Respondents had also intermeddled with the estate of the deceased without lawful authority or justification and continued to receive rents from the same without accountability.
 4. The applicants thus urged the Court to exercise its supervisory jurisdiction over the Kadhi's Court and "in the interest of justice set aside and or revoke all proceedings, judgment and all subsequential orders emanating from the Mombasa Kadhi Succession Cause No. E126 of 2022; In re Estate of Hamisi Shaban Ali (deceased).



5. In the Supporting Affidavit, the 1st Applicant deposed that he and his co-applicants were not Muslims and did not wish to submit to the Kadhi's Court jurisdiction. He further deposed that he had, during the lifetime of the deceased, filed High Court Misc. Application No 19 of 2013, seeking to be recognised as the child of the deceased. He averred that the said application was allowed by the Court.
6. The application was opposed by the Respondents. The Respondents' counsels, Mutisya Mwanzia & Ondeng Advocates, filed a Notice of Preliminary Objection dated 13th September 2023, seeking to have the application struck out with the costs on the grounds that:-
 1. The Notice of Motion dated 5th September 2023 is incompetent, fatally defective and or bad in law as it is not premised upon any suit as provided for under sections 2 and 19 of the Civil Procedure Act as read together with Order 3 Rule 1 of the Civil Procedure Rules or any other method prescribed by the law for the commencement of proceedings; and
 2. The Notice of Motion dated 5th September 2023 is fundamentally flawed by the reason of the fact that the Applicants have neither applied for review nor preferred an appeal against the judgment delivered on 13th April 2023 in Mombasa Kadhi's Court Succession Cause No. E126 of 2022; in the Matter of the Estate of Hamisi Shaban Ali (deceased).
7. A Replying Affidavit sworn by 2nd Respondent, Rajab Hamisi Shaban, on 22nd September, 2023 was filed. Vide the said affidavit the deponent urged that this Court has no jurisdiction to withdraw Mombasa Kadhi Court Succession Cause No. E126 of 2022. He further deposed that the applicants are not the children of the deceased. It was urged that the succession cause before the Kadhi's Court was gazetted. The applicants had an opportunity, which they didn't utilize, to object to the issuance of the grant or to file a Summons for Revocation of the Grant immediately after it was issued. The deponent thus prayed that this Court dismisses the application with costs.
8. Shaaban Shandalla deposed to a Supplementary Affidavit on the 14th of October, 2023, in which he averred that this honourable court has supervisory jurisdiction over the Kadhi's Court and could withdraw the case before the Kadhi and make necessary orders to ensure justice is done. He insisted that he and his siblings are the rightful beneficiaries of the estate of the deceased by virtue of being his biological children.
9. He denied knowledge of the notice in the Kenya Gazette. He deposed that the succession proceedings were not mentioned in the WhatsApp group in which they were members together with the Respondents.

Submissions of the Applicants

10. The applicants identified four issues as coming up for determination:-
 1. Whether the honourable Court should exercise supervisory jurisdiction over the Kadhi's Court in relation to Kadhi Succession Cause No. 126 of 2022; In re Estate of Hamisi Ali Shaban(deceased);
 2. Whether this honourable court can set aside judgment and or subsequential orders pertaining to the estate of Hamisi Ali Shaban (deceased);
 3. Whether this honourable court has the power to transfer Kadhi Succession cause No. E126 of 2022; In re Estate of Hamisi Shaban Ali (deceased) from the Kadhi's Court, transfer the succession cause for retrial hearing and determination to the Magistrates' Court or the High Court's Family Division Mombasa; and



4. Whether injunctive orders ought to be granted in relation to the properties of the estate.
11. On whether this Court could exercise supervisory jurisdiction counsel for the Applicants drew the Court's attention to Rule 20 of the High Court (Organization and Administration) (General) Rules, 2016 and submitted that the said Rule donates authority to this honourable Court to exercise supervisory jurisdiction over the Subordinate Courts, including the Kadhi's Court. They submitted that the succession proceedings before the Kadhi were done without disclosure of all material information, such as the fact that the applicants aren't Muslims and the non-disclosure of all the beneficiaries and properties of the deceased and their values. That being so, it was in the best interest of justice that the proceedings before the Kadhi be set aside. I was referred to the decision of the Court in *George Aladwa Omwera versus Republic* [2016]eKLR.
12. The applicants submitted that this Court could issue injunctive relief. I was referred to the case of *In re Estate of Gideon Kibitok Tarus (deceased)* [2021]eKLR, where it was held that
- “the two provisions cloth the High Court with wide discretion to do what is necessary to ensure that the ends of justice are met.”
- I was also referred to the case of *Floris Piezzo & Another versus Giancarlo Falasconi* [2014]eKLR, where the Court of Appeal held that:-
- “We have carefully considered the grounds of Appeal
- ...We would imagine such orders would also include injunctive orders.”
13. The application thus urged that this Court has jurisdiction to issue all manners of orders, including conservatory or injunctive orders.

Submissions of the Respondent

14. The Respondents' counsel filed written submissions dated 17th January 2024.
15. This Court was referred to the decision of the Court of Appeal in the the Owners of the Motor Vessel “Lilian S” versus Caltex Oil (Kenya) Ltd [1989] eKLR. Counsel submitted that as a preliminary objection on jurisdiction had been raised, I was under obligation to determine if I had jurisdiction straight away and to down my tools immediately I concluded that I do not.
16. Counsel submitted that the objection taken by the applicants to the proceedings before the Kadhi Court should have been raised by them in the court below in the first instance. He urged that the:-
- “supervisory jurisdiction of the High Court, it has been said time and again, is a relief of last resort and ought not to be treated as an alternative mode of redress under the legal process.”
17. It was urged that the Applicants ought to have exhausted the remedies available to them under the statute before coming to this Court seeking remedies under the supervisory jurisdiction of the High Court. Counsel referred to the decision of the Court in *Samson Chembe Vuko versus Nelson Kilumo & 2 Others* [2016]eKLR and *Mutanga Tea & Coffee Co Ltd versus Shikara Limited & Another* [2015]eKLR.
18. Regarding the alleged failure by the Respondents to adhere to the *Fair Administrative Action Act*, counsel submitted that sections 9(2) and (3) of the said Act required litigants to exhaust relevant mechanisms, including internal mechanisms for appeal or review “and all remedies available under any other written law are first exhausted.”



19. It was contended that the application was incompetent as it was not premised on any suit. I was referred to the decision of the Court in Peter Mweiha Kahoro versus Benson Maina Githethuki [2005]eKLR and Norah Ndunge Henry & Another versus Abednego Mutisya & Another [2022]eKLR.
20. It was thus urged that I allow the Preliminary Objection and strike out the application
21. On the merits of the application, it was urged that the High Court exercises supervisory jurisdiction sparingly and in the clearest of cases. Reliance was placed R versus Chief Magistrate’s Court (Milimani Law Courts), Director of Public Prosecutions & 2 others (Interested Parties); Ex-parte: Pravin Galot [2020] eKLR. It was urged that this was not one such clear case as the applicants hadn’t appeared before the Kadhi to air their grievances.

Analysis & Determination

22. The preliminary objection raised by the Respondent challenge my jurisdiction hear and determine the matter on the grounds that the applicants hadn’t exhausted the numerous remedies available to them before coming to this Court. That being the case, this Court must first ascertain whether it has jurisdiction to hear the matter.
23. I am guided by the decision of the Court of Appeal in the Owners of the Motor Vessel “Lilian S” versus Caltex Oil (Kenya) Ltd [1989] eKLR where Nyarangi, JA, stated as follows:-

“The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity, and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined.”

24. The Scope of a preliminary objection was settled in the Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd [1969]EA 696, where the Court stated as follows:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which, if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

and

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”



25. In this case, it is common ground that the Respondent filed a petition in the Court below seeking to inherit the properties of the deceased under Muslim law. The applicants were not parties to the said proceedings, and a judgment was delivered by the Court. The judgment of the Court below has not been reviewed nor appealed against. The preliminary objection was thus rightly taken as relevant facts are not in contention in this matter.
26. Since the preliminary objection questions the jurisdiction of the Court, I must determine it straight away since, as is now clear, if I do not have jurisdiction, I would be obliged to down my tools.
27. Article 165(6) and (7) of *the Constitution* of Kenya, 2010 provided that:-
- “(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.”
28. I do not understand the said provisions of *the Constitution* as granting this Court jurisdiction to interfere whimsically, at the slightest excuse, with the proceedings of the subordinate Courts. In my view, the constitutional provisions exist to prevent misuse of the jurisdiction and the powers of the subordinate Courts. It is a remedy that should not be used unless clear and substantive justifications exist.
29. Mativo, J in Republic versus Magistrates Court, Mombasa; Absin Synegy Limited (Interested party) (Judicial Review E033 of 2021) [2022] KEHC 10 (KLR) (24 January 2022) (Judgment) stated that:-
- “This power of superintendence conferred by Article 165 (6) of *the Constitution*, as pointed out by Harries, C.J. in *Dalmia Jain Airways Ltd. v Sukumar Mukherjee*²⁶ is to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors. This power involves a duty on the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power does not vest the High Court with an unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the Court or Tribunal. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principle of law or justice, where grave injustice would be done unless the High Court interferes. As the Supreme Court of India stated, unless there is a grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under Article 165 (6) of *the Constitution* to interfere.”
30. Are there any justifications in this case for the exercise of the supervisory jurisdiction? In my view, there aren't. The applicants could have objected to the issuance of the grant once the same was gazetted (vide Kenya Gazette Notice No. 7284 dated 17th June 2022). The Kenya Gazette is an official publication of the government, which every citizen is presumed to be aware of. Even if they did not become aware of the gazettement, they had the option of applying to set aside the decision of the Kadhi once they became aware of the decision of the said Court. They opted not to do it. Instead, they directly came to this Court seeking the exercise of the supervisory jurisdiction.



31. The applicants should have exhausted the remedies available to them before invoking the Court's supervisory jurisdiction. I am guided by the decision of the Court of Appeal in *Mutanga Tea & Coffee Co. Ltd versus Shikara Ltd & Another* [2015]eKLR where it was held that:-

“ ... where there is a clear procedure for the redress of any particular grievances prescribed by *the Constitution* or the Act of Parliament, that procedure should be followed.... And further held as follows.....“ this court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes (*Speaker of the National Assembly V Karume* (supra) was a 5(2) (b) applicant for stay of execution of an order of the High Court issued in Judicial Review proceedings rather than in a petition as required by *the Constitution*.” In granting the order, the court made the often quoted statement :“ where there is a clear procedure for the redress of any particular grievances prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.(See also *Kones v Republic & Another exparte Kimani Wanyoike & 4 Others*[2008] e KLR (ER) 296.It is readily apparent that in the above cited cases the court was speaking on issues of the correct procedure rather than of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by *the Constitution* or a statute, to resolve to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.....We are therefore satisfied that the learned judge did not err by striking out the appellant’s suit and application which sought to invoke the original jurisdiction of the High Court in circumstances where the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellant the right to access the High Court by way of an appeal, which mechanisms he had refused to invoke...”

32. Thus, I have found merit in the objection with respect to jurisdiction. That would be enough to dispose of the matter. I will, however, consider whether the objection on the procedural grounds is merited.
33. In my view, this limb of the objection is bereft of merit. Rule 63 of the Probate and Administration Rules, 1980 lists down a limited number of the Civil Procedure Rules which are applicable in proceedings before the Probate & Administration Court. In my view, Order 3 Rule 1 of the Civil Procedure Rules and sections 2 and 19 of the *Civil Procedure Act* are inapplicable to succession matters.
34. Is the application otherwise merited? I agreed with Mr Mwanzia that it isn't. The applicants haven't shown a basis for their apprehension that they would not find justice in the Court below. If they object to that Court's jurisdiction, as they say they do, the Court below would be obliged to consider their objection and to give a reasoned determination. That decision could then be appealable to this Court.

Disposition

35. I find and hold that the supervisory jurisdiction of this Court under Article 165 (6) and (7) of *the Constitution* of Kenya, 2010, is a remedy that should be sparingly used in the most clear of cases. This is not one such case.
36. The applicant has remedies before the lower Court, which they should first exhaust before coming to this honourable Court.
37. In the circumstances I uphold the Preliminary Objection dated 13th September 2023 and strike out the Notice of Motion dated 5th September 2023.
38. This being a family matter, each party shall bear own costs.



39. Orders accordingly.

DATED AND SIGNED THIS 23RD DAY OF FEBRUARY 2024 AT MOMBASA.

GREGORY MUTAI

JUDGE

In the presence of: -

Ms Wambani for the Applicants;

Mr Mwanzia for the Respondents; and

Arthur - Court Assistant.

