



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Rajabu Juma Tayari (Deceased) (Succession Cause E011 of 2024) [2024] KEHC 7328 (KLR) (24 May 2024) (Ruling)

Neutral citation: [2024] KEHC 7328 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE E011 OF 2024**

G MUTAI, J

MAY 24, 2024

IN THE MATTER OF THE ESTATE OF RAJABU JUMA TAYARI (DECEASED)

BETWEEN

MARIAM NDUNGE RAJAB PETITIONER

AND

RAMADHAN JUMA TAYARI RESPONDENT

AND

ANASTACIA MTINDA INTERESTED PARTY

OMAR RAJAB JUMA INTERESTED PARTY

RULING

1. The Petitioner/Applicant filed a Notice of Motion application dated 6th February 2024 vide which she sought, inter alia, a stay of execution of the judgment and decree delivered in Kadhi Succession cause E134/2023; Ramadhan Juma Tayari vs Anastacia Mtinda & Juma Rajab Omar dated 25th January 2024.
2. The Petitioner also filed a Petition for Letters of Administration Interstate dated 6th February 2024.
3. Vide a Notice of Preliminary Objection dated 23rd February 2024, the 1st, 2nd and 3rd Respondents objected to the application dated 6th February 2024 on the following grounds:-
 1. These proceedings and in extension, the application dated 6th February 2024 is in contravention of section 7 of the Civil Procedure Act;
 2. These proceedings and in extension, the Application dated the 6th of February 2024 is in contravention of section 50(2) of the Law of Succession Act; and



3. The Application dated 6th of February 2024 is in contravention of Order 42 of the [Civil Procedure Rules](#).
4. The application dated 6th February 2024 was dismissed for non-attendance on 26th February 2024. The same was, however, reinstated by consent on 22nd March 2024. On the said date, the Court directed that the Preliminary Objection would be canvassed through Written Submissions.
5. The Respondent, vide submissions dated 28th March 2024, urged that the application and the petition are legally incompetent and should be dismissed. They argued that the proceedings and the application dated 6th February 2024 contravene Section 7 of the [Civil Procedure Act](#), Section 50(2) of the [Law of Succession Act](#) and Order 42 of the [Civil Procedure Rules](#).
6. Counsel for the Respondents submitted that there were proceedings before the Kadhi Court, to wit, Kadhi Succession Cause No E134 of 2023. It was urged that the said proceedings concluded and that the learned trial Kadhi delivered his judgment on 25th January 2024. The Respondents submitted that the Petitioner should have applied to have the judgment set aside or, in the alternative, ought to have appealed against it.
7. The Court was referred to by the decision of the Court in [John Florence Maritime Services Ltd & Another vs Cabinet Secretary for Transport & Infrastructure & 3 others](#) [2015] eKLR for the proposition that the doctrine of res judicata prohibited multiplicity of suits and ensured that there was an end to litigation. I was also referred to the case of [Abdulatif Ahmed Yunus vs Hussein Mohamed Andulkadir & another](#); Malindi Civil Appeal No. 23 of 2014, where the Court of Appeal held as follows: -

“it may well be the case that the Appellant was unaware of the institution of the case against him, but unless and until the orders issued in Lamu SRMC Misc. Application No 2 of 2001 are set aside the same are binding on the person named in the application as parties...”
8. It was urged that the Petitioner is barred from filing the instant proceedings.
9. Section 50(2) of the [Law of Succession Act](#) provides that an appeal lies to the High Court regarding any order or decree passed by the Kadhi’s Court regarding the estate of a deceased Muslim. It was urged that this Court has an appellate jurisdiction against the decision of the Kadhi. Counsel submitted that the appellate jurisdiction had not been invoked. For that reason, it was urged that the proceedings herein are incompetent.
10. The counsels for the Respondents submitted that applications for a stay of execution can only be founded on appeal. I was referred to the decision of the Court of Appeal in [Abubaker Mohamed Al-Amin vs Firdaus Siwa Somo](#) [2018]eKLR. It was urged that as there were no appeal, prayers for a stay of execution had nothing to stand on.
11. The Petitioner opposed the Preliminary Objection. The Petitioner filed Written Submissions dated 4th April 2024.
12. Derrick Odhiambo Advocates, learned counsels for the Petitioner, submitted that Article 169 (1) of the [Constitution of Kenya](#) establishes the Kadhi Courts as subordinate Courts within the Republic of Kenya. They submitted that the Constitution limits the jurisdiction of the Kadhi Courts, in Article 170(5), to proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi Courts. It was urged that the proceedings before the Kadhi were conducted in the absence of the Petitioner who in any case does not profess the Muslim religion.



13. On whether the suit offends section 50(2) of the [Law of Succession Act](#) and Order 42 of the [Civil Procedure Rules](#) the said counsels submitted that the Petitioner was not aware of the proceedings before the Kadhi. It was argued that the Kadhi Courts deny the Petitioner the capacity or authority to review, challenge the judgment or institute the succession proceedings at the said Court. It was urged that the only avenue available to the Petitioner was Article 165 of the [Constitution](#) which is the provision she had relied on before this Court.
14. Relying on the case of [Nancy Mwangi t/a Worthlin Marketers vs Airtel Networks \(K\) Ltd & others](#) [2014]eKLR and [Bernard Mugo Ndegwa vs James Nderitu Gitbae & 2 others](#) [2010]eKLR. It was urged that the proper test when determining whether a matter is *res judicata* is:-
 1. The matter in issue was identical in both suits;
 2. The parties in the suit are the same;
 3. The claim title is the same; and
 4. The Court has concurrent jurisdiction and finality of the previous decision.
15. It was urged that if I found the suit *res judicata*, I should not exercise what the Petitioner considered a draconian remedy of striking out of the suit but instead utilise the discretion under section 18 of the [Civil Procedure Act](#) and either transfer the Petition to this Court or to a subordinate Court, other than the Kadhi Court, competent to try the matter.
16. Learned counsel submitted that I dismiss the Preliminary Objection with costs to the Petitioner.
17. I have considered the submissions of the parties. I must now determine whether the Preliminary Objection has merit. To do this, I must determine the following issues; -
 1. Is the suit/petition *res judicata*?
 2. Do these proceedings contravene section 50(2) of the [Law of Succession Act](#)?
 3. Does the application contravene section Order 42 of the [Civil Procedure Rules](#)?
18. I will answer these questions/issues in turn.
19. Section 7 of the [Civil Procedure Act](#) provides that: -

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
20. In [John Florence Maritime Services Ltd & Another vs Cabinet Secretary for Transport & Infrastructure & 3 others](#) [2015]eKLR) the Court stated as follows:-

“The rationale behind *res judicata* is based on public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. *Res judicata* ensures that the economic use of Court’s limited resource and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgment by reducing the possibility, of inconsistency in judgments of concurrent Courts.



It promotes confidence in the Courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably.”

21. For a matter to be considered res judicata, the 4 factors listed in [Nancy Mwangi t/a Worthlin Marketers vs Airtel Networks \(K\) Ltd & others](#) [2014] eKLR case must be present. That is to say:-
 - a. The matter in issue should be identical in both suits;
 - b. The parties should be the same or litigating under the same title;
 - c. The title under which they are litigating must be the same; and
 - d. The Court that made the decision had the jurisdiction to do so.
22. Applying the above test to this matter, I note that the matter before the Kadhi Court was with respect to the estate of Rajabu Juma Tayari (deceased). The contestation in the suit before the Kadhi was between the same parties/dependants over the estate of the same deceased person.
23. The deceased was a Muslim. Under section 2(3) of the [Law of Succession Act](#), the devolution of his estate was governed by law Muslim law. The said provision states that: -

“(3) Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of this death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.”
24. Although the Petitioner contends that she is not a Muslim and did not submit to the jurisdiction of the Kadhi’s Court, it is my view that she should have lodged her objection before the said Court. The Court would then have been under an obligation to consider her objection, on the grounds of jurisdiction, as a preliminary point and to make a determination, which she could then have appealed to this Court in the event that she was dissatisfied.
25. As the Kadhi Court has already made its decision, it is my view that the instant petition is res judicata and is, therefore, for dismissal.
26. That is enough, in my view, to dispose of this matter. That notwithstanding, I will look at the other 2 grounds of objection.
27. Section 50(2) of the [Law of Succession Act](#) provides that: -

“(2) An appeal shall lie to the High Court in respect of any order or decree made by a Kadhis’ Court in respect of the estate of a deceased Muslim and, with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.”
28. What is before me is not an appeal. The Petitioner, rather than appeal against the decision of the Kadhi Court, filed another Petition for grant. In so doing, the Petitioner, in my view, contravened Section 50(2) of the said [Act](#). That being the case, the proceedings herein are fatally and incurably defective.
29. The application purports to seek a stay of execution of the decision of the Kadhi Court without first filing an appeal. An application for a stay field without an appeal lacks a foundation and cannot stand.
30. M Thande, J, in [Abubaker Mohamed Al-Amin vs Firdaus Siwa Somo](#) [2018]eKLR, held as follows:-

“



“ 10. The foregoing provision indicates that stay of execution may be granted by the Court appealed from or by the court appealed to. In order for this Court to consider the application for stay, it must be the Court appealed to. The wording of the provision contemplates that an appeal must be in existence before an application for stay can be entertained. An application for stay of execution of a judgment must be filed within an appeal against that judgment. As stated above, there is no appeal before this Court. Where an application for stay is directed to a decision against which no appeal has been filed as in the present case, the Court has no jurisdiction to entertain the same.”

I am in agreement with her decision.

31. The application in this cause has no basis and is for striking out.
32. The upshot of the foregoing is that the Preliminary Objection has merit. The same is upheld. Consequently, the Petition dated 6th February 2024 and the Notice of Motion application dated the same day are hereby struck out.
33. Although costs ordinarily follow the event, this matter, being a succession cause, does not warrant the issuance of orders as to costs. Parties will, therefore, bear their own costs.
34. Orders accordingly.

DATED AND SIGNED THIS 24TH DAY OF MAY 2024 IN MOMBASA. RULING IS DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Mr Hassan for the Respondents;

No appearance for the Petitioner/Applicant; and

Arthur – Court Assistant.

