



A Summary of the Pertinent Facts, Submissions, Holdings and Final Orders in the decision of the Constitutional Court in the Case of **Jesse Kamau & 25 others v Attorney General [2010] eKLR**

***By Kenya Law Reports  
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**Case Number :** Miscellaneous Civil Application 890 of 2004      **Delivery Date** Mon 24 , : May, 2010

**Judge :** J. G. NYAMU, R. V. P. WENDO & M. J. ANYARA EMUKULE

**Court :** High Court at Nairobi (Nairobi Law Courts)

**Citation :** JESSE KAMAU & 25 Others V ATTORNEY GENERAL [2010] eKLR

### **Some pertinent facts**

- The application was filed by 24 Clergy persons from various religious institutions.
- The suit was filed against the Attorney General and the now defunct Constitution of Kenya Review Commission
- Though the Supreme Council of Muslims was served with the application in the present case, it did not participate in the proceedings whether as an interested party or in any other capacity.
- The Hindu Council of Kenya had been served with the application and it filed an affidavit in which it raised concerns sympathetic to the applicants, basically that the inclusion of the Kadhis courts in the Bomas Draft appeared to favour one religion against another.
- The Case was filed in 2004 challenging the proposal to include the Kadhi's Courts in the then Bomas Draft Constitution
- While the Case was still pending, a proposed Constitution which was a mixed product of the Bomas Draft and other later drafts was rejected at a public referendum in 2005 and the Commission was wound up. In fact, the hearing of the case started after the referendum had been done.
- Ms. Abida Ali Aroni, who was then the Chair of the Constitution of Kenya Review Commission, and now a Judge of the High Court, filed a replying affidavit opposing the application. The Commission was represented by the Hon. James A. Orengo.

### **Declarations sought by the applicants**

*1) that Section 66 of the Constitution of Kenya which introduces and entrenches Kadhis' Courts in the said Constitution infringes on the 3*

*Constitutional rights of the Applicants to equal protection of the law embodied in Sections, 70, 78, 79, 80 and 82 of the Constitution and to that extent is discriminatory, unconstitutional and should be expunged in its entirety from the said Constitution;*

*(2) that Section 66 of the Constitution of Kenya is inconsistent with Section 82 of the same Constitution and is therefore null and void;*

*(3) that any provision similar to section 66 of the Constitution of Kenya in word or effect as proposed in the draft otherwise known as the “Zero” or “Bomas Draft” or any other draft infringes the right of the Applicants and is discriminatory, is unconstitutional, null and void and of no effect;*

*(4) that the enactment of the Kadhis' Courts Act contravenes the Constitution and is to that extent null and void;*

*(5) that the financial maintenance and support of the Kadhis' Courts from public coffers amounts to segregation, is sectarian, discriminative, unjust as against the applicants and others and amounts to separate development of one religion and religious practice and therefore unconstitutional;*

*(6) that further and in the alternative and without prejudice to the foregoing, the purported extension of the jurisdiction of the Kadhis' Courts through the enactment of the Kadhis' Courts Act from the former Protectorate to areas falling outside the said Protectorate contravenes the Constitution and is null and void;*

*(7) that any or all provision(s) such as Section 66 of the Constitution and Section 197 (2) 198, 200 (1) (e) of the “Zero” draft that seeks(s) to introduce and/or entrench, promote, elevate, encourage, advance, give special preference to, support by public funds or otherwise any religion or sectarian religious interests or such interests of a religious nature or otherwise that draw their base*

*from a given or known set of religious teachings/doctrines, practices and/or beliefs in the Constitution is and would be discriminatory, oppressive to the applicants and others, offensive to the doctrine of separation of state and religion retrogressive, unconstitutional null and void;*

*(8) that any form of religious courts should not form part of the Judiciary in the Constitution of Kenya as it offends the doctrine of separation of state and religion and also Chapter 2 S. 9 of the “Zero” or “Bomas Draft”;*

*(9) that the entrenchment of the Kadhis' Courts under the aforesaid section 66 of the Constitution of Kenya and in the draft otherwise known as the “Zero” or “Bomas Draft” section 197 (2), 198, 199, 200(1) (e) has a clear and determined hidden agenda to or is intended to advance, promote, encourage, introduce, propagate an Islamic agenda or what is popularly or otherwise known as the Abuja Declaration for Africa and Kenya whose ultimate objective is to turn Africa in general into an Islamic continent and Kenya in particular into an Islamic nation and transgresses, dilutes, vitiates, infringes on the constitutional rights of the Applicants and discriminates against the Applicants and their right to equal protection of law as stated above;*

*(10) the Applicants pray that without prejudice to the foregoing and in the alternative a declaration be and is hereby issued that such entrenchment does reasonably evoke fears of schemes of subterfuge and constitutional sabotage in the Applicants the right to equal protection under the Constitution.*

*(11) that the entrenchment of the Kadhis' Courts in the Constitution was and is but the stepping stone and or vehicle to the attempt being made through the “Zero” and or “Bomas Draft”’s introducing of “Sharia Law” or form of justice in Kenya as has happened in other jurisdictions in Africa and which step is retrogressive, discriminatory, dangerous as far as*

*the stability of the Nation is concerned, unjust, detrimental to the Applicants and all Kenyans and is unconstitutional; 5*

*(12) further and in the alternative it be and is hereby declared that the entrenchment of the Kadhis' Courts in the Constitution, the introduction of Sharia and or Islamic agenda for Kenya and Africa and the whole of the Islamic religious agenda is aimed ultimately at the sole goal of acquiring **inter alia** political power, supremacy and control over Africa and Kenya in particular by means which are unconstitutional, discriminative and oppressive to the Applicants and other Kenyans;*

*(13) that the entrenchment of the Kadhis' Court in the Constitution elevates and uplifts the Islamic religion over and above other religions in Kenya which is unconstitutional and discriminatory against the Applicants and Kenyans of other religions;*

*(14) that the process leading to the inclusion of the Kadhis' Courts in the so called "**Zero**" or "**Bomas draft**" a new Constitution under the Constitution Kenya Review Act Cap 3A was flawed, lopsided, fraught with partisan entrenched and sectarian interests biased, corrupt and manifestly inimical to constitutionalism and discriminated against the applicants, their religion and other religions in Kenya; and*

*(15) that an order be issued in the first instance to restrain the respondents jointly and severally or any one of them or any other person or group of persons claiming under them jointly and or severally from discussing, subjecting to debate in any form and in any manner whatsoever the draft Constitution prepared by the National Constitutional Conference otherwise known as the "**Zero Draft**" or "**Bomas Draft**" or by whatever name called pending the hearing and determination of this application;*

*(16) that the Respondents be and are hereby ordered to pay the Applicants' costs in any event.*

### **Some pertinent arguments**

- On the question of jurisdiction Mr. Ombwayo learned Principal Litigation Counsel **firstly** argued that the court has no jurisdiction to strike out section 66 of the Constitution on the basis of Section 3 of the Constitution, that the court has only jurisdiction to strike out a law other than a provision of the Constitution.
- Counsel urged that section 66 of the Constitution is an existing provision and cannot be struck out as being contrary to Section 3 of the Constitution as no provision of the Constitution is superior or inferior to any other provision of the Constitution and that an order of the court nullifying any provision of the Constitution would itself be unconstitutional.
- Counsel's **second** argument was that the application itself was an infringement of the doctrine of the separation of powers as envisaged under section 23 and 24 of the Constitution that unlike this doctrine, the doctrine of a secular state is not clearly defined in the Constitution.
- Counsel further argued that Sections 46 – 49 establish and empower the Legislature to make laws through Bills, passed by the National Assembly and assented to by the President. Section 47 of the Constitution provides for the manner of alteration of the Constitution, and that Section 66 thereof can only be altered in the manner so prescribed.
- Counsel also argued that the Judicature is itself a creature of the Constitution and it has no power itself to alter any entrenched or other provision of the Constitution

- It was Hon. J. B. Orengo's argument, at the time these proceedings were filed, that the issue of the Kadhis' Courts as set out in the Zero Draft Article 222 (*of Bomas Conference*) was still being negotiated, and was a live issue before the Commission, Parliament, the Referendum and the President, and that these government organs are better suited, to resolve the issue of the Kadhis' Court. It is an issue beyond the courts or judicial determination. The courts will have no basis on which to answer the question whether or not it is right to entrench the Kadhis' Courts in the Constitution.

### **Findings:**

- The general and overarching principle of constitutional law as entrenched in Section 70 of our Bill of Rights (*Fundamental Rights and Freedoms of the Individual*) is that personal law of one community religious or otherwise cannot override or qualify the Bill of Rights - fundamental rights guaranteed under the Constitution.
- The doctrine of separation of Church and State provides that as between the State and religion each had its own sphere, the former of law making for the public good, and the latter moral welfare of individuals and their God or creator.
- Mr. Ombwayo, learned Principal Litigation Counsel argued, and we agree with his argument, that the court does not have jurisdiction to strike out Section 66 of the Constitution even if (as he seemed to agree) it contradicts Section 82 of the Constitution. Counsel also argued that no provision of the Constitution is superior to the other. With respect we do not agree with that submission. For instance the Bill of Rights, which are also referred to as universal, inherent and natural rights, cannot be taken away by the State. In addition we also hold that the courts have the jurisdiction to declare conflict or inconsistency in the constitutional provisions, or to declare whether or not the provisions are in conflict with any values, principles or purposes of a democratic constitution such as ours.
- This court would not have a role or does not play any role in the alteration of Section 66 of the Constitution or any other section of the Constitution. The process of altering Section 66 of the Constitution or indeed any other provision of the Constitution lies in the National Assembly (*Parliament which enacts the law and the President who assents to the law*) before it becomes operational or comes into effect. Whereas an amendment may be challenged in court once enacted into law, only Parliament has the necessary legislative mandate to alter the provision by way of amendment provided the provisions of section 47 on amendments are satisfied. ... The Applicants prayer to declare Section 66 of the Constitution void is therefore not tenable and is declined.

- the Judicature too is a creation or creature of the Constitution, and whereas it has power to interpret any provision of the Constitution (*under sections 67, 84 and 123(8)*) of the Constitution, that power is limited to interpretation and constitutional judicial review but not alteration of the Constitution. Under its constitutional judicial review jurisdiction the court may grant a declaration in the event of conflict of provisions.
- Parliament does not have the power to take away the basic structures of the constitutional "**sanctum**" - the Bill of Rights, the security of tenure of Judges, which is the cornerstone of the rule of law, and the democratic provisions of Section IA of the Constitution. The second exception is that it is only the people who have the power to enact a new constitution
- It is further correct that Section 82 provides that no law shall make any provision, which is discriminatory in itself or in its effect. The contention by the Applicants is that despite this specific provision (*s.82*) with regard to non-discrimination the same Constitution in Section 66 entrenches one religious community's dogma by establishing in the Constitution, a court called the Kadhis' Court, to adjudicate that community's religious beliefs in matters of personal law – marriage, divorce inheritance (*succession*) or devolution of property. For these reasons the Applicants contend that the court should declare section 66 of the Constitution is inconsistent with section 82.
- In Kenya we have witnessed that competitiveness and total intolerance to other faiths particularly Christianity resulting in the torching and burning to the ground here in Nairobi **South "B" of Our Lady Queen of Peace Catholic Church** and at the Coast of burning and razing down to the ground of five Pentecostal Churches in Tana River District. This is notwithstanding that the Quran, the Muslim Holy Book, and indeed Islam acknowledges the founder of Christianity Jesus (*Issa*), as a muslim figure in Islam. Muslims accept many of the miracles he performed on earth to the sick and disabled. Muslims accept the (*Ascension*), the bodily ascent of Jesus into heaven on the completion of his earthly career or mission.
- Although theoretically at least, Islam encompasses a version of Christianity, in reality, no Muslim is likely to describe himself as a Christian and vice versa – No Christian will call himself a Muslim.
- Now both Islam and African customary law rank women lower in matters of devolution. Widows and daughters receive much less than men. Widows receive a life interest, daughters are virtually hounded out of their homes and woe unto them if they are unmarried. Such treatment is inherently unconstitutional being contrary to Section 70 which guarantees **life, liberty, security of the person protection of the law and freedom of conscience** etc. without reference to sex
- Constitution section 66(4)
- **(4) the Chief Kadhi and the other Kadhis or the Chief Kadhi and such of the other Kadhis not being less than three in number as may be prescribed by or under an Act of Parliament shall each be empowered to hold a court of a**

***Kadhi having jurisdiction within the former Protectorate or within such part of the former Protectorate as may be so prescribed.***

- ***Provided that no part of the former Protectorate shall be outside the jurisdiction of some court of a Kadhis' Court.***
  
- Since it is to the former Protectorate where the sights of the drafters of both the Independence Constitution and the amendments thereto were trained, it cannot be said that it was a mere error of omission when they retained language in the Constitution that the Kadhi's courts were clearly restricted to operate within the former Protectorate which by definition extended to the ten miles beyond the Indian Ocean shoreline. For the Kadhis' Courts Act, though well intentioned, to purport to extend the jurisdiction of Kadhis' Courts beyond the former Protectorate is clearly in breach of Section 179 (4) of the Independence Constitution, that is, Section 66(4) of the current Constitution.
  
- **There is no doubt in our collective mind that entrenchment of Section 66 establishing the Kadhis' Courts in the Constitution is certainly inconsistent with section 65 which grants Parliament power to establish other courts subordinate to the High Court. Section 66 certainly favours one religion in preference to other faiths, Christianity, Hindu, Buddhist, Bohras, and Indigenous religions and culture.**
  
- The Kadhis' Courts Act 1967, (*now Chapter II, Laws of Kenya*) extended the jurisdiction of the Kadhis' Court to Nyanza and Western Provinces, Rift Valley, Central, Eastern Provinces and Nairobi, areas well beyond the former Protectorate. This was clearly in breach of Section 179 (4) of the Independence Constitution and now section 66 (4) of the current Constitution.
  
- **The establishment of Kadhis' courts outside the protectorate violates Section 66(4) of the Constitution. The Kadhis' courts were intended to have territorial application within the Protectorate as defined, and on strict construction of the constitution Kadhis' courts were restricted to the former Protectorate.**
  
- Having said as much, we are keenly aware of Section 78 of the Constitution which provides for freedom of religion, for a person to manifest and propagate his religion or belief, in worship, practice and observance, at its own expense. It is our view that this provision covers all religious communities, including Muslims and our construction on this is that being the anchor or umbrella provision in the Constitution on freedom of worship, practice and observance of religion and its edicts section 66(4) of the Constitution on Kadhis' courts is superfluous. In our view territorial jurisdiction at this time and age in our democratic state curtails that freedom of worship or religion.
  
- Having failed to alter section 179(4) [(or now Section 66(4))] of the Constitution, the provisions of Section 4 of the Kadhis' Court Act (*Chapter 11 of the Laws of Kenya*) establishing and extending the jurisdiction of the Kadhis' Courts beyond the former Protectorate is contrary to and inconsistent with the said provision of the Constitution.

- In exercise of its declaratory jurisdiction under Section 3 of the Constitution we find and hold that Section 4(2) (b) of the Kadhis' Courts Act (*Chapter 11, Laws of Kenya*) is inconsistent with section 66(4) of the Constitution and is therefore void to the extent of the inconsistency
- Section 66 of the Constitution on Kadhis' courts is inconsistent with the secular nature of the state and we fully adopt as good constitutional law the decision of the court in the Mauritian case of **BISHOP OF ROMAN CATHOLIC DIOCESE OF PORT LOUIS & OTHERS v. TENGUR** (*supra*) and also the Mauritius case of **BHEWA AND ANOTHER vs. GOVERNMENT OF MAURITIUS** (*supra*) concerning what a secular state entails and the need to separate state and religion. Having regard to the values and principles of the constitution we declare that section 66 does not advance the values which characterize a secular state:
  - *"As between the state and religion each had its own sphere, the power of law-making for the public good and the latter of religious teaching observance and practice. To the extent that Section 66 sought to give to religious principles and commandments the force*
  - *and character of law, religion stepped out of its own sphere and encroached on that of law-making in the sense that it was made to coerce the state into enacting religious principles and commandments into law. That would indeed be constitutionally possible where not only one particular religion was the state religion but also the holy book of that religion was the supreme law."*
- On funding of Kadhis' Courts, we also adopt as good constitutional law the dictum in the case of **ENGEL vs VITALE** (*supra*);
  - *"..... the price of religious freedom is double. It is that the church and religion shall live both and upon that freedom. There cannot be freedom of religion, safeguarded by the State, and intervention by the church or its agencies in the State's domain or dependency on its largesse: . . . . The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation, it vanishes with the resting.*
  - *Public money devoted to payment of religious costs, educational or not, brings the quest for more. It brings too the struggle of sect against sect the larger share or for any. Here one by numbers alone will benefit most, there another. . . . The end of such strife cannot be other than to destroy the cherished liberty. The dominant group will achieve the dominant benefit or all will embrace the state in their dissensions."*
- We further declare that section 66 is in conflict with section 82 in that it has the effect of furthering one faith as against the others. However our role is declaratory only and it is only Parliament under section 47 of the constitution which can alter or amend section 66 of the Constitution or the people in a referendum.

- However as regards Acts of Parliament we have a clear mandate to quash provisions which are inconsistent with the Constitution and to declare null and void and hence our specific action on section 4 of the Kadhis' Courts Act.
  
- We further declare that the real anchor of freedom of worship and conscience in Kenya is not Section 66 of the Constitution but Section 78, and for this reason, Section 66 is in our view superfluous and does not add or offer any additional rights not covered by section 78 which applies to all faiths in Kenya. On the contrary at this time and age it restricts the operation of Kadhis' courts to the ten mile former Protectorate whereas section 78 has no such territorial restriction as regards freedom of conscience religion, or worship etc. Section 66 is also in our view in conflict with section 65 of the Constitution which contemplates subordinate courts of universal application in the Republic of Kenya.

### **FINAL ORDERS**

- 1. In view of the discussion above, we grant the declarations sought in prayer 1 limited to declaring that section 66 is inconsistent with sections 65 and 82 and in respect of section 82 is discriminatory to the Applicants in its effect.*
- 2. As regards paragraph 2 of the prayers we find and hold that sections 66 and 82 are inconsistent with each other, and that section 66 is superfluous but it is not the court's role to expunge it. It is the role of Parliament and the citizenry in a referendum.*
- 3. As regards prayer 3, we hold and declare that any provision similar to section 66 in any other Draft of a Constitution in word or effect is not ripe for determination*
- 4. The enactment and the application of the Kadhis' courts to areas beyond the 10 mile Coastal strip of the Protectorate is unconstitutional.*
- 5. We grant prayer 5 that the financial maintenance and support of the Kadhis' courts from public coffers amounts to segregation, is sectarian discriminatory and unjust as against the Applicants and others and amounts to separate development of one religion and religious practice contrary to the principle of separation of state and religion (secularism) and is therefore contrary to the universal norms and principles of liberty and freedom of religion envisaged under sections 70, 78 and 82 of the Constitution and also against the principle of separation of state and religion as captioned by section 1A of the Constitution.*
- 6. We also find and hold that the purported extension of the Kadhis' courts through the enactment of the Kadhis' Courts Act beyond the former Protectorate areas contravenes section 64(4) and section 4(2) (b) of the Kadhis' Courts Act and is therefore unconstitutional, null and void to the extent of the inconsistency and for that reason a declaration in terms of prayer 6 is granted.*
- 7. We grant the declaration in prayer 7 in relation to section 66 of the Constitution.*
- 8. We grant a declaration that any form of religious courts should not form part of the Judiciary in the Constitution as it offends the doctrine of separation of state and religion.*
- 9. We grant prayer 13 and declare that the entrenchment of the Kadhi's courts in the Constitution elevates and uplifts the Islamic religion over and above the other religions in Kenya which is inconsistent with section 78 and 82 of the Constitution and discriminatory in its effect against the applicants and Kenyans of other religions.*

**10.** *We further find and hold that prayers 9, 10, 11, 12, 14 & 15 relating respectively to the **Bomas Zero Draft** and an Islamic Agenda are matters which are **moot and speculative** and are not justiciable and decline to grant them.*