



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

JR MISC APP 14 OF 2017

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR

JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: MALINDI MADHI'S CASE NO. 87 OF 2008

AND

IN THE MATTER OF: KADHI'S ORDERS OF 25TH JULY 2017

AND

IN THE MATTER OF: THE LAND ACT

BETWEEN

REPUBLIC.....APPLICANT

AND

NURU OMAR MAHENDAN

MARIAM OMAR MAHENDAN

ANZUN OMAR MAHENDAN

MALKIA OMAR MAHENDAN.....EX-PARTE APPLICANTS

VERSUS

MALINDI KADHI.....RESPONDENT

AND

FATMA SHARIF SALIM.....INTERESTED PARTY

JUDGMENT

1. Before me for determination is the Ex-parte Applicants' Notice of Motion dated 30th August 2017. By the said Motion, the Ex-parte Applicants prays for the following orders:-

1. That the Honourable Court be pleased to remove the orders of injunction issued by the Malindi Kadhi on 25th July 2017, to this Honourable Court and quash the same.

2. That the Interested Party be condemned to pay the Ex-parte Applicants' costs to the Application.

2. The said application is supported by an Affidavit sworn by Mariam Omar Mahendan and is premised on the grounds:-

i. That the Kadhi in Malindi has gone out of his jurisdiction and issued an injunction restraining the Ex-parte Applicants herein from dealing with a parcel of land where the High Court had issued a grant;

ii. That there is only one Statutory body in the Republic of Kenya authorized to deal with land issues which is the Land Court and

iii. That the Kadhi's Court has got no jurisdiction to deal with land issues and to issue an injunction on land issues.

3. In its response to the Application, the Kadhi Malindi (the Respondent) has filed Grounds of Opposition herein dated 10th October 2017 through the office of the Honourable Attorney General stating:-

1. That the Respondent acted in compliance with Article 170(5) of the Constitution when he exercised his jurisdiction in the matter;

2. That by dint of the Kadhi's Courts Act, the Respondent herein has the jurisdiction to hear and determine any application brought by any parties affected by its Judgment;

3. That the nature of the dispute between the parties does not fall within the confines of Section 13 of the Environment and Land Court Act for the Court to exercise its jurisdiction.

4. That the application is immature as all parties still have a chance to ventilate their case for consideration by the Respondent and as such this is not the proper forum;

5. That the Application has not met the threshold for grant of judicial review orders and ought to be dismissed with costs; and

6. The Application is otherwise an abuse of the process of this Honourable Court.

4. On her part, the Interested Party Fatma Sharrif Salim filed a Notice of Preliminary Objection dated 7th November 2017 stating that:-

a. The application as filed fails to adhere to mandatory provisions of Order 53 of the Civil Procedure Rules; and

b. The Honourable Court has no jurisdiction to hear and determine issues in question which lie at the High Court.

5. I have considered the Motion and the responses thereto. I have equally perused and considered the Submissions filed herein by the Learned Advocates for the parties.

6. The Kadhi's Court is a creation of Article 170 of the Constitution. Under Article 170(5) the jurisdiction of that Court is 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 Court.

7. Article 169(1) (b) of the Constitution characterizes the Kadhi's Court as one of the Subordinate Courts in this country. Under Article 169(2), Parliament is empowered to enact legislation conferring jurisdiction, functions and powers of such Courts. The legislation envisaged under Article 169(2) is the Kadhi's Courts Act, Cap 11 of the Laws of Kenya. Section 8 of the said Act provides as follows:-

“8(1). The Chief Justice may make rules of Court providing for the procedure and practice to be followed in Kadhi's Courts.

(2) Until the rules of the Court are made under subsection (1) of this section and so far as such rules do not extend, procedure and practice in a Kadhi's Court shall be in accordance with those prescribed for subordinate Courts by and under the Civil Procedure Act (Cap 21).

8. It would appear to me that the rules envisaged under Section 8(1) of the Act are yet to be promulgated by the Honourable the Chief Justice. At least, no such rules were placed before me by any of the parties herein. It was therefore safe in my view to conclude that the Civil Procedure Act and the rules made thereunder remain applicable to that Court as envisaged under Section 8(2) of the Act.

9. From the material placed before me, it is apparent that the dispute between the parties before me was not one over the ownership and/or proprietary claim of the parcel of land described as Portion No. 332 Malindi. Rather it is a matter subsequently relating to a succession dispute in regard to the Estate of one Batuli Omar Mahendan. That can be gleaned from the Order granted by Hon. Salim Mohamed, the Principal Kadhi Malindi Law Court's on 26th July 2017 and the Applicant's reference to the Grant of Probate as issued by the High Court on 7th June 2016.

10. From the aforesaid orders of the Honourable Principal Kadhi, it is also apparent that an application was made before him seeking to preserve a Section of the estate of the deceased pending inter-partes hearing. The Respondent Kadhi proceeded thereafter to issue the impugned orders.

11. Section 63 of the Civil Procedure Act grants all Courts inherent powers as follows:-

“63 Supplemental Proceedings.

In order to prevent the ends of justice from being defeated, the Court may, if it is so prescribed:-

(a) Issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to prison;

(b) Direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property;

(c) Grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;

(d) Appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property; and

(e) Make such other interlocutory orders as may appear to the Court to be just and convenient.

12. Arising from the foregoing, I do not agree with the Ex-parte Applicants that the Kadhi's Court could not grant the orders of interim injunction as it did herein merely because the matter related to land. The Court like any other had an obligation to preserve the status quo and to avoid any wastage of the estate by issuing the temporary orders of injunction pending the hearing inter-partes and/or the main suit.

13. In my mind, by filing this Judicial Review application, the Ex-parte Applicants ought to have demonstrated how in the process of reaching that decision, the Honourable Principal Kadhi had breached the rules of natural justice or how his decision was irrational, made in bad faith, against public policy and/or constituted errors of facts and law. They did not do so.

14. Accordingly I decline to grant the orders sought herein. In view of the succession nature of the dispute giving rise to these judicial review proceedings, the Court makes no order as to costs.

Dated, signed and delivered at Malindi this 31st day of January, 2019.

J.O. OLOLA

JUDGE



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