



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC APPEAL NO. 16 OF 2021**

**KHAKI JUMA.....APPELLANT**

**VERSUS**

**CECILIA MUKAMI.....RESPONDENT**

*(An appeal from the ruling of Honorable J M Kalo read on 8<sup>th</sup> May 2020*

*in Nakuru CM ELC No. 198 of 2018 pursuant to leave and*

*extension of time granted by the court on 15<sup>th</sup> June 2021)*

**J U D G M E N T**

1. This appeal is against the ruling by Hon. J M Kalo Chief Magistrate delivered on 28<sup>th</sup> May 2020 in an application by the appellant in Nakuru CMCC No.198 of 2018. By the application the appellant who was the plaintiff in the lower court sought orders that:-

1. *That the statement of defence and counterclaim filed by the defendant herein on 1<sup>st</sup> July 2014 be struck out.*
2. *That consequently, summary judgment be entered in favour of the applicant herein.*
3. *That upon the entry of summary judgment, the respondent be ordered to deliver vacant possession of the parcel of land known as **Bahati/Engoshura Block I/145** forthwith and in default an eviction order be issued.*
4. *That costs of this application, cost of the suit and costs of the counterclaim be awarded to the plaintiff/applicant*

2. After hearing the application which was canvassed by way of written submissions; the learned trial magistrate dismissed the application provoking the instant appeal. The appellant listed the following grounds of appeal dated 23<sup>rd</sup> June 2021 filed in court on 24<sup>th</sup> June 2021: -

1. *That the trial magistrate erred in law in failing to appreciate and apply the principles of summary judgment and striking out of pleadings.*
2. *That the trial magistrate erred in law in failing to appreciate the facts and the antecedents of the matter and therefore entered a wrong conclusion. In particular, the trial magistrate failed to appreciate:-*
  - (a) *The basis of the respondent's claim was that she was a daughter of the deceased, AMINA JUMA KHAN.*

(b) *The claim that the respondent was a daughter of the deceased was alive in Miscellaneous cause 2 of 2019 (summons for revocation of grant) and that the same was dismissed.*

(c) *The issue could not be reopened and tried by the trial magistrate because the same was barred by res judicata and/or issue estoppel.*

(d) *To the extent that the respondent's claim was founded on issues that had been determined by the Kadhis court, the same were frivolous and they never raised any reasonable defense.*

3. *That the trial magistrate erred in law in failing to undertake any analysis of facts. He therefore arrived at a finding which never took into account all the previous pleadings. In particular:-*

(a) *The trial magistrate never analyzed Succession Cause number 8 of 2013 in which the Kadhi assumed jurisdiction and distributed the parcel of land, the subject matter of this appeal.*

(b) *The trial magistrate never analyzed the application for revocation of grant being Miscellaneous Application number 8 of 2019 in which the summons for revocation of grant was dismissed.*

(c) *As a consequence of the foregoing, the trial magistrate, set stage to determine issues which had been determined by the Kadhi's court, a court of competent jurisdiction.*

3. The Learned Trial Magistrate in his ruling set out the grounds adduced by the appellant in support of the application and the grounds adduced by the Respondent in opposition to the application. The Learned trial magistrate observed that the law on striking out pleadings is settled and placing reliance on the case of *DT Dobie & Co (Kenya) Ltd -vs- Muchina (1982) KLRI* concluded thus:-

*"The crux of the defendant's opposition to the application herein is that considerations that were relied on by the Kadhi's court to make its findings that she cannot inherit from the estate of the deceased would otherwise not apply in this matter. For instance, the court relied on religious difference as one of the reasons. In the court's view, that is an issue that the defendant ought to be allowed to ventilate in this matter. Her defence and counterclaim cannot therefore be dismissed offhand".*

4. Having reached that conclusion the learned trial magistrate proceeded to order the appellant's application dated 18<sup>th</sup> October 2019 dismissed with costs to the respondent. The appellant was aggrieved by the ruling triggering the appeal hereof.

5. The parties canvassed the appeal by way of written submission. The appellant filed his submissions on 12<sup>th</sup> October 2021 while the respondent filed her submission on 8<sup>th</sup> November 2021.

6. The appellant submitted that the defence and counter claim raised by the respondent against the suit by the appellant before the lower court lacked any merit and constituted abuse of the court process. He submitted the issues introduced by the Respondent through the defence and counterclaim were the same issues that were before the Kadhi's court in the succession proceedings and through miscellaneous cause No. 2 of 2019 also brought before the Kadhi's court. The appellant contended that the respondent could only have challenged the orders by the Kadhi's court by way of an appeal which the Respondent failed to do. The appellant consequently submitted the issues were Resjudicata and could not be properly canvassed before this court. The appellant submitted that the learned trial magistrate erred in declining the application for striking out the respondent's defence and counterclaim when the same raised similar issues as had been raised before the Kadhi's court and decided on. The appellant contended that the trial court in its exercise of discretion erred in failing to take account of the fact that the deceased was a Muslim and that the issue relating to entitlement and inheritance of the suit property had been tried and determined by a court of competent jurisdiction.

7. The appellant's position was that had the trial magistrate properly appraised the facts he would have found that the issues raised in the defence and counterclaim were resjudicata and that the defence and counterclaims raised no triable issue to warrant being sustained on record.

8. The respondent in her submissions contended that the appeal lacked any merit. She argued her defence and counterclaim raised a triable issue and was therefore entitled to defend the action. Further the respondent submitted the claim related to ownership of land

and was not such as would invite summary judgment. She pointed out under Order 10 Rules 4, 6, 9 and 10 interlocutory judgment could not be granted unless the claim was accompanied by prayer for pecuniary damages or there was a liquidated claim. The respondent placed reliance on the case of *ICDC -vs- Daber Enterprises Ltd (2000) IEA 75; Dhanjal Investments Ltd -vs- Shabaha Investments Ltd (1998) eKLR*; and *Kenya Trade Combine Ltd -vs- Shah (2001) eKLR* among other authorities.

9. This is an appeal of first instance and the court is therefore obligated and indeed under a duty to reevaluate the facts and the evidence placed before the court below to determine whether the decision reached by the lower court was justifiable. The court is not bound by the findings of the lower court and is upon reevaluation entitled to reach its own conclusion. See the case of *Selle & Another -vs- Associated Motor Boat Co. Ltd & others (1968) EA 123* where the court enunciated the guiding principle thus:-

*“—this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect.”*

10. In the suit commenced before this court as ELC No. 92 of 2016 before being transferred to the lower court, the appellant vide a plaint dated 21<sup>st</sup> March 2016 claimed her late sister Amina Juma Khan was the registered owner of the land parcel **Bahati Engashura Block 1/145 (Nakuru Workers)**. She stated that following the death of her sister on 20<sup>th</sup> May 2012 she filed a succession cause and the suit property was transmitted to her. The appellant stated that her deceased sister had out of goodwill allowed the respondent to occupy the land since the respondent’s mother had abandoned her and her whereabouts were unknown. The appellant claimed the respondent was not a beneficiary to the estate of the deceased and that she had been requested to vacate from the premises which she had declined to do.

11. In the suit the appellant prayed for judgment against the respondent for:-

- (a) *An order that the Respondent/defendant vacates land parcel Bahati/Engashura Block1/145 (Nakuru Workers).*
- (b) *That in default of vacating, an eviction order to issue against the respondent/defendant.*

12. The Respondent filed a defence and counterclaim dated 28<sup>th</sup> February 2019. The Respondent denied the appellant’s averments contained in the plaint. She averred that the deceased, Amina Juma was her biological mother and that she was entitled to land parcel **Bahati Engashura Block 1/145 ( Nakuru Workers)** as the beneficiary. She averred the appellant got the suit property transmitted to her fraudulently and illegally by failing to make disclosure in the succession cause ( Nakuru Kadhi Court Succession No. 8 of 2013) that the respondent was the beneficiary.

13. By the counterclaim the respondent sought orders:-

- (i) *That the registration of the suit property in the appellant’s name was null and void and should be cancelled.*
- (ii) *That the appellant do execute all the necessary and appropriate documents to effect the registration of the suit property in favour of the Estate of Amina Juma (deceased).*
- (iii) *Permanent injunction restraining the appellant from in any manner interfering with the respondent’s possession of the suit property.*
- (iv) *General damages*
- (v) *Costs of the suit.*

14. Following the filing of the defence and counterclaim by the respondent, the appellant opted to file the Notice of Motion dated 4<sup>th</sup> October 2019 which gave rise to the ruling the subject of this appeal. The grounds upon which the application was premised were inter alia; that an application made by the respondent for revocation of letters of administration issued to the appellant before the Kadhi’s court was dismissed and the respondent’s prayer that she be declared an heir of the estate of the late Amina Juma Khan

(deceased) was equally declined. The appellant averred that the basis of the respondent's defence and counterclaim was that she was entitled to inherit from the estate of Amina Juma Khan which issue was determined by the Kadhi's court. The appellant averred that the defence and counterclaim by the respondent was frivolous, vexatious and an abuse of the court process.

15. The record shows that one Kahki Juma petitioned to administer the estate of Amina Juma Khan (deceased) vide the Kadhi's court Nakuru succession case No. 8 of 2013 and on 15<sup>th</sup> November 2013, the Kadhi's court made an order in the following terms:

*1. That deceased parcel of land known as Title No. Bahati/Engashura Block 1/145 ( Nakuru/Workers) be and is hereby transmitted in the names of Khaki Juma ID/No. 0463154 on behalf of the deceased heirs.*

*2. That the Land Registrar, Nakuru County, to effect this transmission order and be served for compliance.*

16. The Kadhi's court under the succession Act, Cap 160 of the Laws of Kenya have jurisdiction to exercise jurisdiction where the deceased was a Muslim for purposes of determining the question of inheritance. Section 48 (2) of the Law of Section Act, provides as follows:-

*48 (2) For the avoidance of doubt it is hereby declared that the Kadhi's courts shall continue to have and exercise jurisdiction in relation to the estate of a deceased Muslim for the determination of questions relating to inheritance in accordance with Muslim law and of any other question arising under this Act in relation to such estates.*

17. The record further shows the respondent herein applied before the Kadhi's court by way of summons for revocation of grant dated 18<sup>th</sup> March 2019 to have the grant issued to Kahki Juma revoked. After hearing the summons for revocation of grant on merits, the Kadhi's court made a ruling on 8<sup>th</sup> August 2019 and a decree was issued on 15<sup>th</sup> August 2019 as follows: -

*1. That no evidence to show the applicant was born by Amina Juma.*

*2. That the applicant (Cecelia Amina) has no right to inherit from Amina Juma for reasons that: -*

*(i) She is not biological daughter*

*(ii) Religious difference*

*(iii) No will about her.*

*3. That the rightful heirs of the deceased Amina Juma are:-*

*(i) Yasmin Khan daughter 50%*

*(ii) Mohamed Iqbal Khan brother 20%*

*(iii) Dilawar Jahn brother 20%*

*(iv) Kahki Juma sister 10%*

*4. That the inheritance of the late Mohamed Iqbal Khan of 20% to be inherited by :-*

*(i) Mustafa Mohammed son 6.67%*

*(ii) Feisal Mohammed son 6.67%*

*(iii) Swaleh Mohammed son 6.67%*

5. *That the administrator of the estate of the late Amina Juma Khan, title No. Bahati/Engashura Block 1/145 ( Nakuru Workers) is Kahki Juma as per the order of the court issued on 15<sup>th</sup> November 2013.*

6. *Each party to bear its own costs.*

18. The Kadhi's court as observed above had jurisdiction to deal with inheritance issues relating to the estate of Amina Juma Khan (deceased). It was not disputed that the deceased was a Muslim and hence the issue of inheritance relating to her estate was properly before the Kadhi's court. The Kadhi's court having dealt with the question of inheritance regarding the suit property the issue of ownership of the same property cannot arise unless the decision of the Kadhi's court was set aside. The decision of the Kadhi's court still stands as the respondent's application to have the grant issued to the appellant revoked was unsuccessful. No appeal appears to have been lodged against the decision of the Kadhi's court. As the matter before the Kadhi's court involved succession, any appeal would have been to the high court since this court has no jurisdiction to deal with succession issues. The suit before the Chief Magistrates court and in particular the defence and counterclaim pleaded by the respondent raised issues of inheritance of and ownership of the suit property **Bahati/Engorusha Block 1/145** (should have read **Bahati/Engashura Block 1/145 (Nakuru Workers)** as per the grant).

19. The appellant's claim against the respondent was essentially for the recovery of land and quite clearly if the appellant had appeared and had filed a defence and counterclaim, Order 36 Rule 1 of the Civil Procedure Rules would have no application. Order 36 Rule 1 of the Civil Procedure Rules provides when a party may apply for summary judgment and it is where a party has entered appearance but has not filed a defence. Where a party had filed a defence summary judgment procedure as provided for under Order 36 of the Civil Procedure is not applicable. This is evident from the reading of Order 36 Rules 3 (2) and 4 which are in the following terms:-

3.(2) *The defendant may show either by affidavit or by oral evidence or otherwise that he should have leave to defend the suit.*

4. *If a defendant is granted leave to defend he shall file his defence within fourteen days of grant of leave unless the court otherwise orders.*

20. The appellant's application before the lower court sought to have the respondent's defence and counterclaim struck out and for that the appellant invoked the provisions of Order 2 Rule 15 and from the grounds pleaded in support of the application, the appellant placed reliance on the ruling by the Kadhi's court which I have set out herein above. On the basis of the Kadhi's ruling the appellant's contention was that the respondent did not have a defence and that the defence as pleaded was frivolous, vexatious and constituted abuse of the court process.

21. Order 2 Rule 15 (1) of the Civil Procedure Rules provides as follows:

15. *Striking out pleadings [Order 2, rule 15.]*

(1)

1) *At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—*

*(a) it discloses no reasonable cause of action or defence in law; or*

*(b) it is scandalous, frivolous or vexatious; or*

*(c) it may prejudice, embarrass or delay the fair trial of the action; or*

*(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*

22. I have carefully reviewed and considered the evidence and material that was before the learned trial magistrate at the time he considered the application by the appellant dated 4<sup>th</sup> October 2019. On my reevaluation of the matter, I am satisfied and I agree

with the submissions by counsel for the appellant that the issues raised by the Respondent in her defence and the counterclaim were the same issues that were determined by the Hon. Kadhi in the same succession case before him. He determined the beneficiaries of the estate of Amina Juma Khan ( deceased) through whom the respondent lays claim to the suit land. The Kadhi's court was a competent court and having made a determination on who the beneficiaries of the deceased were and who was entitled to inherit the suit property and the decision having not been appealed and/or set aside, the issues could not be tried by another court. They are res judicata. The issue of inheritance and ownership in regard to the suit property having been determined by the succession court, there was no other triable issue raised in the defence that would warrant the matter to go to trial. I am satisfied that the learned trial magistrate erred in his evaluation of the facts and the applicable law. The trial Magistrate in his ruling appeared to fault the considerations the Hon. Kadhi relied on in reaching the decision that he did. The court could not act as an appellate court against the decision of the Kadhi's court. Appeals against the decision of the Kadhi's Court on matters of succession lie to the High Court and not to the Environment and Land Court.

23. I accordingly find the appellant's appeal meritorious and I allow the same. The net effect is that the ruling delivered by the learned trial magistrate is hereby set aside and substituted with an order allowing the application dated 4<sup>th</sup> October 2019. The respondent's defence and counterclaim is hereby struck out on the basis of being frivolous, vexatious and an abuse of the court process. Judgment is entered in favour of the appellant as prayed in the plaint. The respondent is ordered to vacate from the suit land within 30 days from the date of this judgment failing which execution to issue on application by the appellant.

24. The parties will bear their own costs for the appeal and the court below.

**Judgment dates signed and delivered virtually at Nakuru this 24<sup>th</sup> day of February 2022.**

**J M MUTUNGI**

**JUDGE**



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