

- Kadhis' Courts and the Constitution
 - Conflict of Constitutional provisions
 - Meaning of secular state and consequences
-

JUDGEMENT

INTRODUCTION –

(1) The Application and Parties

This Judgement relates to the Further Originating Summons, first dated 12th July, 2004, Amended on 30th November 2004, (*pursuant to the Order of Court made on 16th November 2004*), and Further Amended on 1st February 2005 (*pursuant to leave of Court given on 31st January 2005*). It is brought by the twenty-six Applicants led by the **Very Right Rev. Dr. Jesse Kamau** the Moderator of the Presbyterian Church of East Africa, **Bishop Silas Yego** of the Inland Church of Africa, **Bishop Margaret Wanjiru** of Jesus Christ Alive Ministries, the **Rt. Rev. Dr. David Githii**, **Bishop Arthur Gitonga**, **Bishop Boniface Adoyo** of Nairobi Pentecostal Church and the Reverends as enlisted above against the Attorney-General as 1st Respondent and the defunct Constitution of Kenya Review Commission as 2nd Respondent.

(2) The Applicants seek the following declarations:

(1) *that Section 66 of the Constitution of Kenya which introduces and trenches Kadhis' Courts in the said Constitution infringes on the 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
S. 9 of the "**Zero**" or "**Bomas Draft**";

Chapter 2

(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;

(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.

(3) The Grounds of the Summons and Supporting Affidavits

The Summons was supported by the Affidavit of the Very Right Reverend Dr. Jesse Kamau annexed thereto, sworn and filed on 12th July 2004, and the following grounds:-

- (a) That Section 66 of the Kenya Constitution contradicts and offends the provisions and spirit of Chapter 5 of the Constitution and discriminates against the Applicants;
- (b) There is no valid basis whatsoever for the inclusion of the Kadhis' Courts in the Constitution;
- (c) Section 66 of the Constitution as framed is discriminatory against the Applicants who do not benefit from its inclusion and who do not profess the Muslim faith;

CONCLUSIONS

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 ^{& 52} 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.

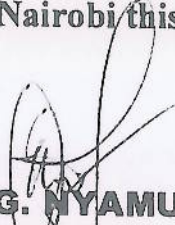
For avoidance of doubt this decision has been handed down on the basis that the role of the court is to interpret and declare the law and that

the doctrine of separation of powers quite rightly prevents us from amending the law (*which role rests with Parliament*) or the enactment of a new constitution including its contents which role is vested in the people of Kenya.

COSTS

This is public interest litigation. There are no losers or winners. We make no order as to costs.

Dated, delivered and signed at Nairobi this day of 2010



J. G. NYAMU
JUDGE OF APPEAL

(SIGNED UNDER SECTION 64(4) OF THE CONSTITUTION)



R. V. P. WENDO
JUDGE



M. J. ANYARA EMUKULE
JUDGE