



**In re Estate of Saleh Ahmed Hassan (Deceased) (Family Appeal
8 of 2020) [2023] KEHC 1165 (KLR) (17 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1165 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL 8 OF 2020
JN ONYIEGO, J
FEBRUARY 17, 2023**

IN THE MATTER OF THE ESTATE OF THE LATE SALEH AHMED HASSAN

BETWEEN

MOHAMED SALEH AHMED APPELLANT

AND

YAHYA SWALEH AHMED HASSAN & 6 OTHERS RESPONDENT

JUDGMENT

(Being an appeal and cross appeal against the Judgment in Mombasa Kadhi's court succession petition No. 23 of 2019 by honourable Habib Salim Vumbi made on 30th January 2020)

1. The deceased herein died on 17th January "1418" leaving two widows and twelve children as his heirs. Subsequently, the appellant herein Mohamed Saleh Ahmed Hassan a son to the deceased petitioned the Kadhi's Court Mombasa vide a Petition dated 4th February 2019 and amended on 12th March, 2019 seeking; determination of the heirs and shares of the estate; distribution of the property of the estate as per the existing consent and that the petitioner be determined as the trustee on his behalf and that of the other heirs.
2. Listed as comprising the estate is a house with plot on plot No. Mombasa/ Block XVII/903 measuring approximately 0.1450 acres situated at Mombasa CBD in Mombasa county. Among those listed as heirs to the deceased are; Noor (mother-deceased),Gamar (widow-deceased),Fauzia(daughter),Feiruz(daughter),Muna(daughter),Zainab(daughter),Amira(daughter),Ahlam(daughter),I(deceased),Omar(son-deceased),Mohamed(son)and Yahya(son)
3. According to the petitioner, the deceased had on 12th January 1994 in writing (written will) distributed his property to his children prior to his death hence died testate.



4. In response, Yahya a son to the deceased and Swabah, Abubakar, Ahmed, Haani, Hindu and Abdallah being heirs of the late Omar Saleh claiming to be the respondents referred to in the petition, filed a joint replying affidavit sworn on 15th March 2019 and filed on the same day thus stating that; the deceased died on 23rd May 1997 and not the year 2007 as claimed by the petitioner; the petitioner to produce accurate list of heirs; the petitioner to produce a death certificate of the deceased, original deed plan, land registry latest search, receipts of rates payment and kplc bills; petitioner to produce statement of accounts for rental income collected between 2015- 2019 from illegal structures and go downs erected in the property without consulting anybody and that; the petitioner to produce the alleged consent regarding distribution referred to in the petition.
5. In their further response to the amended petition filed on 15th November 2019, the respondents stated that the late Faisal a son to the deceased was survived by Latifa(widow), Abdallah(son), Gamar Omar (daughter) and Said (son). That the late Omar Saleh a son to the deceased was also survived by Swabah(widow), Hindu Mbarak(widow), Hani(son), Ahmed-Omar (son) Aboubakar(son) Abdallah Omar(son)
6. He went on to state that the deceased had property in Yemen and Saudi Arabia and that all the deceased's daughters were residing in Jeddah Saudi Arabia. According to the respondents, the estate is comprised of; a parcel of land Known as Mombasa /Block XVII/903 situated in kikowani in Mombasa without the houses as currently existing on the said parcel of land & one building/ house which existed and was bought together with the parcel of land by the deceased except the second floor of the 1st house.
7. That the second floor of the 1st house and the other house currently situated on the parcel of land does not form part of the estate of the deceased as they were constructed by the respondents using their own money. According to them, the second floor of the first house and the whole of the second house were not build by the deceased. Regarding the assets in Yemen and Saudi Arabia, they averred that it was the petitioner who had full details and therefore should be compelled to disclose the details.
8. It was further averred that since the year 2008, the petitioner has been collecting rent from the disputed property to the exclusion of other beneficiaries hence should be made to account for. That the petitioner has over the years misused the estate by demolishing some parts of the building and erecting illegal structures for his benefit and without approval from the other beneficiaries.
9. Regarding the will, the respondents denied its existence and that the consent of the beneficiaries was not sought. In particular, Yahya denied signing any consent touching on distribution of the estate. Finally, they prayed for orders that;
 - a. the petitioner be compelled to provide an accurate account and inventory of all the assets of the deceased in Kenya and fair distribution to all beneficiaries.
 - b. determination of the estate and heirs of the deceased.
 - c. determination of the respective share of each beneficiary in the estate.
 - d. distribution of the estate according to Islamic sharia and not according to the alleged will nor consent
 - e. an order that the tenants to vacate the houses because the go-down was unlawfully constructed by the petitioner and in the alternative any rent due for collection be collected by the respondent herein.
 - f. An order directing the petitioner to account for and refund all monies he has collected as rent.



- g. Land registrar to assist in distribution of the estate more especially Mombasa /Block XVII/903.
 - h. The 1st respondent one Yahya Swaleh Ahmed Hassan be appointed administrator replacing the petitioner who has not been residing in Mombasa
 - i. Costs be awarded to the respondents
 - j. Any other relief the court may deem fit
10. During the hearing, Pw1 (the petitioner) told the court that his father the deceased herein died in 1997. He went on to list beneficiaries as per the petition. He told the court that prior to his death his father had executed a will in 1994 expressing his wishes on how he wanted his estate distributed which was later confirmed by beneficiaries signing a consent. According to him, the deceased's estate constitutes two houses in plot No.903, two vehicles in Saudi Arabia and 29,000 Yemen Rujal-Teme which were allegedly distributed during the lifetime of their mother.
 11. He further stated that the front house has 3 flats & the second house has 4 flats and a parking area, two storage facilities and a meat shop. That in respect to the second house, each son was to get one flat & the first house was for the mother and daughters who are residing in Jedah Saudi Arabia. He further told the court that the year 2008, his mother directed him to collect rent and the year 2011 he renovated the building with the consent of all beneficiaries thus improving the property from 3 flats to 8 flats. That he spent about 6million to meet medical expenses for the 1st respondent. He expressed his willingness to render a proper and accurate account of the estate. He told the court that he was ready to revoke the will and have the estate distributed.
 12. On cross examination by Mr. Hamisi, he told the court that after the deceased died, he took one car and his uncle the other. He further confirmed that the first house was bought by their father and the second one was built by their late father as well. On the agreement or consent to distribute the estate, he confirmed that it was done without court's authority and that Munira who was in Canada did not sign.
 13. On the respondents' part, Yahya Swaleh told the court that his father left a house with land. That the deceased bought a house with ground and 1st floor while the 1st Respondent built the 2nd floor. That he built the second house together with his late brother Omar. He stated that he used to collect rent and distribute to the heirs and he had no problem with the list of heirs. On cross examination by Barayan, he admitted that the father did distribute the estate.
 14. RW1Abdulwaqhab Abrar Sehla adopted his witness statement dated 29th March 2019 in which he merely confirmed that sometime in 1980s he prepared a building plan for the deceased. That he assisted in building the house from 1st floor to second floor. Equally, RW2 Haji Govinda adopted his affidavit sworn on 14th November 2019 in which he confirmed that in 1980 the deceased approached him to build a house which he did by constructing second floor of the 1st house.
 15. RW3 Nur Ahmed Janiane daughter inlaw to the deceased told the court that the list of heirs presented by the petitioner was in order. She further told the court that the deceased left the 1st house at ground floor and the second floor was later extended by Yahya. That Mohamed demolished part of the building without consent from anybody. She supported the position taken by the 1st respondent. On cross examination by Barayan, she denied the existence of the will.
 16. RW4 Ahmed omar Swaleh son to Omar son to the deceased also told the court what his late father allegedly told him regarding his grandfather's estate. That the deceased bought 1st floor of the 1st house and Yahya built the second floor while the petitioner built a go down illegally which has attracted a demolition order from the county government.



17. Upon close of the hearing, the honourable kadhi delivered his judgment on 30th January 2020 thus upholding the list of heirs listed in the petition with shares for the late Feisal Saleh and Omar being inherited by their widows and children according to prescribed shares of Islamic inheritance. The court went further to state that; the will bequeathed by the deceased herein to the heirs is hereby revoked and invalidated; the estate of the deceased herein is vested to the heirs in accordance to their prescribed shares with the widow getting 64/384, daughters 17/384 and sons 34/384 and that each party to bear own cost.
18. Dissatisfied with the judgement of the honourable Senior Resident Kadhi, the petitioner (hereafter the appellant) moved this honourable court through a memorandum of appeal dated 26th August, 2021 and filed on 31st August, 2021. The appeal is based on the following grounds;
- a. The learned Kadhi erred in law and fact in ignoring to give effect to the will of the deceased which was consistent with Islamic law and his tenet.
 - b. The learned Kadhi erred in law and fact in failing to consider or take into consideration the agreement and quotation between the appellant and Davoga Builders as evidence that he constructed the premises forming part of the estate with his own personal funds.
 - c. The learned Kadhi erred in law and fact in failing to consider and apply Islamic law relating to distribution of estate of the deceased. The appellant tendered evidence in support of the petition which the learned Kadhi ignored and/or failed to consider and apply.
 - d. The learned Kadhi misunderstood and misapplied the principle set out in the case of the Estate of Noor Elmi 2019 eKLR thereby wrongly determined the petition against the appellant.
 - e. The judgement and order made by the learned Kadhi was against the weight of evidence that had been tendered by the appellant.
 - f. The learned Kadhi had opportunity to visit the subject premises to ascertain its rightful heirs but declined to do so to the prejudice of the appellant.
 - g. The orders made by the learned Kadhi in his judgement are incapable of application in conformity to Islamic law.
19. The respondents on the other hand filed a Memorandum of Cross Appeal dated 18th May, 2020 against part of the said judgment citing the following grounds:
- a. The learned trial Kadhi erred in law and in fact by not including or taking into account certain assets that form part of the estate of the deceased such as rent collected by the appellant in Kenya from the year 2008, vehicles and money in Yemen and Saudi Arabia.
 - b. The learned trial Kadhi erred in law and in fact by not ordering the appellant to return or reinstate for proper distribution the part of the estate that was wasted or squandered by the appellant solely without consent of the other beneficiaries such as the demolished parts of the house, the unaccounted for rent collections, sold vehicles and utilised money in Yemen and Saudi Arabia.
 - c. The learned trial kadhi erred in fact and in law by not taking into account the said part of the estate unlawfully squandered and/or wasted by the appellant in determining the net share of the estate to be distributed to the appellant.



- d. The learned trial kadhi erred in fact and in law by failing to order the appellant's purported tenants occupying the estate to vacate the premises in order to pave way for distribution of the estate to the beneficiaries.
- e. The learned kadhi erred in fact and in law by failing to take into account all relevant matters in arriving into his decision.
20. The respondents urged the court to; dismiss the appeal and allow the cross appeal with costs; the appellant to account for rent collected from 2008, vehicles and money in Yemen and Saudi Arabia and return or refund the same to the estate of the deceased and the same be distributed under the Muslim Law; the value of the estate wasted or unlawfully utilised by the appellant be deducted from the appellants share of the estate and the appellant's tenants occupying the estate to vacate the premises immediately to pave way for the distribution of the same.
21. The appeal was canvassed by way of written submissions.
22. The appellant through his advocate Asige Keverenge & Anyanzwa Advocates filed his written submissions dated 15th October, 2021. Counsel contended that this being a first appeal, the court ought to have a fresh look at the evidence adduced during the trial, review and analyse it and make an independent decision bearing in mind that as an appellate court it did not have the privilege of hearing the witnesses testify.
23. Counsel further contended that the respondent in his reply to the amended petition delved into issues that were not pleaded and further sought reliefs in the response whereas there was no cross petition on record. That the reliefs sought were invalid and a nullity and should be declined in limine as non-issues.
24. It was counsel's further submission that; the decree extracted was not in accordance with the judgement delivered on 30th January, 2020 as it was not consistent with the finding and holding in the judgement and therefore not enforceable; the judgement and decree should be quashed, vacated and set aside; there was no finding on Plot No.MOMBASA/BLOCK XVII/903 although the same is introduced in the decree making it void, invalid and unenforceable.
25. On jurisdiction, counsel submitted that the kadhi acted without jurisdiction when he made a decree that the estate of the deceased comprised of Plot No.MOMBASA/BLOCK XVII/903 together with the 1st house and 1st floor of the house. That at the time of issuance of the decree, Plot No.MOMBASA/BLOCK XVII/903 was in the name of the deceased and comprised of all the developments that were made on the plot.
26. According to learned counsel, the plot and the developments thereon were therefore indivisible and inseparable. That the Kadhi's order creating separate ownership of the houses and floors to other persons other than the registered owner the late Saleh Mohamed Hassan was unlawful and without jurisdiction hence a nullity and void in law.
27. Counsel further submitted that the jurisdiction of the Kadhi's Court is limited to determination of questions of personal status, marriage, divorce or inheritance in proceedings in which all parties profess the Islamic faith under Article 170 (5) of *the Constitution*. That the learned kadhi acted in excess of jurisdiction in varying and/or altering the legal status of Plot No.MOMBASA/BLOCK XVII/903.
28. In conclusion, counsel urged the court to quash, vacate and or set aside the Kadhi's court judgement (decree) and allow the appeal with costs.



29. The respondents on the other hand through their advocate HM Lugogo & Company Advocates filed their written submissions dated 8th November, 2021. Counsel submitted that the appellant did not make any submissions in support of the grounds of appeal and instead he raised preliminary issues.
30. On the aspect of preliminary issues raised by the appellant, counsel submitted on three of them namely; the response to the Amended Petition was un-procedural; the decree did not accord with the judgement of the court; the honourable Kadhi acted without jurisdiction;
31. On the first issue, counsel submitted that; the law does not bar a litigant from filing a lengthy response; their response was in relation to the estate of the deceased; the procedural law that applied to the kadhi was the Civil Procedure Rules 2010 and not Probate & Administration; the Civil Procedure Rules do not provide for cross petition and the Kadhi's court do not apply strict rules of procedure as their focus is on administering justice.
32. On the second issue, counsel submitted that the Kadhi did make a detailed comprehensive analysis of facts presented in the pleadings, testimony and evidence tendered during the trial and submission. Thus the allegation by the appellant that order 1 of the decree was inconsistent with the findings of the Kadhi's court is misleading.
33. Concerning the 3rd issue, counsel submitted that it is possible in law to have the plot owned by one person and the developments by another. That any development done on the estate asset using private resources does not form part of the estate. That the kadhi did not alter the legal status of the land as he acted within his jurisdiction.
34. On the fourth issue, counsel opined that the cross appeal was only in respect of part of the judgement, and that a judgement cannot be quashed merely because the parties have lodged an appeal against it.
35. Counsel also submitted on four issues in relation to the grounds of appeal; whether the honourable kadhi was right in revoking the alleged will of the deceased; whether the honourable kadhi failed to consider and or apply evidence tendered; whether the order given by the honourable Kadhi was in conformity with Islamic Law and what reliefs should this honourable court grant in the circumstances.
36. On the 1st issue, counsel submitted that the will was not sufficiently proved and it was invalid as it did not meet the requirements of a will.
37. On the 2nd issue, counsel submitted that the appellant's evidence was considered and invited this court to consider the same together with the submissions that were filed before the Kadhi. That none of the parties requested the court for a site visit which in any event is not mandatory.
38. Touching on the 3rd issue, counsel contended that the estate as distributed in the judgement is in conformity with sharia law. On the 4th issue, counsel submitted that the appellant did not submit on what should happen to the estate if the judgment is set aside.
39. This matter having emanated from the kadhi's court, the court in accordance with Section 65 of the *civil procedure Act* sat with the Chief kadhi as an assessor who rendered his opinion dated 24th June 2022 thus finding that the kadhi who presided over the matter had no jurisdiction to hear a dispute pertaining to land hence the appeal should be allowed and the matter be referred to another Kadhi for a retrial.

Determination

40. I have considered the record of appeal, cross appeal and the rival submissions by both counsel. From the grounds cited in the appeal and cross appeal, I will condense the issues for determination as follows:



- a. Whether the kadhi's court had jurisdiction to hear the matter
 - b. What assets constitutes the estate
 - c. Whether the kadhi was right in revoking the will in question.
 - d. Whether the kadhi properly applied Islamic law in distributing the estate of the deceased and who was entitled to which share.
 - e. Whether the honourable kadhi considered the evidence tendered before him.
 - f. Whether the kadhi misunderstood and misapplied the principle set out in the case of *In re Estate of Noor Elmi (Deceased)* [2019] eKLR.
41. This being a first appeal, the duty of the court is to re-evaluate the evidence on record and draw its own conclusions, bearing in mind the fact that the trial court had the advantage of seeing the witnesses testify before it and that it cannot review the decision of the trial court simply because it could have reached a different finding if it were hearing the matter for the first time. See the case of *Jackson Kaio Kivuva v Penina Wanjiru Muchene* [2019] eKLR where the court stated;
- “This being a first appeal, parties are entitled to and expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.”
42. Mr, Asige for the appellant/petitioner submitted that the Kadhi had no jurisdiction to determine issues touching on land hence any ownership dispute over the same is out of jurisdiction under Article 17(5) of *the constitution*. It is trite law that jurisdiction is everything and without it a court cannot move one more step. These were the wise words of Nyarangi JA in the case of *Owners of the Motor Vessel “Lillian S”V Caltex Oil(Kenya) Ltd(1989) e KLR*.
43. The supreme law governing jurisdiction exercisable by a kadhi's court is Article 170(5) of *the constitution* which provides that a kadhi's court shall be limited to determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.
44. In the instant case, both parties are Muslims who profess Islamic religion and had willingly submitted to the jurisdiction of the court. Further, the issue at hand is inheritance of plot No.Mombasa/Block XVII/ 903 and not ownership over the same. To that extent, the court with jurisdiction is the Kadhi's court or the high court. In my view, the issue of lack of jurisdiction having not been raised before the trial court nor the grounds of appeal cannot be introduced on submission during the hearing of the appeal. For those reasons that ground fails.
45. Concerning the subject property constituting the estate, parties were not in agreement. According to the petition, the petitioner listed Plot No. Mombasa /Block XVII/903 as the only asset available for distribution. A copy of title bearing the name of the deceased was attached which is not in dispute. During the hearing, the petitioner expanded the list to include two Mvs and 29,000-Temes (money in Yemen currency). According to him, he took one Mv and his uncle took one. As to the money, the same was allegedly shared out amongst the heirs by their mother (petitioner's mother) while she was alive.



46. On their part, the respondents demanded for properties in Yemen and Saudi Arabia to be included. They however did not produce any proof over the existence of such property. Therefore, a court cannot distribute what has not been established to exist. The respondent shall be at liberty to apply for inclusion when evidence over their existence will be available. As to the MV taken by the petitioner applicant, the equivalent of its value shall be taken into account when final distribution to heirs is done so that he gets less the value of that MV.
47. As to the money in the account amounting to 29,000 Temes, it was alleged that the same was shared out to all beneficiaries by the widow who is now deceased. This fact was not controverted. To that extent, we cannot revive and recover the same from the widow. Having held as above, I am left with plot Mombasa/Block XVII/903 constituting the estate which according to all parties was owned by the deceased.
48. The only point of departure is that the petitioner and the 1st respondent are claiming to have expanded the property by constructing some floors. Although they have disagreed on the date the deceased died to which am unable to find a clear death certificate translated in English from Arabic language, the alleged self-driven and imposed expansion was without approval by the other beneficiaries. None of the two had the right to alter or change the character of the estate without a court order. In law, their actions were criminal for breach of Section 45 of the law of succession on intermeddling with the estate.
49. This court cannot be called upon to sanction and reward such illegal actions. In any event, at one point or the other, the appellant/ petitioner and the 1st respondent were collecting rent from the premises without any accountability to other beneficiaries. For instance, the appellant decided to put up a go down within the premises without approval from the county government hence attracting an order for demolition. In a nut shell, any alleged expansion or alteration of the property was illegal hence cannot be a subject of consideration for compensation.
50. A party who voluntarily assumes a risk cannot ask an innocent party to assist him bear the burden. The same excuse cannot be used to disinherit the other heirs. In any event, none of them adduced evidence to show how much was spent in expansion of the premises and from which source. Accordingly, the only asset available to constitute the estate is plot No. Mombasa /Block XVII/903 which constitutes land and all that is affixed within it.
51. The next question is whether the deceased left a will and whether the Kadhi properly revoked the same. This is a question of interpretation of Islamic law. The appellant stated that the deceased left a written will dated 15th May 1994 which was produced in evidence. The respondents disowned the existence of the will. However, the appellant (petitioner then) in his oral evidence before the court told the court that the deceased had distributed some of the properties of the estate to his heirs during the lifetime of his mother and two brothers who are deceased. That the deceased had left a will which he produced as exhibit 11. He also stated that he was ready to have the will revoked and the estate distributed.
52. Equally, the 1st respondent in his cross examination admitted that the deceased his father had distributed the property before he died. According to the said will, only sons were provided for and daughters were not. However, the petitioner told the court that after the father died, they entered into a family consent to redistribute the estate afresh so as to include the sisters. The consent allegedly entered on 28th June 2003 was disowned by some of the heirs. I wish to clarify that any distribution of the estate after the deceased died and which is not sanctioned by the court is a nullity. Nobody can purport to distribute a deceased person's property except through a court order.



53. Having dismissed the alleged consent, am left with the aspect whether the said will was valid. In making his decision on the said will this what the senior resident Kadhi had to say after considering the evidence submitted before him and the provisions of the Islamic law;

“According to the Islamic substantive law, it is not permissible to make a bequest to heirs, because of the report narrated by...

The will should not be executed except with the consent of the heirs, because of the hadith mentioned above...

Based on this, what the deceased did of bequeathing the estate to the heirs is contrary to the noble Islamic teachings; therefore it is invalid, this is because the other heirs disapprove it. Again another reason why bequest in favour of an heir is not allowed is that it would amount to giving preference to some heirs over others, thus defeating the spirit of law which has fixed the portion of each in the inheritance and causing disputes among persons related to one another.”

54. It is trite that execution of wills under Islamic law is generally not governed by the process provided under the *law of succession Act*. Instead, the same is subject to the interpretation of the quran and jurisprudence derived from Muslim scholars.

55. In the case of SAIFUDEAN MOHAMEDALI NOORBHAI v SHEHNAZ ABDEHUSEIN ADAMJI [2011] eKLR the court had the following to say on wills in Islamic law,

“As to the legality of wills in Muslim law, Sir Dinshah Fardunji Mulla, in his Principles of Muhammadan Law, 1995, explains

“Wills are declared to be lawful in the Koran and the traditions, and all doctors, moreover have concurred in this opinion (Hedayat, 671)”.

The limit on a Muslim’s testamentary freedom, up to one-third of one’s estate, is seen in Islam as a means to ensuring balance between a Muslim’s freedom in this regard and responsibility to his or her heirs. Deriving sanction from a Prophetic tradition, it reflects indications in the noble scripture that a Muslim may not “so dispose of his property by will as to leave his heirs destitute”. (Mulla, Ch, IX, Wills, p. 141).

56. Guided by the above case law, am inclined to find that the deceased having excluded his 8 daughters plus the wife in the will and further having distributed more than 1/3 of his property under the purported will, the same is a nullity by virtue of offending the basic requirements in execution of an Islamic will hence properly revoked or disregarded by the hon. Kadhi.

57. On whether the honourable court applied Islamic law in distributing the estate of the deceased, the honourable Kadhi relied on the Islamic Law of inheritance thereby stating that;

“Allah instructs you concerning your children :(i.e. their portions of inheritance) for the male, what is equal to the shares of two females. But if there are (only daughters, two or more; for them is two thirds of one’s estate. And if there is only one, for her is half. And for one’s parents, to each one of them is a sixth of his estate if he left children...” .Q4:12

“In that which you leave their (your wives) share is a fourth if you leave no child; but if you leave child they get an eighth of that which you leave after payment of legacies you may have bequeathed or debts”.Q 4:12.



Pursuant to the above verses the court is happy to declare that:-

- a. Mother is an heir and is entitled to a sixth (1/60)
 - b. Widow is an heir is entitled to an eighth (1/8) of the total estate.
 - c. Four sons and eight daughters are heirs and are entitled to the remainder of the estate; whereas a son is entitle (sic) to a share what is equivalent to the shares of two daughters...”
58. The appellant has not submitted on this issue neither has he shown the provisions not applied by the Kadhi. Accordingly, it’s my finding that the appellant has not substantiated his claim.
59. On Whether the honourable Kadhi considered the evidence tendered before him, the court in the case of Fal Azad & another v Peter Mubua Karanja & 2 others [2016] eKLR stated as follows
- “A court of Appeal will normally not interfere with the trial courts findings of fact unless they are based on no evidence. There is no doubt that the first respondents’ evidence was unchallenged and straight forward.”
60. In this case the honourable court summarised parties’ evidence and submissions in pages 3, 4 and 5 of the judgement delivered on 30th January, 2020 before proceeding to determine the issues raised. Thus the appellant cannot claim that the honourable Kadhi did not consider the evidence tendered before him. To that extent this ground must fail.
61. Whether the honourable Kadhi misunderstood and misapplied the principle set out in the case of estate of In re Estate of Noor Elmi (Deceased) [2019] eKLR, similarly, the appellant has not submitted on this issue. The case law referred to is a decision from the Kadhi’s Court at Isiolo. The honourable kadhi in this matter was not bound by the decision of a court with concurrent jurisdiction. Further, the appellant did not submit on the alleged principles in the said authority that were not followed. For those reasons, that ground must fail.
62. On the question of failure to conduct a site visit so as to ascertain the rightful heirs, the same cannot stand as the rightful beneficiaries to the estate of deceased are not determined by way of site visit.
63. Taking into account the totality of the evidence tendered before the court and parties’ respective submissions, it is apparent that the deceased’s estate comprises of Mombasa/Block XVII/903 and that the same is subject to distribution to the undisputed heirs in accordance with the Islamic law.
64. Therefore, the mode of distribution adopted and applied in distributing the estate by the kadhi shall apply hence upheld. Accordingly, it is my finding that the appeal herein and the cross appeal lacks merit and the same are dismissed with no order as to costs. I should however add that, should physical division be impossible, the asset shall be sold through a public auction after valuation by a mutually agreed valuer and the proceeds thereof shared amongst the beneficiaries in accordance with their share. Regarding costs, this is a family issue hence each shall bear own costs.

DATED, SIGNED AND DELIVERED IN MOMBASA THIS 17TH DAY OF FEBRUARY 2023

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J.N. ONYIEGO

JUDGE

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