



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kilugha v Omar & 3 others (Civil Appeal E018 of 2022)  
[2023] KEHC 24787 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24787 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CIVIL APPEAL E018 OF 2022  
GMA DULU, J  
OCTOBER 31, 2023**

**BETWEEN**

**MWANAIMA OMAR KILUGHA ..... APPELLANT**

**AND**

**RAMADHAN OMAR ..... 1<sup>ST</sup> RESPONDENT**

**NJAI OMAR ..... 2<sup>ND</sup> RESPONDENT**

**MARYAM OMAR ..... 3<sup>RD</sup> RESPONDENT**

**MNYIKA KASSIM MWADIME ..... 4<sup>TH</sup> RESPONDENT**

*(From the judgment in Succession Cause No. 04 of 2020 delivered by  
Hon. Mohamed Abdullahi (SPK) at Voi Law Courts on 5th May 2021)*

**JUDGMENT**

1. In a judgment delivered on 5<sup>th</sup> May 2021 the learned Kadhi Hon. M. A. Mahmoud concluded as follows:-

“Therefore after careful consideration this Honourable Court decides as follows:-

1. That the lawful heirs of the estate are plaintiff as a widow and the 3 children the respondents two sons and a daughter.
2. The estate left by the deceased to be inherited is a house on Plot No. 245 Kaloleni Voi.
3. That the process of inheritance is as provided in Cap 4 Sec 11 and 12 Holy Quran where the widow gets 12.5% the rest 87.5% goes to the children.



4. Since the children respondents have sold their shares 87.5% to the interested party then he became the owner of 87.5% of the estate house.
  5. That for the cost of this case each side to shoulder its own cost.”
2. From the above decision of the Kadhi’s court, the appellant who was the petitioner (widow) in the Kadhi’s court, has come to this court on appeal through counsel Mwazighe & Company Advocates relying on a Memorandum of Appeal dated 13<sup>th</sup> May 2022 on the following grounds:–
1. The learned Kadhi erred in law and in fact by pegging his judgment on mere speculations that the proposed appellant might have refused to sign the memorandum of sale because she realized that the share was beyond her expectation.
  2. The learned Kadhi erred in law and in fact by not considering that the proposed appellant is a widow and the property in dispute is a matrimonial property which she is entitled to.
  3. The learned Kadhi erred in law and in fact by not considering that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents were given their shares by the deceased before he died and they sold the same.
  4. The learned Kadhi erred in law and fact by not considering the fact if the sale transaction is allowed to take effect the appellant will be destitute and homeless.
  5. The learned Magistrate (sic) erred in law in disregarding the appellant’s submissions and other legal authorities that were presented to him.
  6. The learned Magistrate (sic) erred in law and in fact in declining to take into account the defendant’s evidence at all.
3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Mwazighe & Company Advocates for the appellant as well as the submissions filed by Daniel Orege & Company Advocates for the respondent.
4. Since the counsel on both sides did not highlight the submissions on 19<sup>th</sup> September 2023 when the appeal came up for hearing in the presence of two Kadhi’s as assessors, the court ordered that the Deputy Registrar of this court supply the two assessors with copy of the record of appeal and submissions for each of them to give this court a written opinion. The two Kadhis (assessors) did so.
5. In deciding this appeal, I have perused and considered the written opinion from Hon. Mvudi Masoud Makange Principal Kadhi Voi, and Hon. Mwaito Salim Juma Principal Kadhi Mariakani, who participated in the appeal as assessors.
6. This being a first appeal, I have a duty to reconsider, and re-evaluate all the evidence on record and come to my own independent conclusions and inferences. I have also to bear in mind that this is a case of inheritance by Muslims, and that Islamic Law applies.
7. At the trial, the appellant testified as plaintiff. It was her evidence that she was widow of the deceased married in 2012. She stated that they bought a plot with the deceased, but did not produce any document. She said that the children of the deceased, from another mother, had been given their inheritance earlier, and that she was aware of a purported sale of the house in contest, but did not see the agreement relating thereto.
8. For the respondents, there was Njari Omar who testified that the appellant was his step-mother. It was his evidence that when deceased bought a house at Kaloleni, he had not officially married the step-mother (appellant) but they were living together. It was his evidence that the house at Kaloleni was all



- that he inherited from the deceased, but the stepmother refused to sign the sale agreement, and instead filed an appeal.
9. Ramadhan Omar also testified. It was his evidence that the Kadhi's court had earlier ordered that the estate house, which could not be divided, be disposed of and the amount of proceeds be shared. However, when they got a buyer and brought the money, the step mother left.
  10. Maryam Omar also testified that she was a daughter of the deceased. On the house at Kaloleni, it was her evidence that the Kadhi had ordered it be sold and proceeds be shared. However, when the money was brought before the Kadhi the stepmother left, and her share of the money was then deposited in court.
  11. Mnyika Kassim Mwadime also testified. He stated that he applied for a loan to buy the house and was assured that payment would be done through the court. He stated that he made the payment before the court (Kadhi), wherein the stepmother of the other beneficiaries was present. He said that he saw the stepmother for the first time at the Kadhi's court. He stated that he paid Kshs. 450,000/= before the Kadhi.
  12. Having considered the evidence on record, and the judgment, the grounds of appeal and submissions of the parties, as well as the opinions of the two assessors (Kadhis), my findings are that the law applicable herein is Islamic Law of Inheritance.
  13. First, issue herein relates to whether the respondents had received their respective shares of inheritance from the deceased before he died. Other than the allegations made by the appellant, there was no evidence before the Kadhi to support that contention, so in my view the learned Kadhi was correct to find that no distribution of the estate was done by the deceased to any beneficiary, including the appellant, before death of the deceased.
  14. On whether, the house at Kaloleni Voi was matrimonial property owned jointly by the deceased and the appellant, the appellant's contentions were also not backed by tangible evidence. In any case, the fact that a spouse acquires property during subsistence of a marriage does not, per se, mean that such property is matrimonial property, as the contribution of each spouse has to be established by tangible evidence. The Hon. Kadhi was thus correct in finding that the Kaloleni house was not matrimonial property.
  15. On whether there was a valid sale of the house at Kaloleni, the evidence on record is clear. The sale was ordered by the Kadhi's court which did not determine the buyer nor the price of the property. Thus, under both general Kenyan law and Islamic Law, that property should have been sold by agreement of the interested parties (beneficiaries) at a price preferably determined by professional valuation, and if there were any issues arising, beneficiaries should have gone back to the same Kadhi's court for directions.
  16. From the evidence on record, some beneficiaries sold the house without involving the appellant, and at a price not agreed to by the appellant, thus her refusal. The purported sale was thus invalid, because there was no agreement between all beneficiaries.
  17. Thus, though the Kadhi was correct under Islamic Law to hold that the house be sold and the proceeds be divided among the appellant and the children in the percentages or shares authorized in the Quran, the Kadhi erred in holding that there was a valid sale of the house.
  18. I note on this point also, that both Kadhi assessors herein agree in their opinions and hold that the sale of the house was invalid, and that the buyer can only be entitled to a refund of the sale price. I so agree and hold.



19. For the above reasons, I allow the appeal to the extent that I find that the sale of the Kaloleni house is invalid, and order as follows:-
- i. The purported sale of the Kaloleni house is invalid and of no legal effect.
  - ii. The buyer is entitled to refund of the purchase price from those who purported to sell the house to him.
  - iii. The said house will be sold after valuation by a qualified Valuer and the Kadhi will thereafter distribute the proceeds in accordance with Islamic Law. Costs of valuation will be borne by the estate of the deceased.
  - iv. The parties will bear their respective costs of this appeal.

**DATED, SIGNED AND DELIVERED THIS 31<sup>ST</sup> DAY OF OCTOBER 2023 AT VOI VIRTUALLY.**

**GEORGE DULU**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

**In the presence of:-**

Alfred – Court Assistant

Mr. Mwazighe – for appellant

Ms. Shamsa for respondent

