



REPUBLIC OF KENYA



**Timimi & 3 others v Faraj & another (Family Appeal 30 of 2017)  
[2022] KEHC 14549 (KLR) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 14549 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
FAMILY APPEAL 30 OF 2017  
JN ONYIEGO, J  
SEPTEMBER 30, 2022**

**BETWEEN**

**YUSUF KARAMA TIMIMI ..... 1<sup>ST</sup> APPELLANT  
HUSSEIN FARAJ ABEID ..... 2<sup>ND</sup> APPELLANT  
ESSEID BINTI FARAJ ABEID ..... 3<sup>RD</sup> APPELLANT  
HUDA KARAMA AL -ABDI ..... 4<sup>TH</sup> APPELLANT**

**AND**

**HAMDAN FARAJ ..... 1<sup>ST</sup> RESPONDENT  
ABDALLA FARAJ ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment of the Honourable Khamis Ramadhani,  
Senor Resident Kadhi Mombasa delivered on the 13th September, 2017)*

**JUDGMENT**

1. The deceased herein Faraj Abeid died intestate on October 3, 1983 while domiciled in Mombasa Kenya. He was said to have been survived by three sons and two daughters listed as;
  - a. Abdalla Faraj
  - b. Hussen Faraj Abeid
  - c. Hamdan Faraj-son
  - d. Dhukhun Faraj-son
  - e. Esein Binti Faraj Karama Abeid -daughter
  - f. Ghusun Mohamed Said-widow



2. The said Dhukun Faraj was also survived by her children namely; Mohamed Karama (now deceased), Yusuf Karama and Huda Karama Ali Abeid. The late Mohammed Karama was survived by the following dependants; Amina, Zubeda, Ummu, Ali, Sumeiya, Hamza, Karama, Bilal and Karima.
3. Among the assets list as comprising the estate are;
  - a. Plot No Mombasa/block XVI/1129
  - b. ½ share house without land on Plot No Mombasa /Block XVI /1113
  - c. House without land at Mombasa Miritini
  - d. Cash in Kenya
  - e. Running grocery business in Mombasa
4. By a petition dated April 19, 2016 and amended on November 22, 2016, Yusuf Karama, Hussein Faraj, Abeid, Esseid Binti Faraj and Huda Karama petitioned Mombasa Kadhi's court vide succession cause No 86 /2016 seeking various orders.
5. Named as respondents were Abdalla Faraj and Hamdan Faraj. Among the prayers sought was;
  - a. Determination of the deceased's estate, their heirs/beneficiaries and their shares according to Islamic law;
  - b. An order that the deceased's money be remitted to this honourable court for distribution to the heirs according to Islamic law.
  - c. Any other relief the court may deem fit.
  - d. Distribution of the estate of Ghusun Mohamed Said amongst her lawful beneficiaries
  - e. An order directing the respondents to produce and deposit the original title of plot No Mombasa /Block XVI/1129 before this honourable court.
6. In response to the petition, the respondents filed a reply to the petition dated May 9, 2016 objecting to the indication that the estate was entitled to ½ share of house without land on Plot No Mombasa / Block I/ XV/1/1113. They further denied the availability of any cash in Kenya, Yemen, house without Land at Miritini Mombasa and running grocery business in Mombasa.
7. They further stated that there was a matter pending before this court being cause No 54/1997 which the petitioners did not disclose.
8. That the petitioners had jointly and severally fraudulently changed title in respect of Plot No Mombasa/Block/XVI/1113 and attempted to remove the name of the deceased. That they introduced another green card without his name and in the process dis- inherited the beneficiaries. They averred that plot No 1113 be restored to its rightful owners to reflect its original record at the land's office as of March 2, 1995 and 1997. They too prayed that MSA /Block XVI /113 be reinstated to the original rightful names and that the petitioners be penalized of their fraudulent acts as per Islamic law.
9. During the hearing, Essaid Faraj Abeid ( 3<sup>rd</sup> petitioner ) testified on behalf of the other petitioners. She told the court that when her father died, he left cash in Kenya and back in Yemen amounting to Kshs 400,0000. That the said amount was in her possession but she handed over the same to her brother Abdalla Faraj on instructions from their mother. That the same money was used to purchase 2 flats at Moons which were registered in the name of Hamdan Faraj and Abdalla Faraj



10. She stated that cash in Yemen was taken by Hamdan Faraj and Abdalla Faraj. She further claimed that the deceased had a house in Yemen but she did not have the particulars.
11. Regarding the assets in Kenya, she claimed that the deceased left a house in Miritini -Mikindani which had a butchery but the same was sold by Abdalla. That she and Hussein Faraj were staying in another house at Guraya constituting 4 rooms but the title is in possession of Abdalla and Hamdam. She further told the court that their father also left houses without land at Swaleh Nguru Plots in Plot Mombasa / Block XVI/1129. That the shops are located in Plot ½ share of the house without land on plot No Msa/ Block VVI/1113 while the other ½ belongs to Yusuf and Mohamed Karama who are the children of Dhukan Faraj who is also deceased.
12. On cross examination by Mr Oddiaga, she admitted that she had no proof that cash Kshs 400,000 was left in Yemen nor Kenyan account.
13. In their defence, Abdalla Faraj Abeid told the court that a house on ½ share of plot No 1113 belongs to Karama Ali Abeid and Faraj Abeid Said .He claimed to have bought the plot in 1992 and a title deed assigned to him in 1995. He stated that the title deed in respect to Plot No 1113 bore the name of Faraj Abdalla Said, Mohamed Karama Al Abeid and Yusuf Karma Tamimi. He further told the court that the title deed issued on March 2, 1995 also had the name of the deceased who had died 2 years earlier.
14. He claimed that in the year 2013, Mohamed Karama Ali Yusuf Karama applied for and got another title deed in their joint names. It was his testimony that there was a civil suit No 54/1997 regarding the ownership of Plot N 1113. He denied the claim that there was a plot in Miritini and cash in Yemen.
15. Upon calling the land registrar Mombasa one Hashim, he produced an original land title deed in respect of LR 1113 dated August 17, 1992 with Awadh Said and Said Swaleh Said as tenants in common in equal shares. That the same was cancelled and later a fresh one issued on March 2, 1995 in the names of Faraj Abded Said, Mohamed Karama Abed and Yusuf Karama Timimi which was transacted upon and cancelled. That later, they received a letter dated March 27, 2013 indicating the heir to be Mohamed Karama and Yusuf Karama Timimi. Subsequently, they received a letter from Muhuri lodging a complaint over the manner in which the property was mishandled.
16. Upon conclusion of the hearing, the hon Kadhi delivered his judgment on the September 13, 2017 thereby holding that the removal of the deceased's name from the title deed in respect of LR 1113 was illegal. He directed the land registrar to reinstate the name of the deceased into the register and that his 1/3 share be distributed as part of the estate.
17. The court further found that there was no proof of cash in Yemen, land in Miritini and a running grocery business. The court also found that the only assets comprising the estate were plot No 1113 and 1129. It also recognized the legitimate heirs as those listed in the amended petition. The hon Kadhi shared out the estate to principle heirs ( sons 2/8) while principle daughters got 1/8. Each grandson was to get 2/5 from his mother's share and granddaughter to inherit 1/5 from her late mother's share. That the widow and the children of Mohamed Karama will inherit their husbands' and fathers' share respectively.
18. The two widows were to share equally their share of an 1/8 equivalent to 22/176 from their late husband's share. The children to inherit the balance of 7/8 from their late father's share in the ration 2;1 . Each son's share was set at 28/176 and each daughter's share as 14/176 of the father's share. Finally, the court urged the property to be valued and the beneficiaries to agree on the mode of distributing the estate.



19. Aggrieved by the judgment, the appellants herein filed a memorandum of appeal dated September 27, 2017 citing 7 grounds of appeal as follows;
- a. That the learned honourable kadhi erred in law and fact and wrongly applied Islamic law principles in determining the estate of Faraj Abeid Said ( deceased)
  - b. That the learned honorable kadhi erred in law and fact and wrongly applied Islamic law principles by holding that 1/3 share of plot No Mombasa /Block XVI/1113 constitute part of the estate of the late Faraj Abeid Said.
  - c. The learned honorable kadhi erred in law and fact and wrongly applied Islamic law principles by holding that the house with land on plot number Mombasa/Block XVI/1129 constitutes part of the estate of the late Faraj Abeid Said.
  - d. That the learned Honourable kadhi erred in law and fact and wrongly applied Islamic law principles by holding that the Guraya shop which was an ongoing business did not constitute part of the estate of the late Faraj Abeid Said.
  - e. That the learned honorable kadhi erred in law and fact and exceeded his jurisdiction by ordering the rectification of the land register for Mombasa /Block XVI/1113 to insert the name of a deceased person (Faraja Abeid Said)
  - f. That the learned honorable kadhi erred in law and fact in delivering the said judgment despite notice and knowledge that all matters touching on plot no Mombasa/Block Xvi/1113 were stayed by the ruling of the honorable kadhi Mwidadi, in succession case No 67 of 2015 (the matter of the estate of Mohamed Karama -Ali Karama vs Amina Sheikh Mohamed)
20. When the matter came for hearing, counsel agreed to file submissions to dispose the appeal.

### **Appellant's Submissions**

21. Through the firm of Mgupu Advocates, the appellants filed their submissions on July 2, 2020 thus submitting on each ground of appeal as an independent issue. It was the appellants' submission that the deceased did not possess LR Mombasa XVI/1113 by the time he died on September 10, 1983. That by that time, the plot was registered in the names of Awadhi Swaleh Said and Said Swaleh Said. He claimed that by the time of filing their petition, the plot had changed hands to Mohamed Karama Abeid and Yusuf Karama Timimi.
22. According to the appellants, the property indicated as ½ shares Mombasa/XV/1113 did not constitute free estate of the deceased as defined under section 3 of the *Law of Succession Act*. In their view, the court did not determine the question whether the property indeed belonged to the estate and therefore available for distribution to the rightful beneficiaries. In support of this position, the court was referred to the case of *Mpatinga Ole Kemuye vs Meliyo Tipango & 2 others* (2017) e KLR where the court held that before distribution of an estate, the court must be satisfied that the beneficiaries are legitimate and that the assets indeed belong to the estate.
23. Regarding the existence of a shop, it was submitted that it was in existence at the time the deceased died and thereafter for 14 years after his death until 1997 hence the benefits therefrom should be taken into account.
24. According to the appellants, the issues revolving over ownership of land fall within the jurisdiction of the ELC and not the probate court. That under section 24 and 28 of the repealed *cap 300*, a registered owner of any property has an absolute and indefeasible right over the same land. In their view, the Kadhi



had no right to determine issues revolving on ownership dispute hence acted in excess of jurisdiction . To buttress the position that jurisdiction is a creature of the Constitution or statute , counsel opined that the Kadhi had none. In this regard, the court was referred to the case of *Samuel Kamau Macharia and another vs Kenya Commercial Bank Ltd and 2 others* (2012) e KLR.

25. Learned counsel further contended that the Kadhi's jurisdiction is derived from article 170 (5) of the *Constitution* and section 5 of the *Kadhi's Act*, hence determination over land ownership dispute was in excess of authority. To that extent the court was referred to the case of *Hemed Mohamed vs Rama Kitambi* Civil Appeal No 80/2014.
26. With regard to plot No Mombasa/Block XVI/1129, counsel submitted that the same was not registered in the name of the deceased hence not heritable property.
27. On the aspect of rectification of the land register in respect of plot No 1113 ordered by the Kadhi, it was contended that the Kadhi had no such powers. That in any event, there was no prayer for rectification of the land register hence the Kadhi acted outside his authority.
28. On the issue regarding delivery of the impugned judgment despite the execution of an order of stay issued by the presiding Kadhi in succession case No 67/2015 in the estate of Mohamed Karama Abeid, counsel contended that the same was irregular as plot No 1113 was listed as part of the estate of Mohamed Karama Abeid and the Kadhi's orders in that file are a subject of appeal before the high court.

#### **2<sup>nd</sup> Respondent's Submissions.**

29. Through the firm of Oddiaga and company advocates, the respondents through the second respondent filed submissions on June 4, 2020 supporting the holding of the Kadhi in the impugned judgment. Counsel submitted that the hon Kadhi followed Islamic law properly and that the appellant did not specify the law that was not followed.
30. Learned counsel contended that there was sufficient evidence to show that the deceased owned Mombasa/Block XVI/1129 and ½ share of the house without land on Plot No Msa/MN/XVI/1113. According to counsel, Plot 1113 was owned by three owners the deceased included and that the removal of the deceased's name from the title was irregular hence the reason why Yusuf Karama the 1<sup>st</sup> petitioner could not testify. That no title deed comprising two names was produced and that the removal of the deceased's name was illegal hence the holding of the Kadhi was proper.
31. According to learned counsel, the appellants did not give a proper account on how the deceased's name was removed from the register of title and failure by Yusuf Karama to testify implied that his evidence would have been adverse to them and therefore the respondent's evidence should be taken as uncontroverted . To support this position the court was referred to the holding in the case of Civil Appeal No 87 2016 *SYT vs TA*.
32. In the opinion of the learned counsel, the Kadhi applied his discretion properly in arriving at the decision he did hence the appellate court cannot interfere as he applied the right principles. In that regard, the court was referred to the case of *Mbogo and another vs Shab* (1968) EA 96 where the court held that as an appellate court it could not interfere with the discretion of the judge unless proved that he had applied wrong principles resulting to an injustice.
33. Learned counsel submitted that, based on the impugned judgment, evidence had been exhibited leading to the transfer of one title and another one sub - divided thus alleging that this appeal would occasion injury to the 2nd respondent than the appellants.



34. Concerning rectification of the register, counsel opined that it was not correct as the title deed was already in existence with the deceased's name and share which the court shared out. As to stay orders issued by another kadhi's court, counsel submitted that a court of concurrent jurisdiction cannot stay proceedings before another court touching on different estates.
35. In their supplementary submission filed on April 9, 2021, the respondents introduced judgment of the Kadhi's court in succession cause No 167/2015 in respect of the estate of Mohamed Karama who was also a grandson to the deceased herein but had 1/3 of plot No 1113 listed as his estate and the Kadhi's court did distribute the same. However on appeal, this decision was over turned under appeal No 16/17 where the court held that ownership disputes should be dealt with by ELC.

### Chief Kadhi's Opinion

36. As required under section 65 of the *Civil Procedure Act*, the court sat with the Chief Kadhi as the assessor to assist the court on issues relating to Islamic law. In his Opinion dated September 16, 2021, the hon Kadhi was of the opinion that the Kadhi had no jurisdiction to determine issues relating to ownership dispute hence the appeal was meritorious.

### Determination

37. I have considered the record of appeal herein, grounds of appeal and submissions by both parties. This is a first appeal. As the first appellate court, the court is duty bound to re-examine, re-assess, and re consider a fresh the evidence tendered before the trial court and make its independent conclusion without losing sight of the fact that the trial court had the advantage of listening to and seeing the witnesses to be able to assess their general demeanor. See *Selle and another vs Associated Motor Boat Company Limited & others* 1968) EA 123 where the court held

“...this court is not bound necessarily to accept the finding of fact by the court below. An appeal to this court ...is by way of re-trial and 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...”

38. Similar position was held in the case of *ENK vs MNNN* Civil Appeal No 559 /2019.
39. It is common ground that the appellants did petition the Kadhi's court seeking determination of the estate, its heirs and mode of distribution. The Kadhi's jurisdiction to preside over succession related matters involving persons professing Islamic religion is expressly anchored under article 170 (5) of the *Constitution* which provides that;

“The jurisdiction of a Kadhis' court shall be 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 Kadhi's courts.”

40. Section 5 of the *Kadhi's Court Act* further provides that;

“The Kadhi's Court shall have and exercise the following jurisdiction, namely 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; but nothing



in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it”.

41. Further, section 48 (2) of the [Law of Succession Act](#) does empower the Kadhi’s Court in presiding over inheritance issues by providing as follows;

“For the avoidance of doubt it is hereby declared that the Kadhis’ 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”.

42. From the brief background of this case, the list of heirs to the estate is not contested. what is in contestation is the extent of the estate. Parties were and are not in agreement as to what assets constitutes the estate (free property).

43. Under section 3 of the [Law of Succession Act](#), free property in relation to a deceased person means the property which that person was legally competent fully to dispose during his lifetime and in respect of which his interest has not been terminated by his death.

44. According to the petition before the Kadhi’s Court court, the following properties were listed as belonging to the estate.

- a. Plot no Mombasa /Block XVI /1129
- b. ½ share house without land on plot No Mombasa/Block XVI /1113
- c. House without land at Miritini Mombasa
- d. Cash in Kenya
- e. Cash in Yemen
- f. Running grocery business in Mombasa

45. During the hearing, Esseid Binti Faraj Abdeid one of the petitioners who testified on behalf of the petitioners claimed that, their father left cash in Yemen and Kenya amounting to Ksh 400,000. However, on cross examination by Mr Oddiaga, she stated that she had no evidence to prove that such money ever existed. This evidence is found at page 133 of the record of appeal where it was stated and I quote;

“Q by Mr Oddiaga-“On the money back in Yemen, do you have any evidence that there was some money from Yemen Petitioner- “No I don’t have. It is Yusuf who saw the money.”

46. Unfortunately, Yusuf did not testify. With that unsubstantiated evidence, I do agree with the hon Kadhi that such funds did not exist hence not available for distribution.

47. Regarding the existence of a house in Miritini, the petitioner had no proof of its existence nor the plot Number. She confirmed as such in her cross examination. As correctly held by the hon Kadhi, no evidence was tendered before the court to support the existence of the said property. Accordingly, the court could not distribute non -existent property.

48. When the petitioner was asked on cross examination to explain whether the business (shop cum grocery) used to make profit, her answer was in the negative. The witness could not explain what type of shop it was and whether there was any profit made and how much was it when the deceased died. I



agree with the Hon Kadhi that the asset in the nature of a grocery or shop was not ascertainable hence not capable of distribution.

49. Touching on plot Block XVI/1129, the petitioner stated that the deceased left plot No 1129. This fact was supported by Abdalla Faraj the 1st respondent (2<sup>nd</sup> appellant. At page 138 of the record of appeal, the witness had this to say;

“Q” -refer to petition paragraph 7. It is alleged that your father left a house on plot No 1129. Do you know it?

“A -yes this is where my sister lives. There is another ½ share on 1/3. I know it. It’s a ½ share of Karama Ali and Faraj Abeid Said then it was a house without land”

50. From the supplementary record of appeal at page 30, a copy of title deed for Mombasa/Block XVI/1129 issued on November 24, 1993 in the name of Faraj Abeid Al uwein was produced. However, no record by way of green card was adduced to show the status of the plot as at 1983 when the deceased died.
51. Since nobody came forth to claim that the name Faraj Abdalla appearing in the title deed is different from that of the deceased and, considering that both the appellant and the respondents did admit in their pleadings that the deceased owned that property, I have no reason to fault the hon Kadhi. Why would the appellants list the property as constituting the estate only to change on appeal and submissions. It trite that a party is bound by his own pleadings and that evidence cannot be pleaded through submissions nor appeal unless with court’s leave.
52. I do not find any good ground to interfere with the finding of the hon Kadhi that from the parties’ pleadings and testimony, the plot belonged to the deceased.
53. As regards plot No 1113, this is the most contentious one. Ownership was vehemently contested with some parties arguing that the plot was partly owned by the deceased. According to the petition, the deceased owned ½ share .In their testimony, the appellants claimed that the property (1/2 share) belonged to the deceased. They however changed and claimed that the deceased was originally registered with two others holding 1/3 share but later it changed to two owners namely Mohamed Karama and Yusuf Karama .
54. From the evidence of the land registrar, several corrections were made in the register a fact that made the various entries on the register after the deceased had died questionable. However, from the supplementary record of appeal at page 17, there is a title deed issued on 2<sup>nd</sup> March, 1995 in the name of Faraj Abeid Said Mohamed Karama Abeid and Yusufu Karama Timimi . The same was later changed to the names of the other two co- owners minus the deceased’s name.
55. Apparently, the ownership dispute over plot No 1113 is an issue that has generated a long standing dispute. It is however curious that parties who listed the property as comprising the estate are the same ones raising the issue of ownership dispute.
56. The question that is begging for an answer is whether the Kadhi had jurisdiction to determine the issue of ownership.
57. As it has always been held in a myriad of authorities, jurisdiction is everything and without it a court cannot move any further step hence such court should down its tools. See *“Lilian S vs Caltex Oil (Kenya) Ltd ( 1989) e KLR and Samuel Kamau Macharia and another vs Kenya Commercial Bank Ltd and 2 others ( supra) where the court held that jurisdiction flows from the Constitution or statute and a court cannot arrogate itself jurisdiction where there is none.*



58. Issues relating to land ownership disputes squarely lie with the ELC pursuant to article 162 (2) and (3) of the Constitution in case of courts of equal status or section 13 of the Environment and Land Court Act in case of Magistrate's Act. A Kadhi's court does not have jurisdiction in view of article 170 (5) of the Constitution to hear disputes over land ownership. Equally, a probate court has no jurisdiction to hear a land dispute ownership case.
59. In the case of In the Re estate of Samuel Kathieri ( deceased) 2019 e KLR the court had this to say;
- “where there is dispute as to what constitutes the net estate of the deceased available for distribution arising from the contest as to deceased's title and ownership, then the distribution of the assets is hived off and the confirmation of grant of the undisputed assets may be granted to allow beneficiaries beneficial interest over the said part of the estate”
60. Similar position as above was held in the case of Family Civil Appeal No 16/2017 Ali Mohamed Karama vs Amina Sheikh Mohamed and Mohamed Mohamed Bwana Mkuu vs Abubakar Ali Karama ( 2018) e KLR.
61. I do agree with counsel for the appellant that issues of land ownership disputes should be left for the appropriate court in this case ELC to deal with them. Without dwelling on the merits of the grounds as to who owned plot No 1113 by the time the deceased died, I wish to state that the Kadhi had not jurisdiction to determine ownership dispute over the subject land.
62. Accordingly, save for plot No 1113, the rest of the assets were properly distributed in accordance with Islamic law. To that extent, Plot No Mombasa/XVI /113/MN shall be removed from the list of assets and the orders of the Kadhi's court regarding the distribution of that property are hereby set aside and the parties shall be at liberty to seek legal redress before the ELC. It is upon the final determination of the dispute that the same can be re-introduced by way of review for inclusion to the list of assets.
63. As to the relevance of succession cause No 167/2015, the same does not relate to this estate as it is distinct although the same property is mentioned. Since a decision has already been made under appeal No 16/17 directing that the subject land ownership dispute be directed to ELC, I have nothing more to add.
64. As to the significance of a stay order issued by a Kadhi in another case staying proceedings in succession cause No 86/2016, the same was inconsequential as the two kadhi's were courts of concurrent jurisdiction.
65. In view of the above, the appeal herein partly succeeds and partly fails in terms of the orders made herein. Regarding costs each party shall bear own costs.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**J. N. ONYIEGO**

**JUDGE**

