



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL APPEAL 23 OF 2020**

**JIBRIL GOLLO DUBA.....APPELLANT**

**VERSUS**

**ASLI GOLLO DUBA.....RESPONDENT**

***(Being an appeal from the Ruling of Hon. Galgalo Adan, Senior Resident Kadhi delivered on 20.2.20 in Garbatulla Kadhi Court Succession Cause No. 1 of 2019)***

**JUDGMENT**

**Introduction**

1. The Court heard the appeal herein with the aid of two assessors pursuant to section 65 (1) (c) of the Civil Procedure Act, which provides for appeals to the High Court from original decree of a Kadhi's Court as follows:

*“c) from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or **two other Kadhis shall sit as assessor or assessors.**”*

2. For the hearing of this appeal, I sat with Principal Kadhi A. J. Ishaq Hussein of Nairobi Kadhi's Court and Senior Resident Kadhi Muriithi Muriuki of Meru Kadhi's Court, both of whom gave a unanimous opinion, which, although not binding on the court (see criminal law and procedure analogy in *Kihara v. R* (1986) KLR 473, 479) I agreed with and considered for guidance in concluding the judgment and orders made herein.

***The Principles for consideration of a first appeal***

3. The court has considered the evidence before the trial court as required of a first appellate court see *Peters v. Sunday Post Limited* (1958) EA 424 and *Selle & Anor. v. Automobile Associated Motor Boat Company Ltd.* (1968) EA 123, bearing in mind that on a first appeal the appeal lies on both law and fact; see section 65 (b) of the Civil Procedure Act [as read with Article 169 (1) (b) of the Constitution as discussed in *Siad Adan Bonaya v. Hussein Kuno Tano and Anor.*, MERU HCCA NO. 43 of 2019.

***The appeal before the court***

4. The Appeal herein arises from the Ruling of Hon. Galgalo Adan, Senior Resident Kadhi delivered on 20.2.19 in Kadhi Court Succession Cause No. 1 of 2019. The cause was instituted by the Respondent Asli Gollo Duba seeking an order for distribution of the estate of the late Gollo Duba (deceased), further relief and cost of the suit. The Respondent refute the claim raised by the respondent. In his Ruling of 20.02.20, the Hon. Kadhi included the land at the subject of the dispute as part of the estate of the deceased for distribution.

5. The Appellant was aggrieved by the decision of the Hon. Kadhi and has filed the appeal herein, the grounds of which are reproduced hereunder:

***1. That the Honourable Kadhi erred in law and fact by entertaining the dispute as to ownership of plot No. 280 Kiwanjani a matter that was outside his jurisdiction sitting as a probate and administration court.***

***2. That the Honourable Kadhi erred in law and fact by distributing plot No. 280 Kiwanjani as one of the properties owned by the deceased inspite of the evidence that the said property is owned by Mohamed Godana Wako.***

3. ***That the Honourable Kadhi erred in law and fact by distributing a property to wit plot No. 280 Kiwanjani that does not belong to the deceased's estate.***

6. The Appellant prayed that the appeal be allowed and plot No. 280 Kiwanjani be struck off from the deceased's properties. He also prayed for costs of this appeal.

#### **Issues for Determination**

7. After considering the appeal, the record and submissions, we find that the issue that falls for determination:

*a. Whether the Kadhi's Court has jurisdiction in entertaining the dispute of ownership of plot No. 280, Kiwanjani while sitting as a probate and administration court and further distributing the said plot*

#### **Determination**

8. A Court may only exercise such jurisdiction as has been conferred upon it by the Constitution, statute or both. In *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR the Supreme Court succinctly stated as follows:

***"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."***

9. The jurisdiction of Kadhi Courts flows from the Constitution of Kenya, 2010 and from the Kadhi's Court Act. Article 170(5) of the Constitution provides:

***"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."***

Section 5 of the Kadhis' Court Act is couched in similar terms.

10. The Appellant contends that the subject matter of the suit before the Kadhi's Court did not relate to inheritance but relates to ownership as such the proper forum is ELC. In *Pricilla Ndubi and Zipporah Mutiga vs. Gerishon Gatobu Mbui, Meru Succession Cause No. 720 of 2013*, it was held that –

***"The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which are prima facie valid should be determined before confirmation"***.

11. We respectfully agree with Musyoka, J. in *In Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR, as follows:

***"....The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets."***

***Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators."***

***The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3), which provides as follows –***

***'Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules ...'***

***Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime, the property in question is removed from***

*the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court's work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above."*

12. It is clear that a dispute regarding ownership in respect of the property of a deceased person negates the concept of free property of a deceased person, and the dispute should be determined by a court with jurisdiction to determine ownership disputes before distribution by a succession court and, if necessary, the succession court can set apart the share or property in dispute to await the outcome of the resolution of the dispute.

**Orders**

13. Accordingly, for the above reason set out above, the court makes orders as follows:

1. The decision of the trial court on the suit property herein was made without jurisdiction and the same is quashed, and the order thereon that the suit property, together with others set out in paragraphs 52 (2) of the Judgment, form part of the estate of the deceased Gollo Duba Oda, is set aside.
2. For clarity, Plot No.280 Kiwanjani is removed from the Estate of the deceased.
3. As the parties were not to blame for the trial court's jurisdictional error, there shall be no order as to costs.

*Order accordingly*

**DATED AND DELIVERED ON THIS 19<sup>TH</sup> DAY OF MARCH, 2021.**

**EDWARD M. MURIITHI**

**JUDGE**

**KADHI ASSESSORS:**

*(pursuant to section 65 (c) the Civil Procedure Act, cap. 10)*

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**HON. A. J. ISHAQ HUSSEIN**

**PRINCIPAL KADHI**

**UPPER HILL KADHIS COURT**

**NAIROBI**

.....

**HON. MURITHI N. MURIUKI**

**SENIOR RESIDENT KADHI**

**MERU LAW COURTS.**