REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY CIVIL APPEAL NO. 35 OF 2017

(An appeal from the judgment and decree of Hon. Abdulhalim H. Athman, Principal Kadhi, in Mombasa KCSC No. 86 of 2012, of 18th September 2014)

MARIAM MATHIAS MWASI.....APPELLANT

VERSUS

RAMA ADAM.....RESPONDENT

(Before Hon. Justice Musyoka and Hon. Sheikh Almuhdhar A .S Hussein, Chief Kadhi (as assessor))

JUDGMENT

1. The cause at the primary court was initiated by Mariam Mathias Mwasi, the appellant herein, on 24th May 2012, through a succession petition, of even date, in which she named Rama Adam, the respondent herein, as respondent to the petition. In that petition, she sought that the estate of Adam Zawadi Njama, to be known hereafter as the deceased, be transferred to the beneficiaries named in the petition, in accordance with Muslim law. She also sought that pension and rent be collected by the next of kin. The deceased was said to have had died on 21st December 2011, and to have had been survived by the appellant as his widow, and twelve other individuals, whose relationship with the deceased was not disclosed. The twelve were TA, Mgeni Adam, Juma Adam, Mwanamisi Adam, Idd Adam, Sophia Adam, Binti Ali Adam, Zawadi Adam, Rama Adam, Asha Adam Mariam Adam and Ali Adam. The assets of the estate were listed as a seven-hectare farm with a permanent house, whose registration details are not given; three houses on plots numbers 49, 59 and Kombani; and KPA pension money. The liabilities/debts of the estate were said to be Kshs. 400.00 monthly fees on the plot.

2. To the petition, the respondent filed a defence and counterclaim, on 21st June 2012, dated 18th June 2012. He averred that TA was not a biological child of the deceased, even though documents were obtained after her mother, the appellant, married the deceased, which portrayed her as a biological child of the deceased. He asserted that a deoxyribonucleic acid (DNA) test had confirmed that she was not a biological child of the deceased. He further averred that the deceased had married twice, first, his mother, the late Mwanaisha Rashid Boi and later the appellant, and that one of the wives had been divorced prior to the deceased's death. He identified the assets of the estate as comprising of four rental houses without land in the Likoni area of Mombasa, one of which was rented out to Jongeto Enterprises Limited; a semi-permanent house at Patanani, Matuga, Kwale; a piece of land at the goat and sheep scheme at Matuga, Kwale, with a semi-permanent house; a semi-permanent house without land at Kombani, Kwale; a monthly pension paid by the deceased's former employer, the Kenya Ports Authority; contributions saved with the National Social Security Fund and six goats at Matuga, Kwale. With respect to liabilities, he averred that the four houses at Likoni were built on the principle of houses without land, and attracted a monthly ground rent of Kshs. 400.00 each. According to him the rightful heirs of beneficiaries or dependants of the deceased were the wives of the deceased, that is to say the late divorced wife, Mwanaisha Rashid Boi, and the appellant, the widow; and the children, being six daughters and four sons. He named the daughters as Mgeni Adam, Mwanamisi Adam, Sophia Adam, Binti Ali Adam, Asha Adam and Mariam Adam. The sons were said to be Juma Adam, Iddi Adam, Zawadi Adam and Ali Adam. He proposed that the assets be shared out between the surviving widow, sons and daughters of the deceased, in accordance with Islamic law. In addition, the respondent simultaneously filed a replying affidavit, that he swore on 21st June 2012, essentially to verify his pleadings. In it, he accused the appellant of failing to disclose some assets of the estate, and accused a son of the appellant, Said M. Mwalimo, of alleging to have had bought one of the houses without land in Likoni.

3. The trial court conducted oral hearings on 11th February 2013, 17th June 2013, 4th February 2014, 30th April 2014, and 16th June 2014. The appellant and the respondent testified, called witnesses, and were cross-examined. Judgment was delivered on 18th September 2014. In that judgment the court found the estate to comprise of a Swahili house without land at Plot No. 58/59/I/MS at Jamvi la Wageni, Likoni; one large house and a small house without land on Plot No. 49/I/ MS; a permanent house without land at a farm at Matuga; a farm at Hakalani, Matuga; one house at Kombani; and pension with the Kenya Ports Authority. On the heirs, the court found that TA, was not a biological child of the deceased, and identified the legal heirs to be the appellant, Mgeni Adam, Juma Adam, Mwanamisi Adam, Iddi Adam, Sophia Adam, Binti Ali Adam, Zawadi Adam, Rama Adam, Asha Adam, Mariam Adam and Ali Adam. On distribution, the trial court relied on Qur'an 4:11 and 12, to hold that the estate be distributed as between the survivors/heirs at the ratio of 16/128 for the widow, 14/128 for each son and 7/128 for each daughter. After determining that the household comprised of two houses, and taking into account the number of heirs or survivors in each house, the trial court shared out the estate between the two houses, so that the first house, of the late Mariam Adam,

comprising of one widow, two sons and two daughters, got 58/128 of the estate; while the second house, of Mwanaisha Rashid Boi, comprising of three sons and four daughters, got 70/128 of the estate. The estate was to be valued, and the heirs were to thereafter give personal proposals on the final mode of distribution.

4. The appellant was aggrieved by the judgment of 18th September 2014, hence the instant appeal, vide a memorandum of appeal, dated 25th September 2014. She raises several grounds, as follows: that the trial court erred in finding that the farm at Matuga, Kwale, did not form part of the estate and was not available for distribution; that the trial court erred in finding that the appellant was not entitled to the small house on Plot No. 49/I/MS since the same formed part of the estate of the deceased; that the trial court erred in finding that TA was not an heir to the estate of Adam Zawadi Njama; and that the trial court erred in listing heirs of the estate of the deceased without proper proof of their heirship. She seeks that the judgment of the trial court be quashed:

(a) with respect to the finding that the small house within Plot No. 49/I/MS formed part of the estate of the deceased;

(b) with respect to the finding that TA was not a child of the deceased; and

(c) with respect to the finding that the farm at Matuga, Kwale, did not form part of the estate of the deceased.

5. Upon being served, the respondent filed a memorandum of appeal, on 21st October 2014, of even date, in which he cross-appealed on grounds: that the trial court had erred in awarding the house on Plot No. 43/I/MS to Said Mathias, a son of the appellant when that had not been prayed for in the pleadings; that the trial court did not determine all the issues, and did not, in particular, consider that the respondent's counterclaim had not been challenged by the appellant or Said Mathias; that the trial court erred in awarding Plot No. 43/I/MS to Said Mathias when the former had not filed any pleadings and did not testify at the hearing; that the trial court erred in allowing Said Mathias to testify at the trial when he had not been made a party in the cause before the court. He prays that the order, in the judgment of 18th September 2014, relating to Plot No. 43/I/MS, be set aside.

6. Directions were taken on 12th June 2019, for disposal of the appeal by way of written submissions. The record before me reflects that only one party, the respondent, filed written submissions, on 25th June 2016, of even date.

7. In the said written submissions, the respondent raises the preliminary issue that the appellant had not, since filing her appeal, filed a record of appeal, neither had she filed written submissions, despite the matter being fixed for highlighting the same. He urges that the appellant's memorandum of appeal be struck out for non-compliance with Order 42 of the Civil Procedure Rules. He submits that Said Mathias was not a biological child of the deceased, as he had been born prior to the appellant marrying the deceased. He submits that the said Said Mathias had not sued the administrators of the estate, or brought objection proceedings in the succession, or made a party to the proceedings, or testified in the proceedings. He avers that the sale agreement allegedly executed between the deceased and the said Said Mathias, over Plot No. 43/I/MS, was so executed when the deceased had a mental illness, and, therefore the appellant and Said Mathias must have taken advantage of his condition. It is submitted that the appellant's witnesses had been coached and gave hearsay evidence, the trial court ruled in favour of the said Said Mathias when there were no proper pleadings before the court, and the proper procedure was not followed. He asserts, in his written submissions, that the Said Mathias should have sued the estate over the ownership of the said property.

8. When the matter came up for hearing on 9th September 2020, before me, sitting with the Chief Kadhi, Hon. AlMuhdhar AS Hussein, as assessor, the respondent was represented by Mr. Mburu, while the appellant and her advocate were not in court. Mr. Mburu asked me to adjourn the matter as the appellant was yet to file her record of appeal, and, therefore, the matter was not ripe for hearing. I declined to grant that prayer. There was a record of appeal on record, filed by the respondent, and the original records of the trial court had been availed.

9. Mr. Mburu made his oral highlights of the respondent's written submissions. He submitted that the appellant's memorandum of appeal ought to be struck out for non-compliance with Order 42 rule 13(4) of the Civil Procedure Rules. He also submitted that the trial court ought not to have awarded the house on Plot No. 43 to Said Mathias, because the said Said Mathias was not an heir nor a dependant of the deceased, for he was born before the marriage of the petitioner to the deceased. He also submitted that there were no prayers in the petition relating to Plot No. 43. On the said Said Mathias buying the property from the deceased, it was submitted that he had failed to make a formal claim before the court, either by way of suit or formal application. He asked the court to allow the cross-petition.

10. Before I get to consider the merits of the appeal, or the cross-appeal, or both, I should address the preliminary issue raised by the respondent in his submissions, that the appellant had not complied with Order 42 rule 13(4) of the Civil Procedure Rules, by failing to file record of appeal. I have considered the provisions of Order 42 rule 13(4) of the Civil Procedure Rules, and I do not see anything in there which supports the position urged by Mr. Mburu. The provision merely states what the court should have before it for the purpose of considering the appeal. There is a record of appeal on record, filed by the respondent, that is adequate. The original records of the trial court are also available. There is, therefore, enough material from the trial court to help the appellate court have a complete picture of what transpired before the trial court.

11. I have perused the record before me. I have noted that the matter came up for directions several times. It came up on 17th October 2018, 7th November 2018 and 12th June 2019, and, on all those dates, only the respondent was in court. The record is silent as to whether, on those dates, the appellant had been served or not. The first time that the appellant appeared in court was on 11th December 2019, when the matter was due for highlighting of submissions. By then the respondent had filed his, but the appellant had not. The parties agreed to take out the matter to allow the appellant file her record of appeal and written submissions, by 28th February 2020, ahead of the highlighting of the written submissions scheduled for 11th March 2020. Come 11th March 2020, the respondent was in court, but the appellant was absent. The court ruled that the appellant had forfeited her opportunity to file record of appeal, but the court nevertheless, granted the appellant chance to file written submissions. The matter was fixed for highlighting of written submissions on 22nd July 2020. Come 22nd July 2020, the respondent was in court, but the appellant was not. The matter did not proceed on that day as the respondent indicated that he was not ready to proceed, and the appeal was stood over to 9th September 2020, to be heard by a Judge during service week. That is how it ended up before

me.

12. From the above, it is obvious that the appellant, despite being the mover of the appeal, was never keen on prosecuting it. She never filed a record of appeal, despite the court bending backwards to give her time to do so. She also never filed written submissions, and never attended court on the 9th September 2020 to state her position. I shall, accordingly, take it that she lost interest in the appeal, and had abandoned the same. The same was not argued nor presented, and I hereby, as a consequence, strike out the memorandum of appeal, dated 25th September 2014.

13. The dismissal of the appeal leaves me with the cross appeal. I have gone through the grounds, and noted that there is really only one issue for determination, whether, the trial court properly handled the matter of the ownership of Plot No. 43/I/MS. The respondent asserted that the property formed part of the estate, while the appellant took the position that the property was not an asset of the estate as the deceased had sold it to Said Mathias. The respondent reacted to that by alleging that the sale transaction was fraudulent. The trial court took evidence, before finally concluding that the property did not belong to the estate.

14. The proceedings that the trial court was conducting, leading up to the impugned judgment, were on distribution of the estate. The said proceedings were, principally, what are known as confirmation proceedings under the Law of Succession Act, Cap 160, Laws of Kenya, even though the said proceedings were not framed as such.

15. Jurisdiction of the Kadhi's court, with respect to succession to estates of deceased Muslims, is set out in the Constitution of Kenya 2010, the Kadhis' Courts Act, Cap 11, Laws of Kenya, and the Law of Succession Act. In the Constitution the provision is in Article 170(5), while in the Kadhi's Courts Act it is in section 5, and in the Law of Succession Act it is in section 48(2).

16. The constitutional provision states as follows:

> "*170. (1) …*
>
> *(2) …*
>
> *(3) …*
>
> *(4) …*
>
> *(5) 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."*

17. Section 5 of the Kadhi's Court Act reads:

> "*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."*

18. Section 48(2) of the Law of Succession Act provides:

> "*For the avoidance of doubt it is hereby declared that the Kadhi's 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."*

19. Section 2(3)(4) of the Law of Succession Act is also relevant, it states:

> "*2. Application of Act*
>
> *(1) …*
>
> *(2) …*
>
> *(3) Subject to subsection (4), the provisions of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.*
>
> *(4) Notwithstanding the provisions of subsection (3), the provisions of Part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim dying before, on or after the 1st January, 1991."*

20. Part VII of the Law of Succession Act applies to the estates of Muslims by virtue of section 2(4) of the Law of Succession Act, to the extent that the same is not inconsistent with Muslim law, and so far no inconsistency has been brought to my attention, and I have not

detected any. Therefore, the processes in Part VII of the Law of Succession Act and the Probate and Administration Rules relating to distribution of estates of estates applied to the proceedings that the Principal Kadhi was conducting in Mombasa KCSC No. 86 of 2012. It is important to clarify the misconception that the Law of Succession Act does not apply to estates of deceased Muslims, it does, but only to the extent of Part VII of the said Act, which largely carries procedural provisions.

21. As stated above, the proceedings the subject of this appeal, related to distribution of an estate. The provisions in the Law of Succession Act on distribution of estates is section 71, while those in the Probate and Administration Rules are in Rules 40 and 41. These are provisions of general application, applying to the estates referred to in section 2(1)(2) and (4) of the Law of Succession Act, and that would mean estates of persons dying after the Law of Succession Act came onto force on 1st July 1981, estates of persons dying before the Law of Succession Act came into force and estates of Muslims.

22. Section 71 states as follows:

> *"Confirmation of Grants*
>
> *71. Confirmation of grants*
>
> *(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.*
>
> *(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—*
>
> *(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or*
>
> *(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be administered; or*
>
> *(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or*
>
> *(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:*
>
> *Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares."*

23. For the purpose of this judgment, I shall focus on the proviso to section 71(2) of the Law of Succession Act, which requires the court to be satisfied that the administrators have ascertained all the persons beneficially entitled to a share in the estate, and have identified their respective shares. It is required that the court should not confirm the grant before it is so satisfied. It would mean that the court should be satisfied that all the persons beneficially entitled to a share in the estate have been ascertained and their shares identified, failing which the court should not consider the application on its merits. The shares of the persons beneficially entitled cannot be ascertained before the assets that make up the estate have been identified and ascertained, since the shares referred to in the proviso would be in the assets of the estate being considered for distribution.

24. The provisions in the proviso to section 71(2) of the Law of Succession Act, have been reproduced in the probate and administration procedures through Rule 40(4) of the Probate and Administration Rules, in the following language:

> *"Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons entitled to the estate have been ascertained and determined."*

25. What the proviso requires is that before the court proceeds to distribute the estate, it must first of all ascertain the persons who are beneficially entitled to a share in the estate and it should also ascertain the assets that make up the estate, that is to say the property from which the court is to allocate the heirs the shares referred to in the proviso and Rule 40(4). The dispute before the trial court was over Plot No. 43/I/MS, as to whether that property formed part of the estate or not. Before allocating shares in it at distribution, the court was obliged to ascertain whether it formed part of the estate. It would only have formed part of the estate if it belonged to the deceased. The status of the property was contested. The appellant did not list it as an asset in the estate in her petition, while the respondent had placed it in the schedule of assets in his cross-petition. The question is, should the trial court have evaluated whether the same belonged to the estate or determined ownership of the said asset as between the estate and Said Mathias, the person alleged to have had bought it?

26. According to Rule 41 (3) of the Probate and Administration Rules, when a dispute arises as to ownership of an asset placed before the court for distribution, the dispute relating to that question ought to be litigated in separate proceedings. In the meantime, the court removes the property from the schedule of assets, to await the outcome of the separate proceedings. For avoidance of doubt, Rule 41(3) says 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 the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant."*

27. The other question that I have asked myself is whether the Kadhi's court would have jurisdiction to determine, within a succession cause that it is seized of, an issue as to ownership of an asset that is disputed. The general position is that the court will treat an asset as part of the estate so long as there is evidence of ownership, which is usually through production of a deed of ownership or a certificate of official search or some official communication from the custodians of documents on ownership of property or through any other proof of ownership. Production of such documents would provide *prima facie* evidence of ownership. If the title documents or deeds of ownership or certificates or other proof of ownership are not in the name of the deceased, then *prima facie*, it should be presumed that the property did not belong to the deceased. Where the documents are in the names of the deceased, but a third party claims to have had bought the property from the deceased, and produces some evidence of the transaction, then the court ought to treat ownership of such property as disputed, and proceed to deal with the matter in terms of Rule 41(3) of the Probate and Administration Rules, by removing the property from the schedule of assets, and asking the parties to initiate separate proceedings to establish ownership of the property as between the estate and the claimant. The ideal situation should be that the court seized of the distribution process ought not to try the issue of ownership within the distribution process.

28. Moreover, such a question usually presents a jurisdictional issue, especially where the property disputed is land. Under Kenya law not all the courts have jurisdiction over land matters, and, before a court seized of a succession or probate cause proceeds to consider whether an asset placed before it, for distribution, formed part of the estate of the deceased, it should first ask itself whether it has jurisdiction to determine land questions that revolve around the issue of ownership and related matters.

29. The Court of Appeal, in *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd* [1989] eKLR, declared that jurisdiction is at the heart of any dispute, and the court before whom a dispute is placed can only proceed if it has the requisite jurisdiction, properly conferred upon it by the Constitution or statute, and where it does not have it, then it ought to down its tools. For avoidance of doubt the Court of Appeal, stated:

> *"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

30. Jurisdiction over land disputes is provided for in the Constitution, which has provided for a special court to deal with such disputes. The relevant provision is in Article 162(2)(3), which states as follows:

> *"162. (1) …*
>
> *(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—*
>
> *(a) …*
>
> *(b) the environment and the use and occupation of, and title to, land.*
>
> *(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)."*

31. Parliament has harkened to the Constitution, and has passed legislation to establish the court envisaged in Article 162(2). The said legislation is the Environment and Land Court Act, No. 19 of 2011. The preamble to the Environment and Land Court Act states the objective of the Act to be: -

> *"… to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land; and to make provision for its jurisdiction functions and powers and for connected purposes."*

32. The scope and jurisdiction of the said court is set out in section 13 of the Act, which states as follows:

> *"13. Jurisdiction of the Court*
>
> *(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to the environment and land.*
>
> *(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes –*
>
> *(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*
>
> *(b) relating to compulsory acquisition of land;*

(c) relating to land administration and management;

(d) relating to public, private, and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land."

33. The jurisdiction conferred on the Environment and Land Court is exclusive, so far as the High Court is concerned. Article 165(5) of the Constitution provides that the High Court shall not have any jurisdiction over the matters that fall under Article 162(2) of the Constitution. Article 165(5) provides:

"*165(5) The High Court shall not have jurisdiction in respect of matters—*

(a) …

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2)."

34. The Constitution limits the jurisdiction of the High Court only over land matters, it does not limit that of the subordinate courts. The Environment and Land Court is a creature of statute, and it exercises jurisdiction conferred upon it by the Constitution and various statutes that govern land matters. Such statutes include the Land Registration Act, No 3 of 2012, and the Land Act, No. 6 of 2012. The two, at section 2 of both, identify the Environment and Land Court as the court referred to in the two statutes for the purposes of the processes set out in the said statutes. Section 101 of the Land Registration Act and section 150 of the Land Act state the Environment and Land Court to be the court with jurisdiction to handle actions, disputes, proceedings and questions that arise with respect to matters governed by the two statutes. Section 150 of the Land Registration Act also indicates that that jurisdiction is shared with such subordinate courts as may be empowered under written law.

36. The provisions in the Land Registration Act state as follows:

"*Interpretation.*

2. In this Act, unless the context otherwise requires—

"*Court" means the Environment and Land Court established under the Environment and Land Court Act, 2011, No. 19 of 2011: …*

Jurisdiction of court.

101. The Environment and Land Court established by the Environment and Land Court Act, 2011 No. 19 of 2011 has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act."

36. The Land Act carries similar provisions; which state as follows:

"*2. Interpretation*

In this Act, unless the context otherwise requires—

"*Court" means the Environment and Land Court established under the Environment and Land Court Act, 2011 (No. 19 of 2011); …*

150. Jurisdiction of the Environment and Land Court

The Environment and Land Court established in the Environment and Land Court Act and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act."

37. Article 169(1)(b) of the Constitution lists the Kadhi's court as a subordinate court. Its jurisdiction is delineated in Article 170(5), and it has been set out here above at paragraph 16. The jurisdiction conferred by Article 170(5) does not include that to determine questions relating to land. The Kadhi's Court Act replicates that constitutional provision on jurisdiction, at section 5, which I have set out at paragraph 17, and the same does not include power to determine questions that revolve around title to and use and occupation of property. Jurisdiction is conferred on a court by the Constitution or legislation or both. A court cannot confer jurisdiction on itself, neither can it be conferred by consent of the parties. If jurisdiction has not been conferred by the Constitution or legislation, then the court has no jurisdiction whatsoever.

38. As stated above, the jurisdiction conferred on the Kadhi's court is limited, and it does not include determination of questions relating to land, even where such land may be held under Muslim tenure. The matter that was before the Principal Kadhi related to inheritance. In succession, as comes out clearly above, questions often arise around ownership of the land that is placed before the court for distribution. Even in the context of succession or inheritance, when such questions arise, the Kadhi would have no jurisdiction to determine them. The scope of jurisdiction of the court, with respect to succession or inheritance, is determination of shares of the heirs in the property belonging to

the estate. Period. Where it turns out that the deceased had no title to the property placed before the court for distribution, there would be no jurisdiction to determine the shares of the heirs in such property. Similarly, where title or right over the property is disputed, the court seized of the distribution would have no jurisdiction to wade into the dispute over title or right to the land. At that stage, the court ought to down its tools, and let the parties move the dispute, over title or right to land, to the court with jurisdiction for determination of those issues.

39. With respect to Plot No. 43/I/MS, the trial court took evidence on the alleged sale transaction between the deceased and Said Mathias. In the end, the court did not make a clear and positive finding about the validity of the said transaction, but it concluded that the property in question did not belong to the estate. A close reading of the judgment would reveal that the court was convinced that the land transaction was valid and the property did not belong to the estate. It obliquely determined ownership of the land. As stated in paragraphs 36 and 37, above, the Kadhi's court has no jurisdiction over such matters, and it ought not to have ventured to determine such questions as to validity of land sale transactions, or ownership of landed property, or the right to occupy or use such property. It does matter that the issue before the court was not on ownership of the land or the right to use or occupy land, but rather on distribution of the assets of the estate. It does not matter that it may appear natural that a court seized of a succession matter ascertains ownership of property placed before it. The ultimate outcome of embarking upon such an exercise is to determine questions that the law has not conferred jurisdiction over, and the court should stay clear of them. By determining the question of ownership of that property the trial court purported to exercise a jurisdiction that it did not have to. What the court should have done was to refer the parties to the courts with jurisdiction to determine the questions at hand, after which, depending on the decree obtained, they could come back for the distribution of the property, should the court with jurisdiction find in favour of the estate.

40. In view of what I have stated above, what orders should I make in the instant cross-appeal? The prayer in the cross-appeal is worded as follows:

> "REASONS WHERFORE the Respondent prays that the judgement/orders delivered on 18th day of September, 2014 and consequential orders be set aside (as regard House on plot No. 43/I/MS – awarded to SAID MATHIAS)."

41. I have read and re-read the judgment of 18th September 2014, and I have not seen any order awarding Plot No. 43/I/MS to Said Mathias. With respect to Plot No. 43/I/MS, the trial court made a finding that the same did not form part of the estate of the estate of the deceased, and it did not award the same to Said Mathias. From the language employed in the judgment, the court was careful not to be seen to be determining ownership, and sought to limit itself to finding that the property did not form part of the estate. However, at the end of the day, the court still made a pronouncement on the status of the said property, which it ought not to have made, for it had no jurisdiction to determine that question, since the ownership was disputed. However, despite, and because of, the unfortunate pronouncement, the trial court did not, quite properly, exercise jurisdiction to distribute an asset whose ownership was disputed.

42. The final orders in the said judgment are on distribution of the estate. The court identified the heirs of the deceased, Said Mathias was not identified as one. It also identified the assets of the estate to be distributed, Plot No. 43/I/MS was not among the assets so identified. It did not distribute Plot No. 43/I/MS, and the said property was not devolved upon Said Mathias. In the final orders, or disposal of the cause, the trial court made no reference whatsoever to Plot No. 43/I/MS and Said Mathias. The respondent, therefore, invites me to set aside orders that were not made, and which do not exist, in the impugned judgment. His remedy lies, so far as Plot No. 43/I/MS is concerned, not in probate and succession proceedings, whether at the primary or appellate level, but in proceedings, properly initiated, in a court with jurisdiction, to determine questions as to ownership, or right to use or occupy landed property.

43. As indicated above, I sat with the Chief Kadhi, Hon. Hussein, as assessor, and the Chief Kadhi, submitted to me his opinion on the appeal, dated 30th September 2020, in which he agreed with me on the matter of jurisdiction, that the Kadhi's court lacked jurisdiction to handle and entertain matters relating to ownership of some of the assets in a succession matter, and that jurisdiction over such disputes lay with the Environment and Land Court. He also expressed the opinion that the trial court had not properly gotten the facts of the case, and did not give reasons for disinheriting TA. However, with respect to TA, I have already made findings, at paragraph 12 of this judgment, that the appeal had not been presented and dismissed it.

44. I have disposed of the appeal hereabove, by making an order, in paragraph 12, striking out the memorandum of appeal, dated 25th September 2014. On the cross-appeal, I do not find any merit in it, and I hereby dismiss the same, for the reasons given in paragraphs 40 and 41 of this judgment. As the appellant did not file a record of appeal and written submissions, and did not even attend court at the hearing, of the appeal and cross-appeal, to argue her case, I shall not award costs.

DATED AND SIGNED AT KAKAMEGA THIS 8TH DAY OF OCTOBER 2020

W. MUSYOKA

JUDGE

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22ND DAY OF OCTOBER 2020

P. J. O. OTIENO

JUDGE