



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MARSABIT**

**CIVIL APPEAL NO.6 OF 2015**

ABDUKADIR GUBO DARCHE ..... 1<sup>ST</sup> APPELLANT

ABDI GUBO DARCHE ..... 2<sup>ND</sup> APPELLANT

FATUMA GUBO DARCHE ..... 3<sup>RD</sup> APPELLANT

VERSUS

KHADIJA GUBO DARCHE ..... 1<sup>ST</sup> RESPONDENT

MUMINA BUBO DARCHE ..... 2<sup>ND</sup> RESPONDENT

HABIBA GUBO DARCHE ..... 3<sup>RD</sup> RESPONDENT

**JUDGEMENT**

The respondents filed suit No.90 of 2014 before the Kadhi's Court in Marsabit. The suit is partly heard. The appellants filed an application on 7.4.2015 seeking to be excluded from the case. The Kadhi delivered his ruling on 23.4.2015 dismissing that application. The ruling led to the filing of this appeal.

There are three grounds of appeal namely:-

- 1. The Kadhi erred in law by finding that the appellants are the rightful defendants in the case.***
- 2. The Kadhi erred in fact and law by failing to find out that the respondents have no cause of action against the defendants.***
- 3. The Kadhi erred by failing to find out the application was merited.***

Mr. Ringera appeared for the appellants. Counsel submit that the suit before the Kadhi's court is wrongly brought against the appellants. The suit property is registered in the names of a deceased person who is the father of the parties. The best way forward was to file a succession cause and list all the shares of the beneficiaries. The Kadhi's Court lacks the powers to grant the orders being sought. The plaint is improperly before the Kadhi's court. This issue was raised before the Kadhi but he did not address it. The proceedings by way of the plaint does not disclose the property in dispute as its not a succession cause.

The respondents submitted that their father died when they were young. Their brother (1<sup>st</sup> appellant) took over the estate. They approached him as they heard that he wanted to sell the land. They went to the area chief. The 1<sup>st</sup> appellant was summoned by the chief but he refused to attend. They went to the District Commissioner but once again he refused to attend. They filed the case before the Kadhi's Court. The 1<sup>st</sup> appellant filed a suit before the Meru High Court. The appellants have sold part of the land.

The issues for determination are:

- 1. Whether the appellants are the proper defendants before the Kadhi's court.***
- 2. Whether the suit before the Kadhi's court is properly filed.***

The parties herein are brothers and sisters. The dispute involves the death of their father and the distribution of their father's estate. The respondents allege that the appellants have not given them their share of the estate. The record shows that both parties testified before the Kadhi's Court. The claim by the respondents is therefore known. Counsel for the appellants contend that the property is registered in the name of the deceased. That is correct but the respondents are claiming their share of the deceased property from their bothers. I do find that the appellants are the proper defendants before the Kadhi's Court. They are the ones in possessions of the properties.

It is submitted by the appellants that the respondents ought to have filed a succession cause before the Kadhi instead of initiating the suit by Plaint. The Plaint filed seeks to have the respondents given their share of their father's estate. It also seeks to have the appellants account and pay back what they have benefited from the estate. The names of the deceased's beneficiaries have been listed in the plaint. It is also indicated that the deceased left a shamba measuring about eight (8) acres and a developed plot in Marsabit town. The appellants in their evidence before the Kadhi's court also attest to that fact.

My view is that whether the suit was initiated by way of a plaint or by a succession cause, the issues in dispute are the same. I do not see how the appellants are being prejudiced by the manner in which the claim has been instituted. Ordinarily, a succession cause has no defendant. However, where a dispute arises, objectors come in and the issue of plaintiffs and defendants develop. At times the objectors become the plaintiffs and the petitioners are made to be the defendants. The end result becomes the identification of the beneficiaries and the distribution of the estate.

The pleadings before the Kadhi's Court clearly establish the cause of action. The respondents are claiming their share of inheritance. The appellants seems to hold that the respondents are not entitled to any share. All the parties are Muslim. The Kadhi's Court is the best place to have the estate distributed. What is being raised by the appellants are mere technicalities. The plaint can be amended and changed to a succession cause. However, that is not necessary. Since there is already an objection on the claim, let the Kadhi decide on the dispute. The appellants filed Miscellaneous application No.4 of 2015 before the Meru High Court and the same was dismissed. The application sought to have the case before the Kadhi's Court be transferred to the Isiolo Kadhi's court for hearing and disposal. It also sought stay of proceedings of the case. Interim orders of stay were granted. The appellants raised several issues before the Meru High Court. These include the admission of the verifying affidavit by the Kadhi, the swearing of the witnesses, that the Kadhi has taken position in the matter and is biased. That application was dismissed on 20<sup>th</sup> March 2015.

From the record, I do find that the appellants are out to frustrate the respondents from pursuing their claim. The appeal is grounded on the contention that the appellants are not the proper defendants. If the Kadhi decides that the respondents are entitled to a share of the estate, what the appellants are holding will be affected by the Kadhi's distribution. The defendants are the proper persons from whom the respondents can lodge their claim of the estate. The suit is properly instituted and the appeal lacks merits. The appellants in their defence did not raise any issue of the Kadhi's Court or Plaint. If the appellants what to have the case transferred to Isiolo, It will still be heard by the Kadhi. The contention that succession cause ought to have been filed instead of a plaint is an afterthought. Parties testified before the Kadhi and all what remains is the finalization of the dispute. I do find that the Kadhi should

complete the hearing and determination of the case.

In the end, I do find and hold that the appeal lacks merit and is hereby dismissed with costs.

**Dated, Signed and Delivered at Marsabit this 23<sup>rd</sup> day of January 2018**

**S. CHITEMBWE**

**JUDGE**