



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

**AT MARSABIT**

**CIVIL APPEAL NO.4 OF 2016**

**AHMED ABBAS EDIN.....1<sup>ST</sup> APPELLANT**

**ABDINASIR ADAN SOMO.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**HASSAN ABDUL ADAN.....RESPONDENT**

**JUDGEMENT**

The late Fatma Abdi Adan died in a road accident in April 2006. She was survived by six children namely:

- (a) Hassan Abdi Adan - Son**
- (b) Abdinasir Adan Somo - Son**
- (c) Ahmed Abbas Edin - son**
- (d) Mohamed Edin Somo - son**
- (e) Neeno Adan Somo - daughter**
- (f) Safia Haj Edin - daughter**
- (g) Halima Adan Somo - daughter**

On 7<sup>th</sup> September, 2012 the appellant filed a suit before the Kadhi's Court in Moyale. The suit sought the following orders as per the plaint dated 7.9.2012.

***(i) that the court to recognize the Lawful heirs and beneficiaries according to the Islamic Law of Inheritance and their respective shares.***

***(ii) That the court to distribute the income from estate among the lawful heirs/beneficiaries according to their shares.***

***(iii) That the issuing of prohibitory order against the selling or transfer of the said estate without the consent of all the heirs.***

**(iv) Cost of this petition and**

**(iv) any other relief this court may deem proper and fit to grant.**

On 13.9.2012 parties recorded a consent in the following terms.

- 1. That the estate of the late Fatma Abdi Adan developed Plot No.211 at Biashara street Moyale should not be sold or change name.**
- 2. That all the seven children of the deceased Fatma Abdi Adan are beneficiaries of her said estate.**
- 3. That the distribution of the income of the said estate will be settled down in the end of this year 2012.**
- 4. That to confirm the above consent the parties do hereby put their hands.**

Thereafter the matter remained dormant for about 4 years until 31.10.2016 when the respondent filed an application under certificate of urgency which sought the following orders:

- 1. That this application be certified as urgent and heard ex-parte in the first instance.**
- 2. That this Honourable Court do order a stay of the Consent Judgement dated 13<sup>th</sup> September 2012 and adopted by this Honourable Court on the same day pending the hearing and determination of this application.**
- 3. That this Honourable Court do order a stay of the ex-parte Order issued on 27<sup>th</sup> October, 2016 restricting the defendant herein from collecting rent on Plot No.211 Biashara Street Moyale pending the hearing and determination of the Chamber summons application dated 19<sup>th</sup> October 2016 and restore the status quo ante to have the Defendant collecting the rent on Plot No.211 Biashara Street Moyale, pending the hearing and determination of this application.**
- 4. That this Honourable Court do order a stay of hearing of the Plaintiffs' Chamber Summons Application dated 28<sup>th</sup> February 2013 and 19<sup>th</sup> October, 2016 pending the hearing and determination of this application.**
- 5. That this Honourable Court be pleased to vacate and/or discharge the ex-parte order issued on 27<sup>th</sup> October 2016.**
- 6. That this Honourable Court be pleased to review, rescind, set aside and expunge from the Court Record *ex debito justitiae* the Consent judgement dated 13<sup>th</sup> September 2012 and adopted by this Honourable court on the same day.**
- 7. That this Honourable Court grant such further or other reliefs as it deems appropriate in the circumstances.**
- 8. That the costs of this application be provided for.**

The Kadhi heard the application by way of oral evidence and proceeded to distribute the estate in the ruling delivered on 23.11.2016. Being dissatisfied with that ruling, the appellants filed the current appeal which is based on the following grounds

- 1. That the Kadhi had no jurisdiction to hear and determine the suit before him and the proceedings are a nullity.**

**2. The learned Kadhi disregarded the clear constitutional guidelines under Articles 159 (2) (c) and Article 170 (5)**

**3. That the trial court disregarded the provisions of the limitations of the Actions Act as well as the Registered Land Act, the Civil Procedure Act and the Government, Land Act, and the Evidence Act.**

**4. That the Kadhi erred by setting aside a consent order without justifiable and lawful cause**

**5. That the learned Kadhi erred by taking into considerations extraneous matters and admitting false and fabricated evidence.**

Mr. Ochieng appeared for the appellant. Counsel submit that a suit was filed by the appellant at the Kadhi's Court which sought distribution of the deceased estate. Clan elders met and their minutes are part of the records. All the parties participated in the meeting and a consent was recorded in court. There was no dispute that all the parties were beneficiaries of the deceased. There was no distribution or order of preference accorded to the beneficiaries. All were entitled to inherit. The appellant wanted the income from the estate to be shared and that is why he filed the suit before the Kadhi. The respondent did not file any defence. However, the Kadhi entertained evidence from witnesses. The ruling of the Kadhi relied on the evidence of two witnesses. Hassan Dawa alleged that there was a meeting in 1972 which led to the allocation of the land to the deceased. No minutes were produced. It was alleged that the allocation of the land to the deceased was in trust for her children. The registration of the land with the Municipal Council had no indication of a trust. The alleged Hassan Dawa was not a councilor in 1972 but was a councilor from 1983 onwards. It is further submitted that the Kadhi held that the land was allocated to the late Fatma Abdi on account of her husband services to the government. The land was allocated to the deceased after the death of the respondent's father. The respondent's father died in 1970. The learned Kadhi held that only 1/8 of the property belonged to the deceased.

It is further submitted that the Kadhi ought to have appointed an administrator to administer the estate. The other beneficiaries had allowed the respondent to be the one on the ground but he has failed to administer the estate. The income from the estate has not been properly shared. There is a distinction between the income from the estate and the shares of each beneficiary. Proceedings before the Kadhi's Court are governed by the Civil Procedure Act. The matter was agreed upon and a consent recorded yet the Kadhi opted to set aside the consent. There was no trust in the property and all the children were to get their shares in accordance with Islamic law. The respondent has not been distributing the shares from the income to the beneficiaries. Despite the fact that the respondent did not file any defence, the learned Kadhi placed an imaginary defence and counter claim on behalf of the respondent before distributing the estate. The Kadhi granted reliefs that were not sought by the respondents. The Kadhi went ahead and distributed the estate despite the fact that was not the dispute before the Court. The respondent had no pleadings at all and was clearly assisted by the Kadhi. The evidence before the court did not meet the required standard for setting aside a consent order. Counsel relies on the case of **Board of Trustees National Security Fund V Micheal Mwalo [2015] eKLR** where the Court stated as follows:

***“A Court of law will not interfere with a consent judgement except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.”***

It is submitted that the proceedings before the Kadhi were a nullity as they contravened clear statutory provisions. Counsel maintain that while the suit was pending the respondent transferred the property into his name contrary to the orders of the court.

Mr. Mutembei appeared for the respondent. Counsel submitted that it is the appellant who filed the suit before the Kadhi's Court. The plaint clearly states the reliefs being sought. The deceased is the biological mother of all the parties. The appellant is from a different father. The respondent's father died in 1970. The appellant's father married the late Fatma in 1973. The consent was recorded on 13.9.2012.

Counsel maintains that all parties were given a hearing and had a right to cross examine witnesses. Evidence was taken before the ruling was delivered. The structures on the property were erected due to the joint efforts of the respondent and the tenants. The ruling of the Kadhi confirmed that the property was given as a gift to the family of the deceased by virtue of the respondent's father's service to the Government of Kenya. There is no evidence as to how the deceased acquired the property devoid of the services by her late husband. The appellants have put in new grounds of appeal in their submission Contrary Order 42 rule 4 of the Civil Procedure Rules. The appellant did not seek leave of the court to introduce new evidence or amend the memorandum of appeal.

It is further submitted that the jurisdiction of Kadhi's Courts is donated by Article 170 of the Constitution and subsection 5 of the Kadhi's Act. The issue in dispute should involve Islamic law. The parties must profess the Islamic religion and submit to the jurisdiction of the Kadhi's Court. Counsel relies on the case of *Abdisatar Haji Mohamed & another V Omar Ahmed & another Civil Appeal 54 of 2016 [2017] eKLR* where the Court of Appeal stated as follows:

***“As is discernable from that provision, where a matter called for determination of issues touching on Islamic law, the jurisdiction of Kadhi's would be the appropriate forum. Such a matter must however relate to either the personal status, marriage, divorce or inheritance. Therefore, not all matters touching on Islamic law fall for determination by the Court. The Constitution goes further to state that the parties in the proceedings must profess the Islamic region; and finally that the parties must submit themselves to the jurisdiction of the Kadhi's Court. This position is buttressed by Section 2 (3) and (4) of the Law of Succession Act which excludes the Act from application to testamentary or intestate succession of a person who at the time of death professed Islamic religion and in lieu thereof Islamic law is to apply. However, Part VII of the Law of Succession Act is applicable to the administration of estates of Muslims where it is not inconsistent with Islamic law.*”**

Mr. Mutembei further submit that the law of succession Act provides that it does not apply to a deceased Muslim. By virtue of instituting the case before the Kadhi's Court it is clear that the parties submitted themselves to the jurisdiction of the Kadhi's Court. The parties are Muslims. The issues presented are related to the estate of Fatma Abdi Adan and the matter involves inheritance which falls within the Kadhi's jurisdiction. The ruling of the Kadhi makes a reference to the Quran. It identifies the deceased's heirs and the shares were distributed in accordance with Islamic law. It is contended that it was not mandatory for the respondent to file a defence before the Kadhi's Court. The issue before the Kadhi was succession which did not call for the filing of a defence. No advance allegations had been made against the respondent. No interlocutory judgment had been entered against the respondent. Parties initially tried to pursue an out of court settlement. Section 6 of the Kadhi's Act provide that the law and rules of evidence applicable in the Kadhi's Court are those applicable under Muslim law. Article 159 only requires the court to promote alternative dispute mechanism. Such mechanism may at times fail to resolve the dispute once and for all. The minutes of the Banna clan did not conclusively address the issues between the parties. The Kadhi did not set aside the consent but furthered it by identifying the beneficiaries and distributing the estate. The respondent has been distributing the income to the other beneficiaries according to their shares. The issue of trust was addressed by the Kadhi.

This is the first appeal and I have to evaluate the record of the trial court including the evidence adduced by the witnesses before making my decision. I have given the background of the dispute herein above. What I can add is that the late Fatma Abdi was initially married to the late Abdi Adan who died in 1970 in Yatta. Abdi Adan was a Police officer. The Moyale county Council allocated plot No.211 Biashara Street in Moyale to the late Fatma Abdi Adan in 1971. The plot was dully registered in her name in 1972. In 1973 Fatma Abdi Adan got married to the late Hajji Edin Somo. In her marriage with Abdi Adan she had four children. These are the respondent and three others who are now deceased. In her marriage with Hajji Somo they had six children. These are the appellants and their siblings who are all alive. The dispute is mainly whether plot No.211 belonged to the late Fatma Abdi Adan or it was allocated to her in trust for the benefit of herself and her children with the late Abdi Adan only.

The respondent summoned six witnesses before the Kadhi's Court. The respondent testified that his father died in 1970 while working as a Police officer. A close relative (PW1) helped the family to

relocate them to Moyale. The relative approached the district land committee together with some elders to allocate land to the respondents' family. The land was allocated to them in 1971 and was registered in 1972 under the name of their mother who was to hold in trust for the respondent and his three other siblings. It is his evidence that a structure was developed on the piece of land using the benefits that was paid as a result of his father's death. In 1973 his mother remarried to Hajji Edin Somo and they were blessed with six children. His mother died in a road accident in 2006. After the death of his mother, he developed the plot with the help of developers. He is currently living in a house which was built by the appellant for their late mother. The 2<sup>nd</sup> witness for the respondent was **HUSSEIN DAWA WILLA**. He testified that he was a councilor in Moyale for fifteen years. Himself and other leaders including the late Haro Kontole and the late Hajji Wario and the District Officer recommended the allocation of the land to the District Land committee for the orphans of the late Abdi Adan. After the allocation was made the land was registered under the name of the late Fatma Abdi who was holding in trust for the orphans. That was in 1972 he could not remember when he was appointed as a councilor for the first time. The 2<sup>nd</sup> witness for the respondent was **Yaqob Ali Osman**. He was also a Police officer. It was his evidence that after **Abdi Adan** passed on he went to Yatta for his burial. He later relocated the family to Moyale. They later managed to convince the District Officer to write a recommendation letter to the District Land Committee for allocation of land to the orphans. After three months the family got the benefits of the late Abdi Adan. The benefits and support from the community was used to put up a structure on the land for the orphans. This was in 1971. **PW3 Mohamed Sobire** is a resident of Moyale and a village elder. His evidence is that the plot was allocated to the orphans of the late Abdi Adan and the house was built with the benefits of their father. The widow later remarried to the appellant's father.

**PW4 Hajji Hassan Mohamed** is also a Moyale resident and was a witness for the respondent. He testified that he has been a neighbor since 1973. The family of the late Abdi Adan was relocated to Moyale with the help of Yaqob Ali Osman. A plot was allocated to the orphans. Fatma Adan later got married in 1973 to Hajji Edin Somo. **PW5 Abdulla Ibrahim** was another witness. It is his evidence that he heard that the orphans of the late Abdi Adan were allocated a piece of land. He is among those who participated in building a structure on that land. **PW6 Abdow Qalla** also testified. He informed the court that the plot along Biashara street was allocated to the orphans of the late Abdi Adan by the Government. He used his camel to transport material from the bush.

The appellant testified that he was representing his mother's other children from the same father and had been given a power of attorney by them. The plot was registered in 1972 in favour of his late mother. There was no trust created and the County Government of Marsabit wrote a letter on 20.8.2016 to that effect. The respondent's father died in 1970 and the property was acquired by his mother through the Health Officer called Ahmad Suff Ahmad and the town clerk. It is his mother who gave him the information when he was around 14 years. Two houses were built on the land with the help of his father. The appellant agrees that the other developments were done with the help of developers.

The appeal herein raises the following issues: -

- 1. whether the Kadhi had jurisdiction to hear and determine the dispute.**
- 2. Whether the learned Kadhi failed to comply with the Provisions of the Civil Procedure Act, the Evidence Act and other statutes.**
- 3. Whether the Consent order was binding between the parties.**
- 4. What constituted the deceased's estate, was the deceased holding the property in trust for the children from her first marriage.**

With regard to the first issue, it is evident that it is the appellants who filed the suit before the court. The suit was seeking identification of the heirs of the deceased and the distribution of the deceased's estate. The issue of inheritance is part of Islamic law involving a deceased's personal status. It falls within the purview of Article 170 of the constitution. I do therefore find that the Kadhi had the jurisdiction to hear the dispute between the parties in relation to the identification of the heirs and distribution of the estate.

All parties profess the Islamic religion and committed themselves to the jurisdiction of the Kadhi's Court.

There is the issue of compliance with certain statutory provisions. The appellant contend that the respondent did not file any defence but was allowed to call witness. The record of the trial Court shows that the appellants filed the suit against the respondent. A consent was recorded. A long period lapsed and the respondent filed an application. The time for filing any defence had lapsed by then. The respondent filed an application seeking to set aside the consent. The appellants filed a response to that application. The Kadhi allowed the application to be heard by way of oral evidence. That procedure is permissible in Succession matters. Under the law of Succession Act, the Succession Cause is not initiated by way of a plaint. Any party objecting to a Succession Cause is allowed to file affidavits in response to the cause. Where the only issue in dispute is the mode of distribution of the estate, the opposing party is allowed to file affidavit in protest. Once that is done, the Court can allow the dispute to be heard by way of *viva voce* evidence. This is normally the case yet there is no plaint or defence filed. Therefore, the absence of a defence does not stop the Court from taking oral evidence. Similarly, Constitutional Petitions and Judicial Review cases are responded to by way of replying affidavits. No defence is filed yet the Court can opt to take oral evidence. I do therefore find that the learned Kadhi was correct in taking the oral evidence.

Section 6 of the Kadhi's Courts Act states as follows: -

***The law and rules of evidence to be applied in a Kadhi's court shall be those applicable under Muslim law:***

Provided that:-

***(i) all witnesses called shall be heard without discrimination on grounds of religion, sex or otherwise;***

***(ii) each issue of fact shall be decided upon an assessment of the credibility of all the evidence before the court and not upon the number of witnesses who have given evidence.***

***(iii) no finding, decree or order of the court shall be reversed or altered on appeal or revision on account of the application of the law or rules of evidence applicable in the High Court, unless such application has in fact occasioned a failure of justice.***

Section 2(1) of the Evidence Act states as follows:

***This Act shall apply to all Judicial proceedings in or before any court other than a Kadhi's court, but not to proceedings before an arbitrator.***

From the above provisions, it is clear that the Kadhi's courts enjoy some form of exclusion from the provisions of the Civil Procedure Act and the Evidence act. However, this exclusion does not imply that the Kadhi's Courts have a free hand to determine disputes before them in a manner not known under the normal principles of natural law such as making decisions before hearing the parties or allowing all the parties to present their respective cases. Kadhi's are duty bound to keep a proper record of the dispute. Where the record leads to injustice as provided under section 6 (iii) of the Kadhi's Court Act, the High Court will be at liberty to reverse the Kadhi's decision. The appellants herein were accorded the opportunity to adduce their evidence. All the witnesses called by the respondent were subjected to cross examination. I do find that the record of the learned Kadhi is proper.

On 13th September 2012 parties recorded a consent before the Kadhi. The respondent appended his signature on the consent. **YAQUB ALI OSMAN** also signed the consent. He later testified infavour of the respondent. The entire consent has been re-produced herein above. All what I can say is that the consent did not entirely resolve the dispute. Parties were to go back to the Kadhi and settle the issue of distribution of the income of the estate.

The consent can be interpreted in several ways. According to the respondent, the consent did not distribute the estate. There was no agreement in the form of distribution and that is why the respondent went back to the court for the estate to be distributed.

Another way of interpreting the consent is that parties agreed that the estate of the deceased comprised the development on plot number 211, Biashara street Moyale. At that juncture, there was no issue of trust. Parties agreed that the plot comprised the estate available for distribution. Since the shares for each beneficiary is known under Islamic law, all what remained was to compute the income that had so far been generated and have it distributed together with the estate. The appellants contend that the trial court went ahead to set aside the consent without any good reasons. I will turn to this issue while dealing with the last issue involving the deceased's estate.

The last issue involve the deceased's estate. What constituted the deceased's estate? Was the deceased holding plot number 211, Moyale Biashara street in trust for his children with her first husband? The Kadhi's decision is to the effect that the property belonged to the late Abdi Adan. The Kadhi held as follows:

***"I have considered the evidence, as well as the submission before the court. It is crystal clear from the record of the court that the applicant proof beyond reasonable doubt to the court the said Plot No.211 Biashara street was allocated to the children of late Abdi Adan by the Government of Kenya in 1971.***

***Therefore the said plot No.211 of Biashara street Moyale form part of the late Abdi Adan estate, at time of his death he was survived by the late Fatuma Abdi(widow) and four children three of whom are since deceased, so the late Fatuma Abdi could have inherit 1/3 of the estate while the remaining portion (2/3) is inheritance of the only surviving son of late Abdi Adan (the applicant).***

***The respondents and other siblings together with the applicant again are entitled to inherit from their deceased mother's share that is (1/3) of the estate according to the Islamic law of succession.***

***In the premises stated above the division and distribution of the deceased estate shall take the following mode.***

Therefore the above decision led to the following conclusion: -

***(a) Plot number 211 Moyale Biashara street formed part of the late Abdi Adan's estate.***

***(b) The respondent and his three other siblings were entitled to inherit their late father's estate to the extent of ? share.***

***(c) The late Fatma Abdi, being the widow of the late Abdi Adan was entitled to inherit 1/3 share of plot number 211.***

***(d) The appellants and their other siblings together with the respondent are entitled to inherit and share the 1/3 share of their late mother's estate.***

The record of the trial court shows that there were several meetings held by clan elders as follows:

***i. 26.12.2012, Community elders held a meeting and found that the property belonged to the late Abdi Adan .***

***ii. 13.3.2013, Banna clan elders held that the property belonged to the late Fatma Abdi.***

***iii. 3.10.2016, meeting of elders resolved to refer the matter to the Garri scholars (ulamas).***

**iv. 6.10.2016, meeting of Garri scholars and elders resolved as follows:**

- 1. The property that Hassan Abdi Adan, his sister and sons got was hadya(gift) from Kenyan government in respect their father's Police Service to Kenya government.***
- 2. That the mother only got inheritance from the property of the children who have passed on before she (died) because the plot is not also hers.***
- 3. That the children of late Edin Somo will share with Hassan Abdi Adan their late mothers share.***
- 4. That also Hassan Abdi will get the share from the late Edin Somo estate from his mother side the property they have developed.***

It is clear that soon after the Garri Ulamas (scholars) made their resolution, the respondent filed his application on 31.10.2016. The Kadhi seems to agree with the decision of the elders and scholars that the property belonged to the late Abdi Adan.

I have gone through the minutes and evidence adduced before the meetings of the elders as well as the evidence adduced before the court. One common factor is that the late Abdi Adan died in 1970. There is no dispute on that issue. It is also not disputed that the plot was allocated in 1971 and was duly registered in 1973. By then the appellant's father had not married the late Fatma Abdi. All the witnesses before the Kadhi seemed to agree that the property was allocated to the orphans of the late Abdi Adan because their father had served the National Government.

The decision of the Kadhi raises two curious issues. Firstly, the Kadhi found that it had been proved beyond reasonable doubt that the said plot No.211 Biashara street was allocated to the children of the late Abdi Adan by the Government of Kenya in 1971. Secondly, the Kadhi held that therefore the plot formed part of the late Abdi Adan's estate at the time of his death.

What is an estate. Although the law of Succession Act to some extent does not apply to Muslims, the Act defines the word "**estate as**" follows: -

**"Estate" means the free property of deceased person.**

The late Abdi Adan died in 1970. By that time plot No.211 had not been allocated to him. In simple terms the deceased was not aware of plot No.211. By the time he died, plot No.211 had not accrued as part of his properties. It is possible that the late Abdi Adan had other properties which formed part of his estate. This included his personal items such as clothes, Television, radio as well as his death benefits.

The question which come to my mind is whether a dead Muslim can continue acquiring estate long after his death? The decision of the elders seems to make such suggestion. The decision of the Garri scholars is based on the evidence on record and not on any religious knowledge or citation from the Koran. If it is possible that a deceased can be allocated lands under the Islamic system, it would therefore be prudent that the record at the land registry make such indication. There are situations where one applies for a plot during his lifetime. The demarcation of the land could be done long after his death. If those who demarcate the land acknowledge that the deceased had applied for a plot and go ahead to allocate him posthumously, then that procedure is legal and the beneficiary need not be a Muslim. The family of such a deceased person will proceed to benefit from that property. At times the concerned property would be where the deceased was occupying or developing but had not yet been surveyed.

The deceased herein was living in Yatta. He had no plot in Moyale. He was not aware that there were plots available for allocation in Moyale. It is not even clear whether the deceased came from Moyale. To make a decisive conclusion that plot No.211 was allocated to the deceased posthumously would be to extend the registration of land system in Kenya beyond known horizons. The deceased never applied for that plot.

According to the Kadhi, the plot was allocated to the late Abdi Adan's children. If that was the case, then the late Abdi would not have acquired 2/3 share from the estate as he died before his children. Three of the children of Abdi Adan have passed on. The children could have divided the plot amongst themselves and distributed their shares to their children. They could give a share to their mother under Islamic law. That line of thought therefore means that the land did not belong to the late Abdi Adan. The Kadhi's decision has two limbs, one that the land was allocated to the children of the late Abdi Adan, the second one is that the land was allocated to the late Abdi Adan and formed part of his estate. The Kadhi ignored his first decision and picked the second one. He proceeded to share the property in favour of the respondent 2/3 and the late Fatma Adan 1/3. Even going by this decision, it is clear that the respondent's siblings were alive in 1970. How comes the respondent was allocated 2/3 share as the only surviving son of the late Abdi Adan.

The evidence adduced before the Kadhi's court is that elders approached the area District Officer who made a recommendation to the District Land Committee for the orphans to be allocated land. The land was allocated and registered in the name of their mother. This led to the issue of trust. The question is whether the deceased was holding the land in trust. It is clear to me that due to the death of her husband, people were sympathetic to the late Fatma Abdi who had children. It is not clear how old the first born child was. Fatma Abdi was a Kenyan and lawfully entitled to be allocated a plot in her own right. There is no law prohibiting the allocation of land to widows or to women. There is no requirement that families of deceased civil servants have to be allocated land. **Yaqob Ali Osman** was a sergeant in the Police, he did not tell the court that he was allocated land because he worked for the Government. If we go by the evidence before the Kadhi that the land was allocated to Fatma Abdi simply due to her late husband's service with the government, that would mean that those who serve in the government are given priority to land allocation or even entitled to be allocated land even if they pass on. How many civil servants does the government have? Where is the land to allocate to each civil servant?

There is also another angle of evaluating the dispute. Assuming it was Fatma Abdi who died in 1970 and Abdi Adan was allocated the land in 1971. Assuming Abdi Adan got married after the death of his first wife and subsequently got other children, can it be said that the land belonged to his first wife's late Fatma Abdi. The answer would be a straight "NO". Reason being that Abdi Adan was a man and was allocated his land after the death of his wife. All the children of Abdi Adan would be entitled to inherit. This would have included those of Fatma Abdi and those from his subsequent marriage.

In my view, the dispute has arisen simply because Fatma Adan was a woman. Why should the court hold that she could not be allocated land in her own right? Why should it be that she was to hold in trust for her children. If that was the case, why didn't the land register indicate that Fatma Abdi was to hold in trust for his children from Abdi Adan only and not for any other children she may get in future. All these are issues concerning the dispute. Didn't the elders know in 1971 that Fatma Adan could get married and get other children who would be entitled to her estate.

There is the issue of Hajji Edin Somo. Fatma Adan got married to Hajji Edin Somo in 1973. Didn't Hajji Edin Somo assist her in bringing up the four children from her first marriage. How long did Hajji Edin Somo assist the children of Abdi Adan. Can't the respondent appreciate the contributions of Hajji Edin Somo in his life. If he was left by his father at a young age and was brought up by Hajji Edin Somo, he would be entitled to inherit the estate of Hajji Edin Somo under the law of Succession Act. That issue has not arisen.

From the sequence of events, I do find that the learned Kadhi erred in law by holding that plot number 211, Biashara street, Moyale was part of the estate of the late Abdi Adan. I do find that the property belonged to Fatma Abdi in her own right and she was not holding the property in trust for anyone, be it her children from her first marriage or her first husband. She had the right to dispose the property during her life time. An estate is what a deceased a deceased person leave behind. The late Abdi Adan did not own plot No.211 during his lifetime and could not have been held by the trial court to be the owner of that plot. What was before the court was a dispute involving the estate of Fatma Abdi and not the estate of Abdi Adan.

This brings me to the issue of the consent. The consent was recorded on 13<sup>th</sup> September, 2012. The respondent went back to court four years later. In my view, the contents of the consent was to the effect that plot No.211 Moyale Biashara street was part of the estate of the late Fatma Abdi Adan. The consent does not alledge that Abdi Adan owned the land. The respondent had the right to challenge the consent but the evidence adduced does not displace the plain fact that plot number 211 belonged to the late Fatma Abdi Adan. All the seven children of Fatma Abdi Adan are entitled to inherit the property.

It is clear from the record of the trial Court that the respondent's other siblings died before 2006 when Fatma Abdi Adan died. The respondent was held by the Kadhi to be the only surviving child from his father's side. The respondent clearly feels that he will get a small share of his mother's estate as it is a case of one against six. This can be the case if the respondent does not consider himself to be the child of Fatma Abdi Adan and pursue his claim from his father's direction. He is one of the children of Fatma Abdi Adan and just like the other children, he is entitled to inherit his mother according to Islamic law.

## **FINAL ORDERS**

There are four sons and three daughters. The share of a son is twice that of a daughter. This gives a total of eleven (11) shares. Each son gets 2/11 share while each daughter gets 1/11 share of the deceased's estate.

In the end, I do hereby allow the appeal. The decision of the learned Kadhi delivered on 23<sup>rd</sup> November, 2016 is hereby set aside. Plot No.211 Moyale Biashara street belonged to the late Fatma Abdi Adan and not the late Abdi Adan or his children. The estate of the late Fatma Abdi Adan shall be distributed as follows:-

<b>Relative (Heirs)</b>	<b>Status</b>	<b>Share Fraction</b>	<b>Share percentage</b>
Hassan Abdi Adan	Male	2/11	18.18
Abdinasir Adan Somo	Male	2/11	18.18
Neemo Adan Somo	Female	1/11	9.09
Safia Haji Edin	Female	1/11	9.09
Ahmed Abbas Edin	Male	2/11	18.18
Mohamed Edin	Male	2/11	18.18
Halima Adan	Female	1/11	9.09

In order to implement the decision of the Court, it is prudent that there be an administrator to distribute the estate. Parties are at liberty either to value the property and distribute it or continue distributing the income from the property to each beneficiary according to his/her share herein. I do appoint the appellants **Ahmed Abbas Edin, Abdinasir Adan** and the respondent **Hassan Abdi Adan** together with **one** of their **sisters** to be the administrators of their mother's estate. A certificate of confirmed grant to issue. The appellants shall consult their three sisters and agree on who amongst the three to be included in the certificate of confirmed grant.

I do further order that any transfer of plot No.211, Moyale Biashara street in favour of the respondent or any other person be canceled. The plot to revert back to the names of the deceased and thereafter to be transferred to the four administrators.

This being a family dispute, parties shall meet their own respective costs.

**Dated, Signed and Delivered at Marsabit this 18<sup>th</sup> day of April 2018**

**S. CHITEMBWE**

**JUDGE**