



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

**AT MARSABIT**

**MISC. APPL. NO.1 OF 2017**

**1. HASSAN SHARIFF ABDIRAHIM ..... APPLICANTS**

**2. HUSSEIN SHARIFF ABDIRAHIM**

**VERSUS**

**1. MOHAMMED ABDIRAHIM MOHAMMED**

**2. ABDIKADIR SHARIFF ABDIRAHIM..... RESPONDENTS**

**3. YAHYA SHARIFF ABDIRAHIM**

**4. SADIA SHARIFF HASSAN**

**RULING**

The application dated 25<sup>th</sup> January, 2017 seeks the following orders:-

- 1. That the Honourable call for and examine the original record in Moyale Kadhi's court Succession Cause No.50 of 2014.***
- 2. That the decision and/or judgement made on 30<sup>th</sup> March 2016 be revoked and /or set aside.***
- 3. That pending hearing and determination of this application and further directions and/or orders by the Honourable court be pleased to make an order of temporary injunction to restrain the petitioner/respondent from accessing any of the deceased's properties and/or other benefits whatsoever from the deceased's estate.***

***Alternative prayer***

- 4. The Honourable court be pleased out of time to stay execution and operation of the orders herein made to the petitioner on 30.03.2016 pending hearing and determination of the summons and/or further orders(s) of the Honourable court.***

The application is supported by the affidavit of Hassan Shariff Abdirahim sworn on 25<sup>th</sup> January, 2017 and his further supporting affidavit sworn on 27<sup>th</sup> February 2017. The respondents filed a replying affidavit sworn by Mohamed Abdirahim Mohamed on 14.2.2017 and his supplementary affidavit sworn on 14.3.2017. parties agreed to determine the application by way of written submission.

The applicant submit that the dispute relates to the estate of the late Shariff Abdirahim Mohammed who died on 20.12.1995. The deceased was survived by four wives and several children. It is submitted that the 1<sup>st</sup> respondent is directly dealing with the deceased's properties alleging that he had been allocated the land by the deceased. The applicant maintains that there are two issues to be determined by this court. The first issue is whether the deceased's children had authority to deal with the estate and how should the estate be distributed.

Counsel for the applicant maintains that Section 47 of the Law of Succession Act and Article 159 of the Constitution of Kenya confers Jurisdiction to this court to deal with this matter. Further, Section 82(b)(ii) of the Law of Succession Act (Cap 160) provides that no immovable property shall be sold before confirmation of the grant. The respondents had no authority to sell and transfer the deceased's property. Similarly, Section 45 of Cap 160 provides as follows:

***“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purposes, take possession or dispose of or otherwise intermeddle with any free property of a deceased person.”***

The applicants submit that the respondent's dealing with plot numbers 1060, 130 and 250 all located at Moyale was unlawful. The respondents did not disclose to the Kadhi's Court about the three properties.

On the second issue on distribution of the deceased's estate, it is submitted that the estate should be distributed equally amongst all the beneficiaries including the surviving widows. The surviving widows should be allowed to be the administrators instead of the deceased's children. The respondents did not disclose some of the deceased's properties. Some properties were transferred and registered in the names of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents without the knowledge of other beneficiaries.

On their part, the respondents contend that the dispute arises from succession cause number 50 of 2014 filed before the Moyale Kadhi's court. The Kadhi's court is a creature of the constitution and is one of the subordinate courts. Article 170(5) of the constitution confers jurisdiction to the Kadhi's courts and states as follows:

***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.***

Counsel for the respondents maintain that the deceased was a Muslim and all the parties are Muslims. All the parties are bound to have the estate distributed as per Islamic law. Counsel further contends that the application is not contesting the decision of the Kadhi. There are no allegations that the Kadhi did not fulfill his constitutional mandate. The applicant filed an application to set aside the orders of the court issued on 21.11.2016 before the Kadhi's court and the same was dismissed. Counsel relies on the case of ***AHMED SHARIFF SWALEH and 3 OTHERS –V- ABDULLADER SHARIFF SWALEH & 3 OTHERS[2014] Mombasa High Court Misc. Application number 32 of 2013*** where Justice Odero Observed as follows:-

***“As it turns out the beneficiaries are divided regarding the forum In which to conduct probate proceedings. The Respondent and three (3) other wish to have the estate determined by the Kadhi in accordance with Islamic Sharia Law. However the Applicant and 3 other beneficiaries have declined to submit to the jurisdiction of the Kadhi's Court and seek to have the estate determined by the High Court under the law of succession Act. It is a fact that Kadhi's Courts were set up to cater for the interest of Muslim faithful in matters of marriage, divorce and succession.***

According to the respondents, the parties subjected themselves to the jurisdiction of the Kadhi's courts. If the applicant is not satisfied with the decision of the Kadhi, he should appeal instead of filing the current application. It is the respondents' submission that the contested plots did not belong to the deceased.

I have perused the record of the Kadhi's court in Moyale succession cause number 50 of 2014. A judgment was delivered on 30.3.2016 distributing the deceased's estate. Part of the judgment reads as follows:-

- 1. That the deceased Abdirahim Mohamed had 25 children and two wives at the time he passed away.**
- 2. That the deceased left behind the following properties/estates**
  - (a) Commercial plot number 12 at Moyale township**
  - (b) Commercial plot number 513 at Moyale township Biashara street.**
  - (c) Shamba number 18 at Guremesa location**
  - (d) Shamba 7.5 acres at Mansile Heilu location Moyale District/sub county**
  - (e) Shamba 25 acres at Mansile Heilu location Moyale sub county.**
- 3. That, the 25 children of the deceased and his two windows are only entitled to inherit the deceased estate/properties.**
- 4. That the below is the list of the heirs and their shares according to Islamic sharia.**

In November 2016 the applicant filed an application dated 21.11.2016 seeking the following orders:

- 1. That this application be certified as urgent and heard ex-parte in the first instance.**
- 2. That the Honourable Court be pleased to Review/Vary/Set aside the Judgment delivered by Hon.Sheikh Abdi Osman, Kadhi dated the 30<sup>th</sup> March 2016.**
- 3. That the plot No.180 at Manyatta, Shamba No.250 at Manyatta be incorporated as property belonging to the deceased estate and the same be distributed accordingly**
- 4. That it is imperative and in the interest of justice that the court allows this application.**
- 5. That costs of this application be provided for.**

The record of the trial Court indicate that the application was placed before the Kadhi on the same day 21.11.2014. The Kadhi directed the applicant to serve and the application was to be heard in the afternoon. On the same day the application was dismissed. The record of the trial court reads as follows:-

**Before: A.D. Wako SRK**

**CC: Johari**

**Court:**

**Matter dismissed due to mater have been determined by the previous Kadhi.**

**21.11.2015**

It is the decision of the Kadhi to dismiss the applicant's application which led to the filing of the current application.

Article 165(7) of the constitution provides as follows:-

***For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.***

It is clear to me that all the parties herein appeared before the Kadhi in Moyale and agreed to have the estate distributed. The cause was filed in 2014 and the distribution was made in March 2016. The applicant did not contest the findings of the Kadhi on the mode of distribution. My understanding of the applicants' position is that after the estate was distributed, it came to their knowledge that the deceased used to own plot number 180, and 250 at manyatta. They wanted the two properties to be incorporated as part of the deceased's property. The affidavit of Hassan Shariff Abdirahim sworn on 21<sup>st</sup> November, 2016 in support of the application before the Kadhi indicate that the deceased also left plot number 1060 measuring 300x210ft and plot number 130 measuring one acre all located in Moyale. The applicants wanted the initial judgment to be set aside or varied to include these other properties.

In the affidavit in reply to the current application, it is averred that plot number 1060 Moyale was registered in the names of Yahya Shariff Abdirahim in 1993 before the deceased's death. Plot number 130 was registered in the name of Abdikadir Shariff in 1970. These two plots are not part of the deceased estate. Further, the respondents aver that plot number 180, Manyatta is registered in the name of one Halima Ife who is a stranger to these proceedings.

Although it is true that the deceased's estate was distributed on 30.3.2016, it is clear to me that the Kadhi was duty bound to hear the applicant's application dated 21.11.2016 and make a decision on it. The application was not challenging the Kadhi's judgment but wanted to have additional properties included as part of the deceased's estate. The judgment of the Kadhi is to the effect that no witnesses testified. The new properties which the applicants wanted to be included as part of the deceased's property are not part of the properties indicated in the judgment of the Kadhi.

It could be true that the new properties are not part of the deceased's estate. No title deeds, searches or extracts from the land registry have been produced to prove or disprove each party's contention. The Kadhi directed the applicant to go and serve the respondents. The subsequent proceedings of the same day do not indicate whether the applicant was present when the application was dismissed. There is no indication whether the respondents were served and appeared in court. No replying affidavit was filed in response to the application. It appears that the Kadhi did not properly evaluate the application so as to differentiate the properties indicated in the judgment and those ones in the application. The applicants had raised a totally different matter that was not dealt with by the previous Kadhi. The new Kadhi had no information to conclude that the new properties were not part of the deceased's estate as no replying affidavit was filed.

Ordinarily, the applicants had to file an appeal against the decision of the Kadhi. However the record of the Kadhi shows that the applicants were not heard. It appears that the Kadhi dismissed the application *Suo moto*. There is no detailed ruling. Article 165(7) of the Constitution empowers this Court to call for the record of the proceedings of a subordinate Court and make any order or give directions. The application herein was filed on 26.1.2017. The Kadhi had dismissed the applicant's application on 21.11.2016. There was no inordinate delay. Since the applicant's application before the Kadhi was not heard, I do find that the current application was properly filed before this court.

I will not dwell on the issue as to whether the applicants are disputing the jurisdiction of the Kadhi to distribute the estate. The flow of events does confirm that the applicants did subject themselves to the jurisdiction of the Kadhi. The estate has to be distributed in accordance with Islamic law.

Given the record of the trial Court, I do find that the application herein is merited and is granted on the following terms:

***1. The judgement of the Kadhi dated 30.3.2016 shall still remain in force.***

*2. The orders of the Kadhi's Court of 21.11.2016 dismissing the applicants' application of the same date are hereby set aside.*

*3. The application dated 21.11.2016 is hereby referred back to the Kadhi's Court for full and final determination.*

*4. The respondents are at liberty to file their replying affidavit to the applicants application.*

*5. The Kadhi shall be at liberty to hear the application either through oral or written submissions or by way of oral evidence as the nature of the application involves proof of ownership of some properties.*

*6. Upon hearing the application, the Kadhi, depending on his decision, shall decide as to whether to vary or set aside the judgement of 30.3.2016 or leave it intact.*

*7. Parties shall meet their own respective costs of this application.*

**Dated, Signed and Delivered at Marsabit this 17<sup>th</sup> Day of October 2017**

**S. CHITEMBWE**

**JUDGE**