



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**SUCCESSION CAUSE NO. 301 OF 2014**

**IN THE MATTER OF: THE ESTATE OF S.P.B – DECEASED**

**1. R.B**

**2. R.G.O**

**(suing on their own behalf and on behalf of T.S.B (4 years)**

**and A.S.B (2 years).....PETITIONERS/RESPONDENTS**

**AND**

**1. H.S.B**

**2. A.S.B.....INTERESTED PARTIES/APPLICANTS**

**RULING**

1. The petitioners, respectively a widow and a mother-in-law of the deceased Muslim man the subject of this suit, have filed two proceedings before the High Court being Succession Probate and Administration Causes, P&A 301 and 395 of 2014, respectively, petitions for limited grant *ad colligenda bona* and for the full grant of representation to the estate of deceased herein.

2. By Chamber Summons dated 3<sup>rd</sup> December 2014, the Interested Parties, who are respectively, a son and widow of the deceased under first marriage, have raised a Preliminary Objection on the jurisdiction of the High Court seeking the following specific orders:

***a). This matter be consolidated with Mombasa Succession Cause No. 395, Estate of SB, (Deceased).***

***b). This Honourable Court be pleased to strike out this matter together with Succession Cause No. 395 of 2014 for want of the requisite jurisdiction to hear and determine the two matters.***

***c). In the alternative and without prejudice to prayer (b) above, this Honourable Court be pleased to transfer this matter together with Succession Cause No. 395 of 2014 for hearing and determination by the Kadhi's Court at Mombasa.***

**d). In the alternative and without prejudice to prayers (b) and (c) above, Form 38 dated 15<sup>th</sup> September 2014 and Paragraphs 4, 5, 6 and 7 of the affidavit filed herein as Form P&A 26(2) in the main Succession Cause be struck out.**

3. The Petitioners filed a replying affidavit sworn by the deceased's petitioner widow on the 9<sup>th</sup> December 2014, the principal opposition to the application being that the petitioners were entitled to approach the High Court for the determination of the Succession Cause of the deceased Muslim herein as she had not submitted to the jurisdiction of the Kadhi's Court.

4. Counsel for the parties – Mr. Agwara for the Interested Parties and Mr. Miyare for the petitioners - made oral submissions on the 10<sup>th</sup> December 2014 and ruling was reserved for the 16<sup>th</sup> December 2014.

5. The issue before the court is whether the High Court has jurisdiction to entertain the matter of succession to the estate of the deceased Muslim herein or whether it is the Kadhi's Court that has exclusive jurisdiction, and, consequently, whether the Court will order the transfer of the succession proceedings to the Kadhi's Court for hearing and disposal.

6. Although counsel made submissions, in an obtuse manner, on the law applicable to the succession of a deceased Muslim, the same was not live before the Court at this stage of the Preliminary Objection as to jurisdiction, and the Court will not make any findings on the issue in this ruling. The issue of the applicable law only falls for determination in the consideration of the final disposal of the main dispute between the parties as to the inheritance of the estate of the deceased Muslim herein. The counsel for the parties will consequently make relevant submissions thereon in subsequent proceedings, as necessary. The court also directed that the issue in prayer (d) of the Chamber Summons dated 3<sup>rd</sup> December 2014 seeking the striking out of certain prayers in the Petition and paragraphs of the supporting affidavit must await the finding of the court on its jurisdiction.

7. Although the decision of the Supreme Court in **Mary Wambui Munene v. Peter Gichuki King'ara and 2 Ors.**, [2014] eKLR was cited no serious submission was made as to the unconstitutionality of any provisions of the Law of Succession Act cap. 160 or the Kadhi's Courts Act cap.11 of the Laws of Kenya and, indeed, there was no specific prayer for such relief. Accordingly, the issue does not fall for determination, and from the court's findings below, there is no room for such finding.

8. I agree with the general propositions by the Interested Parties that the Constitution is to be interpreted purposefully to promote its purposes, values and principles as prescribed by Article 259 of the Constitution (See **Centre for Rights Education and Awareness (CREAW) & Ors. v. A-G** [2011] 1 EA 83); that the High Court should exercise restraint to give first instance opportunity to relevant constitutional and statutory bodies to deal with a dispute without appearing to presume bad faith or inability to act on the part of such body or, otherwise put, the principle that where the Constitution or a statute prescribes a procedure for the resolution of particular disputes such procedure should be strictly followed. See **Speaker of National Assembly v. Njenga Karume** [2008] 1 KLR 425; **Stephen Nyarangi Onsomu & Anor. v George Makhoha & 7 Ors.**, [2014] eKLR, and **Stanley Mungatha Daudi & 5 Ors. v. Hon. Cyprian Kubai Kiringo & 3 Ors.** [2013] eKLR relied on by the Interested Parties.

9. The jurisdiction of the Kadhi's Court is provided for in Article 170 of the Constitution, which establishes the Court as one of the subordinate courts under Part 3 of Chapter 10 of the Constitution of Kenya as follows:

**“170. (1) There shall be a Chief Kadhi and such number, being not fewer than three, of other Kadhis as may be prescribed under an Act of Parliament.**

**(2) A person shall not be qualified to be appointed to hold or act in the office of Kadhi unless the person—**

**(a) professes the Muslim religion; and**

(b) possesses such knowledge of the Muslim law applicable to any sects of Muslims as qualifies the person, in the opinion of the Judicial Service Commission, to hold a Kadhi's court.

(3) Parliament shall establish Kadhis' courts, each of which shall have the jurisdiction and powers conferred on it by legislation, subject to clause (5).

(4) The Chief Kadhi and the other Kadhis, or the Chief Kadhi and such of the other Kadhis (not being fewer than three in number) as may be prescribed under an Act of Parliament, shall each be empowered to hold a Kadhi's Court having jurisdiction within Kenya.

**(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."**

*[Emphasis added]*

10. It is clear from the textual provision of Article 170(5) of the Constitution that the jurisdiction of the Kadhi's Court is **limited** to questions relating to **personal status, marriage, divorce or inheritance**, in proceedings where **all the parties** profess Muslim religion and **submit** to the jurisdiction of the Court. It appears to me that the primary purpose of the Article 170 is to preserve a forum for the resolution of disputes as to personal law matters of Muslims as existed before the Constitution of Kenya 2010 under section 69 of the former Constitution. The new Constitution, however, recognised and gave effect to the right of Muslims to choose to utilize the regular system of adjudication through the High Court.

11. This right of choice is consistent with the constitutional values of liberty of the person embodied in the principles of "human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised" under Article 10 (2) (b) of the Constitution. To compel all Muslims to subject themselves to the jurisdiction of the Kadhi's Court would be contrary to all notions of choice which is the basis of rights and freedoms in the Bill of Rights. Hence the provision for the Muslims to **submit**, rather than compulsion to subject themselves, to the jurisdiction of the Kadhi's Court.

12. On the other hand, the jurisdiction of the High Court in civil matters is **unlimited** by virtue of Article 165(3) of the Constitution as follows:

*"165 (3) Subject to clause (5), the High Court shall have—*

*(a) **unlimited** original jurisdiction in criminal and **civil** matters;*

Article 165(5) of the Constitution provides that -

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

*(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or*

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

13. The jurisdiction of the High Court in succession matters relating to estates of deceased Muslims is not ousted by sub-Article 5 of Article 165 as with the matters set out in Article 165 (5) (a) and (b) quoted above. Moreover, the High Court is the succession court under section 47 of the Law of Succession Act, which provides as follows:

#### *47. Jurisdiction of High Court*

*The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:*

*Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”*

The jurisdiction of the Kadhi's Court over the estates of deceased Muslims is, however, saved under section 48 (2) of the Act in terms that:

*“48. (2) 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.”*

14. The Kadhis' Courts Act, cap 11 Laws of Kenya, itself acknowledges the jurisdiction of the High Court in matters that come before it as follows:

*“5. Jurisdiction of the Kadhis' Courts.*

*A 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.**”*

*[Emphasis added]*

15. The Court of Appeal has interpreted Article 170 (5) of the Constitution on the jurisdiction of the Kadhi's Court and held in the case of ***Genevieve Bertrand v. Mohamed Athman Maawiya and Anor.***, Malindi Civil Application No. 24 of 2013 [2014] eKLR of 20<sup>th</sup> March 2014 (Okwengu Makhandia and Ouko, JJA) that –

*“23. In the case of the Kadhi's Court, it is a creature of the Constitution (section 66 of the retired Constitution and article 169 of the current Constitution). The jurisdiction of the Kadhi's Court is specifically defined under Article 170 (5) of the Constitution and section 5 of the Kadhi's [Court] Act, as “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 Court”. **Thus the jurisdiction of the Kadhi's Court is determined by the existence of three factors. That is the subject matter of the claim or dispute, the party's Muslim faith, and the party's submission to the jurisdiction of the Kadhis Court.**”*

*[Emphasis added]*

16. The question of jurisdiction of the High Court in this matter therefore resolves itself in the holding of the Court of Appeal in ***Re the Estate of Ismail Osman Adam ( Deceased), Noorbanu Abdul Razak v. AbdulKader Ismail Osman***, Mombasa Civil Appeal No. 285 of 2009 delivered on 5<sup>th</sup> December 2013 which upheld the choice of Muslim parties to submit to the Kadhi's Court or to file succession proceedings in the High Court. In his decision Githinji, JA., with whom Koome and Okwengu, JJA concurred held:

*“There should not be any confusion between the jurisdiction of the High Court to entertain a dispute relating to testamentary or intestate succession to estates of Muslims and the substantive law applicable in the High Court in such disputes. **Section 47 makes it clear that the High Court has jurisdiction to entertain any application and determine any dispute under the LSA [Law of Succession Act]. However, by section 48(2) the jurisdiction of the High Court is not exclusive as Kadhi's Courts have also jurisdiction to entertain disputes relating to the estate of deceased Muslims. However, if the High Court assumes jurisdiction to the estate of a deceased Muslim, then by virtue of section 2(3) [of the Law of Succession Act], the law applicable in the High Court as to the devolution of the estate is the Muslim law and not the LSA. As an example,***

disputes relating to the validity of a will made by a Muslim and the ascertainment of heirs and shares of each will be determined in accordance with Muslim law. In **Saifudean Mohamedali Noorbhai v. Shehnaz Abdehusein Adamji**, Mombasa Civil Appeal No. 142 of 2005 (unreported) this Court said in part:

**‘Kenya Courts have held in past judgments that every litigant of whatever religious persuasion, has the option of going directly to the High Court, and a Muslim is not necessarily restricted to the jurisdiction of the Kadhi’s Court’**

However, by virtue of section 2(4) LSA, the law relating to the administration of the Estate of the deceased Muslim is the one stipulated in Part VII of the Act, that is, sections 44-95 in so far as those provisions are not inconsistent with Muslim law.”

[Emphasis added]

17. The Court of Appeal decisions are binding on this court. For its part, this court takes the view that the issue of profession of Muslim faith is distinct from the necessary ingredient of **submission** to the jurisdiction of the Kadhi’s Court to deal with the personal law matters of marriage, divorce and inheritance of Muslims. Profession of the Islam is not synonymous with submission to the jurisdiction of the Kadhi’s Court.

18. I do not agree with the suggestion by counsel for the Interested Parties that Muslims have no choice of the forum for determination of their personal law matters and that by the very act of converting to Islam as evidenced by the Certificate of Confessing Islam [**Shahada ya Kusilimu**] dated 7<sup>th</sup> July 2009, the 1<sup>st</sup> petitioner had by conduct submitted to the jurisdiction of the Kadhi’s Court. While the parties before the Kadhi’s Court must all be Muslims, no party who has not submitted to the jurisdiction is compelled to litigate before that court. That the 1<sup>st</sup> Petitioner converted to Islam only satisfies the second ingredient for the jurisdiction of the Kadhi’s Court which must be complemented by the Petitioner’s choice to **submit** to the Court.

19. The requirement for submission to the Jurisdiction of the Kadhi’s Court is an addition by the Constitution of Kenya 2010. The Former Constitution had under section 69 (3) (d) provided only for appointment to the office of the Chief Kadhi and Kadhis with their jurisdiction being given by the Kadhis’ Courts Act cap. 11 under section 5 thereof as set out above. In interpreting Article 170 (5) of the Constitution the court must purposefully give effect to the tenor of the addition of the requirement of submission of the Muslims to the jurisdiction of the Kadhi’s Court by the new Constitution of Kenya 2010 by upholding choice of the Court before which to file proceedings of personal nature.

20. The word ‘**submit**’ is defined by *The Concise Oxford Dictionary* as a verb meaning ‘give way, resign oneself, yield, cease or abstain from resistance’. Accordingly, in my view, the right to ‘**submit**’ must be taken to contain an opposite inbuilt right to choose ‘**not to submit**’. I consider that in providing as a prerequisite that the Muslims submit to the jurisdiction of the Kadhi’s Court, the Constitution was upholding the choice that Muslims have traditionally exercised as noted by the Court of Appeal in the decision of **Saifudean Mohamedali Noorbhai v. Shehnaz Abdehusein Adamji**, *supra*, cited in the passage quoted above.

21. I have also noted the decisions of Odero, J. in **A.A.M v M.S.M** Mombasa HCCC NO. 13 of 2012 (OS) [2014] eKLR and G W Ngenye Macharia J. in **Fauzi said Ali and 3 Ors. v. Said Ahamed Ali (Deceased) and Anor.**, Eldoret HC Civil Appeal No. 130 of 2009 [2014] eKLR to the like effect. The decision of Odero, J in **Zoglo Zolleyyn aka Alis Said Ahmed v. Abdalla Said Ahmed** [2014] eKLR that the matter which was already in progress before the Kadhi’s Court ‘*ought to proceed on the first instance before the Kadhi and only if any party is dissatisfied with the manner of probate in the Kadhi’s Court, then the matter may move upon appeal to the High Court*’ is not a contradiction as suggested by counsel for the interested Parties. In that case, the learned judge rightly in my view held that ‘the fact that there may exist a written will does not of necessity remove the matter from the Kadhi’s Court’.

22. For the reasons set out above, I am, with much respect to the learned judge, unable to agree with Kimaru J. in **Re. Estate of Maryam Juma Kibanda (Deceased) Ashraf Abdul Kassim v. Karar Omar & 3 Ors.**, [2014] eKLR holding that –

*“Disputes involving persons of Islamic faith can only be determined by the Kadhi’s Court because the holders of the office of Kadhi are required under Article 170 (2) of the Constitution to be persons who possess such knowledge of the Muslim Law as is applicable to the particular sect of Muslims. The only exception to **this requirement that persons of Muslim faith submit to the jurisdiction of the Kadhi’s Court** is where both parties to the dispute indicate to the court their preference that the dispute be heard and determined by the Court.”*

*[Emphasis added]*

The learned judge appears to have read into the provisions of Article 170 (5) an obligation rather than a choice to **submit** whereas the declared object of the new Constitution is clearly libertarian, by its Preamble **“RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law”**.

23. I agree that in filing the two petitions, P&A 301 and 395 of 2014, in the High Court, rather than filing a plaint in the Kadhi’s Court, the petitioner 2<sup>nd</sup> widow has chosen to approach the High Court and, consequently, declined to **submit**, within the meaning of Article 170 (5) of the Constitution, to the jurisdiction of the Kadhi’s Court to hear and determine the matter of the inheritance of the Estate of the deceased herein.

24. Accordingly, I find that the High Court has jurisdiction to entertain the application by the Petitioners in this case. The issue of the applicable law will fall for consideration, as observed above, when the court determines the prayers for administration and distribution of the Estate.

24. For the reasons set out above, I make the following orders on the Interested Parties’ Chamber Summons application dated the 3<sup>rd</sup> December 2014:

- 1. The prayers for the striking out of the petitions P&A Nos. 301 and 395 or, in the alternative, for the transfer of the said petitions to the Kadhi’s Court, Mombasa, for hearing and determination are declined.**
- 2. The Petitioners’ petitions P&A Nos. 301 and 395 of 2014 will proceed to hearing before the High Court on dates to be fixed in consultation with the counsel for the parties.**
- 3. The Interested Parties will pay the costs of the application to the Petitioners.**

**Dated, Signed and Delivered on the 16<sup>th</sup> day of December 2014.**

**EDWARD M. MURIITHI**

**JUDGE**

In the presence: -

Mr. Agwara for the Applicants/Interested Parties

Mr. Minyare for the Petitioners/Respondents

Mr. Mugao - Court Assistant