



Mwaropo (Suing as the administrator of the Estate of Shaban Mwashange Mdawida - Deceased) v Shaban & 3 others (Miscellaneous Application E022 of 2024) [2025] KEHC 622 (KLR) (17 January 2025) (Ruling)

Neutral citation: [2025] KEHC 622 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
MISCELLANEOUS APPLICATION E022 OF 2024
AN ONGERI, J
JANUARY 17, 2025**

BETWEEN

SHABANI MWAROPO (SUING AS THE ADMINISTRATOR OF THE ESTATE OF SHABAN MWASHANGE MDAWIDA - DECEASED) APPLICANT

AND

JUMA MWANYUNGU SHABAN 1ST RESPONDENT

SWALEH SHABAN 2ND RESPONDENT

ADAM MWAKESI SHABAN 3RD RESPONDENT

SALAMA SHABAN 4TH RESPONDENT

RULING

1. The application coming for consideration in this Ruling is the one dated 29th July 2024 brought under Section 1A, 1B and 3A of the [Civil Procedure Act](#), Section 5 of the [Kadhi's Court Act](#) and all enabling provisions of the Law seeking the following orders:-
 - i. That pending the hearing and determination of the application herein inter parties, there be a stay of proceedings in CMCC E173 of 2023 (Voi) – *Juma Mwanyungu Shaban & 3 Others v Hamisi Shaban Mwaropo (sued as the Administrator of the Estate of Shaban Mwashange Mdawida (Deceased))*.
 - ii. That the Honorable Court be pleased to transfer the matter to Kadhi's Court for hearing and final determination.
 - iii. That costs be provided.
2. The application is based on the following grounds:-



- i. The litigants in the suit are all Muslims professing the Islamic religion.
 - ii. The cause of action arose from succession proceedings filed in the Kadhi's Court being Succession Cause No. 5 of 2019 where all litigants surrendered to the jurisdiction of the Kadhi's Court.
 - iii. Disputes relating to inheritance where parties profess the Islamic faith and/or religion falls within the purview of the Kadhi's Court.
 - iv. The Sharia Law is the law that governs inheritance and distribution of assets to beneficiaries thereto and not the Kenyan Constitution, statutes and Law.
 - v. Any grievances that arise out of a succession matter heard and determined by the Kadhi Court as governed by the Sharia Law.
 - vi. In the interest of justice, fairness and proportionally that the application be allowed.
3. The application is supported by the affidavit of the Applicant Hamisi Shaban Mwaropo in which he deponed as follows:-
- i. That I am the Applicant herein conversant with the issues in controversy hence competent to swear this Affidavit.
 - ii. That the Respondents and I are related by blood as we are siblings. The Respondents and I are the children of the late Shaban Mwashange Mdawida who is deceased.
 - iii. That all parties herein profess the Islamic faith and/or religion.
 - iv. That the dispute herein is one that emanates from a succession cause which was filed, heard and determined at the Kadhi's Court being Succession Cause No. 5 of 2019 where an order was issued by the Kadhi's Court for the sale of Plot No. Mombasa Block XIV/306 and the proceeds be distributed equally among 8 families among them being the family of the late Shaban Mwashange Mdawida.
 - v. That I am informed by my Advocate on record Mr. Brian Motuka which information I verily believe to be true that it is trite law that matters of personal status, marriage, divorce or inheritance where all parties profess the Muslim religion fall within the jurisdiction of the Kadhi's Court.
 - vi. That the dispute herein relates to distribution of money to the beneficiaries of the estate of the Late Shaban Mwashange Mdawida hence it is a matter dealing with inheritance that can be heard and determined by the Kadhi's Court.
 - vii. That on 6.1.2023 the Kadhi's Court sitting in Voi in Succession Cause number 5 of 2019 issued an order for the sale of Mombasa Block/XIV/306 and the proceeds be distributed equally within 8 families. In the event a dispute arose because of such an order, then it is proper and logical that parties ventilate the dispute at the Kadhi's Court.
 - viii. That vide succession proceedings being probate and administration cause no. 15 of 2022 filed at the Kadhi's Court, the family of the late Shaban Mwashange Mdawida collectively agreed that I be appointed the administrator of the estate of the late Shaban Mwashange Mdawida hence I should be answerable to the Kadhi's Court for any allegations of not having distributed the alleged monies to the beneficiaries and not before the Principal Magistrate Court.



- ix. That it is in the interest of justice, fairness and proportionality that the suit herein be transferred to the Kadhi's Court to ensure that the suit is heard and determined in accordance to Sharia Law as all parties herein profess the Islamic religion.
 - x. That the Respondents will suffer no prejudice.
 - xi. That I am informed by my Advocate which information I verily believe to be true that it is trite Law that a party who claims to suffer prejudice, if any, should demonstrate to this Hon. Court actual, real and demonstrable prejudice.
 - xii. That I swear this affidavit in support of the application herein.
 - xiii. That what is deponed to herein above is true within my knowledge save as it is otherwise stated the sources and grounds whereof have been disclosed and given.
4. The 1st Respondent filed a Replying Affidavit dated 21st August 2024 in which he deponed as follows:-
- i. That I am the 1st Respondent herein with the authority of my fellow Respondents to plead and act on their behalf hence competent to swear this Affidavit.
 - ii. That though the issues in dispute in Voi CMCC No. E173 of 2023 – *Juma Mwanyungu Shaban & Others v-VS- Hamisi Shaban Mwaropo* are connected to Islamic personal law specifically inheritance, which fall within the jurisdiction of the Kadhi's Court, together with my fellow Respondents, we do not submit to the jurisdiction of the Kadhi's court for determination of our grievances in the civil suit.
 - iii. That I am advised by my Advocates on record which advise I verily believe to be true that the jurisdiction of the Kadhi's Court is based on three factors being subject matter, religion and submission to the jurisdiction of the Kadhi's court.
 - iv. That being that we have not submitted to the jurisdiction of the Kadhi's court to hear and determine the civil suit in Voi CMCC No. E173 of 2023, we should not be compelled litigate before that court but should be allowed to proceed before the magistrate's court whose jurisdiction is not entirely ousted by the Kadhi's court Act, Section 5 per the advice by my Advocates.
 - v. That to that end, I pray that the application for the transfer be dismissed to allow the case in Voi CMCC E173 of 2023 proceed for determination.
 - vi. That what is stated is true to the best of my knowledge, information and belief.
5. The parties filed written submissions as follows:- the applicant submitted that the litigants herein are family members and legitimate beneficiaries to the Estate of the deceased who all profess the Islamic religion. The totality of the respondent's pleadings in the lower court, it is evident that the respondent's cause of action stems from Succession Cause No. E005 of 2019 In the matter of the Estate of the Late Maryam Swaleh Mwatamaa (deceased), Shaban Mwashangi Mdawida (deceased), Munir Swaleh (deceased), Zubeda Mbunde Swalee (deceased) and Amina Ismail Mwatamaa (deceased).



6. The applicant submitted that the Kadhi court has the jurisdiction to deal with matters which are incidental to the Kadhi's as enumerated in *Fazelabas Mohamed Chandoo v A. I Hussein, Kadhis Court & 4 Others* [2015] eKLR where it was held

“...that Kadhi's courts have jurisdiction to deal with any matter incidental to the exercise of jurisdiction over matters within its exclusive jurisdiction”

7. The applicant argued that because the trial court while hearing and determining the suit, shall be compelled to address and interpret vital laws and principles of Sharia law, it is in the interest of justice that the lower court suit be transferred from the Chief Magistrate's Court to the Kadhi's Court.
8. The respondents alternatively submitted that Article 170 (5) fo the *Constitution* of Kenya restricts the Kadhi's Court's jurisdiction to matters of personal status, marriage, divorce or inheritance, specifically when all parties involved are Muslims and submit to the court's jurisdiction. The main aim of Article 170 is to provide a platform for settling personal law issue among muslims.
9. The respondent argued that the 2010 constitution, however acknowledged Muslims' right to opt for the regular court system, for dispute resolution. The right to choose, aligns with constitutional values supporting individual freedom as reflected in Article 10 (2)(b) which promoted principles such as human dignity, equity, social justice inclusivity, equality, human rights, non-discrimination and protecting marginalized groups.
10. The respondent argued further that that the act of submission to the Kadhi's Court is fundamentally a voluntary decision, respecting the constitution right of Muslims to decide whether or not to do so. It is evident herein that the issued that shall fall for determination by the court in trying Civil Suit No. E173 of 2024 is whether the respondent received their rightful shares as realized from the sale of the deceased property. The determination shall be based on evidence placed before the court and not on a determination whether according to Muslim Law, the shares were made rightfully. That based on this the application herein lacks merit and should be dismissed with costs to the respondents.
11. The sole issue for determination in this application is whether Voi CMCC E173 of 2023 – *Juma Mwanyungu Shaban & 3 Others v Hamisi Shaban Mwaropo (sued as the Administrator of the estate of Shaban Mwashange Mdawida (Deceased))* should be transferred to the Kadhi's Court.
12. The Kadhi's Court has jurisdiction over the following issues where both parties profess the Muslim faith. 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."

13. 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."

14. 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 where it was held 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 *Kadhis' [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."

15. I find that this application has merit and I allow it and direct that Voi CMCC No. E173 of 2023 be transferred to the Kadhi's Court for determination.

16. The Respondent to pay the costs of this application assessed at Kshs. 10,000/= and the file to be marked as closed. Orders accordingly.



DATED, SIGNED AND DELIVERED THIS 17TH DAY OF JANUARY 2025 VIRTUALLY AND IN OPEN COURT AT VOL.

ASENATH ONGERI

JUDGE

In the presence of:-

Maina/Trizah – Court Assistants

