



REPUBLIC OF KENYA



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**In re Estate of Sheik Yunis Mohamed (Deceased) (Civil Appeal  
E012 of 2022) [2025] KEHC 2683 (KLR) (7 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2683 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CIVIL APPEAL E012 OF 2022**

**JN ONYIEGO, J  
MARCH 7, 2025**

**BETWEEN**

**AHMED SHEIKH YUNIS ..... APPELLANT**

**AND**

**ALI SHEIKH YUNIS ..... 1<sup>ST</sup> RESPONDENT**

**ISSACK SHEIKH YUNIS ..... 2<sup>ND</sup> RESPONDENT**

**HABIBA SHEIKH YUNIS ..... 3<sup>RD</sup> RESPONDENT**

**SIYAD SHEIKH YUNIS ..... 4<sup>TH</sup> RESPONDENT**

*(delivered on 17.08. 2022 in Mandera KCSC No. E015 of 2021  
between Ali Sheikh Yunis and 3 others vs Ahmed Sheikh Yunis)*

**JUDGMENT**

1. By a petition dated 26.02.2021, the respondents moved the Kadhi's court seeking grant of letters of administration in relation to the estate of the deceased herein. In the petition filed by the respondents, it was urged that the deceased died intestate on 12.12.1994 while domiciled in Kenya. He was survived by the following: Ali Sheikh Yunis, Isack Sheikh Yunis, Habiba Sheikh Yunis, Siyad Sheikh Yunis and Ahmed Sheikh Yunis.
2. It was stated that the deceased left the following property: Plot No. 116 Bulla Jamhuri, Plot No. 2242 Duse, Farm Jira – 68 acres Barwako location and a Plot situated in Takaba town. It was prayed that the estate of the deceased be distributed equally and according to the Islamic Sheria law.
3. In the process of hearing the matter, Ahmed Sheikh Yunis the appellant filed an application seeking to be refunded all the expenses incurred in developing Plot No. 116 Bulla Jamhuri. He averred that at the time the deceased died, the buildings erected in Plot No. 116 Bulla Jamhuri being semi-permanent were in bad shape and that it took his effort to develop and maintain the current structures besides



paying all dues in relation to the said land. He also stated that he incurred other costs in his attempt to trace the property forming the estate of the deceased. He thus urged that the said expenses be considered while distributing the estate of the deceased.

4. Upon hearing all the parties, the trial court delivered its judgment on 17.08.2022, thus directing as follows:
  - i. That plot number 116 situated at Bulla Jamhuria should not be sold as suggested by five out of six beneficiaries unless consensus of the majority of the heirs on condition that the sale should be commensurate to the current market price.
  - ii. That the rent proceeds should be distributed henceforth based on the following equation: widow, 12.5%, Each son, 19.45% and Daughter 9.745%.
  - iii. That the respondent should pay rent at market price for the three rooms he occupies, vacate the three rooms to be rented by a third party or be deducted from his shares from proceeds of the rent.
  - iv. That any future development in the plot, the parties to agree in consensus and proceeds shared based according to Islamic law of inheritance.
  - v. The two administrators should appoint rent collector or a person who can document details of the tenants and keep record of the proceeds to avoid misappropriating or mismanagement of the proceeds.
  - vi. That no beneficiaries should be paid proceeds without acknowledgement receipt indicating the amount, date, month and year.
  - vii. That the administrators should furnish the court half yearly record of management and progress report on plot number 116 situated at Bulla Jamhuria.
  - viii. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> petitioners should either return or be deducted from the proceed of either plot 116 Bulla Jamhuria or make payment after selling of Jira farm from their shares amount of 800,000 for the expenses incurred by the respondent.
  - ix. That the beneficiaries who are interested to sell their portion of land in Jira farm number 011 located at Barwaqo can look for prospective buyer. The Honourable court if called upon to oversee the transaction will do so to avoid further conflict and dispute.
  - x. That the Land Registrar Mander County to subdivide and distribute, register names stated with portion of each beneficiary farm number 011, Jira Barwaqo location within 90 days as stated herein: Ali Sheikh Yunis (son), 1.73 ha; Isack Sheikh Yunis (son), 1.73 ha; Habiba Sheikh Yunis (daughter), 0.865ha; Siyad Sheikh Yunis, son, 1.73 ha; Ahmed Sheikh Yunis(son), 1.73 ha and Habiba Osman Ali (widow), 1.11 ha.
5. Aggrieved by the said judgment, the appellant through the firm of Abdikheir Advocates filed a memorandum of appeal dated 03.11.2022 citing 4 grounds of appeal as hereunder;
  - i. The trial Kadhi erred in law and fact by finding that the appellant did not prove expenses incurred in the development of the estate despite production of two valuation reports.
  - ii. The trial Kadhi erred in law and fact by ordering that the deceased's estate be distributed to the heirs without consideration of the expenses incurred in development of the estate.



- iii. That the trial Kadhi failed to evaluate all the evidence presented before him hence arriving at a wrong conclusion.
  - iv. That the trial Kadhi failed to apply equity under the Islamic law and thereby arrived at a wrong conclusion.
6. The appellant sought for orders that:
- i. The appeal be allowed.
  - ii. Distribution of the estate be done under Islamic Law after the deduction of the respondents' expenses in developing the estate.
  - iii. In the alternative to prayer 'b' above, an order do issue directing that, the succession case No. E15/2021 Estate of Sheikh Yunis Mohamed (deceased) be heard afresh before another Kadhi.
  - iv. Costs of the appeal and lower court.
7. The court directed that the appeal be canvassed by way of written submissions which directions parties complied with. The appellant in his submissions dated 02.11.2023, submitted in reference to two issue as follows:
- i. Whether the appellant proved expenses on development of the estate herein.
  - ii. Whether the expenses incurred by the appellant should be deducted from the estate before the distribution.
8. On the first issue, counsel reiterated and indeed recited witnesses' testimony. Counsel contended that there was no dispute that the appellant spent over kes 7,080,000/= to put up new and modern structures in place of the old and dilapidated semi-permanent building. Counsel further contended that the respondents did not adduce any evidence to prove their contribution towards the development of plot number 116. According to counsel, he who alleges must prove. To support that position the court was referred to the case of North End Trading Company Ltd Carrying On Business Under The Registered Name Of Kenya Refuse Handlers Lmt V Cgty Council Of Nairobi (2019) eKLR.
9. It was further contended that the respondents having admitted that the appellant did develop the rooms in question and that they were willing to refund him kes 2,100,000/=, the appellant's claim is unchallenged.
10. On whether the amount spent by the appellant ought to be deducted from the estate as a debt, it was urged that it was only fair and just that before the computation of the estate property, the expense incurred be deducted from the estate of the deceased. Reliance to that end was placed on the case of Re estate of Francis Andachilla Luta (deceased) Succession Cause No. 875 of 2012 where the court held that ...settlement of debts and liabilities ought to take priority over distribution. In conclusion, the court was urged to allow the appeal as prayed.
11. In opposing the appeal, the firm of Abdirizak & Co. Advocates on behalf of the respondents filed submissions dated 15.05.2024 citing three issues for determination as follows:
- i. Whether the expenses incurred in the development of the estate should form the basis of distribution of the estate and if so, has the appellant proved the same?
  - ii. Whether the appeal has merit?
  - iii. Who should bear the costs?



12. Regarding the first issue, it was submitted that the appellant did not submit estate accounts showing a comprehensive record of all financial transactions and activities related to the administration of a deceased person's estate. That the same should have clearly shown an overview of how the estate's assets and debts were managed, expenses paid and funds distributed. That contrary to the law, the appellant did not demonstrate the same. It was contended that the financial expenditure reports and valuation of the building plus the land were solely done by the appellant hence biased.
13. Learned counsel blamed the appellant for single handedly taking responsibility and managing plot number 116 Bulla Jamhuria wherein he collected rent without sharing with other beneficiaries. That the foregoing notwithstanding, the appellant did not prove nor produce any evidence in support of his allegation and therefore his claim was unverified.
14. On whether the appeal is merited, it was urged that the determination by the trial court was not only fair but also just as the same ensured that each beneficiary was catered for. This court was therefore urged to find and uphold the determination by the Kadhi.
15. On costs, it was urged that pursuant to section 27 of the *Civil Procedure Act*, costs of and incidental to all suits shall be in the discretion of the court but as a general rule, costs follow events. It was their case that they be awarded costs of the proceedings herein.
16. This being the first appellate court, it is thus bound to reconsider, re-evaluate and re-assess the evidence tendered before the trial court and arrive at an independent determination and or conclusion without losing sight of the fact that the trial court had the advantage of seeing and listening to the witnesses testify to be able to assess their demeanour. In *Abok James Odera t/a AJ Odera & Associates vs John Patrick Machira T/A Machira & Co Advocates* [2013] eKLR, the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
17. It is worth noting that, Prior to the hearing, the parties consented that plot No. 2242 Duse be sold for the benefit of the beneficiaries; plot in Barwaqo be transferred to Habiba Sheikh Yunis which eventually was to be sold and the proceeds shared equally and in accordance to the Islamic law among the beneficiaries; farm in Jira, documentation was to be provided within a period of a week; the farm in Takaba, there existed a dispute between the beneficiaries with the county government of Mandera. It followed therefore that the hearing conducted by the Kadhi was in reference to plot 116 Bulla Jamhuria.
18. The appellant in laying out his case urged that his father, prior to his death had built three old semi-permanent rooms which had since collapsed. That the same were built using dis, local materials. That the said rooms thereafter collapsed thus prompting him to build other rooms which have since elevated the value of plot 116 Bulla Jamhuria. It was his case that noting that the respondents were away, he could not consult with them on the decisions pertaining to improving and building and /or constructing new rooms on the suit land. It was his testimony that there were funds owed to the estate by several tenants to wit: Maalim Alio, Abdia Ali, Seinab Abdullahi, Yarey Kullow, Abdia Dhertow, Issack Sukar and Habiba Mohamed.
19. He stated that he accepted the proposal by the scholars who had intervened but desired that he collects the rent personally as opposed to Kadhi as had been directed. That Some of the developments that he had initiated in regards to the subject property were related with connection of electricity and water



and subsequent utility bills arising therefrom, payment of land rates and rents and further improving and/or developing the said land. He therefore urged the court that he be compensated his dues before the state could be distributed.

20. In opposing the application, the 1<sup>st</sup> respondent, Ali Sheikh Yunis testified that the deceased before his death had directed that a room situated at plot 116 Bulla Jamhuria be donated to the widow, Habiba Osman Ali and another room to his only daughter, Habiba Sheikh Yunis. That plot 116 Bulla Jamhuria had seven shops, three rooms and store, one store which were built by the tenants as was the norm in Mandera. It was his case that he had received three months proceeds from the rent of the said houses since the deceased passed on. That previously, the elders had made a proposal to them to compensate the appellant his expenses as he (appellant) had improved the buildings. He sought for prayers that the appellant be made to account for all the amount received in terms of rent from the said houses and further, that he be evicted from the said premises.
21. The 2<sup>nd</sup> petitioner, Siyad Sheikh Yunis stated that the disputed rooms were built by his father. That upon coming of age, he requested the appellant to hand over to him two rooms which suggestion the appellant turned down. He went further to state that the chief and some of the elders tried to intervene urging that they let the appellant raise his children on the disputed plot but they declined the request.
22. It was his case that he was not aware whether the houses previously on the suit land were destroyed or got demolished and further, he was not consulted before the new shops on the suit land were erected. It was his evidence that the appellant did not show any proof of the alleged sums that he used in the process of developing and/or improving the estate of the deceased. He urged the court to issue eviction orders against the appellant urging that given that he was the youngest sibling he was well suited to inherit the property.
23. The 3<sup>rd</sup> respondent, Issack Yunis testified that prior to filing the suit herein, elders gave six houses to the appellant while the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents were given two rooms each. That the petitioner had requested to be added one room on top of the six and so, the elders advised that they be given Kes. 8,000,000/- as an opportunity cost. That after two weeks, they did not receive the said Kes. 8,000,000/- thus prompting them to file the suit herein before the Kadhi's court. It was his evidence that each of the beneficiaries should get his or her rightful share of the estate as the appellant had solely benefitted from the estate since the death of their father.
24. The 4<sup>th</sup> petitioner, Habiba Sheikh Yunis testified that the appellant and Ali Sheikh Yunis used to live on the suit land. She stated that she had given the appellant her one room given that she was working and further, was living in El Wak. She stated that there was a dispute between the appellant and Ali Sheikh for the reason that the appellant used to receive rent including from a room meant to be hers.
25. It was her evidence that the previous structures had been demolished and thereon, new ten rooms built sometime in the year 2010 from where the appellant was receiving rent in the amount of Kes. 500,000/-. She equally clarified that her previous room was demolished and instead expanded into two shops. That when she demanded her share from the appellant, he told her that upon her retirement, he would give her some money which promise was not honoured.
26. She further told the court that elders tried to convince them to relinquish their rights over the suit land to no success. Consequently, the matter was escalated to the Kadhi for determination.

#### **Kahdis' opinion.**

27. When the matter came up for hearing, the court sat with Kadhi Hassan Daffa (SRK) and Kadhi Thulkif W. Karanja (SRK) as assessors pursuant to Section 65(1) (c) of the *Civil Procedure Act*. After



carefully considering the grounds of appeal against the record of appeal; the honourable Kadhis rendered themselves as follows; the estate of the deceased had no liability at the time the deceased died hence no claim can be made by the appellant against the estate; that the appellant committed acts of intermeddling with the estate by unilaterally undertaking repairs on the estate property without consent from the other beneficiaries hence no claim can be made against the estate to recover his illegal expenditure; the appellant failed to account for the benefits (rent earned) from the houses comprising the estate for 26 years;

28. In conclusion, the honourable Kadhis held that; Allegations to attribute a debt to the deceased's estate which the deceased never incurred is against Islamic law; the unilateral act of putting up structures on the deceased's land was against Islamic law of succession.; the appellant shall forfeit his claim and let the estate to be distributed in accordance with the Islamic law; that the land be valued by a mutually agreed valuer and beneficiaries share the estate.

### **Analysis and determination.**

29. I have considered the record of appeal, grounds of appeal and submissions by both parties. In my view, this court has been called upon to determine the following issues:
- i. Whether the appellant legally developed building structures comprising the estate.
  - ii. Whether the appellant's development of the estate amounted to intermeddling with the estate
  - iii. Whether the expenses incurred by the appellant if any should be refunded by deducting from the estate before distribution.
30. On the first issue whether the appellant incurred expenses in developing the property in question, I note that the appellant attached valuation report by Shukri Osman Consulting Associates which report valued the improvements including site works at Kes. 6,695,000/-. Additionally, from the photos attached in the report, it was clear that the buildings erected on the suit land, Plot No. 116 Bulla Jamhuri were modern in nature and thus could not be compared with the old buildings previously erected on the suit land. That claim was confirmed by, Habiba Sheikh Yunis, the 4<sup>th</sup> respondent in her testimony also stated that the structures that existed there before were demolished and new rooms, ten in number constructed.
31. She further stated that her previous structure/room was demolished and thereafter, the same was reconstructed to bring about two shops/rooms. From the evidence adduced herein in totality, it is clear that indeed the appellant had improved the estate of the deceased.
32. There is no contestation that the estate had no liability by the time the deceased died. There is no dispute that the old structures constructed by the deceased were demolished unilaterally by the appellant to pave way for construction of new structures. It was also not contested that the rest of the beneficiaries did not contribute towards the aforesaid improvement nor were they consulted.
33. Was the improvement legally done? The respondents are agitated by the fact that the appellant did not consult anybody. There was no order from the court or by consensus of beneficiaries for the appellant to alter or change the status or value of the estate before confirmation of the grant. The act of the appellant amounted to intermeddling with the estate which is a criminal act. Section 45 does provide as follows;

“. No intermeddling with property of deceased person



1. 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 purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
  2. Any person who contravenes the provisions of this section shall-
    - a. be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
    - b. be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”
34. In the case of *In re Estate of John Wekesa Wafula alias Bengi (Deceased)* (Probate & Administration E016 of 2023) [2024] KEHC 675 (KLR) (31 January 2024) (Ruling) Neutral citation: [2024] KEHC 675 (KLR) the court had this to say;
- “As the Respondents have admitted selling a portion of the estate, I find that they are guilty of intermeddling in the estate. They have no capacity to pass any interest in land to the alleged purchaser since there is no confirmed grant. It seems they have been misled by the alleged clan deliberations to go against the law yet the clan has no powers to distribute property of the deceased herein as that is a preserve of the courts. The Respondents must now be called to heel and warned to stop intermeddling with the estate of the deceased forthwith. The Respondents must wait for the grant to be issued to the petitioners and that all the beneficiaries will participate during the confirmation of the grant. An order for the preservation of the assets is appropriate at this state so as to ensure that they are not dissipated and to ensure that they are available for distribution to the beneficiaries once the grant is confirmed.”
35. Since no grant had been issued to the appellant, he cannot purport to have exercised the rights of an administrator under section 83 of the [Law of Succession Act](#) which provides;
- “83. Duties of personal representatives Personal representatives shall have the following duties—
- a. to provide and pay, out of the estate of the deceased, the expenses of a reasonable funeral for him;
  - b. to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;
  - c. to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);
  - d. to ascertain and pay, out of the estate of the deceased, all his debts;
  - e. within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
  - f. subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of



this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;

- g. within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration.
  - h. to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
  - i. to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.
36. On whether the said expenses incurred by the appellant should be deducted from the estate before the distribution, it is trite that vide section 47 of the LSA and Rule 73 of the Probate and Administration Rules, this Honourable Court has powers to protect and /or make any order in regard to the estate of a deceased person. [ Also see *Millicent Mbatha Mulavu & Another v Annah Ndunge Mulavu & 3 Others* [2018] eKLR].
37. It is not lost to this court that the appellant was faulted for single handedly taking responsibility and managing plot number 116 Bulla Jamhuria wherein he collected rent without sharing with other beneficiaries. The same was supported by the fact that previously, the Kadhi had directed that the income from the said property be shared amongst the beneficiaries herein, which suggestion, the appellant was not comfortable with. The said allegations were not controverted by the appellant in any way.
38. It therefore follows that the appellant deliberately denied the other beneficiaries' access to the income of plot number 116 Bulla Jamhuria for over 24 years. The appellant cannot be allowed to ride on a criminal act which is intermeddling to the detriment of other beneficiaries. He was not able to account for the rent collected from the estate property since 1994. To allow the appellant to dictate terms of compensation in respect to an illegal act, will amount to disinheriting his siblings through the back door in the event they are not able to refund what was illegally spent.
39. Having noted that this court is possessed of the powers to protect the estate of a deceased person, it is clear that if intermeddling is allowed, the likelihood of the innocent beneficiaries being prejudiced by having their shares affected by reduction is real. In this regard, it is for the purposes of preserving the social fabric, cohesion and peaceful co-existence or bring an end to disputes between family members who are beneficiaries to estates that the law restricts, indeed prohibits any dealings with an estate until the grant is confirmed.
40. As a consequence of the foregoing, it is my view that the appellant approach this court with unclean hands. I say so for the reason that he is keen on receiving the amounts he spent in improving the estate of the deceased but not willing to account for his actions towards the very estate he is making claims against. [ Section 45 of the LSA and also the case of *Re estate of John Gakunga Njoroge* [2015] eKLR]. In nutshell, I do not find merit sin the appeal. The appellant should have graciously taken the offer made by the Kadhi rather than gamble.
41. As a consequence of the foregoing, the orders that are commendable to me are as follows:



- i. The appeal herein is dismissed for want of merit.
- ii. The kadhi's judgment is upheld to the extent that the estate comprising jira Baraqwo 011 and plot no 2242 Duse shall be shared out as per the Islamic law pursuant to the consent agreement entered before the trial court
- iii. That the appellant is not entitled to any refund for his illegal acts of intermeddling with the estate save for what the beneficiaries may voluntarily be willing to refund or as directed by the Kadhi in the impugned judgment
- iv. That plot number 116 Bulla Jamhuria be valued by a mutually agreed valuer and then be sold and proceeds therefrom be shared out amongst the listed beneficiaries in accordance with the Islamic law.
- v. That during the pendency of the valuation and sale exercise, rent accruing from the property be shared out in accordance with the Islamic law.
- vi. That this being a family matter each party to bear own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 7<sup>TH</sup> DAY OF MARCH 2025**

**J. N. ONYIEGO**

**JUDGE**

