



REPUBLIC OF KENYA



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**Issack v Hared & another (Civil Appeal 8 of 2019)
[2025] KEHC 4660 (KLR) (10 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4660 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CIVIL APPEAL 8 OF 2019**

**JN ONYIEGO, J
APRIL 10, 2025**

BETWEEN

OMAR ABDI ISSACK APPELLANT

AND

MALEBO HARED 1ST RESPONDENT

FATUMA HASSAN 2ND RESPONDENT

*(Being an appeal against the Judgment of Hon. M.
S. Hassan (PK) delivered on 21-06-2025 Garissa)*

JUDGMENT

1. The proceedings herein relate to the estate of Abdi Issak Hassan (deceased) who died sometime in the year 1963 leaving various properties to wit: livestock, water dams, a vehicle and three plots in Garissa. In the petition dated 06.04.2017, it was averred that the deceased was survived by the following persons: Halima Kuter Abdulle, Malabo Hared, Fatuma Abdullahi and Fathuma Hassan (widows) and children Bishar Abdi Issak, Fatuma Abdi Issak and Kaltuma Abdi Issak, Yussuf Abdi Issa, Asha Abdi Issack, Omar Abdi Issack, Abdirahman Abdi Issack, Gini Abdi Issack, Zeinab Abdi Issack, Mohamed Abdi Issack, Gutho Abdi Issack, Garan Abdi Issack, Issa Abdi Issack, Sahan Abdi Issack, Hindiya Abdi Hassan, Aden Abdi Issack and Moge Abdi Issack.
2. The petitioner also averred that the deceased also left the following property in the hands of Malabo Hared and Fatuma Hassan, the respondents herein as trustees to distribute the same to his entire beneficiaries according to the Islamic law. The properties were listed as the following:
 - i. 2360 cattle.
 - ii. 1650 goats and sheep.



- iii. 30 donkeys.
 - iv. 150 camels.
 - v. 2 water dams.
 - vi. 371 cattle as gift to his children.
3. The petitioner averred that despite having financial interest in common over the property together with other children, the respondents locked them out of the property and have been using the property while the petitioner and his siblings are living in abject poverty. That despite several pleas and demands from the petitioner and his siblings, the respondents have refused and/or declined to share the property. Additionally, that the estate had no liabilities or debts at the time of the death of the deceased herein and if at all there were, the same had been settled.
4. The petitioner urged the trial court to grant the following orders:
- i. Determination of the shares of each beneficiary in accordance with the Islamic shariah.
 - ii. Distribution of the deceased's estate in accordance with the Islamic shariah.
 - iii. Order compelling the respondents to file in this court full and accurate statements of accounts of income received from the estate.
 - iv. Any other order or relief that this Honourable Court deems fit and just to grant; and
 - v. Costs of this suit.
5. In response, the 1st respondent through the Firm of Hassan Bulle & Co. Advocates filed a replying affidavit sworn on 25.04.2017 deposing that she was a wife to the deceased and therefore, a beneficiary of the estate. That she has been a pastoralist and was even during the lifetime of the deceased. It was her case that the petitioner was not born at the time the deceased herein passed on and the petitioner's mother, her co-wife and a resident of Garissa had been in charge of the deceased's properties. She further stated that the petitioner welcomed her son and afforded him a room and then suggested that they take the remaining 30% of the animals to the deceased's ranch in Voi where other animals were.
6. She averred that in the year 2005, the petitioner threw her son out and refused to acknowledge receipt of her 30% cattle which he had received thus treating the same as a rental expense. She further averred that they bought a donkey cart which they used to fetch firewood for their maintenance. That the petitioner took charge of the deceased's estate comprising of, five plots in Garissa, Voi ranch containing 100 cattle, 150 camels and 400 goats and a lorry unlawfully. She blamed the petitioner for misusing the estate unlawfully and further, that he sold a property at Bulla Suna. That the current petition was clearly an abuse of the court process and therefore, the same ought to be dismissed.
7. The petitioner/appellant filed a further affidavit sworn on 04.07.2017 as a rejoinder to the response by the 1st respondent thus deposing that the respondents did not deny the fact that they took away the deceased's property hence disinheriting the rest of the beneficiaries. That no animals were taken to the Voi ranch or any other place. It was averred that to the contrary, the Voi ranch only came into existence in the year 2002.
8. He generally denied the allegations by the 1st respondent and further averred that by the time the deceased passed on, Garissa was very bushy and therefore, it was not possible that the deceased could have owned the alleged plots. He stated that the cattle in Voi ranch were co-owned between him and Hassan Mohamed Amin and that the goats kept there were bought from his brother Moge Abdi Issack.



Further, that the deceased did not leave any lorry but a land rover which was later repossessed for non-payment of the balance owed.

9. During the hearing, PW1, Osman Abdi Issack, the appellant herein testified that he was born in the year 1964 and that his dad died in the year 1963. He stated that the deceased was survived by four wives and that his father died before he was born. He told the court that the 1st wife Halima Guret Abdille had seven children to wit: Kadija, Bishara, Fatuma, Asha, Yussuf, Omar Abdi and Kaltuma; the 2nd wife, Malabo Haret had seven children to wit: Gini, Zeinabu, Garan, Gutho, Sahan, Mohamed and Issa; the 3rd wife, Fatuma Hassan had three children to wit: Hindia, Adan and Moge while the 4th wife Fatuma Abdullahi had one son by the name of Abdirahman Abdi Isaack.
10. He stated that two families, Malabo Haret and Fatuma Hassan lived in the rural area while the other two families lived in Garissa lived in two different plots. It was his testimony that upon the death of the deceased herein, Fatuma Hassan and Malabo Haret went to Somalia with the livestock. According to him, he was not yet born at that time but instead, he was allegedly told that Malabo and Fatuma Hassan left with 2700 cattle, 150 camels, 1600 sheep and goats and some donkeys.
11. That he knew about the livestock as an old man by the name of Uway Ibrahim who is also his relative informed him that he counted the livestock during the payment of zakat. The deceased also left two dams at Afmadow in Somalia. According to him, the livestock have since multiplied yet at the return of the respondents in the year 2000, they only brought along 30% of the livestock.
12. It was his evidence that he heard that the respondents bought houses in Kismayu in as much as he could not verify the same. He conceded that the deceased had two plots in Garissa and therefore, upon his demise, the two families took ownership of the said two plots as the respondents took the livestock.
13. PW2, Abdikarim Mogge, a former councilor of Nanigi ward, Tana River County testified that the petitioner called and informed him of a dispute involving the estate of the deceased. According to him, he was not well versed with the affairs of the estate and that despite living at Jaradende with Moahmed Abdi Mogge and Yussuf, he only remembered that the number of the cattle was 100 but he did not know where the said cattle came from. On cross examination, he stated that he did not know the deceased nor was he aware of the extent of his estate.
14. PW3, Hassan Adan Mohamed testified that he knew the deceased and that he estimated his cows to be about 1000, 1500 goats as well as camels in as much as he did not know the number. He averred that the camels were for production and others for breeding as the deceased was a prominent businessman. He further testified that the deceased had two families in Garissa and that he was amongst the richest people at that time owning vehicles and two plots in Garissa.
15. PW4, Adan Hussein Ali testified that sometime in the year 1988, Yussuf Abdi and Mogge met at a livestock market where Yussuf told him to go to Liboi and get some livestock. That while at Liboi, he came to know that Mogge had 6 donkeys and 330 cattle inclusive of 30 calves. It was his evidence that he did not know Yussuf's cows. That he hoofed the cows from Liboi to Modikar and thereafter, together with Yussuf and Mogge, they drove the cows to Tulia and got paid Kes. 4,000/-. On cross examination, he stated that he was not know what the case was all about.
16. PW5, Abdi Hilowle stated that he knew Yussuf Abdi Issack. That sometime in the year 1989, Yussuf called him to trek his cattle from Somalia to Tana River but he declined. That he subsequently trekked animals to Tulla and got paid Kes. 1500/- for the service. He stated that he trekked 420 cattle with 4 donkeys.



17. On cross examination, he stated that he was not aware of the dispute between the parties herein nor was he aware of the deceased, his wives and the number of children he had. On re-exam, he stated that he was tasked by Yussuf to move the livestock and the said Yussuf told him that the livestock belonged to Mohamed Abdi Issack. That the said Mohamed Abdi Issack received the said livestock.
18. PW6, Osman Kansi Godana stated that in the 1990's he worked for Mogge as a herder. That he herded 330 cattle and 285 goats for a period of six months.
19. PW7, Yusuf Abdi Issack recalled that he was three years when the deceased passed on. That the deceased had four families and his estate comprised of livestock which were kept by the respondents and two plots which were situated in Garissa at the Agricultural Development Corporation (ADC) farm. He stated that the deceased also had dams in Somailia and the respondents left the dams during the emergency period. That the number of livestock was 2365 as told by Uway Ibrahim.
20. According to him, the deceased had 1600 goats and 40 donkeys. That the families in Garissa had the plots while the respondents had the animals. He told the court that Mogge was the son of Fatuma Hassan while Mohamed was the son of Malabo. He stated that Mogge had requested him to assist him in finding a person who could drive the cattle to modikar. That he approached Aden who agreed to do the work at Kes. 4,000/-. That the livestock were trekked to Modikar and thereafter to Tulla. He further approached a kadhi in Afmadow who identified the people who bought the dams.
21. He further stated that his mother is Halima Guter and he was ready for the estate of the deceased to be distributed but only if the respondents account for the part of the estate that they have. On cross examination, he conceded that his late father had three plots in Garissa and the rent proceeds were about Kes. 40,000 per month and that they benefitted from the said rent.
22. That all the heirs and beneficiaries have the right to inherit from the livestock that were taken and consequently returned from Somalia. That the total value of the said livestock was approximately Kes. 12 million shillings. On re-exam, he stated that the livestock were taken to Somalia sometime in the year 1963 and that in the suit property that they occupy, some of the rooms were constructed by the deceased and some, by his mother.
23. PW8, Gabb Hafow Mohamed testified that he never saw the deceased in as much as he heard and stayed with his children. That he knew Mohamed Abdi Issack and Mogge as they had cattle, goats and a dam. That they shifted from Somalia and further, they sold to his father the dam at Kaluwale before his dad resold the same. On cross examination, he stated that he came from Afmadow, Somalia and that he heard that the deceased had three families but he wasn't very sure of the same. He said that he used to hear that the family of Abdi Issack used to own livestock but not any other property.
24. The petitioner closed his case and thereafter, the respondents presented their case as follows:
25. DW1, Haret Malabo testified that Omar the petitioner herein was not yet been born at the time the deceased passed on. That the deceased was a business man and that he left about 20 cattle for reproduction and some livestock for business. She also averred that the livestock perished due to famine. That the deceased also had four plots and two cars. On cross examination, she stated that she lived in the rural area as a pastoralist but after the livestock perished, she moved to town. She denied ever being in Somalia or owning a property in Somalia. She stated that the family had never sat down to discuss inheritance in reference to the estate of the deceased.
26. DW2, Fatuma Hassan testified that she was the 4th wife of the deceased. That the deceased died before the petitioner was born and that the properties of the deceased comprised of cattle in the rural area and 4 plots in Garissa town. She averred that the deceased had livestock for business in as much as she



could not remember the total number. She stated that one of the plots belonging to the deceased was occupied by Fatuma Abdullahi (deceased) while another plot was occupied by Halima Guter, the 3rd plot situated near Jaribu Primary School was also occupied by Halima Guter. The 4th plot was a hides and skin store near the G.K. Prison in Garissa.

27. That the plot near Jaribu School comprised of temporary rooms which were rented. That at the time of the death of the deceased, her eldest child was 6 years old. On cross examination, she stated that she has since remarried and bore three children. That one plot with permanent rooms is occupied by the petitioner while the second plot is occupied by Fatuma's son and Abdirahman and Halima occupies the 3rd plot near Jaribu School.
28. DW3, Abdi Mohamed, a cousin to the deceased stated that when the deceased died, he left plots, livestock and vehicles. That the plots were four in number situated in Garissa. The 1st plot was situated near Jaribu Primary School, the 2nd plot is a store in Bulla Sheikh near G.K. Prison, the 3rd plot is occupied by Halima Guter and the 4th plot is situated near Jamia mosque.
29. DW4, Ahmed Sheikh, a relative of the deceased testified that he was married to Fatuma Abdullahi after her late husband passed on. That the deceased left four plots and that he knew where all were located. That three plots are used by Halima and her family while the second one was occupied by Fatuma Abdullahi and the last plot by Abdirahman. On cross examination, he stated that he lives in the suit property near Mzalim and that he married Fatuma eight years after the demise of the deceased herein.
30. It was his testimony that one of the plots comprising two rooms was situated near anti-shifita camp while the second one occupied by Halima was near Bulla Sheikh serving as a store for hides and skins., That the 3rd plot is occupied by Halima Guter and the fourth plot is where he lives. That Fatuma Abdullahi passed on and the livestock also perished. That the heirs did not inherit nor share the properties.
31. DW5, Dolal Ibrahim, nephew to the deceased testified that he knew the deceased had four plots in Garissa and that he could easily identify the same. That he also had livestock in as much as he could not remember the number of the said livestock.
32. After hearing both sides, the learned Kadhi was of the view that a court exists to do justice and that there was no basis to deny the families of the respondents their rightful shares out of the estate of the deceased.
33. Upon conclusion of the case, the learned Kadhi rendered his decision on 18.06.2019 holding that;
 - a. Each widow thus Halima Guter, Malabo Haret, Fatuma Hassan and Fatuma Abdullahi to get 1/8 share of the total estate; which comprises of plots No. 79, 1/79 in the name of Abdirahman Abdi and the 3rd to be identified by the petitioners. All the plots are situated in Garissa town.
 - b. Each son of the late Abdi Issak to get twice the share of a daughter from the estate of Abdi Issack which comprises of Plots No. 79 situated in CBD, Garissa, Plot No.1/79 in the name of Abdirahman Abdi Isaak and the 3rd plot to be pinpointed by the heirs after valuation of the current value.
34. Aggrieved by the said judgment, the appellant proffered a memorandum of appeal dated 01.07.2019 on the grounds that:
 - i. The Honourable Kadhi's finding totally ignored the totality of the evidence presented before it; the decision of the Honourable Kadhi was primarily based on speculation, an erroneous assumption and outright biased reasoning as against the appellant leading to inter alia a



conclusion that property that does not form part of the estate of the deceased be distributed to the deceased's beneficiaries.

- ii. The Honourable Kadhi erred in giving credence and/or legitimacy to the respondent's unfounded allegations that the deceased left behind certain properties in the care and control of the appellant and his family; such legitimacy was accorded in total disregard of the fact that the said properties are registered in the name of one Abdirahman Abdi, who has absolute and indefeasible title.
 - iii. The Honourable Kadhi erred in reaching a finding that totally ignored the fact that there was clear and unequivocal admission from the 1st and 2nd respondents that they, upon the death of the deceased, took over the livestock belonging to the said deceased without proper administration.
 - iv. The Honourable Kadhi erred in reaching a finding and a conclusion whose net effect is to scuttle the proprietary rights of the third parties whose property does not form part of the deceased's estate.
 - v. The Honourable Kadhi erred in law and in fact in failing to analyze, contextualize and appreciate the evidence adduced by the appellant and the totality of the claim before him. The judgment fails to address the issues raised in the petition holistically and comes out as haphazard.
 - vi. The Honourable Kadhi erred in law and in fact by not considering documentary and witness evidence testimony that was adduced and proceeded to decide the case on fuzzy and very unsound legal principles.
 - vii. The Honourable Kadhi erred by failing to act as an independent arbiter as envisaged under the constitution; the language of the Kadhi and ultimately the decision reached clearly shows that he was biased against the applicant.
35. The appellant sought for orders that:
- i. The judgment and decree of the Honourable Kadhi M.S. Hassan (Principal Kadhi) dated 18.06.2019 be set aside in its entirety.
 - ii. This Honourable court do allow the prayers sought by the appellant in the petition dated 06.04.2017 filed before the lower court.
 - iii. The appellant be allowed costs of this appeal and costs of the petition in the Kadhi's court.
 - iv. That any other order that the court may deem fit to grant.
36. The appeal was canvassed by way of written submissions.
37. The appellant via submissions dated 29.06.2022 submitted under the following heads:
- i. Whether the deceased owns properties known as Plot No. 79, Plot No. 1/79 and 3rd plot to be pinpointed by the heirs all situated in Garissa town.
 - ii. Whether the Kadhi considered the totality of the evidence before him.
 - iii. Whether the Kadhi was right to find that the appellant's property should be distributed to the beneficiaries of the estate.



38. On the first issue, it was submitted that this being a succession matter, the jurisdiction of the court was to distribute the property of the deceased. That the court was duty bound to distribute only the property legally belonging to the deceased that could be distributed to the beneficiaries. It was urged that the estate of the deceased comprised of a specified number of livestock and dams as captured in the petition and therefore, it's quite baffling how the Kadhi arrived at his decision to distribute properties that were not part of the estate of the deceased. Reliance was placed on the case of Priscill Ndubi and Zipporah Mutiga vs Gerishon Mbui, Meru succession Cause No. 720 of 2013 where the court stated that the primary duty of the probate court is to distribute the estate of the deceased to the rightful beneficiaries.
39. It was contended that the properties erroneously distributed by the Kadhi as part of the deceased's estate actually belongs to the appellant as demonstrated by the certificates of title dated 31.12.2018. Further, it was urged in regards inter alia sections 24 and 25 of *Land Registration Act* and the case of Propowa Company Limited vs Justus Gatondo & Another [2020] eKLR where the court recognized the sanctity of certificate of a title as a prima facie evidence of ownership.
40. On the second issue, it was urged that the trial Kadhi erred by failing to scrutinize evidence tendered before it as no single document was produced to prove that indeed the deceased owned the alleged properties listed in the Kadhi's judgment. That all witnesses testified that the deceased owned livestock and the respondents took charge of the same. The said livestock formed part of the estate of the deceased and the same was never distributed to the appellant and other beneficiaries. Further, the respondents failed to adequately account for the same. That the respondents having failed to account for what they have had and used since the deceased's demise in 1963, claiming for more assets they mistakenly believed to be the deceased's cannot be allowed to stand.
41. In reference to the third issue, it was submitted that as already demonstrated, no evidence was led to illustrate the deceased's purported ownership of the parcels of land. That noting that there exists a dispute in terms of ownership of the properties and having in mind the jurisdiction of the Kadhi's court, the Kadhi acted beyond his jurisdiction to deal with ownership dispute of the subject property. This court was further reminded that its jurisdiction was invoked as an appellate court and as such, it cannot sit to determine a dispute on ownership of the suit properties. This court was therefore urged to allow the appeal as prayed and condemn the respondents to pay costs.
42. On the other hand, the respondents in their written submissions dated 28.10.2024 isolated two issues for determination as listed hereunder:
- i. Whether the properties known as Plot No. 79, Plot No. 1/79 and Plot No. 1/154 all situated in Garissa town form part of the Estate of the Deceased?
 - ii. Whether the Memorandum of Appeal raises sufficient grounds to warrant the setting aside of the Judgment and Decree of the Kadhi's Court dated 18th June 2019?
43. On the first issue, the respondents reiterated that when the appellant filed a petition before the Kadhi's court, he listed the properties of the deceased at paragraph 5 to include 3 plots in Garissa town. That this position was also captured by most of the witnesses who gave evidence before the Kadhi's Court. It was stated that in reference to the judgment by the Kadhi, the estate of the deceased comprised of plot no. 79, plot 1/79 in the name of Abdirahman Abdi and the 3rd plot which was to be identified by the beneficiaries, all situated in Garissa town.
44. That the 3rd Plot has since been identified as Plot No. 1/154 which is one of the Deceased's properties that the Kadhi's court visited during the pendency of the Petition. It was urged that the appellant, at that time, did not raise any objection to the properties known as Plot No. 1/154 and Plot No.



- 1/79 being identified as the property of the Deceased forming part of his Estate. That the move by the appellant to acquire title for the property Plot No. 1/154 and Plot No. 1/79 in his own name on 31.12.2018, before the Kadhi's Court delivered a judgment and further in failing to bring this to the attention of the Kadhi's court was an afterthought and the same was done in bad faith hence as an attempt to arrest the decision of the Kadhi's Court on distribution of the Estate of the Deceased.
45. It was submitted that the three plots being Plot No. 1/154, Plot No. 1/79 and Plot No. 79 all form part of the Estate of the Deceased and ought to be divided amongst all the beneficiaries as rightfully held by the Kadhi's court.
46. That in pages 42 to 43 of the Record of Appeal, the Petitioner admitted that he and his mother took over the 2 plots of land in Garissa since the Respondents had taken the livestock. At page 43, the appellant admitted that at the time they took over the deceased's properties, the properties had not been registered and as such, the same amounted to intermeddling.
47. The respondents were appalled that letters of allotment were issued to the appellant's mother hence a product of intermeddling. It was contended that the entire transaction of how the properties were transferred to the appellant are damning. Counsel submitted that the act of the appellant's mother obtaining rights to the property through an alleged letter of allotment dated 18.09.1968 after 5 years following the deceased's death and thereafter confirmed by way of allotment letter from the town council dated 24.11.1982 for plot Registration No. GSA/79 measuring 100 x 100 was questionable. Further, it was contended that the transfer of the said plot on 8-04-1999 to the appellant by his mother, is also questionable. The land was subsequently transferred to Abdirahman Abdi Issak vide an Application for transfer dated 12.07.2011.
48. That the above transaction was in contravention of the Court order issued on 11.07.2017 restraining the appellant from changing ownership.
49. Regarding the second issue, it was contended that although the respondents did not produce documents of ownership to establish that the deceased owned those plots, oral evidence and Kadhis's site visit revealed that the plots in question were the deceased's properties.

DIVISION - Kadhi's opinion.

50. The Court heard the appeal herein with the aid of two Kadhi assessors pursuant to section 65 (1) (c) of the *Civil Procedure Act*, which provides for appeals to the High Court from original decree of a Kadhi's Court as follows:

“c) from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.”

51. For the hearing of this appeal, I sat with the Deputy Chief Kadhi S.H. Omar and Kadhi Fahad Ismail Mohamud (S.R.K.) of Garissa Law Courts. In his opinion, Kadhi S.H. Omar formed the view that the main issue for determination is whether the trial Kadhi disregarded evidence and misdirected himself in the distribution of the estate herein. It was his view that there are four rights associated with an estate of a deceased Muslim. That the same include settlement of the deceased burial expenses, settlement of the deceased debts, fulfilment of his legitimate will and the distribution of the residue among the legal heirs. He stated that according to the testimony of the appellant and equally the respondents, it was clear that indeed the deceased person left behind livestock which had since perished and a vehicle which was sold by the appellant's mother and plots No. 79, 1/79 occupied by Abdirahman and another plot to be identified by the heirs.



52. According to him therefore, the trial kadhi could not be faulted in as far as the extent of the estate is concerned for the reason that the evidence by all the parties informed his findings. In the same breadth, he noted that the kadhi erred by allocating each widow an eighth of the estate as the same ought to be an eighth of the estate be shared by all the widows. He urged that the appeal should partly succeed to that extent.
53. Kadhi Fahad Ismail Mohamud on the other hand fully concurred with his brother Kadhi.
54. In as much as this court is not bound by Kadhis S.H. Omar 's and Fahad Ismail Mohamud's findings, it is important to note that the court has considered their guidance in order to reach a logical conclusion to this matter.
55. This being the first appellate court, it is thus bound to reconsider, re- evaluate and re-assess the evidence tendered before the trial court together with the assessors' opinions and arrive at an independent determination without losing sight of the fact that the trial court had the advantage of seeing and listening to the witnesses to be able to assess their general demeanour. [See *Selle and another vs Associated Motor Boat Co. Ltd and others* (1968) E.A 123 and *Peters vs Sunday post limited* (1958) E.A 424].
56. I have considered the record of appeal, grounds of appeal, submissions by the parties and the assessors' opinions. In my opinion, the following issues are ripe for determination;
- i. What was the extent of the deceased's estate?
 - ii. Whether the distribution by the Kadhi was sound and legal.
 - iii. Costs.
57. It is important to note that Section 48(2) of the LSA provides that the Kadhi's court shall continue to have and exercise jurisdiction in relation to the estates of a deceased Muslim for the determination of inheritance in accordance with Muslim law and any other question arising under the Act in relation to such estates. [See the case of *Chelanga vs Juma KLR* (2002)].
58. The appellant urged that the trial Kadhi purportedly included his land as part of the estate of the deceased and proceeded to distribute the same. That the same was contrary to the law as he is the registered owner of the said pieces of land. From the evidence before the court, the petitioner in his exam in chief stated that the deceased had two houses in Garissa town and a 3rd plot at ADC (Agricultural Development Corporation) was grabbed by people. That their family occupied one plot and that their family remained with the plots in Garissa. He urged that they increased the number of rooms in the house where they lived at their expense and further, none of the heirs inquired about the plot which belonged to his mother and therefore, he disposed the same.
59. In the same breadth, in his statement dated 06.04.2017 and filed together with the petition, he stated that his father left behind four wives and 18 children and also the following properties: 2360 cattle, 1650 goats and sheep, 30 donkeys, 150 camels, 2 water dams, 371 cattle as gift to his children, 3 plots in Garissa town and a car.
60. The next question that this court needs to determine is whether the plots as already argued and listed by the witnesses belonged to the deceased. Could they be the same plots that the appellant urges that he owns? Having looked at the allotment letters, specifically, for Plot Numbers: 79 Garissa Township, 1/79 (BCR) Garissa County, Block 1/154 (BCR) Garissa County, I note that the same are in the name of the appellant, Abdirahman Abdi Issack. Of importance to note is the fact that 1/79 (BCR) Garissa



County, Block 1/154 (BCR) Garissa County were allotted to the appellant on 30.05.2016 while 79 Garissa Township was allotted to him on 26.04.1984.

61. The petitioner and as supported by the other witnesses stated that the deceased had plots in Garissa Township and further made reference to Plot Numbers: 79 Garissa Township, 1/79 (BCR) Garissa County, Block 1/154 (BCR) Garissa County during the hearing of the suit herein. It is important to note that the suit herein was filed in the year 2017 while as already shown the allotment letters and/or the certificate of lease show that the appellant was already registered as the owner of the alleged lands.
62. Indeed, all parties pointed out that the lands belonged to the deceased but no evidence was produced before the court to pinpoint the exact four pieces of land that were being referred to. No documentation was attached to prove that the deceased owned those properties. Even if we were to assume that the respondents are claiming a share on account of constructive trust which is not pleaded, the Kadhi's court could not qualify to determine the issue of trust save for the Land court
63. It is trite law that he who alleges must prove. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya, provides that:-Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
64. In *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:-As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.
65. In my view, the dispute is on the pieces of land as listed by Kadhi to wit Plot No. 1/154, Plot No. 1/79 and Plot No. 79 as forming part of the estate of the deceased. In essence, no evidence was provided at the time of filing the petition that indeed the said pieces of land belonged to the deceased. Of importance to note is the fact that the petitioner did not annex documents to show that the plots were owned by the deceased at the time of his death. Unless the applicant proves this, the dispute must be considered as purely land matter which should be filed in the Environment and Land Court as that is the Court with jurisdiction.
66. In *re Estate of Obedi Ndwiga Rubarita (Deceased)* [2021] eKLR the court stated that: -It is now trite that the primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries and which jurisdiction is over the net estate of the deceased being that which he was free to deal with during his lifetime. With respect to matters touching on title to and, and occupation of land, the proper forum ought to be the Environment and Land Court which is established under the *constitution* of Kenya 2010 and the *Environment and Land Court Act*, No. 19 of 2011. This court (High Court) has no jurisdiction to determine any disputes that centers on ownership, occupation and use of land. Further, the issue as to the ownership once raised in a succession cause, they must be resolved before such property is distributed. (See *In re Estate of Stone Kathuli Muinde (Deceased)* [2016] eKLR). The Applicant ought to have presented the instant issue before the court with competent jurisdiction which is the Environment and Land Court. [Also See *In re Estate of the Late Moses Cyprian Kimanjui Nguru(DCD)* eKLR.]
67. In my view, no evidence was presented before the court to show the extent of the deceased's person's estate for distribution before the Kadhi's court and as such, I find that it was not possible to specifically discern the extent of the deceased's estate.
68. From the foregoing, it is my finding that:



- i. The appeal herein is merited and the same is upheld.
- ii. Parties to seek necessary redress from a court with competent jurisdiction.
- iii. Should the ELC court find that the property in question belonged to the deceased, then the matter shall be mentioned before the kadhis court for appropriate distribution in accordance with the Islamic law.
- iv. In the event that the ELC finds that the disputed property belongs to the appellant, the kadhis court shall remove the said properties from the list of assets lined up for distribution.
- v. This being a family dispute, each party to bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 10TH DAY OF APRIL 2025

J. N. ONYIEGO

JUDGE

