



**Buya v Komora (Miscellaneous Application E001 of 2025)
[2025] KEHC 6615 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6615 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
MISCELLANEOUS APPLICATION E001 OF 2025**

JN NJAGI, J

MAY 15, 2025

BETWEEN

HADIJA MUMBO BUYA APPLICANT

AND

ESHA GHAMALOKU KOMORA RESPONDENT

RULING

1. The applicant has filed an application dated 17th January 2025 seeking for orders that the court makes an order for transfer of succession cause No. E004 from Hola Kadhi's Court to the High Court at Garsen for determination. The application is based on the grounds stated on the face of the application and supported by the affidavit of the applicant.
2. The grounds thereof are that the applicant was married by the deceased in the subject succession cause under Pokomo customary law while the respondent was the deceased's first wife under Islamic law. That the union between the applicant and the deceased was blessed with two children. That the respondent has filed a succession cause at Hola Kadhi's Court. That under Islamic law only a spouse validly married under Islamic law, Nicah, and legitimate children are entitled to inherit. That the jurisdiction of the Kadhi's court is limited to determining inheritance matters under Islamic law and does not have jurisdiction to adjudicate claims arising from customary law or questions of constitutional rights That the matter raises questions of customary law and constitutional interpretation which all fall under the jurisdiction of the High Court. That a hearing at the Kadhi's court may cause prejudice to the applicant and therefore a the transfer to the High Court will ensure that justice is done to both sides.
3. The application was opposed by the respondent vide her replying affidavit sworn on the
4. 14th March 2025 in which she averred that the parties involved in this matter confess the Islamic faith. That it is trite that matters of personal status, marriage, divorce and inheritance where all parties confess



the muslim religion fall within the jurisdiction of the Kadhis Court. That it is in the interest of justice that the case proceeds before the Kadhi's court as is the one seized of jurisdiction to determine the matter. That the application has not raised a proper ground for transfer to the High Court.

Submissions

5. The applicant submitted that the respondent excluded the applicant and her children in the succession cause that she filed at the Kadhi's court. She submitted that under Islamic law only spouses married under nicaH and children born to a woman in an Islamic marriage are recognized as heirs. That the respondent in paragraph 9 and 10 of her replying affidavit acknowledges that the marriage between the applicant and the deceased is not recognised under Islamic Sharia law.
6. It was submitted that under the Kadhi's Court Act the Kadhi does not have jurisdiction to determine matters involving inheritance under customary law. That Islamic law does not recognize the applicant as a spouse entitled to inheritance. That her children are not recognized as children of the deceased entitled to inherit from the estate of their father. That the High Court with its wide jurisdiction is best suited to resolve the dispute.
7. The applicant submitted that the jurisdiction of the Kadhi's court is limited to matters of Islamic personal laws of marriage, divorce and inheritance where both parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's court. The applicant made reliance on the case of *Genevieve Bertrand v Mohamed Athman Maawiya & another*, Malindi Civil Application No. 24 of 2013 (2014) eKLR where the Court of Appeal held that:
 - a. 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 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 Kadhi's Court.
8. It was submitted that the High Court has power under section 18 of the *Civil Procedure Act* to transfer a suit to a court that is competent to try it. Reliance was placed in the case of *John Mwangi Karanja v Alfred Ndiangui* (2011) eKLR where the court held that:

"It appears to me that transfer of suits from one court to another is essentially a procedural issue that has been elevated to the status of jurisdiction. If a suit finds itself in the wrong court, surely it is in the interests of justice and in the interests of all concerned that the suit be forwarded to the appropriate court with jurisdiction so that the issues in dispute can be properly and finally adjudicated. What prejudice would any party suffer in that event? After all, the overriding objective of the *Civil Procedure Act* and Rules is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act (section 1A (1)).The court itself is enjoined by subsection (2) of that section to seek to give effect to the said overriding objective in exercise of its powers under the Act or the interpretation of any of its provisions"
9. The applicant submitted that she has made a strong case for the transfer of the case to the High Court. That transfer of the same to the High Court will not cause prejudice to the respondent. That a transfer



is necessary to ensure that both the issues under Islamic law, civil law and succession law are addressed comprehensively, thus guaranteeing a fair and just resolution of the dispute.

10. The respondent in her submissions reiterated the averments of her affidavit that the Kadhi's court is the one with jurisdiction to determine the matter.

Analysis and Determination

11. I have considered the grounds in support of the application, the grounds in opposition thereto and the submissions tendered by the parties. The issue for determination is whether the application is merited.

12. The applicant seeks for the transfer of the matter from the Kadhi's Court to the High Court on the ground that the sharia law which is applicable at the Kadhi's court does not recognize her customary marriage to the deceased for purposes of inheritance nor does it recognize her children with the deceased for the said purpose. She submits that it is the High Court with its unlimited jurisdiction which in a better position to hear and determine the matter.

13. The jurisdiction of the Kadhi's Courts is established under article 170 of *the Constitution* of Kenya 2010 of which Article 170(5) provides that:

“The jurisdiction of a Kadhi's Court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.”

14. The above is replicated in section 5 of the Kadhi's Court Act, cap 11 Laws of Kenya which states that:

“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.”

15. In the case of *Genevieve Bertrand v Mohamed Athman Maawiya and another* [2014] eKLR the Court of Appeal in interpreting Article 170(5) of *the Constitution* stated the following:

“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.”

16. It is clear from the above that one of the factors which limits the jurisdiction of the Kadhi's Court is the choice of a party not to submit to the jurisdiction of the Kadhi's court. It is clear from the supporting affidavit of the applicant that she does not submit to the authority of the Kadhi's court. In my view a party who does not submit to the jurisdiction of the Kadhi's court has the option of taking the matter to the High court or Magistrates court by dint of section 47 of the *Law of Succession Act*.



17. The choice of a Muslim approaching the High Court where he/she does not submit to the authority of the Kadhi's court was emphasized by Muriithi J. in the case of R.B. & R.G.O. -Vs- H.S.B. & A.S.B. [2014] eKLR where he held that:

“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.

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.

18. It is then obvious that the court cannot compel a party to submit to the authority of the Kadhi's court if he/she does not wish to do so, even where a party is a muslim as is the case for the applicant herein. In Saifudean Mohamedali Noorbhai v. Shehnaz Abdehussein Adamji, Mombasa Civil Appeal No. 142 of 2005 (unreported) this Court said in part:

“Kenya Courts have held in past judgement 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.”

19. The High Court has power under section 18 of the *Civil Procedure Act* to transfer suits from subordinate courts in proper cases as follows:

“ 18. Power of High Court to withdraw and transfer case instituted in subordinate court

1. On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—
 - a. transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - b. withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—
 - i. try or dispose of the same; or



(ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or (iii) retransfer the same for trial or disposal to the court from which it was withdrawn.

ii. (2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.”

20. In view of the issues raised by the applicant in this application and considering that she is unwilling to submit to the authority of the Kadhi's court, it is my considered view that she has adduced sufficient grounds to warrant the transfer of the succession cause to the High Court for hearing and determination. Consequently, the application dated 17th July 2025 is allowed as prayed. I thereby order that the Kadhi's court Hala Succession Cause No.E004 of 24 be transferred to this court for hearing and determination. Each party to bear its own costs.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 15TH DAY OF MAY 2025

J. N. NJAGI

JUDGE

In the presence of:

Miss Timna holding brief for Miss Hadija for Applicant

Respondent: Absent

Court Assistant - Ndongye

