



**Rajab v Hamisi (Family Appeal E030 of 2024)
[2025] KEHC 7269 (KLR) (16 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7269 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E030 OF 2024**

**G MUTAI, J
MAY 16, 2025**

BETWEEN

SIMAKENI RAJAB APPELLANT

AND

MWANAJUMA HAMISI RESPONDENT

JUDGMENT

1. Before the court is an appeal filed by the appellant on 21st May 2024. The appeal is against the decision of the Hon Principal Kadhi, A M Mohamed, delivered on 9th May 2024 in Kadhi's Court Succession Cause No. E022 of 2024; Mwanajuma Hamisi vs Simakeni Rajab.
2. Vide a notice of preliminary objection dated 30th March 2024, the appellant objected to the jurisdiction of the Kadhi's court to hear and determine the succession proceedings. Her grounds for doing so were that:-
 - a. The respondent did not voluntarily submit to the jurisdiction of this court and therefore could not be compelled to litigate before the said court;
 - b. The respondent was in the process of filing a succession cause at the magistrate's court; and
 - c. In the circumstances, the petitioner's suit against the respondent in the Kadhi's court ought to be dismissed for lack of jurisdiction by the said court.
3. The preliminary objection was canvassed by way of written submissions.
4. The appellant filed written submissions dated 2nd April 2024, in which her counsel urged that, although the estate belonged to a deceased Muslim and despite both parties to the dispute being Muslims, the Kadhi's court lacked jurisdiction to hear and determine the matter, as the appellant had not submitted herself to its jurisdiction. Reliance was placed on Article 170 (5) of *the Constitution* of Kenya, 2010,



and the decision of the court in *Genevieve Bertrand v Mohamed Athman Maawiya & another* [2014] KECA 687 (KLR), where the court held that:-

“ 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.”

5. Counsel for the appellant urged that the submission has to be voluntary and could not be compelled. Reliance was placed in the decision of the court in the case of *R.B & R.G.O v H.S.B & A.S.B* [2014] KEHC 1027 (KLR), where it was observed that:-

“ 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. ”

6. Based on the fact that jurisdiction is everything, without which the court must put down its tools, as famously stated in the case *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR, counsel for the appellant prayed that the court below dismiss the succession petition.
7. The plaintiff, on the order, had prayed that the preliminary objection be dismissed, as what the appellant was doing amounted to an abuse of the court process. The submissions of the respondent were dated 17th April 2024.
8. Counsel for the respondent submitted that under Article 170(5) of *the Constitution* and Section 5 of the Kadhi’s Court Act, the Hon Kadhi had jurisdiction to determine the matter as all the parties were Muslims. At the same time, the estate belonged to a deceased Muslim.
9. The respondent’s counsel submitted that the preliminary objection did not raise pure points of law, as factual issues were under contestation and would have to be established.
10. He urged that, having submitted to the jurisdiction of the Kadhi’s Court, the proper procedure for the applicant to use was to make an application for the transfer of the suit under section 18 of the *Civil Procedure Act* to the appropriate court.
11. Upon considering the matter, the court below found that the preliminary objection raised did not raise pure points of law. The court also found that it had jurisdiction to hear and determine the dispute. Consequently, the court ordered that the matter before it proceed.
12. The appellant was aggrieved by the said decision and filed an appeal to this court. The grounds upon which the appeal is based are the following: -
 1. The learned Kadhi erred in law by ruling that he has jurisdiction to hear and determine the succession petition filed in court, contrary to the provisions of *the Constitution* of Kenya, which mandates that parties must willingly submit to the jurisdiction of the Kadhi’s Court.
 2. The learned Kadhi misinterpreted the constitutional requirement under Article 170(5) of *the Constitution* of Kenya, which stipulates that the jurisdiction of the Kadhi’s Court is dependent upon the consent of all parties involved in the matter.
 3. The learned Kadhi erred in fact and in law by misinterpreting the reply affidavit filed by the Appellant as a submission to the jurisdiction of the Kadhi’s Court. The affidavit clearly contested the jurisdiction of the Kadhi’s Court, and this misinterpretation led to an erroneous ruling.



4. The learned Kadhi failed to adequately consider and address the Appellant's objections regarding the jurisdiction, thereby violating the Appellant's constitutional rights to a fair hearing and due process.
13. The appellant also applied for a stay of proceedings pending appeal. The said application was granted
14. The appeal was canvassed through written submissions which were highlighted before the Judge and 2 Kadhis, the Hon Salim J Mwaito, Principal Kadhi, and Hon Wendo Shaban Wendo, Senior Resident Kadhi, on 28th November 2024.
15. The appellant's submissions are dated 4th October 2024. It was urged that the appellant was dissatisfied with the decision of the Hon Kadhi as he purported to assume jurisdiction in a matter where he didn't have it.
16. Ms Lugogo, learned counsel for the appellant, identified issues coming for determination as being: -
 - a. Whether the Hon Kadhi erred in assuming jurisdiction;
 - b. Whether the Hon Kadhi misinterpreted Article 170 (5) of *the Constitution* of Kenya, 2010;
 - c. Whether the Hon Kadhi misinterpreted the replying affidavit filed by the appellant; and
 - d. Whether the Hon Kadhi failed to address the appellant's objection.
17. Ms Lugogo submitted that the Hon Kadhi was wrong to assume jurisdiction without the appellant's express consent by way of submission to his Court. As she had done in the Court below, Ms Lugogo relied on the decision of the court in *Genevieve Bertrand v Mohamed Athman Maawiya & another* [2014] KECA 687 (KLR) and also *R.B & R.G.O v H.S.B & A.S.B* [2014] KEHC 1027 (KLR).
18. Regarding submission, it was urged that the appellant did not submit to the Kadhi's Court and the court was wrong to subject her to it. Counsel contended that the fact that the deceased was a Muslim and that the parties were Muslims did not mean that they had submitted to the court's jurisdiction. It was urged that submission could not be implied merely because she filed a defence or response.
19. She urged that the court was silent on the issue of submission to the jurisdiction of the court. She submitted that the court ought to have addressed itself to the said question. By failing to do so, the court did not properly adjudicate the appellant's jurisdictional concerns, and by not doing so, the court erred.
20. The respondent's submissions are dated 22nd November 2024.
21. Counsel for the respondent, Mr Said Mgupu, in his written and oral submissions urged that the court below had jurisdiction under section 5 of the Kadhi Courts Act and Article 170 (5) of *the Constitution* of Kenya. He submitted that the estate was that of a deceased Muslim while the parties hereto are all Muslims.
22. Counsel submitted that there was no proper preliminary objection before the court below as it was based on contested factual issues, such as whether the appellant was in the process of filing a succession cause at the magistrate court, which would have to be ascertained. That being the case, there was no proper preliminary objection before the Court below.
23. On the question of submission to the court, Mr Mgupu submitted that counsel ought to have filed an application under Section 18 of the *Civil Procedure Act* for the transfer of the case before the Kadhi rather than raising a preliminary objection. Counsel relied on the case of *Guyo Jarso Guyo v Republic* [2015] KEHC 3832 (KLR).



24. For the foregoing reasons, it was argued that the appeal should be dismissed, as it was tantamount to an abuse of the court's process.
25. I have considered the appeal and taken into account the view of the Hon Kadhis who sat with me as assessors. In my view, the issues are whether there was a valid notice of preliminary objection before the court below, whether the court below has jurisdiction to hear and determine the matter pending before it, and whether the appellant submitted to the jurisdiction of the Kadhi's Court. It would appear to me that in determining the foregoing questions, I would need to consider whether by filing a response, the appellant can be said to have submitted to the jurisdiction of the Kadhi's Court.
26. What amounts to a preliminary objection is well settled. The Court in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 stated as follows: -
- “So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
27. In the said case, Sir Charles Newbold P., stated that-
- “..... the first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse issues. This improper practice should stop.”
27. From the foregoing decision it is clear that for a preliminary objection to be properly raised the following conditions have to be satisfied: Firstly, the preliminary objection should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.
28. It would appear to me that the preliminary objection raised by the appellant in the court below was proper. It challenged the jurisdiction of the Kadhis Court to hear the matter on the ground that the appellant had not submitted to its jurisdiction. The objection wasn't based, as far as I can tell on contested facts and was capable of disposing of the petition.
29. Having determined the first issue, I must now turn to the second issue. I note that the Kadhis' Courts derive their jurisdiction from Article 170 (5) of *the Constitution* of Kenya 2010 and section 5 of the *Kadhis' Courts Act*. Article 170(5) of *the Constitution* states 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 in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's Courts.”



30. Section 5 of the Kadhi's Court Act, states: -

“ 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.”

31. The jurisdiction of the Kadhi's court is therefore limited to questions relating to personal status, marriage, divorce or inheritance, in proceeding where all the parties are Muslims and submit to the authority of the court. Article 170(5) of *the Constitution* of Kenya, 2010, gives the Muslims option of having their personal status disputes adjudicated by the Kadhis Courts or the High Court or any subordinate court. In *R.B & R.G.O v H.S.B & A.S.B* [2014] KEHC 1027 (KLR), E. Muriithi, J, held that: -

“ 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.”

32. Therefore, the jurisdiction of the Kadhi's court is determined by the existence of three factors namely; the subject matter of the claim or dispute, in this case is inheritance; the parties' Muslim faith, and the parties' submission to the jurisdiction of the Kadhi's Court. In my view these requirements are conjunctive; they must all be present for the Kadhi's Court to have jurisdiction.

33. 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, upheld the right of Muslim parties to choose either to file their personal status matters in the Kadhi's Court or in the High Court.

34. In his decision, Githinji, JA, in which Koome and Okwengu, JJA concurred held that: -

““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 Abdehussein 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.”

35. In Saifuden Mohamedali Noorbhai v. Shehnaz Adamji [2011] eKLR the Court of Appeal stated that:—

“Kenyan 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.”

36. In my view profession of Islamic faith is separate from the other equally valid and 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. Without submission by the parties the Kadhis Court cannot have jurisdiction. As with religion there can be no compulsion of any Muslim to submit to the Kadhi’s Court. I therefore find and hold that since the appellant did not submit to the Kadhi’s Court the said Court had no jurisdiction and the Court below should therefore have downed its tools.

37. With respect the learned Principal Kadhi does not appear to have addressed all the issues that were before him. Despite the fact that the issue of submission was raised by the appellant he did not consider it fully. In my view the fact that the appellant filed an objection does not mean that he submitted to the jurisdiction of the said court. In my view submission requires a positive and unequivocal acquiescence to the jurisdiction.

38. The upshot of the foregoing is that I am satisfied that the appeal has merit. The same is allowed. I set aside the decision of the Hon Kadhi and find and hold that the Hon Kadhi lacked jurisdiction to hear and determine the matter. I therefore strike out the proceedings before the Hon Kadhi.

39. As this is a family dispute over succession of the estate of the deceased, I order that each party bears her own costs of the appeal and also of the Court below.

40. It is so ordered.

DATED AND SIGNED IN MOMBASA THIS 16TH DAY OF MAY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of

Ms Lugogo, for the Appellant;

No appearance for the Respondent; and

Arthur – Court Assistant.

