



REPUBLIC OF KENYA



Hassan v Njue; Kimanathi & 10 others (Interested Parties) (Civil Appeal E030 of 2023) [2025] KEHC 9549 (KLR) (1 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9549 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E030 OF 2023
AN ONGERI, J
JULY 1, 2025**

BETWEEN

MARRIAM K HASSAN APPELLANT

AND

ALIMA MARUU NJUE RESPONDENT

AND

FLORENCE MUTINDI KIMANTHI & 10 OTHERS INTERESTED PARTY

(Being an appeal from the Ruling of Hon. M. M Mvudi (Principal Kadhi) in Kadhi's Court Voi Succession Petition No. E008 of 2022 delivered on 5th July 2023 at Voi at 10a.m)

JUDGMENT

1. The Kadhi's Court at Voi delivered a Ruling on 5th July 2023 in an application in protest of a special limited grant dated 24th October 2023 filed in court on 25th October 2022 by the Appellant Marriam K. Hassan.
2. The Respondent Alima Maruu Njue who was the Petitioner had filed an application in protest of Grant of special limited grant intestate dated 20th September 2022 to which the protest was filed.
3. The Petitioner Respondent Alima Maruu Njue was seeking the following orders in the application dated 20th September 2022:-
 - i. Recognition of lawful heirs.
 - ii. To identify the estate of the deceased.
 - iii. The lawful shares according to Islamic Laws of Inheritance and



- iv. That the Respondent to pave way for the distribution of the estate according to the Islamic Laws of Inheritance.
4. The Appellant Marriam K. Hassan filed an affidavit of protest in which she stated that the supporting affidavit sworn by the Petitioner was full of falsehoods and was meant to mislead the court.
5. Further that it is not true that the deceased died on 22nd March 2000 and not on 10th November 1994 as alleged by the Petitioner.
6. The Appellant said she had not submitted to the Kadhi's Court and she asked that the application be dismissed.
7. The Kadhi's Court found that the mandate of the Kadhi's Court emanates from Article 170(5) of the Constitution of Kenya which states as follows:-
8. The Kadhi's Court found that the case had stalled for a long time and directed that the application dated 20th September 2022 be heard on 13th July 2023.
9. The Kadhi's Court dismissed the application dated 24th October 2022 and consequently the Appellant Marriam K. Hassan filed this appeal on the following grounds:-
 - i. That the Honourable Kadhi erred in law and fact by dismissing the application to protest of grant of limited grant intestate dated 25th October 2022.
 - ii. That the Honourable Kadhi erred in law and fact by giving a ruling on the application of protest dated 25th October 2022 which had been heard and determined by another court of similar jurisdiction on 15th day of December 2022.
 - iii. That the Honourable Kadhi Court was functus officio as a the time of delivering the ruling on 5th July 2023 in regard to the application of protest dated 25th October 2022.
 - iv. That the Honourable Kadhi lacked jurisdiction to hear the application of protest dated 25th October 2022.
 - v. That the Honourable Kadhi erred in law and fact by holding that the Appellant must proceed with the succession matter before the Kadhi Court when she did not submit to the jurisdiction of the Kadhi Court as required by law.
 - vi. That the Honourable Kadhi lacked jurisdiction to hear a matter where one of the parties did not submit herself to the Kadhi Court.
 - vii. That the Honourable Kadhi erred in law and fact by ordering that the petition for special limited grant filed in Voi Kadhi Court must proceed simultaneously with a main petition for letters of administration for the same estate of Mwangela Isika Kingu (deceased) which was filed in Makindu Law Courts earlier with many interested parties, thus allowing duplicity of proceedings and denying some litigants who are parties in the Makindu petition a right to be heard.
 - viii. That the Honourable Kadhi was biased as against the Appellant.
10. The parties filed written submissions as follows;
11. The appellant, Mariam K. Hassan submitted that she seeks to overturn the ruling of the Kadhi's Court delivered on 5th July 2023, arguing that it violates the legal doctrines of res judicata and sub judice, as well as exceeding the jurisdiction of the Kadhi's Court.



12. She contended that the issues raised in the Voi Kadhi's Court succession case (Petition No. E008 of 2022) had already been addressed in an earlier ruling by a competent court on 15th December 2022, making the subsequent ruling improper under the principle of *res judicata*, which prevents re-litigation of the same dispute between the same parties.
13. Additionally, she argued that the matter is sub judice because an earlier-filed succession case concerning the same estate (Makindu Succession Cause No. E021 of 2022) is still pending, and allowing parallel proceedings would undermine judicial efficiency and fairness.
14. Further, the appellant challenged the Kadhi's Court's jurisdiction, asserting that while she is a Muslim, she did not voluntarily submit to its authority, a requirement under Article 170(5) of the *Constitution* and the Kadhi's Courts Act.
15. She emphasized that the High Court and subordinate courts retain jurisdiction over succession matters, particularly where non-Muslim parties are involved, as is the case with other interested parties in the Makindu succession cause.
16. The appellant urged the High Court to set aside the Kadhi's ruling and stay the Voi proceedings pending the outcome of the Makindu case, ensuring a unified and fair resolution of the estate dispute. Costs are also sought against the respondent.
17. The Respondent opposed the Appellant's appeal, arguing that the orders sought are unnecessary and intended to disrupt the family.
18. The Respondent asserted that the Kadhi's Court has exclusive jurisdiction over this succession matter under Section 48(2) of the *Law of Succession Act*, as it involves Islamic inheritance principles.
19. The Appellant, being the wife of a grandson of the deceased, is not a legitimate heir under Islamic law.
20. The Respondent accused the Appellant of secretly filing a fraudulent succession case in the Makindu Magistrate's Court, presenting forged documents, including a death certificate with an incorrect date (claiming the deceased died in 2000, whereas the actual date was 1994).
21. Additionally, the Respondent alleged that the Appellant fabricated a title deed to support her claim.
22. The Respondent further pointed out inconsistencies in the Appellant's affidavit, which falsely claimed the deceased attended an event in 1999, five years after his death.
23. The Respondent argued that the Makindu succession case is invalid and should be struck out, as it was initiated deceitfully.
24. Further, that the purported interested parties in the case are not legitimate heirs and cannot participate in Kadhi's Court proceedings.
25. The Respondent insisted that only the Kadhi's Court can lawfully distribute the estate according to Islamic law and that further delays are unjust to the rightful heirs.
26. The Respondent asked for the costs of the appeal from the Appellant and any other relief the court deems appropriate.
27. The issues for determination in this appeal are as follows:-
 - i. Whether the Kadhi's Court was functus officio at the time of delivering the Ruling on 5th July 2023.
 - ii. Whether the appeal should be allowed.



28. On the issue as to whether the Kadhi's Court was functus officio at the time of delivering the Ruling on 5th July 2023, the doctrine of functus officio provides that a court cannot revisit or alter its final decision except to correct clerical errors or under specific statutory provisions.
29. In the case of *Telkom Kenya Ltd v. John Ochanda* [2014] eKLR, the Court of Appeal emphasized that once a court renders a final decision, it exhausts its authority over the matter.
30. In this case, the Appellant contends that the Kadhi's Court's ruling on the protest application dated 25th October 2022 had already been determined by another court of similar jurisdiction on 15th December 2022, rendering the subsequent ruling on 5th July 2023 a nullity.
31. I find that this assertion has been substantiated, since the Kadhi's Court had ruled that proceedings should be stayed awaiting the determination of the case at Makindu Magistrate's Court (Succession Cause No. E021 of 2022).
32. Regarding the second issue, the principles of res judicata and sub judice under Section 6 and 7 of the *Civil Procedure Act*, state that a matter already adjudicated by a competent court cannot be re-litigated between the same parties.
33. The Court of Appeal in *Independent Electoral & Boundaries Commission v. Maina Kiai & 5 Others* [2017] eKLR reiterated that res judicata serves to prevent multiplicity of suits and judicial inconsistency.
34. The Appellant argues that the succession dispute was already pending in the Makindu Magistrate's Court (Succession Cause No. E021 of 2022), making the parallel proceedings in the Kadhi's Court a violation of the sub judice rule under Section 6 of the *Civil Procedure Act*.
35. The High Court in *Kenya National Commission on Human Rights v. Attorney General & Another* [2020] eKLR held that sub judice prohibits courts from entertaining matters already under active judicial consideration to avoid conflicting rulings.
36. Further, the Appellant challenges the Kadhi's Court's jurisdiction, citing Article 170(5) of the *Constitution*, which limits the Kadhi's Court's mandate to disputes where parties voluntarily submit to its jurisdiction.
37. In *Re Estate of Abdulrehman Noor (Deceased)* [2019] eKLR, the High Court held that the Kadhi's Court cannot adjudicate succession matters involving non-Muslims or where parties do not submit to its jurisdiction.
38. The Appellant, though Muslim, asserts she did not submit to the Kadhi's Court.
39. Additionally, the presence of non-Muslim interested parties in the Makindu case further complicates the Kadhi's Court's authority, as observed in *Re Estate of the Late Mohamed Abdalla Bajaber (Deceased)* [2021] eKLR, where the court emphasized that Kadhi's Courts lack jurisdiction over non-Muslim heirs.
40. The Respondent's allegations of fraud and forgery, while serious, do not negate the jurisdictional defects or the procedural irregularities raised by the Appellant.
41. These claims should be adjudicated in the Makindu Magistrate's Court, where the succession cause was first filed.



- 42. The Respondent’s insistence on the Kadhi’s Court’s exclusive jurisdiction under Section 48(2) of the Law of Succession Act is misplaced, as this provision applies only where all parties are Muslims and have submitted to the Kadhi’s Court’s authority.
- 43. In light of the foregoing, the appeal is merited.
- 44. The Kadhi’s Court’s ruling of 5th July 2023 is set aside for being functus officio and for violating the sub judice and res judicata doctrines.
- 45. The proceedings in the Voi Kadhi’s Court (Succession Petition No. E008 of 2022) are stayed pending the determination of the Makindu Succession Cause No. E021 of 2022, which was filed earlier and involves broader interests, including non-Muslim parties.
- 46. Accordingly, the appeal is allowed, and the orders sought by the Appellant are granted.
- 47. The matter shall proceed in the Makindu Magistrate’s Court, which is better suited to address the competing claims, including allegations of fraud, and to ensure all interested parties—Muslim and non-Muslim alike—are accorded a fair hearing.
- 48. Each party to bear its own costs of the appeal.

DATED, SIGNED AND DELIVERED THIS 1ST DAY OF JULY, 2025 IN OPEN COURT AT VOI HIGH COURT.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Millicent

.....for the Appellant

.....for the Respondent

