



REPUBLIC OF KENYA



**Mayow v Mayo & another (Civil Appeal E004 of 2023)
[2024] KEHC 8742 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8742 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CIVIL APPEAL E004 OF 2023
JN ONYIEGO, J
JULY 19, 2024**

BETWEEN

HASSAN MAYOW APPELLANT

AND

HAMIDA MAYO 1ST RESPONDENT

ABDI BARRE MAYO 2ND RESPONDENT

(Being an appeal from the judgment of Kadhi's Court at Mandera (Hon. Sambul M. Mubiyidin) delivered on 14th April 2023 in succession case No.E053 of 2022)

JUDGMENT

1. The deceased in respect of whom these proceedings relate one Gaba Mursal (herein after referred to as the deceased) died intestate in 1975 while domiciled in Kenya. He was survived by six children namely; Hamidah Mayo (Deceased); Abdi Mayo; Abdi Bare; Habiba Mayo(deceased); Hassan Mayo and Nunay Mayo (deceased). According to the petitioners, the deceased left only one asset known as plot No.82- Bulla Jamhuria.
2. Vide a petition dated 21st October 20022, Abdi Mayo and Hamidah Mayo petitioned Mandera Kadhi's court against Hassan Mayo seeking;
 - a. That plot number 82-Bura Jamhuria to be distributed amongst the beneficiaries in accordance with the Islamic law.
 - b. That the court orders that the said plot is part of the estate of the deceased and subject to succession
3. On the other hand, the respondent in objecting to the petition urged that the suit plot belonged to him and therefore the same could not be distributed to the alleged beneficiaries. It was his case that



out of a kind gesture, he allowed his siblings to utilise one room each of the building erected on the suitland. He produced a letter from the Ministry of Lands, Housing Survey, Physical Planning and Urban Development dated 30.03.2022 showing that he was the owner of the suitland and the same therefore could not form part of the deceased's estate. He thus urged the court to find in his favour.

4. After weighing the evidences of the parties, the hon. Kadhi delivered a ruling dated 14.04.2023 thus making the following orders:
 - i. A declaration is hereby made that the Plot No. 82 situated in Bulla Jamhuria is the estate of Gaba Mursal (deceased), consequently the property belongs to heirs of Gaba Mursal namely: Hassan Mayo, Abdi Mayo, Hamida Mayo, Abdi Mayo and Habiba Mayo (deceased).
 - ii. That the Land Registrar Mander County Government to substitute registered name in Plot No. 82 Bulla Jamhuria to the heirs of Gaba Mursal (deceased) namely: Hassan Mayo Madey, Abdi Mayow, Hamida Mayow Madey, Abdi Bare and Adan Hassan Bulle (representing Habiba Mayow Madey (deceased) children jointly.
 - iii. That Abdi Bare and Hamida Mayo are hereby appointed administrators of Plot No. 82 Bulla Jamhuria and they should open joint account within a week for the remittance of rental income.
 - iv. That the tenants are hereby restrained in submitting the rent to the defendant, his agent or servant and they should submit to Abdi Bare and Hamida Mayo thereafter receipts be issued.
 - v. The administrators to share the proceeds as follows: Hassan Mayo, 25%; Abdi Mayo, 25%; Hamida Mayo, 12.5%; Abdi Bare, 25% and Habiba Mayo (deceased) 12.5 % to be inherited by her children.
 - vi. The investigative agencies, the Office of the Director of Public Prosecution, Director Criminal Investigation to investigate circumstances of fraud and forgery pertaining the suit land.
5. The appellant having been dissatisfied with the said judgment has now appealed the same before this court.
6. The appeal herein was instituted vide a memorandum of appeal dated 03.10.2023 wherein the appellant challenged the judgment of the trial court (Hon. Sambul M.) Kadhi in Succession Cause No. E053 of 2022 which judgment was delivered on 14.04.2023. The appellant raised the following grounds of appeal;
 - i. That the proceedings before the learned Kadhi were fatally and incurably defective for non-compliance with sections 53,67 and 71 of the Law of Succession Act, hereinafter LSA hence null and *void ab initio*.
 - ii. That the judgment of the learned Kadhi is a nullity ab initio having been delivered by a court devoid of jurisdiction over land matters.
 - iii. The learned Kadhi grossly erred in facts and law as he misdirected himself by failing to appreciate that the matter before him was a succession cause and not a civil suit.
 - iv. The learned Kadhi erred in fact and law by purporting to distribute Plot No. 82 Bulla Jamhuria which was not and has never been an asset of the estate of the deceased.
 - v. The learned Kadhi grossly erred in fact and law by deliberately failing to take note of the fact that Plot 82 in Bulla Jamhuria was registered in the name of the appellant as absolute proprietor and could therefore not be subject to the Succession Cause before the court.



- vi. The learned Kadhi grossly erred in fact and law by ordering the cancellation of registration when the trial court was devoid of such jurisdiction.
 - vii. The judgment of the learned Kadhi was not based on the pleadings filed by the parties.
 - viii. The judgment of the learned Kadhi was against the weight of the evidence adduced.
7. The appellant thus prayed that the judgment dated 14.04.2023 be set aside with costs.
 8. The appeal was canvassed by way of written submissions.
 9. The appellant in his submissions dated 03.10.2023 urged that the proceedings before the Kadhi's court were fatally defective hence a nullity for the reason that the same were not in compliance with sections 53,67 and 71 of the Law of Succession Act. Reliance was placed on the case of Fatuma Rama Mwaurinda & another v Kusi Mukami Mwaurinda [2017] eKLR where the court held that:

“...the only provisions of the Act that are applicable to the estate of the Muslim as per section 2(4) are the procedural provisions contained in part VII of the Act relating to administration of estates.”
 10. The trial court was faulted for making declarations in regards to ownership of land while sitting as a probate court. That the actions of the trial court were akin to intimidation as the court ordered that the appellant be investigated by the relevant authorities. It was urged that the trial Kadhi lost track of what was due for determination noting that the respondents equally acknowledged that the suitland was registered in his name. Reliance to that end was placed on the case of R.M.M v M.A.K.A. a.k.a. J.K.M. [2019] eKLR where it was stated that a court exercising jurisdiction that it doesn't have amounts to nothing.
 11. In addition, counsel urged that the determination by the Kadhi was against the weight of the evidence adduced in court. This court was therefore urged to set aside the findings of the Kadhi with costs to the appellant.
 12. Ms. Roble, counsel for the respondent filed submissions dated 17.11.2023 and while making reference to section 32 of LSA, counsel urged that the same specifically excludes Garissa, Marsabit, Wajir, Isiolo and Mandera districts from the application of the LSA. That the provisions of the LSA on administration of the estate herein did not apply.
 13. On the second ground, it was submitted that the parties herein being Muslims and noting that the issue that fell for determination before the Kadhi was an issue of inheritance, the Kadhi was possessed of the requisite jurisdiction to determine the issue herein. Noting that the constitution under article 170(5) provides for the Kadhi's court to determine questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all parties profess the Islamic religion and submit to the jurisdiction of the Kadhi's courts, the trial Kadhi could therefore not be faulted for having arrived at the impugned decision.
 14. That in determining questions of inheritance, the Kadhi's court is necessarily clothed with jurisdiction to determine the assets of the deceased, the survivors of the deceased and persons with beneficial interest and distribution of the assets of the deceased among his survivors and persons with beneficial interest in the same. As a consequence, it follows that a Kadhi's court has powers to determine disputes between survivors/heirs of a deceased person as to whether any property, including land, forms part of the estate of the deceased. To that end, support was drawn from the case of Santuzza Billiotti alias Mei Santuzza



(deceased) v Giancarlo Falasconi (2014) eKLR where the court held that a succession court has powers to order a title deed to revert to the name of a deceased person.

15. It therefore was proper for the Kadhi to determine whether the suitland formed the estate of the deceased and thereafter make consequential orders therefrom. Given that the respondent had intimated that the suit land was his, it was imperative for the court to call evidence to determine the same. Noting that the same was done, the Kadhi could therefore not be faulted for having reached the impugned determination.
16. It was however contended that although a letter by the Principal Land Administrator dated 30.03.2022 showed that the suit land belonged to the appellant the appellant did not produce a title deed or an allotment letter to prove how he became the owner of the suitland. In the end, this court was urged to uphold the finding of the Kadhi as the same was not only sound but also legally correct.
17. This being a first appeal, parties are entitled to expect a rehearing, reevaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. See Gitobu Imanyara & 2 others v Attorney General [2016] e KLR, where the Court of Appeal stated that;

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”
18. The Court heard the appeal herein with the aid of two Kadhis (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.”
19. During the hearing of this appeal, I sat with Principal Kadhi A.D. Wako of and Senior Resident Kadhi Hassan Omar Daffa both of whom gave a conflicting opinion, which, although not binding on the court (see criminal law and procedure analogy in Kihara v R (1986) KLR 473, 479) I have considered for guidance in concluding the judgment and orders made herein. According to Kadhi Hassan Omar, the asset was part of the estate hence capable of distribution. He urged the court to dismiss the appeal. On the other hand, Kadhi A.D. Wako was of the contrary view that the court had no jurisdiction as the issue revolved around a dispute over ownership of land.
20. I have analysed the pleadings before the trial court and I note that what was before the trial court for determination was a petition dated 21.10.2022 wherein the petitioner had sought for orders that:
 - i. The Plot No. 82 Bulla Jamhuri be distributed among the beneficiaries and shared in accordance with Islamic law of inheritance.
 - ii. The Honourable court orders that the plot is part of the estate of the deceased and subject to succession.



21. The appellant has faulted the trial court for holding that it had the jurisdiction to hear and determine a question of cancellation of title deed while sitting as a succession court. Further, that the court proceeded to divide the said suit land to the beneficiaries herein.
22. Article 170 of the [constitution](#) creates the Kadhis' Courts. Article 170(5) provides that:
- “170(5) The jurisdiction of a Kadhis' 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.”
23. Further, section 5 of the [Kadhi's Courts Act](#) provides as follows:
- “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.”
24. Having noted as above, it is my view therefore that what falls for determination is: Whether the Kadhi's Court had jurisdiction in entertaining the dispute of ownership of Plot No. 82 Bulla Jamhuri while sitting as a probate and administration court.
25. It is trite that a court can only exercise such jurisdiction as has been conferred upon it by the [constitution](#), statute or both. In [Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others](#) [2012] eKLR the Supreme Court succinctly stated as follows:
- “A Court's jurisdiction flows from either the [constitution](#) or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the [constitution](#) or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
26. The appellant urged that the subject matter of the suit before the Kadhi's Court did not relate to inheritance but ownership and therefore, the court was not possessed of the requisite jurisdiction to deal with the matter.
27. There is no doubt that any court sitting as a probate court ought to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. [See rule 41(3) of the [Probate and Administration Rules](#) which provides that: -
41. Hearing of application for confirmation:
- (3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the [Civil Procedure Rules](#) and may thereupon, subject to the proviso to section 71 (2) of the [Act](#), proceed to confirm the grant. [Underlining mine for emphasis]



28. In the same breadth, *In re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR, it was held that;

“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the *Probate and Administration Rules* was enacted so that claims which are prima facie valid should be determined before confirmation”.

29. In as much as I appreciate that what fell due for determination before the Kadhi was an issue of succession, ordinarily a dispute regarding ownership in respect of a property of a deceased person negates the concept of free property of a deceased person.

30. In the instant case, and as already noted, the court was sitting as a probate court and the same notwithstanding, was presented with a case wherein the appellant urged that he was the owner of the said suitland. Of importance to note is the fact that, the respondents in their submissions conceded that a letter by the Principal Land Administrator dated 30.03.2022 produced before the court showed that the suit land belonged to the appellant.

31. The trial court had no capacity to determine issues of trust on land. It follows that the suitland was not a free property for distribution. See *in Re Estate Of Solomon Mwangi Waweru(deceased)*(2018) e KLR where A.K.Ndung’u J held that a succession court has no jurisdiction to hear and determine issues related to trust in land as that is the jurisdiction of Environment and land court. Similar position was held In the matter of the Estate of peter of peter Igamba Njoroge Nakuru succession cause number 432 of 2009 and *In re Estate of Samuel Kathieri(deceased)*(2019)e KLR

32. While noting that the respondents had made a claim that the very land belonged to their deceased’s mother, the trial court could have given an opportunity for the dispute to be arbitrated by a court with relevant jurisdiction(ELC) to determine ownership disputes before distribution by a probate court. [See *In re Estate of Atibu Oronje Asioma (Deceased)* (Succession Cause 312 of 2008) [2022] KEHC 11046 (KLR) (22 July 2022) (Ruling); also article 162(2) of the *constitution* and section 13(1) of the *ELC Act*].

33. In view of the above holding, I am persuaded that the trial court did not possess the requisite jurisdiction the land ownership dispute.

34. Accordingly, for the above reason set out above, the court makes orders as follows:

- i. The decision of the trial court on distribution of the disputed suit property herein was made without jurisdiction and the order thereon that the suit property forms part of the estate of Gaba Mursal (deceased) is revoked and therefore set aside.
- ii. That parties shall be at liberty to approach the ELC court for relevant orders before approaching the probate court for distribution if found that the plot belonged to the deceased.
- iii. In the meantime, the status quo obtaining before institution of the succession cause herein shall prevail pending determination of the land ownership dispute by the ELC.
- iv. As the parties were not to blame for the trial court’s jurisdictional error, there shall be no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF JULY 2024

J. N. ONYIEGO



JUDGE

