



**Hamisi & 3 others v Suleiman (Civil Appeal 1 of 2023)
[2024] KEHC 11485 (KLR) (24 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11485 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CIVIL APPEAL 1 OF 2023
JN KAMAU, J
SEPTEMBER 24, 2024**

BETWEEN

**ABUBAKAR HAMISI 1ST APPELLANT
ALI HAMISI 2ND APPELLANT
ASMAN KIGANGA 3RD APPELLANT
ABDALLA MANYOA 4TH APPELLANT**

AND

AMANI GALOMBA SULEIMAN RESPONDENT

(Being an appeal from the Judgment of Hon K. W. Bakari (Kadhi) delivered at Kadhis' Court in Hamisi in Succession Cause No 41 of 2016 on 6th December 2016)

JUDGMENT

Introduction

1. In his decision of 6th December 2016, Hon A. Bakari entered Judgment in favour of the Respondent against the 1st, 2nd, 3rd and 4th Appellants in respect of the deceased's estate(sic) as follows:-
 1. The second sub-division is wrong and has been revoked.
 2. The land will remain shared among the four siblings in the nature of first division where the land ran across and not along.
 3. All the four siblings will get equal share of the land.
 4. He Abubakar be the first bordering the road of Banja-Kinu be followed by Ali Hamisi then the sons of Fazil and the last be Amani who touches the small road down that goes to KipsinaiNote that this court advises you to engage the services of a surveyor for clarity.”



2. Being aggrieved by the said decision, on 11th January 2017, the Appellants herein filed a Memorandum of Appeal of even date. They relied on five (5) grounds of appeal. They filed Supplementary Grounds of Appeal dated 7th August 2023 on 8th August 2023 pursuant to leave that was granted by this court on 18th July 2023. They set out seven (7) Supplementary Grounds of Appeal.
3. Their Written Submissions were dated 7th August 2023 and filed on 8th August 2023. Despite having been given ample time to file his written submissions, the Respondent did not do so. He did not also pay Court Adjournment Fees of Kshs 2,0000/= as directed by court on 16th October 2023 as a condition to consider his late submissions. The Judgment herein is therefore based on the Appellants' Written Submissions only.

Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
5. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
6. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, the court noted that the Appellants had narrowed down their Grounds of Appeal into three (3) grounds only. It did therefore appeared to this court that the issues that had been placed before it for determination were as follows:-
 - a. Whether or not the Kadhi had jurisdiction to hear and determine the matter:
 - b. Whether or not the Respondent had the locus standi to institute the suit in the Kadhis'court; and
 - c. Whether or not the Kadhis'court erred in directing that the second distribution be revoked.
7. The court deemed it prudent to address the issue under the following distinct heads.

I. Jurisdiction

8. Supplementary Ground of Appeal No (3) was dealt with under this head.
9. The Appellants argued that the matter herein purely dealt with ownership and dispute over the sub-division and boundary dispute which was exclusively the preserve of the Environment and Land Court (ELC). They pointed out that the Kadhis'court had no jurisdiction to handle such issues.
10. They invoked Article 170(1) of *the Constitution* of Kenya, 2010 and Section 5 of the Kadhis'Courts Act Cap 11 (Laws of Kenya) that set out the jurisdiction of the Kadhis'court.
11. Notably, Article 170(5) of *the Constitution* of Kenya, 2010 provides that:-

“The jurisdiction of a Kadhis' court shall be limited to the determination of questions of Muslim 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 Kadhis'court.”

12. Section 5 of the Kadhis' Court Act also provides as follows:-

“ A Kadhis'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.”

13. The Respondent filed suit in respect of L.R. No Nyang'ori /Banja/718 (hereinafter referred to as “the subject property”) that was registered in the name of Suleiman Galombo, who was indicated as “their late father/ grandfather) (sic)”. He asserted that he was a beneficiary of the said subject property and the same had been sub-divided by the Chief, one Harun Mbere as per a letter dated 11th March 2015.

14. The Hon Kadhi observed that inheritance was always done after one was dead but that in the circumstances of the case herein, the distribution was done when the owner was alive. It was therefore clear that the sub-stratum of the dispute that had been placed before the Kadhis'Court related to sub-division of land belonging to the estate of the said Suleiman Galombo. It was immaterial that the subject property was not registered in his name. What was clear from the judgment of the Hon Kadhi was that there was no dispute in the manner the said Suleiman Galombo sub-divided the subject property.

15. As the dispute related to inheritance of the subject property by family members who professed the Muslim religion and had agreed to submit themselves to the jurisdiction of the Kadhis' Court, this court found and held that the Kadhis' Court had the jurisdiction to hear and determine the matter that was before it.

16. In the premises foregoing, Supplementary Ground of Appeal No (3) was not merited and the same be and is hereby dismissed.

II. Locus Standi

17. Supplementary Grounds of Appeal Nos (1) and (2) were dealt with under this head as they were both related.

18. The Appellants argued that the Respondent lacked the locus standi to commence, originate or maintain the suit and as such the proceedings and the judgment of the trial court remain a nullity. This was a preliminary point of law that had a bearing on the other grounds of appeal.

19. The Appellants submitted that the Respondent's suit at the Kadhis'court was brought as a land matter and not a succession cause. They asserted that the Respondent had complained that the subject property was sub-divided afresh by the aforementioned Area chief to his detriment.

20. They contended that the subject property was still registered in the name of Ishmael Kiganga Kidalanga, the Respondent's grandfather who was deceased as was evidenced in a Certificate of Search that was annexed in an application that the Respondent withdrew. They averred that the Respondent failed to obtain limited grant of representation that would have given him the locus standi to sue on behalf of the deceased's estate.

21. In that regard, they placed reliance on the case of Hawo Shanko vs Mohamaed Uta Shanko [2018] eKLR where the court therein upheld a preliminary objection striking out the suit on the ground that



the suit could not be sustained as the plaintiff therein had not obtained a limited grant to enable him file the suit. It was their contention that the proceedings giving rise to this appeal and the resultant judgment were substantially defective and bad in law.

22. This court looked at the proceedings that were before the Kadhis' Court and noted as had been held hereinabove that the same related to a claim to family land through inheritance. The Respondent had sought that the Kadhis' Court hear and determine the dispute relating to re-sub-division of the subject property. There was nothing to show that he was suing on behalf of the estate of his father and/or grandfather. He did not therefore require to take out a grant of letters of administration to enable him institute the proceedings in the Kadhis' court.
23. In the premises, Supplementary Grounds of Appeal Nos (1) and (2) were merited and the same be and are hereby allowed. However, Supplementary Ground of Appeal No (3) was not merited and the same be and is hereby dismissed.

III. Distribution

24. Grounds of Appeal Nos (1), (2), (3), (4) and (5) of the Memorandum of Appeal and Supplementary Grounds of Appeal Nos (4), (5), (6) and (7) were dealt with under this head as they were all related.
25. The Appellants were emphatic that the subject property was registered in the name of the Respondent's grandfather and not his father, Suleiman Galombo and hence the subdivision of the estate in favour of the deceased's grandfather before succession cause was instituted amounted to intermeddling of the estate of the deceased punishable under Section 45 of the [Law of Succession Act](#). They added that the Respondent's father had no capacity and authority to give or will out the property which was in the name of the Respondent's deceased grandfather before succession was done and the grant confirmed.
26. They pointed out that the issue of the will was a creation of the Kadhis' Court to justify his reasoning in his judgment which they termed as open bias and favoured the Respondent. They asserted that a perusal of the pleadings did not show anywhere where a will was mentioned and that the Respondent's father could not will out what he did not have.
27. They further submitted that the Islamic law recognised testate succession in that the Koran ordained that the testamentary power was exercisable by any Muslim who was above fifteen (15) years old and that his bequest could only extend to a third of his estate. They asserted that that was not the case even if it was to be assumed that the said Suleiman Galombo had the capacity and right to will out the subject land.
28. They further asserted that according to the Mohammedan Law, heirs were classified in three (3) categories namely: Ahlul-Feraidh (Qu'ranic sharers), Asabah (residuary or agnates), Dhawil-Arham (distant kindred/uterine relatives). In that regard, they contended that the first Rule of the intestate succession was that Quranic sharers had to be first be assigned their shares before all other heirs.
29. They explained that Quranic sharers mentioned in the Koran included a daughter, mothers, father, husband, wife, male siblings of the same mother, female siblings of the same mother, female siblings of the same parents and female siblings of the same father. In this regard, they relied on the case of Succession Cause No 18 of 2019 Estate of Mwangi Suleiman Kahi (deceased) (eKLR citation not given) without highlighting the holding they were relying upon.
30. They also placed reliance on the case of Mohamed Juma vs Fatuma Rehan Juma & 6 Others [2017] where it was held that a relative of the third class could not inherit if there was among the survivor of the first class who were daughters of the deceased. They referred to the Muslim Law of Marriage at page



284 and argued that in the instant case, the people who benefited from the estate of the deceased were the grandchildren and that the third parties who were biological daughters of the deceased and who had priority to inherit from the deceased estate being the Quranic Sharers were left out of the same.

31. They blamed the Kadhis' Court for having failed to ascertain the bona fide beneficiaries and/or heirs of the deceased before distributing the estate. They pointed out that it was incumbent upon the Kadhis' Court to have ensured that the rightful beneficiaries of the estate of the deceased benefitted from the same. They urged the court to allow their appeal and set aside the Trial Court's Judgment.
32. Notably, Section 45 of the Law of Succession Act Cap 160 (Laws of Kenya) states as follows: -
1. Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 2. Any person who contravenes the provisions of this section shall-
 - a. be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - b. be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.
33. Having said so, this court noted that the Respondent's father was the one who distributed the subject property. However, he was already deceased. He could not therefore have been charged with the offence of intermeddling. Even so, the offence of intermeddling did not appear to have been present as he distributed the subject property to his children. He did not appear to have wasted the estate of his father which would have been the essence of intermeddling as envisaged in Section 45 of the Law of Succession.
34. This court therefore had due regard to the case of Mohamed Juma vs Fatuma Rehan Juma & 6 others [2017] eKLR to ascertain whether or not the Kadhis' Court applied the correct principles before distributing the subject property. In the said case, it was held as follows:-

“Heirs according to the Mohammedan Law are classified in three (3) categories herein namely:-

Ahlul –Faraidh (Quranic Sharers)

Asabah (Residuary or agnates)

Dhawil – Arham (Distant kindred/Uterine relatives)

At the first rule of intestate succession is that the Quranic sharers must first (before all other) be assigned their shares. The Quranic sharers are the most important class of heirs who take primacy, they are entitled before all others the shares allocated to them either by the Holy Quran or by the tradition. Reference may be made to Holy Quran chap 4:11.

Four the shares are males and there are eight (8) females, they are (a) the father, (b) the grandfather and lineal male, ascendant (when not excluded), (c) the uterine brother (d) the husband. The female are (a) the widow, (b) daughter (c) Son's daughter or the daughter of a lineal male descendant how low so even (d) mother (e) grandmother, (f) full sister (g)



consanguine sister (ie) half sister on the father's side and (h) Uterine sister (e) half sisters from on the mother's side.

Asabah – The Residuals

The second rule of intestate Succession is that whatever left after assigning the first class their share (residue) should go to the heirs of the second class, names the Asabah or Agnates, also known as the Residuaries, because they take the residue of the estate of the deceased person. They compose of all those agnate male relatives i.e. son agnate grandson, son of a brother, father, grandfather, great grandfather etc.

35. There was nothing in the decision of the Kadhis' Court to show that it considered the categories of beneficiaries of a deceased's estate before it distributed the subject property before it made its decision. In addition, the Kadhis' Court sub-divided a deceased's property without a succession cause having been instituted. It also determined that the Respondent's father left a will without evidence having been led in that regard.
36. Although Article 159(2)(d) of *the Constitution* of Kenya mandated courts to administer justice without undue regard to procedural technicalities, the manner in which the proceedings were instituted in the Kadhis' Court were not a procedural technicality. Rather, the nature of the proceedings was substantive and went to the very root of the competence of the said proceedings.
37. Notably, Rule 164 of the Kadhis' Courts (Procedure And Practice) Rules provides that:-

“The provisions of Part VII of the *Law of Succession Act* relating to the administration of a deceased person's estate where they are not inconsistent with those of Muslim law shall apply in the case of a deceased Muslim.”
38. The nature of the proceedings were not any ordinary petition that would have been brought pursuant to Rule 20 (1) of the Kadhis' Courts (Procedure And Practice) Rules. Bearing in mind that the Kadhis' Court proceeded in the absence of a succession cause to determine a matter relating to inheritance, the entire proceedings in the said court were defective, incompetent and null and void ab initio.
39. In the circumstances, Grounds of Appeal Nos (1), (2), (3), (4) and (5) of the Memorandum of Appeal and Supplementary Grounds of Appeal Nos (4), (5), (6) and (7) were merited.

Disposition

40. For the foregoing reasons, the upshot of this court's decision was that the Appellants' Appeal dated and filed on 11th January 2017 and the Supplementary Grounds of Appeal dated 7th August 2023 and filed on 8th August 2023 was partly merited and the same be and is hereby allowed. The effect of this Judgment is that the Judgment of Hon Kadhi K. W. Bakari that was delivered on 6th December 2016 be and is hereby set aside and/or varied and/or vacated forthwith.
41. The beneficiaries of the deceased's estate are at liberty to lodge the succession proceedings appropriately.
42. As the dispute was a family matter, there will be no order as to costs so as to preserve the family unity.
43. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 24TH DAY OF SEPTEMBER 2024

J. KAMAU



JUDGE

