



REPUBLIC OF KENYA



**Leo & another v Leo & 4 others (Civil Appeal 8 of 2019)
[2023] KEHC 1410 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1410 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CIVIL APPEAL 8 OF 2019
JN NJAGI, J
FEBRUARY 16, 2023**

BETWEEN

IBRAHIM MOHAMED LEO 1ST APPELLANT

MARIAM MOHAMED LEO 2ND APPELLANT

AND

HUSSEIN MOHAMED LEO 1ST RESPONDENT

SALAD MOHAMED 2ND RESPONDENT

ISAAK HASSAN 3RD RESPONDENT

WATO DARCHE 4TH RESPONDENT

MOHAMMED ISAAK 5TH RESPONDENT

(Being an appeal from the judgment and decree of Hon.A. D. Wako, Senior Resident Kadhi, in Moyale Kadhi's Court Succession Case No.29 of 2017 delivered on 6/3/2019)

JUDGMENT

1. The Appellants and the 1st Respondent are all children of the late Mohamed Geno Leo (herein referred to as the Deceased) while the 2nd to 5th Respondents are purchasers of parcels of land that the Appellants contend to belong to the estate of the deceased.
2. The Petitioners had petitioned the Kadhi's Court at Moyale seeking for the following orders:
 1. That the respondents be hereby ordered to vacate and/or be evicted from the deceased plot number Manyatta Burji, Harbora/Gubalticha/215, Mado and Mansile.
 2. That this Honourable court be pleased to find and declare the respondents as intermeddlers in the estate of the deceased.



3. That this Honourable court be pleased to issue orders of injunction restraining the respondents from trespassing into any of the estate properties either in the Republic of Ethiopia or at Moyale and/or any other place within the Republic of Kenya.
 4. That this Honourable court be pleased to fine and imprison the respondents for deliberately intermeddling with the estate properties without the authority of the personal representative or this honourable court in accordance with Section 45 (2)(a) of the *Law of Succession Act* Cap. 60.
 5. That the respondents be restrained from harassing the Administrator/or creating circumstances that might occasion a breach of peace that might endanger the lives welfare of the administrator and their immediate family members.
 6. The orders be served upon the OCS Moyale Police station for enforcement.
 7. That the costs for the application be provided for.
3. The parcels of land that were in contestation at the Kadhi's Court are manyatta Plots Nos. 929, 930, 945 and unregistered plot situate at Manyatta in Moyale County. The Appellants argued before the Kadhi's Court that the suit properties were part of the estate of the deceased herein and that the 1st Respondent transferred the said properties to the 2nd to 5th Respondents without the consent of the other beneficiaries. There was another parcel of land at a place called Mansile which the 1st Respondent claimed to be his own land but the appellants contended was estate property. The Appellants thus sought for a declaration affirming that the said properties were part of the estate and that the Respondents are intermeddlers within the meaning of section 45 (2) (a) of the *Law of Succession Act*, Cap 160 Laws of Kenya.
 4. The Respondents filed Replying Affidavits refuting the claim by the Appellants. They contended that the suit properties were sold with the consent of the beneficiaries and more so that some were sold for the benefit of the 1st Appellant.
 5. The matter proceeded by way of viva voce evidence wherein the parties testified and called witnesses. Upon hearing the parties, the Kadhi held that the 1st Respondent sold the plots in issue at Manyatta Burji to the 2nd, 3rd and 4th Respondents without consent of the beneficiaries and also sold a plot to the 5th Respondent on behalf of the 1st Appellant. However, that since the 2nd to 5th Respondents have dully registered the said plots with County Government of Moyale to which they have been paying annual rates, the status quo should be maintained. The Appellants were aggrieved by the finding and preferred the instant appeal.
 6. The grounds of appeal are that:
 1. The Hon. learned Kadhi erred in law and fact by holding that the deceased's plots at Manyatta Burji sold by the 1st Respondent to the 2nd, 3rd, 4th and 5th were sold regularly.
 2. The Hon. learned Kadhi erred in law and fact in ignoring the fact that the said parcels formed part of the deceased estate which the 1st respondent intermeddled with by selling.
 3. The Hon. learned Kadhi erred in law and fact by finding that the remaining parcels at Manyatta Burji and Mado Adi were the only properties remaining to the deceased estate yet the appellants mentioned other properties at Harbora/Gubalticha/25 and Mansile.
 4. The Hon. learned Kadhi erred in law and fact by ignoring the fact that the deceased had other unnamed dependents.



5. The Hon. Kadhi erred in law and fact by not finding that the appellant had equal right to the deceased estate but have benefited from the same.
6. The Hon. learned Kadhi erred in law and fact by not appreciating that the due process of succession and application for confirmation of grant was never followed prior to the distribution of the estate.
7. The Hon. learned Kadhi erred in law and fact by ignoring the fact that the properties that were mentioned did not have any documentation and there was no tangible evidence and proceeded to distribute the estate.
8. The Hon. learned Kadhi erred in law and fact by holding that by registering their perceived parcels in their names and were paying for the ground rents they were entitled to legal possession notwithstanding the 1st respondent illegally sold the same.
9. The Hon. learned Kadhi erred in law and fact by failing to consider the appellant's evidence.
10. The Hon. learned Kadhi erred in law and fact by ignoring the reason adduced by the appellant that the 1st respondent intermeddled with the estate of the deceased after his death and no justification was tendered that the 1st respondent had the capacity to sell part of the deceased estate.
11. The Hon. learned Kadhi erred in law and fact by relying on the evidence of chief Mohamednur Bakata Ibrahim who acted as an agent instead of carrying out his official duty to witness the transaction.
12. That Hon. Kadhi erred in law and fact by not considering that the weight of evidence tendered by the appellants outweighed the respondent's assertions.
13. The Hon. Kadhi erred in law by ignoring that the respondents on balance of probability did not prove their case.

Submissions–

7. The appeal proceeded by way of written submissions. The advocates for the appellants who were at the time on record, Kiogora Mugambi & Co Advocates, submitted that the 1st Respondent did not have power to transfer the properties to the other Respondents as he did not possess a confirmed Grant of letters of Administration when he transferred the parcels of land to them. That the act amounted to intermeddling with the estate of the deceased which had the effect of disinheriting some of the children of the deceased. That any title derived from the purported sale by the 1st Respondent was illegal, null and void and ought to be revoked. The Appellants thus urged the court to set aside the judgment of the Kadhi and allow distribution of the estate to proceed.
8. The advocates for the Respondents, Hashim & Leisagor Associates, on the other hand submitted that the applicable law in the case of the deceased herein is the Islamic law and that that the [Law of Succession Act](#) does not apply to the estate of a deceased Muslim. That the Kadhi rightly found that the Respondents acquired proper titles to the suit properties on the basis of Islamic law of inheritance. Therefore, that the Kadhi properly held that the Manyatta plots do not form part of the estate of the deceased and that they were lawfully transferred to the 2nd to 5th Respondents. That the argument by the Appellants that the transfer of the suit properties was vitiated by lack of letters of administration intestate is untenable and has no basis in Islamic law as the same are foreign in distribution of the estate



of a deceased muslim. In this respect the Respondents made reliance on section 2(3) of the Law of Succession Act which provides that:

“Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.”

9. Further reliance was made on the case of Mustaq Alimohamed v Mohamed Iqbal Mohamed & 2 others (2020) eKLR where it was held that:

“While dealing with the estate of a deceased Muslim, this court is required by section 2(3) of the Act to apply Islamic law in the devolution of the estate. Under Subsection (3), substantive provisions of the Act are not applicable to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim. In lieu of these provisions, the devolution of the estate of a Muslim shall be governed by Islamic law. 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 Respondents submitted that for a person to administer the estate of a deceased Muslim he/she does not require letters of administration because such are not a requirement in Islamic law. This is because the general rule in Islamic law of succession is that estates do not stay in abeyance but automatically vests in the heirs. The Respondents cited M.M. Khan in his “Islamic Law of Inheritance” at page 22 where the author states that:

“Administration as understood by modern law, was unknown to Islamic jurisprudence. In Islam there is mere distribution of property of the deceased, by the state if not by the heirs themselves. Unlike other modern systems to dispose of the estate of a deceased Muslim, neither there is a need of executor or/and administrator nor probate or/and letters of administration. In the absence of an executor appointed by the will of the deceased, heirs of a Muslim have a right and capacity to dispose of the estate of the propositus according to law. In case they fail or refuse to do so, the Qazi (magistrate) may appoint an executor.”

11. It was thus submitted that the transfer of the plots to the 2nd to 5th Respondents was valid, lawful and proper.
12. It was further submitted that the 2nd to 5th Respondents were purchasers for value without notice and thus should not be condemned for their innocent actions. That it is trite law that a bona fide purchaser for value without notice of any defect in the seller’s title cannot be faulted. The doctrine is anchored in Section 26 of the Land Registration Act, 2012 which espouses the principle that a certificate of title or its equivalent is conclusive evidence of ownership.
13. It was submitted that the finding by the Kadhi was in recognition of the said principle. That the Appellants did not lead evidence to impeach the Respondent’s ownership of the suit properties and therefore the Kadhi was right in dismissing their case. The Respondent relied on the case of Abdullahi Sheikh Ahmed v Mandera County Government (2020) eKLR where the High Court found for the Plaintiff on the basis that the defendant did not call evidence to show that the plaintiff acquired title to the suit property through fraud, misrepresentation or through other unlawful means. It was therefore submitted that the Respondents lawfully acquired the subject property.



14. As regards the land at Mansile, the Respondents submitted that the Kadhi rightly held that the 1st Respondent tendered credible evidence that he is the owner of land and consequently that the said land did not form part of the estate of the deceased. That if the Appellants desire to impugn the ownership of the said property the proper forum will be the Environment and Land Court. Reliance in this respect was made on the case of *In re Estate of Moses Mbogori (Deceased)* (2021) eKLR where the court cited the decision of Musyoka J. in *In re Estate of Kathuli Muinde (Deceased)* (2016) eKLR that:

“With regard to the assets, one of the questions that may present itself would be the ownership of the assets presented as belonging to the deceased. An outsider may claim that the property does not form part of the estate and therefore it need not be placed on the probate table. The resolution of such questions do not necessitate joinder into the cause of the alleged owner to establish ownership. It is not the function of the probate court to determine ownership of the assets alleged to be estate property. That jurisdiction lies elsewhere.

Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the *Civil Procedure Act* and the *Civil Procedure Rules*. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant, then such decree should be presented to the probate court in the succession cause so that that court can give effect to it”.

15. The Respondents urged the court to dismiss the appeal with costs.

Analysis and Determination -

16. This being a first appeal, the duty of the court is to analyze and re-evaluate afresh the evidence adduced at the lower court and draw its own independent conclusion. The Court of Appeal in *Selle vs. Associated Motor Boat Co. Ltd* [1968] EA 123 asserted this duty to be as follows:

“An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

17. I have perused the lower court’s file in Moyale Kadhi’s Court Succession No.29 of 2017. The matter that the Kadhi dealt with in the succession cause arose from an application dated 14th November 2017 wherein the Petitioners were seeking for orders as enumerated in paragraph 2 above.
18. The application was supported by the affidavit of the two petitioners. The petitioners/Appellants contended that they were the personal representatives of the estate of the deceased herein. That the 1st Respondent had secretly and without authority of the personal representatives of the deceased sold the deceased’s estate to the 2nd and 3rd Respondents and put them in possession thereof thus disinheriting the Petitioners. That the two were not beneficiaries to the estate of the deceased. That the conduct of the 1st, 2nd and 3rd Respondents amounted to intermeddling with the estate of the deceased which is



an offence under section 45 (2)(a) of the Law of Succession Act. That the act of the Respondents will put the estate of the deceased into waste to the detriment of the listed beneficiaries of the estate. That the court has a duty to protect the interest of the estate of the deceased from irresponsible acts of the Respondents.

19. The application was opposed by the 1st Respondent, Hussein Mohamed Leo, vide his replying affidavit sworn on the 18th December 2017 in which he deposed that he was unable to properly respond to the allegations in the application as the parcels of land in question were not identifiable and it was thus an exercise in futility to deliberate on the matter without proper facts as to the exact particulars of the suit property as to the exact location, size evidenced by proper documents of proof such as title deed or searches proving ownership thereof. The 1st Respondent denied having intermeddled with the estate of the deceased and said that all his dealings with the estate has been to the benefit of all the beneficiaries particularly the 1st Petitioner who on 4/7/2015 received Ksh.450,000/= being the proceeds of sale of land to the 5th Respondent. He contended that the estate of the deceased was intact as no beneficiary had been disinherited as most of them had put up structures in their respective portions. That the 2nd, 3rd and 4th Respondents have proper documentation of their parcels of land and were thereby not trespassers to the estate of the deceased. Further that some of the parcels of land mentioned by the petitioners did not form part of the estate of the deceased hence proof of ownership was material. For the above said reasons the 1st Respondent urged the court to dismiss the application with costs.
20. The application was also opposed by the 3rd Respondent, Isaak Hussein, who deposed in his affidavit that he had on the 27th October bought an unregistered plot from the 1st Respondent for a sum of Ksh.325,000/= which in the year 2016 he registered with the County Government of Marsabit as plot No 930. That he has since been paying annual plot rent for it. That in the premises the plot does not form part of the estate of the deceased.
21. The application was also opposed by the 4th Respondent, Wato Darche, who deposed in his replying affidavit that he had on the 3/8/2011 bought an unregistered plot situate in Hellu/Manyatta from the 1st Respondent who was selling it on behalf of the 1st Petitioner/Appellant for a sum of Ksh.215,000/=. That though the same is not registered it does not form part of the estate of the deceased.
22. The 5th Respondent also opposed the application vide a replying affidavit dated the 27th November 2017 in which he deposed that he on the 3/6/2015 bought an unregistered plot from the 1st Respondent who was selling it on behalf of the 1st Appellant for a sum of Ksh.500,000/=. That in June 2015 the plot was registered with County Government of Marsabit as plot No.929 for which he has been paying annual plot rent. Therefore, that the plot did not form part of the estate of the deceased herein.
23. The application proceeded by way of viva voce evidence. The 1st Petitioner/Appellant testified in the case and called no witness. He said that the 1st Respondent sold 4 plots at Manyatta Burji belonging to the estate of their father without consent of the beneficiaries. He prayed that the sale be declared null and void.
24. The 1st, 3rd and 5th Respondents testified in the case and called 6 witnesses. The 3rd and 5th Respondents reiterated what was in their affidavits on how they bought parcels of land from the 1st Respondent. The 1st Respondent stated that the land at Ado Madi belonged to his father. That the land at Mansile belonged to him and his late brother Hassan Mohamed Leo and did not form part of the estate of the deceased. On the Manyatta plots, he said that his late brother had subdivided the land and distributed the plots to the beneficiaries. That he only sold what belonged to him. That he sold the 1st Appellant's portion on his behalf and he was sent the money.



25. In his judgment, the Hon Kadhi held that he had jurisdiction to entertain the matter as the issues before him revolved on the estate of a deceased Muslim. He relied on the provisions of Article 170 (5) of the Constitution that gives the Kadhi's Court the jurisdiction to hear matters relating to Muslim law on personal status, marriage, divorce and inheritance.
26. The Kadhi held that jurisdiction of the Kadhi's Court was determined by the existence of three things, namely: the subject matter, the party's faith and the party's submission to the jurisdiction of the court. He found the 3 factors to be existent in the case before him and he therefore had jurisdiction to entertain the matter.
27. Upon considering the evidence the Kadhi determined the matter as earlier stated above in paragraph 5 .
28. The issues for determination in the appeal are:
 - (1) Whether the Kadhi's Court had the jurisdiction to entertain the application and the responses to the application dated 14th November 2017, and if so:
 - (2) Whether the 1st Respondent intermeddled with the estate of the deceased and whether he had capacity to sell part of the estate.
 - (3) Whether the parcels of land sold to the 2nd to 5th Respondents by the 1st Respondent formed part of the estate of the deceased and whether the said purchasers lawfully acquired title to them.

Whether the Kadhi's Court had Jurisdiction to Entertain the Application and the Responses to the Application Dated 14th November 2017 -

29. The Petitioners were in their Application dated 14th November 2017 seeking for five substantive orders – eviction of the Respondents from plot Nos. Manyatta Burji, Harbour/Gubalticha/215, Mado and Mansile; a declaration that the Respondents were intermeddlers in the estate of the deceased herein; orders of injunction to restrain the Respondents from trespassing into the estate of the deceased; imprisonment of the Respondents for intermeddling with the estate of the deceased without authority of the personal representative and for orders that the Respondents be restrained from harassing the administrator.
30. The 2nd to the 5th Respondents claimed to be purchasers for value. The question then was whether the Kadhi's court had Jurisdiction to Entertain the dispute between the Petitioners and third parties who were not direct beneficiaries of the estate of the deceased.
31. A court of law can only assume jurisdiction as conferred by the law. Jurisdiction goes to the root of every case and without it the court would be engaged in a futile exercise. The Supreme Court in Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR emphasized this point in the following terms: -

“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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”



32. In the celebrated case of *Owners of the Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Ltd* [1989] KLR 1 the late Justice Nyarangi held as follows:-

"I think that is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its stools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing.

33. Since jurisdiction goes to the foundation of the case the issue can be raised at any stage of the proceedings, even during an appeal. In *Adero v Ulinzi Sacco Ltd* [2002] 1 KLR 577, as cited by the Court of Appeal in *Attorney General & 2 others v Okiya Omtata Okoiti & 14 others* [2020] eKLR, Ringera, J. (as he then was), held that:

...It is trite law that jurisdiction cannot be conferred by the consent of the parties. Much less can it be assumed on the grounds that parties have acquiesced in actions which resume the existence of such jurisdiction. And jurisdiction is such an important matter that it can be raised at any stage of the proceedings and even on appeal.

34. In *Lemita Ole Lemein v. Attorney General & 2 Others* [2020] eKLR, also cited by the Court of Appeal in the same case, Karanja, J.A. took a similar view and stated:

In my view, jurisdiction is primordial and must exist right from the filing of a case to determination. The issue of jurisdiction need not be raised by the parties to a suit for the court to address its mind to it. It is incumbent upon every judicial or quasi judicial tribunal or court to satisfy itself that it has jurisdiction to entertain a matter before settling down to hear it. In essence therefore, a court or tribunal should not wait for a party to move it on the issue of jurisdiction for it to determine the issue. The Court can suo motu determine the issue even without being prompted by a party. Just like you cannot confer jurisdiction even by consent of the parties, you cannot confer jurisdiction by ignoring the issue or sidestepping it. It is omnipresent and cannot be wished away. Moreover, it being a point of law, the issue of jurisdiction can also be raised at any stage; in the trial court, first appeal or even on second or third appeal.

35. In *Stanley Muiruri Muthama v Rishad Hamid Ahmed & 2 others* [2018] eKLR the Court of Appeal observed that:

It is trite law that an issue of jurisdiction, as the one that was argued by the 1st respondent's counsel, can be raised at any time, in any manner, and even by the Court itself.



36. In Nyeri Civil Appeal No. 310 of No. 1997 *Karanja Vs The Attorney General* the same court stated that:

“ Any order made without jurisdiction is a nullity and no amount of legal ingenuity can turn that into a valid order. What is a nullity remains a nullity. We say so now and it has been said so before ...”

37. It is therefore my view that the court can address the issue of jurisdiction even when the matter is on appeal.

38. The Kadhi’s court derives its jurisdiction from the *Constitution* and from Section 5 of the *Kadhi’s Court Act*. Section 5 of the *Kadhi’s Court Act*, Cap 11, states as follows: -

“ A Kadhi’s Court may 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.”

39. Article 170 (5) of the *Constitution* provides as follows: -

“ 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.”

40. From these provisions it is clear that the jurisdiction of the Kadhi’s court is only limited to adjudicating on questions touching on 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. There is nothing in these provisions that can be construed to give power to the Kadhi’s court to determine disputes over title and ownership to property.

41. The Court of Appeal in *Genevieve Bertrand –v- Mohamed Athman Maawiya & Another* [2014] eKLR set out the factors that must exist for a Kadhi’s court to assume jurisdiction over a matter. Said the 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 in dispute, the party’s muslim faith, and the party’s submissions to the jurisdiction of the Kadhi’s Court.”

42. The subject matter in the case that was before the Kadhi was inheritance of the deceased’s property. The duty of the Kadhi in the matter was to determine the estate of the deceased, the heirs of the deceased and their respective shares. However, the pleadings which were placed before the Kadhi showed a dispute pitting the administrators of the estate, the Appellants, on the one hand and the 1st Respondent and the purchasers of the deceased’s estate on the other hand. The purchasers were arguing that they were purchasers for value without notice. The 1st Respondent claimed to have lawfully sold the parcels of land to the said purchasers. The dispute was therefore over ownership of the properties. In my considered view, it is not within the jurisdiction of the Kadhi’s court to adjudicate on disputes over ownership of property between administrators of an estate and third parties. That is the province of the civil courts.



43. In this respect I find support in the case of *Pricilla Ndubi and Zipporah Mutiga vs. Gerishon Gatobu Mbuji*, Meru Succession Cause No. 720 of 2013, where 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”.

44. The way to go about resolving disputes between the administrators of an estate of a deceased person and third parties claiming ownership of estate property is as was stated by Musyoka J. in the case of *In Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR, where it was held as follows:

“.....The *Law of Succession Act*, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes of course do arise in the process. The provisions of the *Law of Succession Act* and the *Probate and Administration Rules* are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the *Law of Succession Act* and the *Probate and Administration Rules*. Such have to be resolved through the structures created by the *Civil Procedure Act and Rules*, which have elaborate rules on suits by and against executors and administrators.

See also the holding in *In re Estate of Katbuli Muinde (Deceased)* (2016) eKLR (*supra*).

45. In my view, the procedure stated by Justice Musyoka is the one that should be followed by the Kadhi's courts in probate matters where there is a dispute over ownership of property with third parties, as was the case in the instant matter.
46. There are persuasive authorities to support the proposition that a Kadhi's Court has no jurisdiction to entertain disputes touching on ownership of title to property. In the case of *Mahmoud Mohamed Bwanamkuu v Abubakar Ali Karema* [2018] eKLR where there was a dispute over ownership of a house and the Kadhi took evidence of the parties and determined that the house belonged to the deceased and not the Appellant, Thande J. held that the Kadhi had in determining the dispute exceeded the jurisdiction conferred by Article 170(5) of the *Constitution* and the Kadhi's Court Act. Said the court:

The Kadhi's Courts jurisdiction is exhaustively provided in the Constitution and the Kadhis' Courts Act. The Hon. Kadhi in the instant case therefore misdirected himself by purporting to expand the Court's jurisdiction by judicial craft and innovation. Upon realizing that the dispute herein went beyond the determining the heirs of the deceased and their respective shares in her estate, the Hon. Kadhi ought to have downed his tools. When he ventured into the determination of ownership of the house, he arrogated to himself



jurisdiction he did not have. In the circumstances, I allow the Appeal and set aside the judgement of the Hon. Kadhi delivered on 27.6.13. There shall be no order as to costs.

47. Similarly, in *Jibril Gollo Duba v Asli Gollo Duba* [2021] eKLR, where the question was whether the Kadhi's Court had jurisdiction in entertaining a dispute of ownership of a certain plot while sitting as a probate and administration court and further distributing the plot, Muriithi J. quashed the decision of the Kadhi on the ground that the same was made without jurisdiction and held that:

It is clear that a dispute regarding ownership in respect of the property of a deceased person negates the concept of free property of a deceased person, and the dispute should be determined by a court with jurisdiction to determine ownership disputes before distribution by a succession court.

48. In this appeal it is my finding that the Kadhi's court in purporting to determine the dispute over ownership of property between the Appellants/petitioners and the Respondents exceeded his jurisdiction as conferred by the law. A decision made without jurisdiction is null and void.
49. Having reached a decision that the Honourable Kadhi had no jurisdiction to entertain the dispute that was before him, I do not see the need to consider the merits of the judgment. The order that commends itself to me is to quash the whole of the judgment and the orders of the Hon. Kadhi as delivered on 6th March 2019. The same is quashed accordingly.
50. I order that the succession cause proceeds before another Kadhi of competent jurisdiction other than Hon. A.D Wako.
51. Each party to bear its own costs to the appeal.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 16TH DAY OF FEBRUARY 2023.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Behailu for Appellants

Mr. Atuku for Respondents

Parties: Appellants - Absent

Respondents - Absent

Court Assistant – Jillo

