



In re Estate of Issa Ali Ndamunga (Deceased) (Succession Cause E366 of 2021) [2025] KEKC 8 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KEKC 8 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT MOMBASA
SUCCESSION CAUSE E366 OF 2021
IA HUSSEIN, PK
FEBRUARY 28, 2025**

IN THE MATTER OF THE ESTATE OF ISSA ALI NDAMUNG (DECEASED)

BETWEEN

MISHI SAIDI ABDALLA 1ST PETITIONER

JABU ISSA ALI 2ND PETITIONER

AND

MWANAHALIMA ISSA ALI RESPONDENT

AND

ABDULRAHIM MOHAMED INTERESTED PARTY

MOHRA AHMED HUSSEIN INTERESTED PARTY

SHANDUR LIMITED INTERESTED PARTY

JUDGMENT

Background

1. The Petitioners Mishi Saidi Abdalla and Jabu Issa Ali filed a petition on 18th October, 2021, seeking confirmation of the estate of the late Issa Ali Ndamunga who died on 2nd April, 2021. In their petition they sought: determination of the legal heirs and their shares, declaration of the 2nd Petitioner Jabu Issa Ali as the administrator of the estate, and an order to vest title deed No. Mombasa/Block XI/882 to the 2nd Petitioner.
2. The Petitioners aver that they are the widow and daughter of the deceased respectively and that they are the sole beneficiaries of the estate. The 1st Petitioner claims to be the sole legitimate widow of the deceased while the 2nd Petitioner claims to be the legitimate daughter of the deceased.



3. The Respondent, Mwanahalima Issa Ali, subsequently filed a cross-petition on 7th May, 2024, indicating that she is a biological daughter of the deceased from a different mother, one Zuhura Saidi Mwamakanzu, whom she claims was the second wife of the deceased. The cross-petition further claimed that the deceased left behind other legitimate heirs, namely Amani Issa Ali (son) and Fatuma Issa Ali (daughter), both children of Zuhura Saidi Mwamakanzu.
4. The Respondent further avers that the deceased died intestate and that the estate comprises two properties: a Swahili house at Sparki and the property described as Mombasa/Block XI/882.
5. The Interested Parties entered the proceedings following the sale of one of the disputed properties by the 2nd Petitioner. They aver that they purchased the property in good faith and acquired title to the same.

The Hearing

6. The matter came up for hearing on 17th February, 2025, and proceeded with the testimony of witnesses. From the proceedings, the following evidence emerged:
7. PW1 (Mishi Saidi Abdalla), the 1st Petitioner, testified that she was the wife of the deceased, having married him with evidence of a marriage certificate (Pexhibit No. 1). She stated that the deceased had only married her and that the Respondent was not known to her as a widow of the deceased. She produced the marriage certificate as her evidence. She further testified that the deceased left two houses in Spaki, one of which was under construction by the Interested Parties. She denied knowledge of Zuhura Saidi Mwamakanzu and her children until the proceedings were initiated.
8. RW1 (Mwanahalima Issa Ali), the Respondent, testified that she was a biological daughter of the deceased who raised her. She produced her birth certificate (Rexhibit 2) and National ID card (Rexhibit 1) indicating the deceased as her father. She stated that her late father had two wives – Mishi and Zuhura, and that they used to live in the deceased's second house near Ziwani (the suit property) since the 1990s until 2021. She claimed they had a good relationship with the Petitioners' family until her father's death.
9. RW2 (Zuhura Saidi), testified that she was married to the deceased in 1987 at the Kadhis Court, with Kadhi Ali Mwezangu officiating the ceremony. Her guardian (wali) was her uncle Abdallah Ali, and various witnesses attended the marriage, including Bakari (now bedridden), Haruni (deceased), and others. She stated that the agreed mahr was KES 5,000 which was fully paid. She claimed she was issued a marriage certificate that was later damaged by water, and attempts to retrieve a copy from the Kadhis Court archives were unsuccessful as records for certain months of 1987 were missing.
10. RW3 (Alwani Jabu Babu), testified that he was Zuhura's maternal uncle and witnessed her marriage to the deceased in court, though he could not recall the specific date. RW4 (Billy Huka), testified that he was related to Zuhura through marriage and was aware of her marriage to the deceased, though he did not witness the actual ceremony.
11. The Interested Party (Hassan Sheikh Abubakar), testified regarding the purchase of property Mombasa/Block XI/882 from Jabu Issa Ali. He produced various documents including a Power of Attorney (IExb 1), Sale Agreement (IExb 2), transfer documents, and permits for construction. He stated that the purchase price was KES 8 million.



Parties' Submissions

12. The Petitioners, through their advocate, submitted that the jurisdiction of Kadhis Court flows from Article 170 of *the Constitution* and is guided by statutes passed by Parliament. They argued that under the *Marriage Act* Cap 150, Sections 57 and 59, registration of Islamic marriages is essential for proving their existence. They contended that Zuhura failed to produce a marriage certificate or provide evidence of marriage as required by law, and therefore she and her children are not entitled to inherit from the deceased.
13. The Respondent, through counsel, submitted that the deceased was lawfully married to two wives and had children from both marriages. They argued that: a) The question of whether a valid marriage exists is a question of fact that can be proved by evidence, and the applicable law should be Muslim law rather than ordinary rules of evidence; b) Islamic law does not insist upon any particular form for marriage contracts, and non-registration or absence of a marriage certificate does not invalidate a lawful marriage; c) A Muslim marriage may be proved directly (through documents or oral testimony) or presumptively (through evidence of conduct and public reputation); d) The circumstances for presumption of a lawful marriage between the deceased and Zuhura were met through evidence of long cohabitation and public reputation.
14. The Respondent further argued that Zuhura's children's paternity was established through birth certificates and national identity cards, which are sufficient prima facie evidence. They submitted that the legal heirs of the deceased should include both wives and all children, and that the property known as Mombasa/Block XI/882 was illegally sold by Jabu Issa Ali when the dispute was still active in court.
15. The Interested Parties submitted that Zuhura failed to prove her marriage to the deceased as she could not produce a marriage certificate. They cited that under Islamic law, a marriage contract must be proven, and the burden of proof falls on the person asserting the existence of such a contract. They cited the Kenyan Court of Appeal decision in Civil Appeal E043 of 2022 (FAAF v. RFM, JMM & MCP), which established that children born outside wedlock are not considered legitimate heirs under Islamic law. They argued that the 2nd Petitioner had lawfully inherited the property and could therefore pass good title to the Interested Parties.

The Respondent's Authorities

16. The Respondent relied on two authorities:
17. First, *In re Estate of Mohamed Idris Ahmed (deceased) (Succession Cause E053 of 2020) [2022] KEKC 152 (KLR) (Family) (29 September 2022)*, where the court found that while a marriage certificate is recommended and demanded by law, its absence does not invalidate a valid marriage. The court recognized that a valid marriage under Islamic law is one that satisfies its requirements: offer and acceptance of the bride and groom, consent of the wife's waliy (guardian), and witnesses by at least two male witnesses. The court also recognized that where there is a semblance of lawful marriage recognized by law, children are either admittedly lawful or capable of being made so by acknowledgment.
18. Second, *In re Estate of Ramadhan Hassan (Deceased) [2014] eKLR*, where the court held that in the absence of direct proof, presumption in favor of a lawful marriage arises where parties lived together continuously for a prolonged period openly and to the knowledge of relatives and friends. The court found that a woman's failure to produce or prove the marriage contract in court does not imply that her marriage is invalid or that she is not entitled to any matrimonial right. The court also held that paternity of a child is confirmed by any of three ways: marriage, acknowledgment, or evidence.



Issues for Determination

19. From the testimonies, pleadings, exhibits presented and submissions, the following issues emerge for determination:
 - a) Whether Zuhura Saidi Mwamakanzu was legally married to the deceased under Islamic law.
 - b) Whether Mwanahalima Issa Ali, Amani Issa Ali, and Fatuma Issa Ali are legitimate children of the deceased under Islamic law and thus entitled to inherit.
 - c) What properties constitute the estate of the deceased.
 - d) Who are the rightful heirs of the deceased and what are their respective shares.
 - e) The validity of the sale of property Mombasa/Block XI/882 to the Interested Parties.

Analysis and Determination

Whether Zuhura Saidi Mwamakanzu was legally married to the deceased under Islamic law

20. The 1st Petitioner, Mishi Saidi Abdalla (PW1), testified that she was the only wife of the deceased and produced a marriage certificate (Pexhibit No. 1) as evidence of her marriage. She denied knowledge of Zuhura Saidi Mwamakanzu as a co-wife.
21. The Respondent and her witnesses testified that Zuhura was married to the deceased in 1987 at the Kadhis Court with Kadhi Ali Mwezangu officiating the ceremony. They stated that her guardian (wali) was her uncle Abdallah Ali, and witnesses to the marriage included Bakari (now bedridden), Haruni (deceased), and others. RW2 claimed that the agreed mahr was KES 5,000 which was fully paid.
22. RW2 further testified that they were issued with a marriage certificate which was later damaged by water. She claimed to have attempted to obtain a copy from the Kadhis Court archives but was unsuccessful as some records from 1987 were missing.
23. This Court acknowledges that marriage under Islamic law is a contract requiring certain elements for validity. As noted in *In re Estate of Ramadhan Hassan (Deceased)* [2014] eKLR, "Marriage under Islamic Law is a civil contract requiring no ceremony or special formality."
24. Section 57 of the *Marriage Act* provides for registration of Islamic marriages, and Section 59 provides the means by which a marriage may be proven. While documentary evidence in the form of a marriage certificate is ideal, Islamic law recognizes other forms of proof of marriage.
25. In the case of *In re Estate of Mohamed Idris Ahmed (deceased)* [2022] KEKC 152 (KLR), the court held: "A valid marriage under Islamic law is one that satisfied its requirements: offer and acceptance of the bride and groom, consent of the wife's waliy [guardian] and witnessed by at least two male witnesses. A marriage certificate while recommended and even demanded by law, its absence does not invalidate a valid marriage."
26. Furthermore, as established in *In re Estate of Ramadhan Hassan (Deceased)* [2014] eKLR: "In the absence of direct proof, the presumption in favour of a lawful marriage arose where there is 'no insurmountable obstacle to such a marriage' - such as prohibited relationship between the parties, the woman being an un-divorced wife of a husband who was alive, etc."
27. The evidence presented shows that Zuhura and the deceased lived together openly as husband and wife for a prolonged period (from 1987 until around 2019), and they had three children together.



Multiple witnesses testified to the validity of the marriage, including Zuhura's uncle who claimed to have witnessed the ceremony.

28. While there are some inconsistencies in the testimony regarding the exact date of the marriage, and the marriage certificate could not be produced, the witnesses were consistent regarding the essential elements of the marriage. There was an offer and acceptance, a wali (guardian), witnesses, and payment of mahr (dowry).
29. The Petitioners have not provided any evidence to establish that there was an "insurmountable obstacle" to the marriage between Zuhura and the deceased. The mere fact that MISHI claims not to have known about Zuhura is not sufficient to invalidate the marriage, as Islamic law permits polygamy up to four wives.
30. Based on the evidence presented and the legal principles established in the cases cited, I find that Zuhura Saidi Mwamakanzu was legally married to the deceased under Islamic law through both direct evidence (witness testimony) and presumptive evidence (long cohabitation and public reputation as husband and wife).
31. It is worth noting that the principle of presumptive evidence of marriage has strong foundations in Islamic jurisprudence. Even the Holy Quran in Surah Al-Masad (Chapter 111), verse 4, states: "#####" meaning "His wife shall carry the (crackling) wood—as fuel!" This verse refers to the wife of Abu Lahab, who was not Muslim, yet the Quran recognized their marital relationship despite the absence of an Islamic marriage contract. This demonstrates that the recognition of marriage in Islamic law can extend beyond formal documentation to factual realities of marital relationships.
32. Furthermore, this principle is reinforced in authoritative Islamic legal scholarship. In "Islamic Jurisprudence and Its Proofs" (#####), Vol. 9, pg. 519, the eminent jurist Wahbah al-Zuhayli explains the Shafi'i school's perspective on marriage: "#####" This text clarifies that according to the Shafi'i school, marriage is considered a worldly act (#####) similar to commercial transactions like buying and selling, and not strictly an act of worship (#####). The evidence for this is that a marriage is valid even when performed by persons professing other religion, which would not be the case if marriage were purely a religious ritual. This legal principle further supports the validity of recognizing marriages based on substantive evidence of the marital relationship rather than rigid formal requirements.

Whether Mwanahalima Issa Ali, Amani Issa Ali, and Fatuma Issa Ali are legitimate children of the deceased under Islamic law

32. The Respondent has produced birth certificates and National ID cards indicating that the deceased was the father of herself, Amani Issa Ali, and Fatuma Issa Ali. The witnesses testified that the deceased recognized and supported these children during his lifetime.
33. In Islamic law, as outlined in *In re Estate of Ramadhan Hassan (Deceased) [2014] eKLR*, paternity of a child is confirmed by any of three ways: marriage, acknowledgment, or evidence. The first is most important, as legitimacy follows from a valid marriage.
34. According to the authority cited in *In re Estate of Mohamed Idris Ahmed (deceased) [2022] KEKC 152 (KLR)*: "Where there exists between a man and a woman the relationship of husband and wife or



such semblance as is recognised by the law, the children are either admittedly the lawful children of the man or capable of being made so by his acknowledgment."

35. Having found that Zuhura was legally married to the deceased under Islamic law, and considering that their children were born during the marriage and acknowledged by the deceased during his lifetime (as evidenced by the birth certificates and testimony), I find that Mwanahalima Issa Ali, Amani Issa Ali, and Fatuma Issa Ali are legitimate children of the deceased under Islamic law.
36. The Interested Parties cited the case of FAAF v. RFM, JMM & MCP, which established that children born outside wedlock are not considered legitimate heirs under Islamic law. However, since I have found that Zuhura was legally married to the deceased, this authority does not apply to the current case.

What properties constitute the estate of the deceased

36. From the evidence presented, the following properties constituted the estate of the deceased:
- a) A Swahili house at Sparki where the Petitioners reside b) Property described as Mombasa/Block XI/882, which has since been sold to the Interested Parties
37. Both parties acknowledge the existence of these two properties. The 1st Petitioner, while initially only mentioning one property in the petition, later admitted during testimony that the deceased owned two houses.

Who are the rightful heirs of the deceased and what are their respective shares

38. Having found that Zuhura Saidi Mwamakanzu was legally married to the deceased and that her children are legitimate, I determine that the rightful heirs of the deceased are:
- a) Mishi Saidi Abdalla (1st widow) b) Zuhura Saidi Mwamakanzu (2nd widow) c) Jabu Issa Ali (daughter from 1st wife) d) Amani Issa Ali (son from 2nd wife) e) Mwanahalima Issa Ali (daughter from 2nd wife) f) Fatuma Issa Ali (daughter from 2nd wife)

39. According to Islamic inheritance law, as outlined in the Holy Quran chapter 4 verses 11 and 12:

"Allah commands you regarding your children -- for the male a share equivalent to that of two females..."

"And for them (your wives) one fourth of what you leave behind, if you did not have a child but if you have a child then for them one-eighth of what you leave behind."

40. Where the deceased is survived by two widows, one son, and three daughters, the distribution shall be as follows:
- a) The two widows share 1/8 of the estate equally (1/16 each) b) The remaining 7/8 is divided among the children, with the son receiving twice the share of a daughter

With one son and three daughters, the denominator becomes 5 (1+1+1+2), so:

Each widow: 1/16 of the estate
Each daughter: 7/40 of the estate
The son: 14/40 of the estate

41. Therefore, the shares are:

- a) Mishi Saidi Abdalla (1st widow): $1/16 = 6.25\%$ of the estate
b) Zuhura Saidi Mwamakanzu (2nd widow): $1/16 = 6.25\%$ of the estate
c) Jabu Issa Ali (daughter): $7/40 = 17.5\%$ of the estate
d) Amani Issa Ali (son): $14/40 = 35\%$ of the estate
e) Mwanahalima Issa Ali (daughter): $7/40 = 17.5\%$ of the estate
f) Fatuma Issa Ali (daughter): $7/40 = 17.5\%$ of the estate



The validity of the sale of property Mombasa/Block XI/882 to the Interested Parties

42. The evidence shows that the 2nd Petitioner sold the property Mombasa/Block XI/882 to the Interested Parties while the dispute over the estate was still pending before this Court. The Interested Parties have produced a sale agreement, transfer documents, and various permits and approvals for construction.
43. It is worth noting that despite being given ample opportunity to testify and explain her actions regarding the disposal of the property, the 2nd Petitioner Jabu Issa Ali chose not to participate in the proceedings for reasons best known to herself. This is particularly concerning given that she was principally responsible for disposing of the property that forms part of the estate under dispute. The court can only conclude that her absence suggests an unwillingness to account for her actions in selling the property without proper authority.
44. However, it is clear from the findings above that the 2nd Petitioner was not the sole heir to the estate and therefore did not have the authority to dispose of the entire property without the consent of the other heirs.
45. The actions of the 2nd Petitioner in selling the property while the matter was still pending before this Court demonstrate a disregard for the judicial process and the rights of the other potential heirs. This conduct cannot be condoned.
46. Nevertheless, I note that the Interested Parties claim to have acted in good faith, having conducted due diligence through a transactional lawyer. They have paid consideration for the property and have commenced construction.
47. In balancing the interests of justice, I find that the sale to the Interested Parties cannot stand as it was conducted without proper authority and in contravention of the rights of the other heirs. The transfer of the property to the Interested Parties is hereby declared null and void.
48. The Interested Parties, having acted in good faith, are entitled to recover the purchase price and any reasonable expenses incurred from the 2nd Petitioner personally, and not from the estate.

Orders

49. Based on the foregoing, I hereby issue the following orders:
 - a) I declare that Zuhura Saidi Mwamakanzu was legally married to the deceased Issa Ali Ndamunga under Islamic law.
 - b) I declare that Mwanahalima Issa Ali, Amani Issa Ali, and Fatuma Issa Ali are legitimate children of the deceased under Islamic law and entitled to inherit from his estate.
 - c) The estate of the deceased Issa Ali Ndamunga consists of: i) A Swahili house at Sparki ii) Property described as Mombasa/Block XI/882
 - d) The rightful heirs of the deceased and their respective shares are: i) Mishi Saidi Abdalla (1st widow): 6.25% of the estate ii) Zuhura Saidi Mwamakanzu (2nd widow): 6.25% of the estate iii) Jabu Issa Ali (daughter): 17.5% of the estate iv) Amani Issa Ali (son): 35% of the estate v) Mwanahalima Issa Ali (daughter): 17.5% of the estate vi) Fatuma Issa Ali (daughter): 17.5% of the estate
 - e) The sale and transfer of property Mombasa/Block XI/882 to the Interested Parties is declared null and void.



- f) The Registrar of Lands is directed to cancel the registration of property Mombasa/Block XI/882 in the names of the Interested Parties and restore it to the estate of the deceased.
- g) The Interested Parties are at liberty to institute proceedings against the 2nd Petitioner personally for the recovery of the purchase price and any reasonable expenses incurred.
- h) The estate shall be administered jointly by MISHI SAIDI ABDALLA and Zuhura Saidi Mwamakanzu as representatives of the two households.
- i) The parties shall within 90 days agree on the mode of distribution of the estate, failing which the properties shall be valued by a court-appointed valuer and sold, with the proceeds distributed according to the shares outlined above.
- j) Each party shall bear their own costs.

These are the orders of this Court.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF FEBRUARY, 2025

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AJ ISHAQ

DEPUTY REGISTRAR/PRINCIPAL KADHI

In the presence of:

Mr. Nelson - Court Assistant

Mr. Hamisi & Mr. Hamadi for the Respondent

Mr. Olaba for the Interested Parties

