



**In re Late Ahmed Swaleh Bin Swaleh (Deceased) (Succession Appeal  
42 of 2017) [2025] KEKC 9 (KLR) (18 February 2025) (Ruling)**

Neutral citation: [2025] KEKC 9 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT MOMBASA  
SUCCESSION APPEAL 42 OF 2017**

**IA HUSSEIN, DR**

**FEBRUARY 18, 2025**

**IN THE MATTER OF**

**RUKIA AHMED ALIAS RUKIA LUGOGO MWANZIJE ..... 1<sup>ST</sup> PETITIONER**

**SWALEH AHMED ..... 2<sup>ND</sup> PETITIONER**

**AND**

**SWALHA WAMBUGU NAHDEY ..... INTERESTED PARTY**

**ZUBEIDA MOHAMED NAHDEY ..... INTERESTED PARTY**

**FATUMA KELLAH NAOMI ..... INTERESTED PARTY**

**YUSSUF ABOUBAKAR T/A ABUBAKAR, MWANAKITINA & COMPANY  
ADVOCATES ..... INTERESTED PARTY**

**ABUBAKAR ATHMAN ALI ..... INTERESTED PARTY**

**RULING**

**Background**

1. The matter before me is an Application dated 23rd February 2024 seeking seven prayers, principally for the Applicants to be enjoined as interested parties, for leave to be granted to M/s Abdikadir & Abdikadir Company Advocates to come on record, and for an order directing the firm of Abubakar Mwanakatina & Co. Advocates to deposit in court the sum of KES 5,250,000/- being the Applicants' share of the deceased's estate.
2. By a ruling delivered on 4th July 2019, Hon. Abdullahi M. Salim ordered the distribution of the estate with Fatma Ahmed (widow) receiving 3/4 share, which upon her death was to devolve to her children. Subsequently, Hon. Vumbi in his judgement of 9th July 2021 directed the parties to reach a compromise, failing which any party could apply to court for final orders.



3. The parties reached a compromise where the estate was to be distributed as follows:
  - Rukia Ahmed - KES 875,000/-
  - Swaleh Ahmed - KES 1,750,000/-
  - Swalha Nahdy - KES 875,000/-
  - Zubeida Nahdy - KES 875,000/-
  - Amina Nahdy - KES 875,000/-
  - Nassir Sheikh Amin - KES 1,750,000/-
  - Abubakar Athman - KES 1,750,000/-
4. Following sale of property, KES 9,499,000/- was deposited with the 5th Interested Party for distribution. Only KES 863,368.65 has been released to one beneficiary, with the balance being retained allegedly for legal fees.

#### **The Parties' Submissions:**

5. Mr Muyove for the Applicants submitted that they qualify for joinder under Rule 10(2) of the Kadhi's Court Procedure Rules as beneficiaries with direct interest in the estate. He relied on the case of Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 Others [2014] eKLR which set out criteria for joinder of interested parties.
6. Ms Said supported the application, citing Simon Juma Mganga v Advocates Commission Misc. E074 2020 which held that an advocate cannot hold client funds as lien until taxation. She submitted her client was entitled to additional KES 749,000/- from the excess sale proceeds.
7. Mr Abubakar opposed the application, arguing it was incompetent as it sought joinder post-judgment. He maintained that under Rule 119 of the Kadhi's Court Procedure Rules and Section 52 of the Advocates Act, he was entitled to retain the funds pending taxation of his fees.

#### **Issues for Determination:**

8. The following issues arise:
  - a) Whether the Applicants can be enjoined as interested parties at this stage
  - b) Whether leave should be granted to M/s Abdikadir & Abdikadir Company Advocates to come on record
  - c) Whether the 5th Interested Party has legal justification to continue holding the funds

#### **Analysis:**

##### **On Joinder of Interested Parties:**

9. On joinder of interested parties, I am guided by the Supreme Court in *Muruatetu v Republic* [2016] eKLR which set out three key criteria: formal application, demonstration of personal interest, and prejudice if not joined. The Applicants have fulfilled these criteria as beneficiaries of the Fatma Ahmed.
10. While Mr. Abubakar correctly points out that Rule 13 requires joinder applications before close of proceedings, the circumstances here are unique. As held in *Kenya Medical Laboratory Technicians and*



Technologists Board & 6 others v Attorney General & 4 others [2017] eKLR, the test is whether the intended interested party has an identifiable stake or legal interest in the proceedings.

11. The Court of Appeal in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* [2014] eKLR emphasised that procedural technicalities should not defeat substantive justice. This aligns with Article 159(2)(d) of *the Constitution* and Rule 5 of the Kadhi's Court Procedure Rules on the overriding objective.

#### **On Leave for New Advocates:**

12. The right to legal representation is a fundamental right enshrined in Article 50(2)(g) of *the Constitution* of Kenya 2010. In *Kipchilat v Boit* (Suing as the personal representative of the Late Samwel Kipilel Arap Boit) [2024] KEELC 5654 (KLR), the court held that the right to legal representation includes the right to choose counsel of one's preference.
14. It is a trite law that procedural technicalities should not be used to defeat the ends of justice, particularly where substantive rights are at stake. In this case, the Applicants' right to their inheritance is clearly a substantive right deserving protection.
15. While it is true that the substantive succession matter has been determined, the court retains jurisdiction to supervise the implementation of its orders and ensure proper distribution of the estate. The need for proper legal representation is particularly acute where, as in this instance, there are disputes over the distribution of estate funds held by an advocate.

#### **On Release of Held Funds:**

16. The matter of retained funds necessitates meticulous consideration of numerous legal stipulations and tenets. Section 52 of the *Advocates Act* provides for an advocate's lien over client funds where fees are disputed. Additionally, Order 52 Rule 4(3) of the Civil Procedure Rules expressly provides that "If the advocate alleges that he has a claim for costs the court may make such order for the taxation and payment, or securing the payment, thereof and the protection of the advocate's lien, if any, as the court deems fit. The High Court in *Simon Njumwa Mghanga v Joyce Jeptarus Kagogo T/A Chesaro & Co. Advocates* [2014] KEHC 6069 (KLR) recognised this right whilst emphasising the necessity to balance it against other interests.
17. In this case, the 5th Interested Party received these funds for onward transmission to beneficiaries. However, there exists a legitimate fee dispute with the 1st Petitioner pending before the High Court in Misc. Civil Application No. E143 of 2023. The Islamic principle "#####" (And upon the heir is like that which was upon [the one they inherit from]) as stated in Surah Al-Baqarah verse 233, suggests that the 1st-4th Interested Parties, as beneficiaries deriving their rights through the 1st Petitioner, are bound by the same obligations that affect their predecessor's interest.
18. Order 52 Rule 4(3) provides this court with discretion to make appropriate orders protecting both the advocate's lien and ensuring fair distribution of funds. Whilst the beneficiaries should not be unduly deprived of their inheritance, their rights flow from and are subject to the legitimate obligations of the 1st Petitioner, including the resolution of professional fee disputes. Given the pending taxation proceedings before the High Court which will definitively determine the advocate's fees, and considering the contractual relationship between the 5th Interested Party and the 1st Petitioner, a balanced approach is required that secures both the advocate's right to fees and the beneficiaries' right to their inheritance.



**Orders:**

19. Having considered the submissions and applicable law, I hereby order:

- a. The 1st to 4th Interested Parties are hereby enjoined to these proceedings for the purpose of receiving their inheritance.
- b. Leave is granted to the firm of M/s Abdikadir & Abdikadir Company Advocates to come on record for the 1st - 4th Interested Parties/Applicants.
- c. The 5th Interested Party shall within 14 days from today:
  - I. Release 60% of the held funds totalling KES 3,150,000/- to be distributed proportionally among the beneficiaries as follows:
    - Swalha Nahdy - KES 525,000/-
    - Zubeida Nahdy - KES 525,000/-
    - Abubakar Athman - KES 1,050,000/-
    - Fatuma Kellah (for Nassir Sheikh Amin) - KES 1,050,000/-
  - II. Retain 40% of the funds (KES 2,100,000/-) pending determination of High Court Misc. Civil Application No. E143 of 2023
- d. The released funds shall be deposited in court for distribution to the beneficiaries.
- e. Upon determination of the High Court proceedings, any party may apply for appropriate orders regarding the retained funds.
- f. Each party shall bear their own costs.

20. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF FEBRUARY 2025**

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**AJ ISHAQ**

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**DEPUTY REGISTRAR/PRINCIPAL KADHI**

In the presence of:

Mr. Nelson - Court Assistant

Mr. Muyove for the Applicants

Mr. Abubakar for the 5th Interested Party

