



**In re Estate of Late Dambala Jirma (Deceased) (Succession Cause E024 of 2023) [2024] KEKC 12 (KLR) (28 February 2024) (Ruling)**

Neutral citation: [2024] KEKC 12 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT MOYALE  
SUCCESSION CAUSE E024 OF 2023  
G ADAN, PK  
FEBRUARY 28, 2024  
IN THE MATTER OF ESTATE OF LATE DAMBALA JIRMA (DECEASED)**

**BETWEEN**

**GARBOLE DAMBALA JIRMA ..... PETITIONER**

**AND**

**HAWO DAMBALA JIRMA ..... INTERESTED PARTY**

**RULING**

1. The late Dambala Jirma (deceased) passed on July 15, 2012, and left behind five beneficiaries. The applicant claims that their deceased's father had unregistered plot situated at manyatta Burji Location of Moyale Sub County. The applicant herein above who is one of heirs of the deceased prays for court's order to share the estate of the deceased among the heirs.
2. Whereas upon filling of the application, summons was sent to the beneficiaries requiring their attendance in court to adduce evidence in respect of the prayers sought. Three of the heirs raised objection to ownership of the said estate plot to the deceased. They argued that the plot said to be estate of the deceased as never belongs to their late father Dambala Jirma, claiming that the plot belongs to Roba Guyo who said bought in the year 1958.
3. Upon perused through the application and the subsequent objection, and upon considered their arguments, it hereby the question of dispute ownership arises as first question to be dealt with before indulging in to the issue of distribution of inheritance.
4. Thus, subsequent question is whether the Kadhi's court has jurisdiction to deal with the issue of ownership dispute of the estate.
5. Jurisdiction of Kadhi's Court provided in the article 170 section 5 of the *constitution* of Kenya 2010, "The Jurisdiction of 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”.

6. In the case of *Mariam Mathias Mwasi v Rama Adam* [2020] eKLR where the court found that the high court has no jurisdiction to determine land disputes. The *Law of Succession Act* is also clear in Rule 41(3) of the Probate and Administration Rules that the issue of ownership ought to be determined before a grant is confirmed. The court with the requisite jurisdiction is the Environment and Land Court as envisaged in the Constitution in Article 162 (2)(b) and section 13 of the Environment and Land Court.

7. Rule 41(3) of the *Probate and Administration Rules* provides that: -

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 of 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.”

8. In the case of Priscilla Ndubi and Zipporah Mutiga v Gerishon Gatobu Mbui, Meru Succession Cause No. 720 of 2013, held: -

“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 of 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.”

9. Kadhis' Court is one of the Probate Court has a duty to distribute the estate of a deceased Muslim according to Islamic. Estate of a deceased is defined in section 3 of the *Law of Succession Act*, “an estate” means the free property of a deceased person, while “free property” in relation to a deceased person is defined to mean the property of which that person was legally competent freely to dispose during his lifetime and in respect of which his interest has not been terminated by his death.

10. In *re Estate of Job Ndunda Muthike (Deceased)* [2018] eKLR the court (Odunga J) while expounding on the said section stated that:

It is therefore clear that any property which the deceased was not legally competent freely to dispose during his lifetime and in respect of which his interest had been terminated by his death cannot form part of his estate and cannot be the subject of an application for confirmation of grant.

10. When such estate property of a deceased Muslim has an issue of ownership dispute, the Islamic law does not allow its distribution unless there is proof ownership to the deceased. The estate must legitimately belong to the deceased as one of the conditions must be fulfilled before inheritance takes place. These conditions are; certainty of death, survival and legitimacy of the heirs and legitimacy of ownership (Abudu: 199, Bukhari: n., NCE/DLS: 1990).



11. In Kenya the Kadhis' court has not been given such jurisdiction to determine who is the owner of the claimed property. It is the Environment and land Court which has jurisdiction.
12. Finally, in my considered view, I refer the parties to the Magistrate court (ELC) which has initial jurisdiction to determine the ownership of said plot. Thereof the Kadhis' court shall assume distribution of estate after the question of ownership is resolved.

**DATED, DELIVERED AND SIGNED AT MOYALE ON 28<sup>TH</sup> FEBRUARY 2024.**

**GALGALO ADAN – PRINCIPAL KADHI**

Moyale Kadhi's Court.

In the presence of both parties:

1. Garbole Dambala Jirma – The petitioner
2. Hawo Dambala Jirma – Interested party/Respondent

And

3. Jattani Waqo – Court's Assistant

