



In re Estate of Kanyanya Kiteda Kole (Deceased) (Succession Cause E035 of 2023) [2024] KEKC 7 (KLR) (27 February 2024) (Ruling)

Neutral citation: [2024] KEKC 7 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT MOYALE
SUCCESSION CAUSE E035 OF 2023
G ADAN, PK
FEBRUARY 27, 2024**

IN THE MATTER OF ESTATE OF LATE KANYANYA KITEDA KOLE (DECEASED)

BETWEEN

HALIMA KANYANYA KITEDA PETITIONER

AND

HALIMA HASSAN KANYANYA 1ST RESPONDENT

HABIBA HASSAN KANYANYA 2ND RESPONDENT

RULING

1. The late Kanyanya kiteda Kole (deceased) died intestate on 14th July 2001 in Moyale, and was survived by five beneficiaries. The applicant being a widow of the deceased claims that the deceased had a registered plot no. 241 In the name of Kanyanya Kiteda Kole (deceased), which situates at manyatta Burji Location of Moyale Sub County. The applicant prays for distribution of the estate (the plot) of the deceased among the heirs.
2. Whereas the respondents filed joint response disputing the ownership of the said plot to the deceased herein, who is their grandfather. They claim that the subject of this succession belongs to their father Hassan Kanyanya who is also a deceased died on 22nd November 1996, long time before their grandfather. They further claim that their deceased father (Hassan kanyanya) only left behind the two respondents (daughters) and the petitioner (the mother) as his beneficiaries.
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, the question appearing for determination, 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".

Section 5 of the [Kadhis' court Act](#) Cap 11, states, "Jurisdiction of Kadhis' Courts

A Kadhi's 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".

[In re Estate of Atibu Oronje Asioma \(deceased\)](#) (2022) eKLR WM Musyoka, J held,

".....the probate was constituted for one sole purpose, distribution of the property of a dead person....." "The central areas of concern in probate and administration were the dead person and his property. With regard to the dead person, what was of importance would be whether there was proof of his death; and, once that was established, the next consideration would be determination of the individuals entitled to the property. If he died testate, having left a valid will, it would be the individuals named as beneficiaries in the will; if he died intestate, without a will, it would be the persons entitled under the applicable law of intestacy. With respect to property, there was only one critical consideration, whether he owned any property. Modern property was subject to registration and whether a person owned a piece of property was evidenced by documents of registration or ownership.

6. The probate court only distributed assets that were undisputedly owned by the deceased. Assets that were unencumbered or the subject of ownership disputes were not undisputedly owned by the deceased, and were not available for distribution by the court until the encumbrances were removed or the ownership disputes resolved. Property available for distribution was defined in section 3 of [Law of Succession Act](#) as the free propriety of the deceased.
7. The design of the [Law of Succession Act](#) was that the mandate of the probate court was limited to distribution of the assets, and where a dispute arose on ownership of any asset, then the same should be placed in another forum, and not the succession cause, for litigation and determination. That was the spirit of rule 41(3) of the [Probate and Administration Rules](#).

Succession proceedings were not appropriate for determining disputes between the estate and third parties over title to or ownership of assets placed before the court for distribution."

8. In the case of [Mariam Mathias Mwasi vs 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](#).



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.

In the case of *Priscilla Ndubi and Zipporah Mutiga vs 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. 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 [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.
11. Similarly, 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).
12. In Kenya the Kadhis’ court likewise 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.
13. 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 27TH FEBRUARY 2024.

GALGALO ADAN – PRINCIPAL KADHI

In the presence of parties:



1. Halima Kanyanya Kiteda – the Petitioner
 2. Halima Hassan Kanyanya – 1st Respondent
 3. Habiba Hassan Kanyanya – 2nd Respondent
- And
4. Jattani Waqo - Court's Assistant

