



**In re Estate of Joseph Kiptoo Cheruiyot alias Abubakar (Succession Cause E002 of 2024) [2024] KEKC 23 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEKC 23 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT KERICHO  
SUCCESSION CAUSE E002 OF 2024  
IN NYABOGA, SRK  
OCTOBER 24, 2024**

**IN THE MATTER OF THE ESTATE OF JOSEPH KIPTOO CHERUIYOT ALIAS ABUBAKAR**

**BETWEEN**

**KHADIJA ABDALLA SALIM ..... 1<sup>ST</sup> PETITIONER  
MUHIDIN ABUBAKAR ..... 2<sup>ND</sup> PETITIONER  
BILAL ABUBAKAR ..... 3<sup>RD</sup> PETITIONER**

**AND**

**PETER CHERUIYOT ..... 1<sup>ST</sup> RESPONDENT  
ERICK CHERUIYOT ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Through a Notice of Motion dated 19<sup>th</sup> August 2024, the Petitioners sought from the Hon Court against the Respondents for orders inter alia that:
  - a. The Court to issue an order restraining the Respondents or any of their agents from trespassing, interfering with or exploiting in any way property titled Kericho/Kapsoit/266.
  - b. The Court issue an order directing the Respondents to vacate the said parcel of land.
  - c. The Court issue and order directing the OCS, Ainamoi Police Station to enforce the above orders.
2. The Respondents through their counsel filed a Preliminary Objection against the Applicants' Notice of Motion dated 24<sup>th</sup> September 2024 on grounds inter alia:



- a. That the Applicants lack capacity to prosecute the matter as they have not obtained a Grant of Letters of Administration in respect of the estate of Joseph Kiptoo Cheruiyot alias Abubakar in accordance to the Kadhi's Court Act.
  - b. That the Kadhi's Court lacks jurisdiction to entertain the Application as the Respondents do not profess the Islamic faith and do not submit to the jurisdiction of this Court.
  - c. That this Court lacks jurisdiction to grant the orders sought since the same orders can only be granted by the Environment and Land Court.
3. The matter came up for hearing on 2<sup>nd</sup> October 2024 and the Respondents' Counsel submitted that she is objecting the Application by the fact that this Court lacks jurisdiction to entertain the same.
  4. She stated that the objection is based on Article 170/5 of *the Constitution* which specifies the limitation the Kadhi's Court.
  5. She further stated that the Kadhi's Court determines questions of Muslim Law related to Personal Status in proceedings which all parties profess the Islamic faith and submit to the jurisdiction of the Court and in this matter, it's only the Applicants and not the Respondent who profess the Islamic faith.
  6. The Counsel cited in *Re Estate of Wario Guracha Dambi(Deceased)*[2021]eKLR/Neutral citation: [2021] KEHC 448 (KLR).
  7. She said that in matters where both parties profess the Islamic faith, the parties should also submit to the Court's jurisdiction for it to entertain a matter.
  8. The Respondents' Counsel stated that the second ground of objection is that the Petitioners did not follow due process before filing their application as they do not have Grant of Letters of Administration which gives them the capacity to prosecute or file a case on behalf of the deceased.
  9. She further stated that the eviction orders sought by the Petitioners can only be granted by the Environment and Land Court which jurisdiction is derived from the Environment and Land Contract and this Court sits as a probate court to determine the succession issues of the estate of Joseph Kiptoo Cheruiyot (deceased) and as such, the Court lacks jurisdiction to issue eviction orders as prayed.
  10. The Petitioner present during the hearing and who was not represented stated that as he did not understand the issues raised by the Respondents and thus would not comment on anything but leave the matter to be decided by the Hon. Court.

**Determination:**

11. The major issue to deal with first in this matter is the jurisdiction of this Honorable Court in entertaining the issues raised by the Petitioners' Application and the Preliminary Objections by the Respondents.
12. In *Owners Of Motor Vessel "Lilian S" Vs Caltex Oil (K) Ltd* [1989] KLR 1, Hon Nyarangi JA then stated that: "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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."



13. The jurisdiction of the Kadhi's Court as submitted by the Respondents' Counsel during the hearing and before that in the Preliminary Objection is derived from Article 170(5) of *the Constitution* and Section 5 of the *Kadhi's Court Act*.
14. *The Constitution* further in providing for subordinate courts and among that the Kadhis' Courts, states in Article 169(2) that: Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1).
15. Through the above provision, parliament extended the jurisdiction of the Kadhi's Court by enacting the Waqf Act 2022 which regulates religious endowments among Muslims in Kenya as the Act states in Section 29 that: Any matter or dispute relating to a waqf shall in the first instance be referred to a Kadhis' court. Thus, the jurisdiction of the Kadhi's Court is not only conferred by *the Constitution* and the Kadhi's Court Act but also by the Waqf Act 2022.
16. Article 170(5) of *the Constitution* states: 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 Kadhis' courts.
17. Section 5 of the Kadhi's Court Act states that: 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.
18. For a Kadhi's Court to entertain any of the matters which it has jurisdiction over, all parties must first profess the Muslim faith and also submit to the jurisdiction of the Court and that means that if a party in a suit before the Kadhi's Court does not profess the Muslim faith or all parties profess the faith but some do not submit to the jurisdiction of the kadhi's Court, then the Court will not be able to proceed.
19. The Respondents through their counsel have categorically submitted that they do not profess the Muslim faith and do not submit to the jurisdiction of the Kadhi's Court.
20. The provisions of *the Constitution* and other legal instruments may be subject to interpretation and that's why for example *in Re Estate of Wario Guracha Dambi(Deceased)*[2021]eKLR/Neutral citation: [2021] KEHC 448 (KLR) supra which the Respondents' Counsel cited in her submission, the Hon Judge there finally pronounced that the Kadhi's Court had the requisite jurisdiction to entertain Marsabit Succession Cause No E003 of 2021 though the Applicant's Counsel had submitted that the Applicant does not agree to submit to the jurisdiction of the Kadhi's Court.
21. The submission clause in Article 170(5) might be abused by a party in a matter before the Kadhi's Court to frustrate another party and which I think was not the intention of the drafters of *the Constitution*. It is allowed for a party to not submit to the jurisdiction of the Kadhi's Court but it should be applied sincerely and not with the objective of harming a party and defeating the ends of justice and thus, it is upon the Court to make sure that a party is honestly not submitting to the jurisdiction of the Kadhi's Court otherwise the Court may have the jurisdiction.
22. The Quran states:
  - a. "....there is no harm in the wrongs you committed unintentionally but what you intended with your own hearts....." 33:5



- b. “ God Almighty does not hold you accountable for the oaths you made unintentionally but the ones you intended with your hearts. 2:225
23. And in a narration from the Prophet Mohammad (p.b.u.h), he said:
- a. “verily, actions are put into consideration according to intentions and everyone receives what he/she intends from his or her actions.” Sahih Muslim: 1907.
24. Classical Muslim jurists constructed a major uncontroversial jurisprudential principle from the meaning of the above texts and others which states: “Deeds and omissions are considered according to intentions.” That means that any deed or omission, whether allowed or prohibited is judged according to the intention of the person who it is resulting from.
25. Imam Abu Is’haaq Ashaatwiby states that: “The intent of the Legislator/Law-maker on the legal person is that the intent of the legal person during acts and omissions to be in agreement with His intent during the legislation of those acts and omissions.” Almuwafaqaat, 3:23. This means that when the Law maker allowed and prohibited the action and omission of deeds, he intended the achievement of the wellbeing of the society and thus when doing or omitting something, our intentions must be in agreement with the intention of the Legislator/Law-maker during legislation, otherwise our deeds and omissions whether allowed or prohibited will be rendered null and void.
26. Going back again to Article 170(5) of *the Constitution* whereby it states that all parties before the Kadhi’s Court must profess the Muslim faith, there are possibilities that a party before a Kadhi’s Court may abuse that provision by claiming that he has abandoned the Muslim faith but the intention in doing that is just to defeat the ends of justice which also was not the intention of the drafters of *the Constitution*.
27. It is difficult to know a person’s intention in doing or not doing something without the person himself disclosing his intention but circumstantial evidence may lead to the knowing of a person’s intention in doing or not doing something.
28. The Respondents’ Counsel in her submissions during the hearing and in the preliminary objection stated that the Respondents were not professing the Muslim faith, a statement which the Petitioners did not challenge thus confirming the faith of the Respondents not be Islam.
29. The Respondents had submitted that the Applicants lack capacity to prosecute the matter as they have not obtained a Grant of Letters of Administration in respect of the estate of Joseph Kiptoo Cheruiyot alias Abubakar in accordance to the Kadhi’s Court Act.
30. The *Kadhis’ Courts Act* Cap 11 does not state the laws pertaining to the administration of estates of deceased persons and instead that is provided in the *Law of Succession Act* Cap 160 and the Probate and Administration Rules.
31. Section 45(1) of the *Law of Succession Act* states that: Except so far as expressly authorized by this Act, or by any other written law, or by grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
32. I agree with the Respondents that the Petitioners while instituting their application had not been issued with Grant of Representation by the Court and thus had no capacity to file the application.
33. Lastly the Respondents’ Counsel submitted that the orders sought by the Petitioners cannot be granted by the Kadhi’s Court and instead can only be granted by the Environment and Land Court which jurisdiction is derived from the Environment and Land Act.



34. She further stated that in this matter, the Hon. Court sits as a probate court to determine succession issues of the late Joseph Cheruiyot alias Abubakar and as such, it lacks jurisdiction to issue eviction orders as prayed in the application.
35. First, matters involving land are not exclusive to the Environment and Land Court as stated in Section 13(4) that and 26(3) of the *Environment and Land Court Act* Cap. 8D.
36. Second, the question which arises from the above is whether the Kadhi's Court which has jurisdiction over succession matters arising from persons who profess the Muslim faith can entertain a succession matter involving land, or they have to first start with courts which are conferred with jurisdiction to deal with land disputes then after that they file a succession matter before the Kadhi's Court.
37. My opinion is that in matters where there is no dispute over ownership of land, the Kadhi's Court has jurisdiction. For example, when some of the beneficiaries are intermeddling with a land of a deceased without being legally capacitated, the other beneficiaries can seek from the Kadhis Court similar orders to those sought by the Petitioners herein.
38. That said, the Respondents' objection is allowed on grounds that the Petitioners do not profess the Muslim faith and further that the Petitioners did not follow due process before filing their application.

**DATED, SIGNED AND DELIVERED ON THIS 24<sup>TH</sup> DAY OF OCTOBER 2024**

**Idris N. Nyaboga**

**Senior Resident Kadhi**

Before:

Kajaira for the Respondents

Muhidin Abubakar-Applicant

