



**In re Estate of Abdikadir Abdi Ibrahim (Deceased) (Succession Cause E014 of 2023) [2023] KEKC 24 (KLR) (15 September 2023) (Ruling)**

Neutral citation: [2023] KEKC 24 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT MOYALE  
SUCCESSION CAUSE E014 OF 2023  
G ADAN, PK  
SEPTEMBER 15, 2023**

**IN THE MATTER OF THE ESTATE OF LATE ABDIKADIR ABDI IBRAHIM (DECEASED)**

**BETWEEN**

**HADIJA ABDI ..... APPLICANT**

**AND**

**SIYADE ALI ..... RESPONDENT**

**AND**

**ABDISHAKUR ABDI IBRAHIM ..... INTERESTED PARTY**

**RULING**

1. By way of notice of motion dated 14<sup>th</sup> July 2023, and under certificate urgency, the applicant sought for orders:
  1. That this matter be certified urgent and deal with it on priority basis.
  2. That the Honourable be pleased to issue orders pending the hearing and determination of the succession suit;
    - a. Directing/or compelling the collection of the monthly rent for the deceased plot in Isiolo town to a joint account to be held between the petitioner and the respondent.
    - b. Prohibit the collections of monthly rent for the said deceased plot by the respondent alone without involving the petitioner.
    - c. Prohibit the respondent from using any income and / or saving from the deceased's estate.
    - d. The cost of this application and any other relief deem fit and just to grant.



Which The Application based on supporting affidavit by the applicant and on grounds;

- a. That applicant is the mother of the deceased herein and his dependent before his demise hence entitled to benefit from the deceased's estate,
- b. That the applicant is an aged and jobless mother cannot provide for herself,
- c. That the applicant is currently ailing and cannot cater for her medication hence urgent need.
- d. That the respondent has barred the applicant from enjoying and benefiting from the estate of the deceased for nine years leaving her unchecked and disinherit her, hence she sought for court's intervention and grant orders as sought.

2. The respondent through her counsel filed a preliminary objection contesting the jurisdiction of the Kadhi's court in entertaining this matter on grounds:

- a. That she does not submit to the jurisdiction of the Kadhi's Court, as in Article 170 (5) of the [\*constitution\*](#) grants a party the choice of whether or not to submit to the authority of the Kadhi although the subject matter of the claim and the parties in dispute profess the Muslim faith.
- b. That her consent to have the matter handled in the Kadhi's Court has not been sought, hence the applicant is effectively denying her choice of forum.
- c. That also it is an averment that the suit violates the provision of the rule 36(b) of the [\*Kadhi's Court \(Procedure and Practice\) Rules 2020\*](#), which states as follows:

“A suit be filed where in case of inheritance proceedings either where most of the estate is situated or where the majority of the beneficiaries reside”.

Over this she mentioned that all the beneficiaries of the deceased, who are essentially the widow and the children of tender age, reside in Nairobi, and most of the alleged properties of the deceased is also in Nairobi.

Wherefore, she averred that the applicant failed to consider the mandatory provisions of rule 36 (b) of the [\*Kadhi's Courts \(Procedure and Practice\) Rules 2020\*](#), hence she objects to the Jurisdiction of this Court to entertain the current application.

3. Both parties presented oral and written submissions, through their counsels, wherefore upon heard them and perused through their respective written submissions, the questions for determination are:

- a. Whether a Muslim party has a choice to submit or not to submit to the jurisdiction of Kadhi's Court as per the provision of Article 170 (5) of the [\*constitution\*](#) of Kenya 2010?
- b. Whether it is mandatory the provision of rule 36 (b) of [\*Kadhi's Courts \(Procedure and Practice\) Rules 2020\*](#)?
- c. Whether a party should get a consent from the other opposing side on forum where to file a succession suit?

4. A preliminary objection must only raise issues of law. The principles that the court is enjoined to apply in determining the merits or otherwise of the preliminary objection were set out by the Court of Appeal



in the case of *Mukisa Biscuit Manufacturing Co. Ltd. V. West End Distributors Ltd.* [1969] E.A 696. At page 700 Law JA stated:

“ A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701 Sir Charles Newbold, P added:

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion...”

5. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.
6. Jurisdiction of Kadhi’s court derives from Article 170 (5) of the [constitution](#) of Kenya 2010 and The [Kadhi’s Courts Act](#), cap 11 laws of Kenya.

Article 170(5) 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 Kadhi’s Courts”

Section 5 of the [Kadhi’s Court Act](#), states “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.”

7. It is clear from this provision of Article 170(5) of the [constitution](#) that the jurisdiction of the Kadhi’s court is limited to questions relating to personal status, marriage, divorce or inheritance, in proceeding where all the parties are Muslims and submit to the authority of the court. This appears that the Article 170(5) of the [constitution](#) 2010, preserves a forum for the resolution of disputes of personal law matter of Muslims, also recognizes and gives effect to the right of Muslims to choose the regular system of adjudication through the High Court or any subordinate court.

In [R.B & R.G.O v H.S.B & A.S.B](#) [2014] eKLR, Judge Edward. M Murithi held:

“This right of choice is consistent with the constitutional values of liberty of the person embodied in the principles of “human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized” under Article 10(2) (b) of the [constitution](#) . To compel all Muslims to subject themselves to the jurisdiction of the Kadhi’s Court would be contrary to all notions of choice which is the basis of rights and freedoms in the Bill of Rights. Hence the provision for the Muslims to submit, rather than compulsion to subject themselves, to the jurisdiction of the Kadhi’s Court.”



8. Therefore, the jurisdiction of the Kadhi's court is determined by the existence of three factors; the subject matter of the claim or dispute, in this case is inheritance, then the party's Muslim faith, and the party's submission to the jurisdiction of the Kadhi's court.
9. The Court of Appeal in *Re the estate of Ismail Osman Adan (deceased), Noorbannu Abdul Razak v. Abdulkader Ismail Osman*, "upheld the choice of Muslim parties to the Kadhi's Court or to file succession proceedings in the High Court.
10. In his decision Githinji, JA, with whom Koome and Okwengu, JJA concurred held;
 

"There should not be any confusion between the jurisdiction of the High Court to entertain a dispute relating to testamentary or intestate succession to estates of Muslims and the substantive law applicable in the High Court in such disputes. Section 47 makes it clear that the High Court has jurisdiction to entertain any application and determine any dispute under the LSA [Law of Succession Act]. However, by section 48(2) the jurisdiction of the High Court is not exclusive as Kadhi's Courts have also jurisdiction to entertain disputes relating to the estate of deceased Muslims. However, if the High Court assumes jurisdiction to the estate of a deceased Muslim, then by virtue of section 2(3) of the Law of Succession Act, the law applicable in the High Court as to the devolution of the estate is the Muslim law and not the LSA. ..."
11. In *Saifudean Mohamedali Noorbhai v. Shebnaz Abdebussein Adamji*, Mombasa Civil Appeal No. 142 of 2005 (unreported) this Court said in part:
 

"Kenya Courts have held in past judgement that every litigant of whatever religious persuasion, has the option of going directly to the High Court, and a Muslim is not necessarily restricted to the Jurisdiction of the Kadhi's Court"
12. To my view the Court of Appeal decisions are binding on this court. My view is that the issue of professing Islamic faith is separate from necessary ingredient of submission to the jurisdiction of the Kadhi's Court to deal with the personal law matters of marriage, divorce and inheritance of Muslims, so long it is dealt with accordance to Islamic law at the High Court or at any of subordinate courts.
13. Submission in Islam, from the Arabic word, "Islam" which means submission to God's will, and the Muslim is one who surrenders himself, or herself, unconditionally to God's will, which is to live and die in Islam.
14. Obeying Allah as creator and to his commands. Believing in the unity and oneness of Allah, worshipping only Allah, observing daily prayers, paying zakat, performing hajj, practicing and living according to shariah etc....
15. In the event that the respondent's refusal to submit to authority of Kadhi would not mean and lead to that the estate of the deceased should not be governed according to Islamic Shariah. And if the respondent intending by refusing to submit to the Kadhi's to deny the deceased's estate be devolve according to Islamic Shariah, it will definitely amount to denying to submit to Allah's law hence making her denounce Islam.
16. But just a mere refusal to the authority of Kadhi's Court to entertain the matter, in exercising her choice of forum right provided by the constitution while wishing the matter be handled in another forum in accordance to Islamic shariah would not amount to not surrendering to the law of Allah SW. This is my considered view on issue of submission by a party to this case.



17. But over the issue of the respondent contends that applicant violates the mandatory provisions of rule 36 of the *Kadhi's Courts (Procedure and Practice) Rules 2020*, is on place suing. The question is on whether it is a mandatory for a party to consider when filing an inheritance proceeding either where most of the estate is situated or where majority of the beneficiaries reside?
18. Rule 36 of the *Kadhi's Courts (Procedure and Practice) Rules 2020*, states as follows:
- “ 36 Place of suing A suit shall be filed where –
- a. A cause of action arose or, in case of divorce and matrimonial proceedings, where either of the parties habitually resides;
  - b. In case of inheritance proceedings, either where most of the estate is situated or where the majority of the beneficiaries reside; or
  - c. Where the parties are not in agreement, the court may direct a convenient place of hearing.”
19. It is evident there is an option in the same rule giving a discretion to the court, on where the parties are not in agreement on where to file a suit, the court may direct a convenient place of hearing. This allowing the court to do hearing of the matter at any convenient place or option of holding virtual hearing if so convenient to the opinion of the court. In this sense, it is a mandatory in the said rules to file a suit at where either most of the estate is situated or where the majority of the beneficiaries reside. However, it is yet established where the said estate and beneficiaries most of them locate and reside respectively.
20. Lastly, on question on whether the applicant should seek a consent from the respondent to initiate this suit against her. To my considered opinion no such laws requires any persons who want to initiate a suit against the other person should seek for his or her consent first before starting legal action against the other. It is also not established whether there was attempt of resolving out side the court from either side and one of the sides has refused.
21. Finally, I will allow the respondent her right of choice refusing to submit to the Kadhi's Court. As any Muslim party has choice of forum would wish his case of personal matter be handled either at Kadhi's Court or at High Court or Magistrates Court which has jurisdiction to entertain the matter. But if she refuses the Kadhi's Court Jurisdiction with the view that she may want to run away from submitting to Islamic law, maybe she wants the estate be devolved in away other than Islamic law without the agreement of the other beneficiary, this would lead to injustice and is against her Islamic faith.
22. However, if she refuses to submit to the Kadhi's Courts jurisdiction on grounds of place of suing and or on the reason that there was no prior consent from her part so to file this matter, it is therefore not allowed because, it is settled to the discretion of the court as provided in law, which my considered opinion to handle the matter here in Moyale Kadhi's Court, unless there is other reason may be there is possible fear of not getting justice from this court and which were not so far raised by any party to this suit.
23. In this event, the hearing of the matter will be done virtually and there will be no parties will incur cost of travel and whatever unless the respondent or the applicant would wish to attend the court physically. In the event of this particular decision the respondent has to appeal against the decision if she is so not satisfied.
24. No cost of suit, each party bears its own.



25. Orders accordingly.

**DATED, DELIVERED BOTH VIRTUALLY AND PHYSICALLY, AND SIGNED AT MOYALE ON THIS 15<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**HON. GALGALO ADAN – PK**

**In the presence of parties:**

1. Hadija Abdi (physically) - Applicant
2. Siyade Ali (virtually) – Respondent
3. Abdishakur Abdi Ibrahim (physically) – Interested Party

And

4. Adho Godana – Court Assistant

