



REPUBLIC OF KENYA

IN THE KADHI'S COURT AT GARBATULLA

KCSUCC 1 OF 2019

In the Matter of Estate of Late GOLLO DUBA (Deceased)

ASILI GOLLO DUBA.....APPLICANT

VERSUS

JIBRIL GOLLO DUBA.....RESPONDENT

JUDGEMENT

1. The late Gollo Duba died on 5th March 2018 and left behind several dependants including 3 widows, and 10 children (2 sons and 8 daughters). The applicant and the respondent are the daughter and son of the deceased herein respectively. The deceased also left behind several properties amongst livestock (camels, sheep and goats) which the petitioner (now the respondent) together with other dependants had already petitioned this court for distribution in the succession matter No. 2 of 2018. That was done in this court and was shared off to the beneficiaries.

2. The plots were left out with the knowledge that it will be shared through the elders as in their verbal agreement. However, they could not reach agreement, the applicant filed this cause sought for fair distribution of the estate (plots) of Late Gollo Duba (deceased), further relief and cost of the suit are also sought. The applicant in her sworn supporting affidavit she averred that the deceased left behind other assets consisting of three developed plots; two in Garbatulla and one in Isiolo. She further said that these plots should form part of the deceased's estates, but was left out when the livestock were distributed, with their knowledge such that it would be shared out fairly with the elders. She claims that the respondent's mother was the cause of the problem who alleged that the three plots belonged to her two sons (Jibril Gollo Duba and Musa Gollo Duba) and her elder daughter to the exclusion of other dependants.

3. The applicant further averred that this implies that it will be only the sons and the elder daughter who only inherits since there are only two sons of the deceased who happens to be the respondent and another one, all from one side of the mother (widow). The rest of the children of the deceased are daughters of different mothers. She contends that this is under any circumstances would infringe her and other dependants' rights of inheritance, which is contrary to the Islamic Shariah law. Hence, the applicant and other dependants of the deceased will go to loss in case this Honourable Court may not grant orders in fair distribution.

4. The respondent entered appearance, where he filed a response against the issues alleged. He contends that their deceased father left behind not three plots but five plots. Four plots in Garbatulla and one of Merti. He denies that his father had no plot in Isiolo as claimed. He states that he did not leave out the plots from the estate when livestock were distributed. He averred that all the five plots have been shared by the deceased in the year 2011 in the presence of 22 elders from Garbatulla, which the mode of sharing the plots to the beneficiaries as follows:

- a) Shaka Diba and her daughter Asili Gollo were given plot no. [particulars with held] in Garbatulla (Manyatta Dharga)
- b) Dansa Huka and her daughters Zeinab and Hadija Gollo were given plot no. [particulars with held] in Garbatulla (Manyatta Kiwanjani)
- c) Hadija Gollo Duba and her four daughters Safia, Shukri, Ralia and Sulekha Gollo were given a plot in Merti (Manyatta Sakuye)
- d) Jibril Gollo Duba (elder son) was given plot no. [particulars with held] in Garbatulla (Town centre)
- e) Musa Gollo Duba (younger son) was given plot no. [particulars with held] in Garbatulla (Town centre)

5. The respondent defends his mother that she was not the cause of the problem for the plots to be given to her sons and elder daughter. According to him everyone was included in the inheritance contrary to the claim of unfair distribution. He averred the right to the inheritance of the dependants was not infringed because the deceased shared the plots long before his demise. The applicant should have not waited until his death to air her dissatisfaction. He states that all the dependants were either present in the meeting or represented by their mothers or other relatives. He said the decision was final and each of the dependants was contented. Therefore, the discontentment and claim of loss

should not have come almost 8 years after the meeting. He further refutes the compliant or knowledge of a plot given to the elder daughter is not known to him. It is his sincere belief this Honourable court will find out the truth and fair trial.

6. The applicant in her reply to the respondent's response, she revealed more plots adding up to seven plots, four in Garbatulla, one in Merti and another two in Isiolo. She states not aware of any information from any source including her mother regarding the sharing of the estates among the dependants in the year 2011 as alleged by the respondent. She said not aware of 22 elders who witnessed the deceased sharing his estates. She averred that she cannot agree to that everyone was included in the alleged inheritance when the other dependants benefited than others and when there is no clear guideline that was used in the alleged sharing of the estates. She hence maintains that the rights of the other dependants are infringed because there is no fair distribution. She further states that if at all the deceased had shared the estates before his demise, all his wives would have been informed, she would not have aired her dissatisfaction in what never existed. She said that the deceased never distributed the plots among the dependants when he was alive since it is not in the interest of the religion; therefore according to her such statement is false and baseless.

7. The applicant further disclosed other assets including motor cycle, chairs (100 pcs) and money that were to be used in construction of Mama Dansa's House which were not mentioned to form the inheritance and ought to have been considered as part of the inheritance. She also mentioned a tent the deceased purchased for Mama Dansa for business but Mama Hadija collected in her absence. She further request these items also be clarified.

8. As well, the respondent again filed another response, stating that he is completely unaware of the plot in Isiolo alleged to be the deceased's property. He said that his father Gollo Duba (deceased) used to live in Garbatulla in his plot [particulars withheld] with one of his wives Dansa Huka in which he had a restaurant and lodging. He states when the deceased father declared to her that the plot will be owned by one of his son Musa Gollo, a disagreement ensued and she left the plot and went to her own son's plot. He said his deceased father called all the three spouses and sat with them in the presence of the 22 elders, and shared the estates as listed here before, so as to avoid any complain in the future.

9. The respondent also based his arguments that they did not take the inheritance by themselves it was their father who shared them. He holds the view that Islam does not give equal share of the inheritance between a son, a daughter and a wife. He relied on a saying which states;

“A Muslim is entitled to a will (wasiyat), a person can give out 1/3 of his estate as a will according to Islam”.

He also supports his argument with a verse from Quran (2:180) which reads as follows;

“It is prescribed upon you when death approaches (any) one of you if he leaves behind wealth, then he should make a will (wasiyat) for his parents and near relatives in a fair manner (in the one third). This is a duty upon pious people”

10. The respondent finally denies that as far as he knows, there is no motor bike, chairs, cash money, and tent left behind by their deceased father and which are in possession of his mother. He presented a list of elders (22) as individuals who were present during the meeting in which the deceased shared his estates. He also had already brought another list of 15 elders who are the witnesses involved in the said meeting. Most of them are the same people in the second list, but two of the individuals in the first list are not in the second list. [Hassan Diba & Abdi Mohamed].

11. The main issues for determination in this matter are:

- a) Whether the deceased shared out his plots to his dependants during his lifetime? Was he shared them as his inheritance or as a gift and or as a will?
- b) Whether the deceased relied on rules provided in Islamic law in distributing his inheritance or in gifting and or in giving a will?
- c) Or what was the guideline the deceased used in any of the above cases?
- d) Whether the ruling prescribed in the verse of Quran 2:180 is still binding?
- e) Whether it is acceptable in Islam, in the event that the deceased distributed his plots to his dependants as his inheritance?
- f) Whether the deceased had plots at Isiolo which ought to form part of his estate?

12. The matter went on full hearing on 19th June 2019 for several days. The parties presented mostly oral testimonies and witnesses. During these time parties also brought different letters from the office of the chief officer Lands and physical planning Isiolo. The letters give detail of the parcels of lands belongs to the deceased as in their records.

13. It is not in disputes, among the dependants of the deceased herein on the list of the beneficiaries, because it is not part of the issues raised concerns in this application, hence it has already submitted in agreement by both sides, during the succession cause no. 2 of 2018, which was concluded here before. Which the same court distributed livestock belong to the deceased among the beneficiaries and left the issue of other properties to the parties' choice of elders' forum since that was their agreement and further they had no misunderstanding at that time.

14. Also in any event that there may be some disputes between them, the law allows them to try for other alternative justice system. This has provided under Article 159 (2c) of the Constitution of Kenya 2010, which empowers alternative disputes resolution when solving a case to be settled by the parties outside the court.

Article 159 (2c) of the Constitution of Kenya states;

“Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3),”

“(3) Traditional dispute resolution mechanisms shall not be used in a way that, (a) contravene the Bill of rights; (b) is repugnant to justice and morality or result in outcomes that are repugnant to justice or morality; (c) is inconsistent with this constitution or any written law”

15. The same are provided in Qurana and Hadith, the two main sources of Islamic Shariah, in the verse 10 of Surah al-Hujurat. Allah says;

“The believers are but a single brotherhood, so make peace and reconciliation (sulh) between two (contending) brothers; and fear Allah, that you may receive mercy”. In another verse 9 of the same surah also Allah says, “If two parties among the believers fall into a quarrel, make you peace between them....with justice, and be fair for Allah loves those who are fair and just”. In the narration of Um Kulthum bint Uqba that she heard Allah’s Apostle Peace and blessings of Allah be upon him, saying, “He who makes peace (sulh) between the people by inventing good information or saying good things, is not aliar”.

16. Based on aforesaid verses from the Holy Quran, and practices of the Prophet peace and blessings of Allah be upon him and His companions, it is irrefutable that ADR is permissible in the light of Quran and hadith and thus, known to Islamic Law as a mean to peaceful settlement of disputes to avoid animosity.

17. The question, as to whether the plots were shared off by the deceased while alive? Was he shared them as his inheritance or as a gift and or as a will? Whether the deceased relied on rules provided in Islamic law in any case of an inheritance or gift and or as a will? Or what was the guideline the deceased used in his distribution?

It is evident that the applicant denied the assertion that the deceased shared his plots to his dependants during his life time. She testified that she has no knowledge of when, where and how their late father distributed the plots belongs to him during his life time among his beneficiaries. She demands from the respondent who alleged the sharing of estate to bring the evidence to proof the fact if there is a time and place where the deceased convened them in a meeting so as to distribute his estate. Hence, she passes over the burden to proof this fact, on when, where and how, the deceased shared his property (the plots) during his lifetime? This burden is placed upon the respondent who claims so, that their late father distributed his plots to the dependants during his lifetime. In the narration of Ibn Abbas may Allah be pleased with him, said; that the messenger of Allah, peace and blessing of Allah be upon him, said, **“were people to be given according to their claims, some would claim the wealth and blood of others. But the burden of proof is upon the claimant and the taking of an oath is upon the one who denies (the allegation)”**. [al-Bukhari and Muslim]. Therefore it is the respondent who first to proof the claims then the applicant who denies the claim may take denial oath lastly.

18. The respondent testified that there is no written evidence to proof the fact that his late father had distributed the plots in his life time. He said he has oral evidence of few elders who were present during the meeting convened by their late father in the year 2011, purposely to distribute the estate. He cannot remember the exact date when the meeting was conducted, and there were no records of such meeting. According to his testimony, that time he was not there present in the meeting. He admits that Mama Dansa was on previous and at the meeting residing in the said plot, while that time his mother Hadija Gollo was residing in Merti. The meeting held as a result of dispute which was between his late father and Mama Dansa over the plot given to him and his borther Musa Gollo Duba. The issue went further before the elders for intervention which then according to him the matter was resolved that his late father to purchase another plot for Mama Dansa and the said disputed plot to remain for the respondent. He averred that this was how the plot no [particulars with held] of Garbatulla (Kiwanjani) was bought for Mama Dansa. He said it was in that meeting the other plots were shared out to the rest of family members according to the mode stated herein in the response filed.

19. In the a reply to cross examination by the applicant, the respondent answered that he did not know further in detail the root cause of their dispute as why their late father held the meeting to air his view to distribute the plots. He also mentioned, **“But he knows their father usually makes statements that the two plots belong to his sons; Jibril (the respondent) and Musa.”**

20. The respondent presented some elders who according to him attended the meeting in which the deceased shared out his plots to his beneficiaries. RW1 a close friend to the deceased, who testified that the deceased had a dispute with his wife Mama Dansa over the plot now operating as lodging which by then was resided by Mama Dansa. He further testified that the deceased declared to give this plot and another one to his sons as part of his inheritance after his death. He also adds that it was declared orally but there was no written document signed, that was open in the presence of elders convened to resolve the dispute. He also testified that the said Mother (Mama Dansa) moved away from the said plot, she was not happy with the decision taken by her husband. Then she sought intervention from elders who reached resolution that the late Gollo Duba to construct a house for her in another plot which he did but passed away before he complete its construction. RW1 further testified that, that time, Mama Dansa agreed to the resolution and now he sees her together with others not satisfied with the decision.

21. RW2 who testified that the late Gollo Duba called him, that time the deceased was in the company of his wife Mama Dansa. The deceased informed them of the reason as why he convened the meeting, that he got dispute with his wife over the issue of the plots he gave to his son as his succession. He further testified that she is not satisfied with his declaration. She complained that the deceased gave the plot to the son when she had already contributed towards the construction of the said plot. She opted to move away but the deceased wanted her to stay in the plot and they advised her not to go away. RW2 further testified that despite their suggestion, her to stay in the plot, she insisted to go away hence they advise the deceased to retreat back and stop the issue because his wife is not happy with his decision. But the deceased refused to retreat back from his stand; he said openly without fear that he gave the plots to the sons and will not retreat back. Then they left the issue like that without giving further solution and alternative but only to advise the deceased not to force her out of the plot unless on her

own wish. RW2 testified that then Mama Dansa moved away on her wish without being forced out. He further said that to his information and understanding the deceased constructed a house for her in another plot on his own wish and proposal, only that he did not manage to complete the construction of the house then he died.

22. RW3 testified that he was called upon by the late Gollo Duba to a meeting which he failed to make, but the deceased himself came to RW3's home where he discussed the dispute he had with his wife Mama Dansa over the issue of the plots he gave to his sons. He gave the plot resided at the time by the said wife and another plot of shops to the sons. RW3 further testified that the said wife was not happy with the decision the deceased took as head of the family, claiming that she was the one who made effort in the construction of this specific plot, which is composing of lodging and hotel. RW3 also testified he confirmed the issue from other elders who were in the meeting and also personally from the deceased's wife (Mama Dansa). He testified to advise her not to move away, but she became deaf to hear his advise which then he left her to go.

23. RW4 testified that he was away out of Garbatulla when the deceased and his wife Mama Dansa had the dispute over the plot. He said on his return he found the deceased alone in the plot which Mama Dansa used to reside in with her husband. RW4 testified that the deceased informed him, that she moved away to live in another plot belonging to her son, reason that she was not happy with the deceased's decision on giving the two plots to his sons. But then he further stated to construct for her a separate plot.

24. In cross examination the RW4 answered that the deceased did not call him to bear witness to his statements, it was him who enquired of the deceased's wife whereabouts. He said to pass there usually as his visits, then he did not find her there, hence he asked her whereabouts. That was how he got information and the deceased let him to know it.

25. According to the above evidences adduced by the respondent and his witnesses, as the court I noted that the meeting was held to resolve the dispute between the deceased and his wife Mama Dansa who became dissatisfied with decision taken by the deceased to give his son from another wife the plot which she contributed to its construction and that she was residing in there. According to the evidence the deceased allowed her to continue living in the said plot but knowing that the plot will be owned by his son from another wife after his death. Where she moved away to go and live in the plot belonging to her son from previous marriage. To my observation this was the cause of action which occasions the meeting to be held and nothing showing in the evidences adduced herein by the respondent and his witnesses that the deceased held the meeting purposely to share out his property as his inheritance. The meeting was held as a result of the dispute arose between the deceased and his wife Mama Dansa. The dispute was about the plot she was residing in which the deceased declared to give to his son from another wife, who will own it after his death.

26. Also in evidences of the witnesses there is contradiction on whether it was resolved in the meeting that the deceased to construct another separate plot for Mama Dansa upon the elders resolution and agreement. Because RW1 who gave evidence of the same statement that the elders resolved the matter on agreement that the deceased to construct for her another house in a separate plot, while RW2 gave conflicting information that they left the matter to the two spouses after they tried their best to resolve, without giving further alternative to build for her another home. The other two witnesses RW3 & RW4 were not in the said meeting, but they later at different time engage in talks with the two spouses on the subject of the dispute but they said, they have not reached further agreement concerning the matter.

27. It is also testified by the respondent that he was not there present in the meeting and no where records of the meeting held was produced. To my believe he gave the testimony out of the information he may got from his father or other family members. The respondent mother was also not there present in the said meeting by then she was residing in Merti. However, the meeting was held to resolve the dispute between the deceased and his wife Mama Dansa over the plot he gave to his son. Hence, it is coming clear that the deceased shared his two plots to his two sons only, as his inheritance so that they will own it after his death. It was not supported that he shared also his other dependants the plots. It is also clear that the deceased gave the plots only to his sons who happened to be from one side of his wives since the other wives have not bore any son apart from daughters, this as supported by the evidences of the witnesses.

28. As a result that the deceased distributed his plots to his dependants during his lifetime as his inheritance so that they will own it after his death. The question arises is on whether it is acceptable in Islamic law for someone who is a Muslim to distribute his property as inheritance during his lifetime? Also whether it is allowed to give his property as inheritance to some of his dependants while others are not given? Whether the Daughters are not entitled to inheritance from their father? Because the deceased gave the plots to his sons without the daughters.

29. According to Islamic law distribution of one's wealth during his lifetime is not a valid division of inheritance. It's not considered as inheritance because the father has not died so as his property is inherited. Rather, it would be considered valid if it is a gift when the conditions of validity of a gift are met. According to Islamic law, he has to maintain equity among his dependants in giving out the gift and ensure transfer of ownership of the gift must take place during his lifetime so that meets all the conditions of the gift set by the Shariah.

This is clearly explained by Ibn Hajar Al-Haytami as he wrote:

“ If the father divided his wealth among his children during his lifetime by granting each of them a share as a gift and all the conditions of the validity of the gift set by the shariah are met, and each of them took possession of his share and his siblings do not share it with him, then this is a permissible division. However, if he divided the estate among them without them taking actual possession of their shares (allowing them to dispose of them freely by selling them or leasing them out if they wish), then this division is invalid, and when the father passes away, all his possession are part of the estate.”

30. Here in this matter the case is that the deceased gave the plots to the sons as their share of inheritance but not as a gift. In case he gave them as a gift he has to maintain justice and fairness among his children when offering them gifts. The prophet peace and blessing of Allah be upon him, said, **“Fear Allah and observe justice among your children.”** [Al-Bukhari and Muslim]. The majority of the scholars held that it is recommended for the father to give his children equal gifts, and that it is not obligatory. The Hanbalis, on the other hand, held that it is obligatory and that it is prohibited for him to favor some over the others with gifts for no valid reason. He has to give them all separately so that they won't share with each other. He gave the two sons without them taking the possession of the plots so that they can have power to

dispose them off freely by selling or leasing the plots if they wish. He gave the sons the plots so that they would receive their respective shares after his death, when they did not take actual possession of the said plots during his lifetime. This is also another condition which makes the giving of the plots invalid if it was given as a gift.

31. This scenario which is stated by the respondent in this matter would not be possible to be inheritance; it looks similar to a “will”, which is transferred to the legatee after the death of the testator. But in such case, the “will” made in favor of an heir cannot be executed except with the consent of all the heirs. The prophet peace and blessing of Allah be upon him, said, **“Allah has given each heir his due share of the inheritance, so no will is to be made in favour of an heir.”** [Al-Tirmithi and others]. The version cited by Ad-Daraqutni from ibn Abbaas reads, **“..... unless approved by the heirs.”**

Ibn Qudaamah may Allah have mercy on him, said in al-Mughni (6/59), **“if he makes a bequest to one of his heirs, and the other heirs did not agree to it, then it is not valid, and there is no difference of scholarly opinion on this matter.”** Ibn al-Mundhir and Ibn ‘Abd al-Barr said, “the scholars are unanimously agree on that. The report from the messenger of Allah blessing and peace of Allah be upon him, that Abu Umaamah [RA] said; I heard the messenger of Allah [PBUH] say, **“Allah has given each person who has rights his rights, and there is no bequest for an heir.”** Narrated by Abu Dawood, Ibn Maajah, and at-Tirmidhi. But if the other heirs agree to it, then it is permissible according to the majority of scholars. End quote.

32. But the verse which was quoted by the respondent to base is argument on, as he states, that Allah (SAW) says in the Quran 2:180, **“It is prescribe upon when the death approaches (any) one of you if he leaves behind wealth, then he should make a will (wasiyat) for his parents and near relatives in fair manner (in the one third). This is a duty upon pious people”.** The Muslims scholars have differed concerning this verse on whether it is abrogated or not? The majority of them including the four Imams, Abu Hanifah, Malik, al-Shaafi’ and Ahmad – may Allah have mercy on them – they are of the view it is abrogated. They quoted a number of evidences for that; (i) among the companions of the prophet peace and blessing of Allah be upon him, are those from whom there is no report they left wills (wasiyyah) and there also no report that any one of them denounced that. If it had been obligatory then they would have not have failed to do it and it would have been narrated from them in a clear text they acted upon it.

(ii) Another argument of the scholars is that the will (wasiyyah) is a gift, and the gift is an act of charity, therefore it is not binding during a person’s lifetime. According to this verse the will can be given by a Muslim when death approaches him, but the respondent here in this matter affirms that the deceased gave the plots long before his demise in the year 2011, while he passed on 5th March 2018. Also the deceased was not even in his sickbed when he gave the plots, which also not be possible for an heir to be given a will. Because (iii) the scholars held that a will given to an heir is abrogated by the verse of inheritance, this according to the majority of scholars supported by the above narration reported from the prophet (SAW) by Abu Umaamah (RA) in the books of Abu Dawood, Ibn Maajah and at- Tirmidhi. Aslo in another narration by Ibn Abbaas may Allah be pleased with him, said, **“the best of the bequest to the parents and relatives. The will remained like that until it was abrogated by the verse on inheritance.”** This narration was classified as saheeh by al-AlBaani in saheeh Abu Dawood. So this verse has been abrogated in both its meanings and in its rulings, one of which a ruling on invalidating a bequest to an heir. Because it is no need of making a will for an heir when he is entitled to an inheritance share, and when the other heirs are not consenting. Another issue not yet answered by the evidences is that whether the deceased has considered the ruling of making a will to a limit of one-third (1/3) of the estate if what was given was a will. It is clear that the deceased father did not in knowledge of this specific limit of a will when making it. Even the respondent himself did not consider that limit when he argued on statements that, **“A Muslim is entitled to a will (wasiyat), a person can give out 1/3 of his estate as a will according to Islam.”** Did he establish that the plots were given can make up to 1/3 of the deceased’s estate or no? yet this was not established before the court.

33. The fact alleged that the heirs kept silent about the issue was not there because it is on record that the dispute arose between the deceased and his wife Mama Dansa over the plots given to the sons, and the matter went before the elders and there was no lasting solution reaped out the said meeting. However, what if there was silence over the issue? Whether the silence constitutes a valid acceptance or evidence of their approval? In the event that there was silence, then silence doesn’t constitute a valid acceptance or evidence of their approval of such a division in all cases. Because scholars held different opinions as to whether silence (tacit approval) is recognizable by the Islamic Shariah as a formal consent. Based on the view that silence is a valid consent, it should be noted that such consent must be based on knowledge. The fiqh maxim reads, **“Consent must be based on knowledge.”** Ma’lamat Al-Qawaa’id wa Al-Usooliyyah reads, “This Fiqh Maxim is based on logic, and Muslim jurist agreed on accepting its meaning and acting upon it.” If the heirs do not know that they have the right to object, then that makes their approval - let alone their silence - unrecognized by the Islamic Shariah. But according to the evidence it is evident that there was objection to the deceased decision, that was why the dispute arose between the deceased and his wife Dansa, and which still the same dispute is extended to the heirs. That is why there is this suit before this court for determination.

34. Another issue on whether the deceased had made consultation with his dependants about the issue before he declared to give the plots to the sons? Nowhere in the records that deceased made talks with his dependants in an official family engagement and which he had a discussion with them over the issue. This has supported by the statement of the respondent who admitted in this court that, **“their father usually makes statements that the two plots belong to his sons”** (Jibril the respondent and his brother Musa). The said plot which was given to the sons without the consent and consultation of the other dependants. The plot was the matrimonial property possessed during the subsistence marriage between the deceased and his wife Mama Dansa. Because the respondent’s mother who is first wife of the deceased was by the time of possession of this plot by the deceased and Mama Dansa was residing in Merti town. She had her plot possessed during her marriage with the deceased at Merti. She later came to reside in the same plot after Mama Dansa moved away upon her dissatisfaction on the deceased’s declaration while she has another residential plot in Merti. It is now eight years ago. Bear in mind the said Mama Dansa according to the evidence had somehow contributed towards the possession of this plot given to the son and further made efforts to its construction.

35. To my believe she has the rights in the said property, because the property was acquired and developed during her subsistence marriage with the deceased, and further she had contributed toward the possession of this property especially the plot she was residing before she left. This as per the provision of Article 45(3) of the constitution of Kenya 2010, which says, **“parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”** Now that the marriage has been dissolved with the death of her husband, she has the right in the said plot which was given to the sons, and also she has another right of inheritance in the said property.

36. In the case that if the deceased distributed his plots to his beneficiaries, the question is what guideline or rule was used by the deceased in doing so? Herein, the deceased professes a muslim faith until the time he died. He was like any other elders who have not acquired Islamic knowledge during their lifetime. Although, he was a practicing muslim during his lifetime, likewise he also belong to Borana community who some of them specially the elder people still some practicing their borana culture in issues concerning gift giving to their children. They prefer a male child than a female child in gifting a property. The Borana Community has “andura” concept still is there practiced in gift giving. They give a male child an animal be it a cow or a goat, because they mainly keep livestock. This animal is named with a son who in most cases would be an elder son, or a son who may be very close to the animals in terms of taking care of the animals, or who is in most cases become very close to the father in time of need. This son would not have authority to use or sell this animal which is gifted to him, unless he will get authority from his father who gave him. He will only have the authority to use or sell the animal after the death of his father. The female child would not be considered to be part of the family because she will join another family upon her marriage to a man. She may be given or lend something to her upon her marriage to benefit from it but not to own it. The things which may be lend or given to her can be a cow or any animal so as she may benefits from its milk or sale its young one (specially a male cow) during when there is need. In this context, her family would not let her to own any property; because the property will automatically be transferred on to another family when she is married.

37. To my finding the deceased favoured the sons in giving the plots, may be based on his Borana practice of “andura”, where a father can distribute his property to his sons depriving or giving a less share to a female child. This practice is mainly there in the Borana community. The practice which contradicts his faith of a muslim culture of inheritance, and the law applicable to the estate of a deceased muslim is a muslim law. The Borana concept of “andura” is irrelevant to the deceased’s property herein for it is not conforming to Islam law, and also it is discriminatory to a female child.

38. Concerning the issue on whether the plot No. (particulars withheld) Kiwanjani – isiolo registered in the name of late Mohamed Godana Wako should form part of the estate of late Gollo Duba Oda? According to the evidence adduced by the respondent, he denied to know any plot in Isiolo that belong to the deceased. But on 27th march 2019, when the case was coming for pre-trial conference. The respondent mentioned the plots left by the deceased among other plots, the plot no. (with held) at Isiolo near al-naim mosque of Kiwanjani which was developed, also the plot no. (with held) at Chechelesi B not yet developed. On 30th May 2019, the applicant produced a letter Ref. No. CEC/LND/COURT/VOL.II/2013 from the office of the chief officer lands and physical planning. The letter gives details of plots in the name of Gollo Duba Oda in its words as follows:

- 1) Commercial plot No. (with held) Garbatulla – Simon Kinyua transferred to Gollo Duba Oda
- 2) Commercial plot No. (with held) Garbatulla – Yunis perera transferred to Gollo Duba Oda
- 3) Residential plot No. (with held) Garbatulla – Gollo Duba Oda Garbatulla
- 4) Plot No. (with held) Checheles – Gollo Duba
- 5) Plot No. (with held) Kiwanjani – Gollo Duba
- 6) Unregistered Residential plot in Merti belonging to 1st wife Hadija Gollo Duba

39. On 23rd July 2019, the respondent also presented another letter Ref. No. CEC/LND/COURT/VOL.II/2017, giving different information concerning the deceased’s plots in Isiolo. The letter states in its words, **“Plot No. (with held) – Checheles was wrongly quoted as belonging to the deceased where as having perused our records, Duba Gollo Duba is a different person not related to the deceased Golo Duba oda. Therefore we regret for the mistake done”.**

40. On 17th December 2019, another letter sent to this court by the chief officer Lands and Physical planning, upon the court requested clarification on the above contradiction about the plot no. (with held) Kiwanjani and plot no. (with held) checheles both of Isiolo. The letter Ref. No. CEC/LND/COURT/VOL.III/13, from the said officer stating in its words, **“..... Plot No. (with held) Kiwanjani reading the name of Mohamed Godana Wako was erroneously entered into our Laiform but it has been rectified and with that discard any issue as pertaining to plot No. (with held) Kiwanjani Isiolo in respect to late mzee Gollo Duba’s estate. Plot No. (with held) chechelezi belongs to Duba Gollo Duba of ID. No. (with held) Isiolo. According to records held in this office this plot (with held) belongs to Duba Gollo Duba who is a different person”.**

41. During the witness hearing, the applicant testified concerning the issue of plot no. (with held) kiwanjani Isiolo. The plot was bought by their deceased father through Mohamed Godana Wako (now deceased) who was the former husband of Safia Gollo Duba (one of the beneficiary of the deceased estate). Because the deceased father was working away from Isiolo, he appointed the said Mohamed Godana to purchase the plot on his behalf and register it in his name. That was how the plot was bought and registered in the name of Mohamed Godana Wako. she further said that their deceased father later on after the said Mohamed Godana Wako passed away, sent sum of kshs 6000 to their sister Safia Gollo so as she will transfer the names to Gollo Duba who is the owner of the plot. She testified that the plot (with held) Kiwanjani belongs to their deceased father and should form part of his estate.

42. AW2 testified that he knew the said plot through the deceased, when he was hired by the deceased to do electrical wiring of the house constructed in the plot. Therefore, that was how he got to knows the plot belong to the deceased Gollo Duba as he was informed by the deceased himself. AW4 also testified that the plot in question belongs to the deceased Gollo Duba Oda. She got to know the plot through the deceased; she lived in the said plot with the permission of the deceased for some years (close to 3 years). The reside there for free without any payment, because the deceased was her clan brother and he used to send her some money on every month for staying there and taking care of his plot. She averred that there was a time the respondent met her there in the plot as he was visiting the plot together with his uncle Adhe Dida (now deceased). She also testified it was Mukhtar Guyo Kotile who handover the keys of the house to her on first time.

43. AW5 another witness testified that he knew the plot as belongs to late Gollo Duba Oda, he said his mother lived there in the said plot since the time he was 9 years old. His mother lived there and gave birth to five children in that plot which had a temporary house before the current permanent house made of blocks was constructed. AW5 gave clear description of the plot and also the neighbours surrounding. On last time before the late Gollo Duba Oda passed away he gave him a duty to take care of the said plot but unfortunately he died after involved in an accident. He testified that that was how he knew the plot.

44. AW6, she is also one of the beneficiaries of the deceased estate. She blames the respondent who on first time of filling this matter denied knowing the plot when Safia his elder sister herself was present in this court, and she Safia did not respond anything pertaining this plot, but now when she is not here the respondent claiming the knowledge that the plot belong to Mohamed Godana who was former husband of Safia. Contrary to the respondent testimony, AW6 adduced that the late Mohamed Godana had also another wife Habiba Halake Dida at the time of his death. She said that Habiba informed her from the information she had from her late husband that the plot (with held) Kiwanjani belong to their deceased father Gollo Duba. She further held that if the plot belongs to the late Mohamed Godana, it could have been inherited by the children and wives of Mohamed Godana but not Safia who was already divorced in the year 2004 by then he was alive, and he died in the year 2010.

45. AW7 who is close relative of the deceased Gollo Duba Oda, testified to know the plot in the year 2007, as the deceased's property. That time the deceased was working in the coast, he used to send money through him so as to be given to one Fatuma Busa, now lives at Gambella. He assumes that she was taking care of the plot, because the deceased use to pay her some money through him. AW7 also avers that later on another woman came to live in the same plot after the first woman left. He was called by the deceased to find out on the condition of house so as to be resided by this second woman who also did not pay the rent and was assisted by the deceased.

AW7 doesn't know the names, number and or document concerning the plot, apart from him was assisting the deceased who sends money for the caretakers through him. Hence he testified that that was how he knew the plot belong to the deceased.

46. According to the above evidences concerning this plot no. (with held) Kiwanjani, I observe that the plot was purchased by the deceased Gollo Duba Oda through his son in-law Mohamed Godana Wako (now deceased). This sentiment is supported by evidences adduced by the respondent. The issue which attracts doubt is a case that the plot has Mohamed Godana Wako's names who registered the plot using his names. This was adduced to be even known to the deceased Gollo Duba who developed and maintained the plot; he has attempted to change the names but was not realized until he died.

47. The respondent did not challenge this claims that the plot belongs to the deceased Gollo Duba, to the satisfaction and standard of adducing evidence to convince the court. He said on to do not know the plot belongs to his father but he knew the plot has the name of late Mohamed Godana who was the husband of Safia (his sister) at the time of his death. While the said Safia was already divorced in the year 2004 and the late Mohamed Godana died in the year 2010. Safia claims on first time the plot was belonging to her former husband, but later she claims the deceased Mohamed Godana gave her before his death. She has not produced any documents in support of the claim; neither had she presented a witness to that effect. The dependants of late Mohamed Godana are aware of this suit involving this particular plot which had the name of their deceased's father and they are not demanding for the said plot. Safia has to proof the claims that her deceased's husband gave her the plot and the denial oath is upon the one who denies so.

48. In any case the said plot would not be assume to be the property of Safia because the plot bears the names of late Mohamed Godana and not the names of Safia. Also the applicant and some heirs of Gollo Duba are claiming the plot belongs to the deceased Gollo Duba so as to form part of his estate. Definitely if the plot belongs to the deceased Gollo Duba the rest of the heirs including the respondent and his likes will benefit from the plot. But in case the plot belongs to the late Mohamed Godana it is only the children of Mohamed Godana (deceased) who will benefit excluding even Safia who had already been divorced and the rest of the heirs of late Gollo Duba will also not entitled to.

49. Another issue is that this plot bears two different numbers which has already clarified from the chief's officers office that it was erroneously entered in the their Laiform (a database system) used by the office of the Land and Physical planning of Isiolo County Government. According to officer this was rectified and errors discarded, and that the plot no. (with held) is in the names of late Gollo Duba hence it will form part of the estate in this matter.

50. Pertaining on the issue of plot no. (with held) of Checheles, the respondent who is also known as Duba Gollo Duba denies knowing this plot. He testified that he found this plot in the system, it bears the name of Duba Gollo Duba, someone else in Merti not him and it has been registered in another identity card number. It is evident from the letter sent to this court from the chief officer of land and physical planning that Duba Gollo Duba is a different person not related to the deceased Gollo Duba Oda, hence this court put down it pen on determining the ownership of this specific plot, and thus should form the subject of this estate.

51. About the rest of the properties like cash money, motorbike, tent and chairs, that alleged to be left behind by the deceased. The applicant and the other heirs who have launched the claim pertaining these assets, have retreat back and withdrawn the claims. Therefore, the court is relieved from the burden to determine the rights vested in these assets.

52. Concerning the mode of distribution the heirs has option to choose between the mode provided in Islamic Shariah or the mode they wish on when they are in not disputes over which way of distribution. But when there is dispute on which way to follow, they have option only to follow the mode provided in Quran and hadith. That in case, the heirs should follow according to sharia law, the widows should inherit all together one-eight of the estate when their numbers are more than one. They share equally, one-eight of the estate. This as per the instructions from Allah, He says, (what means): **"But if you leave a child, then for them [i.e. the wives] is an eight of what you leave, after any bequest you [may have] made or debt"**. The remainder should be divided amongst the sons and daughters by Ta'seeb. By virtue of having a paternal relation with the deceased and not having an allotted share, so they get what is left after the allotted shares of widows have been distributed. The male child gets twice the share of the female child as Allah instructed, (what means) **"Allah instructs you concerning your children (i.e their portions of inheritance) for the male, what is equal to the share of two female"**. [Quran 4:11]

53. Finally, I issue orders as follows:

- 1) That the plots four (4) in number all of Garbatulla, the plot of mert and the plot of Kiwanjani Isiolo, all to form part of the estate of the deceased Gollo Duba Oda.
- 2) That the plot no. (with held) of checheles yet to form part of the deceased estate, since it belongs to a different person not the deceased.
- 3) That the mode of distribution should follow according to the shares stipulated in the Islamic sharia law when there is dispute, and or according to the agreement of the heirs.
- 4) That in case there is dispute over the Mode of distribution, it should be as follows:

	Names of heirs	Relationship to the decease	shares in percentage
1	Hadija Gollo Duba	Widow	4.1666 %
2	Dansa Huka	Widow	4.1666 %
3	Shaka Diba	Widow	4.1666 %
4	Jibril Gollo Duba	Son	14.5833 %
5	Musa Gollo Duba	Son	14.5833 %
6	Ralia Gollo Duba	Daughter	7.2917 %
7	Safia Gollo Duba	Daughter	7.2917 %
8	Sulekha Gollo Duba	Daughter	7.2917 %
9	Shukri Gollo Duba	Daughter	7.2917 %
10	Farida Gollo Duba	Daughter	7.2917 %
11	Asili Gollo Duba	Daughter	7.2917 %
12	Zeinab Gollo Duba	Daughter	7.2917 %
13	Hadija Gollo Duba	Daughter	7.2917 %
	Total		100 %

5) That in any case the mode they prefer, parties are advise to apply for letters of administration as a procedural and to make smooth transition of the estate. Also it should be shared after valuation of the property is done through agreement locally or by accredited and certified valuers.

6) Each side to bear its own cost.

7) Right of appeal with 30 days from the date of this judgement.

Delivered and Signed at Garbatulla on 20th February 2020.

Galgalo Adan - Senior Resident Kadhi

In the open court and in the presence of:

1. Dida Adullah – Court Assistant
2. Asil Gollo Duba – Applicant
3. Jibril Gollo Duba – Respondent