



REPUBLIC OF KENYA

IN THE KADHI'S COURT AT NYERI

SUCCESSION CAUSE NO. 04 OF 2017

IN THE MATTER OF THE ESTATE OF MZEE OMARI [DECEASED]

ABDALLA MUTEMBEI.....APPLICANT

VERSUS

OMARI KAMUNDI.....RESPONDENT

JUDGEMENT

In this succession matter, the petitioner prays for:

1. Distribution of the estate to the legal heirs according to Islamic law and practice.
2. Cost of the suit.

The brief background of this matter is that Succession Cause no 47 of 2011 formally succession 94 of 1992 was filed at Embu High Court. A ruling was delivered on the 30th day of September 2015 granting the transfer of the matter to Kadhi's court. The same matter was heard in the Chief Magistrate Court Embu as Succession Cause no 212 of 2017. It was not until 28th April when the matter was forwarded to Nyeri Kadhi's court. Both the applicant and the respondent are Muslims.

On hearing I found that some of the beneficiaries are Christians namely filavia Murugi and Coreen Ukima both are daughters of the deceased. They confessed before the court that they are Christians and the same is proved by the replying affidavit of Coreen Ukima dated 28th day of July 2015. In paragraph 5 and 11 of her affidavit she indicated clearly that she is a Christian and objects the transfer of the matter to Kadhi's court. This raises the issue of jurisdiction.

The Jurisdiction of the Kadhi's courts is donated under article 170(5) of the constitution of Kenya 2010, which states as follows,

*“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”.*

In summarizing the said article, the court of appeal in Genevieve Bertrand v Mohamed Athman Maawiya & another [2014] eKLR, Application no 24 of 2013 stated:

“Thus the jurisdiction of the Kadhi's court is determined by the existence of three factors. That is the subject matter of the claim or dispute, the party's Muslim faith and the party's submission to the jurisdiction of the Kadhi's court”

And in expounding the same article In Succession cause No 318 of 2011 [2017] eKLR in the matter of the estate of Rama Matano Mwaurinda in the High court of Kenya at Mombasa, M. THANDE, J, stated:

*“The article strips the Kadhi's court jurisdiction in situations where **not all parties profess the Muslim religion** and not all submit to the jurisdiction of the Kadhi's court”*

Section 5 of the Kadhi's Court Act (Cap 11 Laws of Kenya) which reads as follows –

*“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 any subordinate court in any proceeding which comes before it.

The Supreme Court of Kenya in Samuel Kamau Macharia & another Vs Kenya Commercial Bank LTD & 2 others, Application No 2 of 2011 [2012] eKLR paragraph 68 stated:

"A court's jurisdiction flows from either the constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

In the matter of the estate of Ali Shitalo Ibrahim Prob & Admin 151 of 1994 [2006] eKLR in the High court of Kenya at Eldoret, M.K.IBRAHIM.J

Held,

*"In this matter it is clear that **all the beneficiaries** of the estate of the deceased bear Muslim names and unless it is declared otherwise I will deem it that they are all muslims. In the circumstances I am of the view that this matter ought to be heard and determined by the Kadhi's court at Eldoret. This is a special court set up to specifically deal with this situation."*

In Succession cause No HC 72 OF 2010 in the matter of the estate of Gulamhussein Esmailjee Karachiwalla in the High court of Kenya at Mombasa, J.B. OJWANG, J, as he then was, stated:

*"Where the deceased **is a Muslim** and the **beneficiary** of the deceased's estate **is a Muslim**. Strictly in law, in relation to property of such a kind, the Kadhi's decision has finality, and can only be questioned by normal process of appeal, on relevant question of law".*

The constitution is very clear on this subject. In Civil Appeal No 15 of 2016 in Peter Mucheru Njuguna v Fatuma Ahmed Abdulrahman & 3 others [2017] eKLR in the High court of Kenya at Mombasa, M. THANDE, J, in paragraph 14 Held

"With respect, I disagree with the Honourable chief Kadhi. Article 170(5) of the constitution which sets the jurisdiction of the Kadhi's court is clear - all parties before a Kadhi's court must profess the Muslim religion. The issue of jurisdiction is key in determining whether a court seized of a matter will proceed with it or not."

In the owner of the Motor vessel "Lillian S" v Caltex oil (Kenya) Ltd [1989] KLR 1; Nyarangi, JA, stated,

"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."

In my opinion both the High court and the Magistrate court assumed that **all the beneficiaries** were Muslims. In the circumstances therefore I hereby dismiss this matter for lack of jurisdiction. This is a wrong forum. I advise the parties to take it to the right forum. There shall be no order as to costs. Right of appeal thirty days.

Signed, dated and delivered in open court this 8th day of March 2018.

MOHAMED ABDALLA

KADHI – NYERI

In the presence of the applicant

In the presence of the respondent.