



**In re Estate of Mwanaharusi Binti Ali (Deceased) (Succession Cause
198 of 2010) [2016] KEKC 22 (KLR) (18 August 2016) (Ruling)**

Fauziya Abdalla Mwinyi v Mwinyi Abdalla Mwinyi & another [2016] eKLR

Neutral citation: [2016] KEKC 22 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT MOMBASA
SUCCESSION CAUSE 198 OF 2010
AH ATHMAN, PK
AUGUST 18, 2016**

BETWEEN

FAUZIYA ABDALLA MWINYI PETITIONER

AND

MWINYI ABDALLA MWINYI 1ST RESPONDENT

ABBAS DOLA 2ND RESPONDENT

RULING

1. This is an application by the respondents for costs. They have filed a bill of costs of Kes 38,750.00 dated April 4, 2016. The petitioner / respondent opposes the application.
2. Mr Mukomba for the respondent submitted that the court lacks jurisdiction on the issue of taxation of costs. He contends it the duty of the executive officer for assessment. He argues the law does not provide for taxation for matters before Kadhis court. He argues further that the respondent had filed the application in the interest of the estate and should therefore not be subjected to cost. He contends the principle in succession matter is not to award costs. He relied on the cases of *Mbulwa Maingi v Veronica Nthamba* [2015] eKLR and *Pauline Muthoni Kigwe & Another* [2015] eKLR.
3. Mr Aboubakar for the respondents submitted the court has jurisdiction to grant the orders sought. He argued no provisions of the law have been cited to support the claim on lack of jurisdiction. He submitted the practice is for the deputy registrar to tax costs in the High court and since there is no taxing officer in the lower court, it is for the court itself to do the taxation.
4. The petitioner had filed a notice of motion dated February 8, 2015. The application was dismissed with costs in the ruling delivered on June 18, 2015.



5. Article 169 1 [b] of the [Constitution of Kenya \[2010\]](#) categorizes the Kadhis court as subordinate court. The [civil procedure Act](#) is still the applicable law in the Kadhis court as regards procedure since no procedure have yet been made by the Chief Justice under section 8 [1] of the [Kadhis court Act](#) Cap 11 Laws of Kenya. Section 8 [1] [b] of the Act provide :

"Until rules of court are made under subsection (1) of this section and so far as such rules do not extend, procedure and practice in a Kadhi's Court shall be in accordance with those prescribed for subordinate courts by and under the Civil Procedure Act (Cap 21)."

6. The [Civil Procedure Act](#) (Cap 21, Laws of Kenya), thus stipulates (Section 27(1)):

"Subject to such conditions and limitations' as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction shall be not bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order" [emphases supplied]

7. The general rule is that costs follow the event. However courts have discretion to award or deny costs. In [Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others](#) [2014] eKLR, the Supreme Court of Kenya held :

"Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant."

8. Justice Kuloba in [Judicial Hints on Civil Procedure](#), at p 94] states:

"[T]he object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure...Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action."

9. Clearly courts including the Kadhis courts have powers to award costs. The judges in the matters cited by the petitioner exercised their discretion. Nothing in the decisions denies the Kadhis court to award costs. schedule 7 of the [advocates remuneration \[amendment \]order 2014](#) provides for costs in subordinate courts where the Kadhis under article 169 1 [b] fall.

10. In the High court the taxation officer is the deputy registrar. The Chief Justice has powers to appoint or designate any officer for purpose of taxation. In the lower court the rules are not clear whether it is the court itself or the executive officer to tax the bill of costs. in the circumstances either can, where there is a dispute, assess or tax costs. For expeditious disposal of the matter and without regard to technicalities pursuant to article 159 2 [d] the court shall proceed to award costs. I have read the bill of costs and hereby award same at KES 34,570.00

11. Orders accordingly.



DATED, SIGNED AND DELIVERED AT MOMBASA ON 18TH AUGUST 2016.

ABDULHALIM H. ATHMAN

PRINCIPAL KADHI

In the presence of

Mr. Yusuf K. Abdulrahman, Court Assistant.

Mr. Aboubakar for respondent / applicant

Mr. Mukomba for the petitioner / respondent

