



**Yussuf (Suing as the Administrator of the Estate of Ebla Abdirahman Elmi) v Yussuf  
(Civil Appeal E027 of 2024) [2025] KEHC 15550 (KLR) (30 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15550 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CIVIL APPEAL E027 OF 2024  
JN ONYIEGO, J  
OCTOBER 30, 2025**

**IN THE MATTER OF THE ESTATE OF YUSSUF ELMI MUMIN (DECEASED)**

**BETWEEN**

**MUKHTAR YUSSUF ..... APPELLANT**

**SUING AS THE ADMINISTRATOR OF THE ESTATE OF EBLA ABDIRAHMAN  
ELMI**

**AND**

**MOHAMED YUSSUF ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. Ibrahim Mohamed  
Mahamud delivered on 10.12.2024 in KCSUCC/E003/2024 at PK's Court at Wajir)*

**JUDGMENT**

1. The deceased herein a Muslim professing Islamic religion died intestate on 06-12. 2024 while domiciled within Wajir county. He was survived by the following as beneficiaries; Adoy Buul (widow); Mohamed Yussuf Elmi(son); Timira Yussuf Elmi (deceased daughter); Hindia Yussuf Elmi(daughter); Butaha Yussuf Elmi (deceased daughter); Ahmed Yussuf Elmi (deceased son); Mukhtar Yussuf Elmi(son); Hassan Yussuf Elmi (son); Habiba Yussuf Elmi(daughter); Abdi Yussuf Elmi (son); Farhiya Yussuf Elmi (daughter) and Adoy Buul (wife).
2. Subsequently, Mohamed Yusuf, one of the beneficiaries, petitioned Wajir Kadhi's court vide Petition No.KCSCC/E003/Wajir law courts listing the deceased's estate as comprising of ;plot registration number B984 situated within Wajir town measuring 0.1392Ha and 15 camels. The petitioner the respondent in this appeal named his brother Muktar Yussuf the appellant herein as the respondent. He then prayed that the estate be distributed amongst the beneficiaries in accordance with the Islamic law. According to him, the respondent (appellant) had made distribution impossible by becoming hostile and holding the rest of the beneficiaries hostage.



3. In response, the appellant (respondent in the kadhi's court), entered appearance together with his defence on 18-03-2024. He averred that the plot in question did not belong to his father. Instead, he claimed that the plot belonged to his mother hence subject to distribution to his mother's children being his siblings from the same mother namely; Hindiya Yusuf Elmi (daughter), Mohamed Yusuf Elmi (deceased), Muktar Yusuf Elmi (son), Hassan Yusuf Elmi (son) and Habiba Yusuf Elmi (daughter).
4. He further stated that the petitioner had filed the petition with an ill motive and instead claimed that the deceased left three plots which were not disclosed by the petition.
5. The appellant entered appearance on 18.03.2024 and further filed a defence in which he denied the allegations by the petitioner. From his defence, he denied that the plot registration no. B984 belonged to the deceased as the same belonged to his late mother. According to him, the rightful beneficiaries were: Hindiya Yussuf Elmi (daughter); Mohamed Yussuf Elmi (deceased son); Mukhtar Yussuf Elmi (son); Hassan Yussuf Elmi (son); Habiba Yussuf Elmi (daughter).
6. He accused the appellant of illegally registering the plot he currently lives in, in his own name and yet, the same was bought by his late father. He thus prayed that the case be dismissed as the appellant had no share whatsoever in the suit plot. Equally, he urged the court to compel the appellant to surrender all other properties left by the deceased for distribution to the beneficiaries.
7. The matter was heard in the following manner:
8. PW1, Mohamed Yussuf Elmi testified that the deceased was his father who was survived with 5 sons, 5 daughters and 1 widow. It was his case that all the beneficiaries ought to inherit the estate of the deceased but the same wasn't practical as it appears that his paternal brother, the appellant herein was keen to take away the undeveloped plot from the estate. He stated that he had all the documents that supported the fact that the undeveloped plot rightfully belonged to the estate of the deceased.
9. He tendered a plot allotment letter and a letter from the chief confirming that the plot in question was owned by the deceased. Further, he produced resolutions made by elders after the court referred the matter to them for arbitration thus upholding the petitioner's case that the deceased indeed was the owner of the property in dispute.
10. The respondent in rebuttal conceded in his testimony that indeed, the petitioner was his paternal brother but the suit land did not form part of the estate of the deceased as the same belonged to his late mother. According to him, the rightful beneficiaries of the contested undeveloped land ought to be his mother's children in exclusion of the 1<sup>st</sup> wife's children. He urged the trial court to find in his favour.
11. PW2, PW3, PW4 and PW5 (being MAE, ASE, AYE and HBM) having been sworn together presented their testimony by stating that they are relatives and close friends of the deceased and therefore, were well acquainted with the history of the suit land. They confirmed that the disputants were brothers but born of different mothers and that the land in question belonged to the deceased person. That during the lifetime of the deceased, he used to live on the said plot together with his wife. They therefore held that all the children of the deceased ought to benefit from the estate of the deceased.
12. On 20.08.2024, the court proceeded to visit the suit property to ascertain its existence and status and further, directed the Survey Department to prepare a comprehensive report detailing the particulars of the suit plot.
13. The report by the Survey Department by Surveyor Abdalla Abdiladif of Wajir County dated 20.08.2024 was filed in court stating that the suit plot was registered in the name of Yussuf Elmi Mumin, the deceased herein.



14. PW6, Adoy Buul Alio testified that she was the widow of the deceased herein. According to her, the suit plot belonged to the deceased as she confirmed residing on the plot since the year 1982 when it was still undeveloped. It was her case that while at the plot, she was blessed with three children who are since adults and therefore, no one had a better understanding of the plot than her. She reiterated that the suit plot belonged to her deceased husband.
15. The trial court upon considering the facts and the law, delivered a judgment on 09.12.2024 thus finding that:
  - i. The suit plot belonged to the deceased herein and thus constitute the estate of the deceased.
  - ii. The legal beneficiaries as listed were Adoy Buul (widow); Mohamed Yussuf Elmi(son); Timira Yussuf Elmi (daughter); Hindia Yussuf Elmi(daughter); Butaha Yussuf Elmi (daughter); Ahmed Yussuf Elmi (son); Mukhtar Yussuf Elmi(son); Hassan Yussuf Elmi (son); Habiba Yussuf Elmi(daughter); Abdi Yussuf Elmi (son) and Farhiya Yussuf Elmi (daughter).
  - iii. The deceased's wealth should be distributed in accordance with the Islamic law thus: widow, 12.5 %; sons, 58.5% collectively (11.7% each); daughters, 29% collectively (5.5% each).
  - iv. No order as to costs
16. The appellant being dissatisfied with the judgment and decree of the trial court filed a memorandum of appeal dated 23.12.2024 citing grounds summarized as follows:
  - i. That the learned trial Kadhi erred in law and fact by finding that the suit plot belonged to the deceased thus forming part of the estate of the deceased's estate.
  - ii. That the learned trial Kadhi erred in law and in fact by failing to grant him a fair hearing.
  - iii. That the learned trial Kadhi erred in law and in facts by disregarding his evidence despite the same being cogent.
  - iv. That the learned trial Kadhi erred in law and in fact by failing to appreciate his legal rights over the suit property.
  - v. That the learned trial Kadhi erred in law and in fact by being biased and favouring the respondent's side.
  - vi. That the learned trial Kadhi erred in law and in fact by failing to appreciate the rules of procedure in regards to civil litigation and practice.
17. The appellant sought for the following prayers:
  - a. That the appeal be allowed.
  - b. That the case be heard de novo before a different Kadhi.
  - c. The appellant be awarded costs of the suit.
18. The Court heard the appeal with the aid of two assessors pursuant to section 65 (1) (c) of the [Civil Procedure Act](#), which provides for appeals to the High Court from original decree of a Kadhi's Court as follows:
  - "c) from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors."



19. Thus this court sat with Senior Principal Kadhi Rashid Kokonya Otundo of Ijara and Senior Resident Kadhi Muyihidin Mohamed Sambul of Balambal. In his opinion, Senior Principal Kadhi Rashid Kokonya Otundo in his undated opinion, urged as to whether the appellant was given a fair hearing?
20. He stated that, in Islamic law, the principles of natural justice are deeply grounded in the Qur'an, Sunnah, and Hadith forming the ethical and procedural basis of judicial proceedings. That justice ('adl) is both a divine command and one of the highest moral virtues in Islam and further, that Allah the Almighty says: "Indeed, Allah commands justice and fair dealing..." (Qur'an 16:90); believers are also commanded to uphold justice, even if it goes against their own interests or those of their families. Additionally, that in the Qur'an 4:135, the same provides that, "O you who believe! Stand out firmly for justice, as witnesses to Allah, even if it be against yourselves, your parents, and your relatives..."
21. He opined that the Islamic evidentiary rules state that the burden of proof rests on the claimant, while the respondent may be asked to take an oath in denial. The Prophet (peace be upon him) said: "The onus of proof is upon the claimant, and the oath is upon the one who denies" (Tirmidhi, Hadith 1341). For this reason, a Qadhi must grant the claimant and the respondent sufficient time and opportunity to bring forth evidence and witnesses. [ Also see Mustafa Rashid Issa, "Natural Justice in Islam and Human Law," Journal of Philosophy, Culture and Religion, Vol. 15 (2016). That any departure from these principles violates the essence of due process under Shariah and undermines the legitimacy of judicial proceedings."
22. Accordingly, and in light of the above, it was his opinion that the proceedings before the Kadhi did not fully adhere to the standards of Islamic law and procedural fairness required in a Kadhi's Court. Consequently, that the appeal merits serious reconsideration and as such, it was only mete that the matter be remitted before a different Kadhi for fresh hearing.
23. Senior Resident Kadhi Muyihidin Mohamed Sambul in his opinion dated 9-10 -2025 stated that the manner in which the proceedings were conducted led to a tainted determination as the record revealed procedural irregularities. That the learned kadhi had failed to give the appellant an opportunity to present and defend his case hence offending the rules of natural justice. That failure to involve all legal heirs in the proceedings was a major flaw. Hon. Kadhi recommended a reconsideration of the trial before another kadhi.
24. The court directed that the appeal be canvassed by way of written submissions.
25. The appellant via his undated submissions urged that he was denied a right to fair hearing as he was denied an opportunity to present his defence. That the trial Kadhi thus infringed his fundamental rights as the matter was hurriedly heard without following the provisions of *the constitution* in particular article 50 of *the constitution*. The appellant relied on the case of Otieno vs The Attorney General [2013] eKLR Petition No. 27 of 2012 where the court held that:

"An accused person must be given a reasonable opportunity to prepare for trial, which includes the right to access the relevant information and witnesses in a timely manner"
26. The appellant decried the alleged acts of intimidation by the Kadhi during the hearing process. According to him, the Kadhi was not only hostile but also created an environment that demeaned his capability to confidently prosecute his case. He relied on the case of Samuel Kamau Machara & Another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR, Civil Appeal No. 2 where the court emphasised on the essence of a fair hearing and impartiality.
27. The Kadhi was faulted for having allegedly ordered the detainment of the appellant for a period of nine days in custody. He argued that the said order infringed on his rights as he relied on the case of Mumo



Matemu vs Trusted society of Human Rights Alliance & 5 Others [ 2013] eKLR, Petition No. 122 of 2012 where the court held that unlawful detention is a direct violation of an individual's rights under article 29 of the constitution.

28. It was further urged that the Kadhi erred by failing to consider vital evidence to wit, testimonies from beneficiaries and the report from the ADR process thus reaching a determination that was incorrect. In the same breadth, it was submitted that the determination by the Kadhi cannot be upheld for the reason that the same failed to follow the Civil Procedure Rules thus occasioning prejudice and injustice to the appellant. To that end, the appellant relied on the case of Seven Eleven Properties Limited vs Department of Valuation & Rating [2017] eKLR Civil Appeal No. 10 of 2017 where the court held that: "the rules of procedure are meant to ensure fairness and orderliness in the conduct of litigation and failure to comply with them can lead to injustice". In the end, the appellant urged this court to allow the appeal as prayed.
29. The respondent on the other hand filed submissions dated 15.05.2025 and distilled two issues for determination as follows:
  - i. Whether the appellant has the requisite locus standi to institute the appeal herein as the administrator of the estate without any letter of administration.
  - ii. Whether the appeal herein has merit.
30. On the first issue, the respondent submitted that where a suit is commenced without letters of administration in respect of a deceased estate, such a suit is null ab initio. That the estate of the deceased can only be represented in any legal proceedings by a person who is duly authorized to do so on behalf of the estate. Therefore, only a person issued with grant of letters of administration can do so on behalf of the estate. Thus in this case, the respondent urged that the appellant did not during the trial provide any evidence of authority to represent the estate of the deceased herein. To that end, reliance was placed on the Court of Appeal decision in the case of Trouistik Union International & Another vs Jane Mbeyu & Another [2008] IKL (G&F) 730 where it was held that:

‘To determine who may agitate by suit any cause of action vested in the deceased at the time of his death, one must turn to section 82(a) of the Law of Succession Act. That section confers power on personal representatives and on them alone.’
31. In reference to the above case law, this court was urged to be persuaded that the appellant ought to have armed himself with a grant ad litem before filing the appeal herein.
32. On the second issue, the respondent submitted that the appeal herein is destitute of any merit as the appellant did not demonstrate how the learned Kadhi erred in his finding. That from the appeal, it is clear that the appellant sought to introduce new facts in the case as the same were not litigated during the trial of the matter. To support the foregoing, the respondent relied on the case of Republic vs Ali Babitu Kololo [2017] eKLR where the Court of Appeal held that:

‘it has been said time and again that the unfettered power of the court to receive additional evidence should be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in the determination of the appeal.’
33. The respondent further contended that in reaching the impugned judgment, the trial Kadhi deliberately considered the evidence before him together with the law thus reaching a lawful finding. According to him, the appeal herein lacked merit and the same ought to be dismissed.



34. Having reviewed the evidence adduced before the trial court, the respective parties' pleadings, authorities cited, the opinion of the assessor and the applicable law, the following are the issues that germinate for determination:
- i. Whether the appellant has locus to before this court.
  - ii. Whether the proceedings by the trial court adhered to the basic civil Procedure Rules
  - iii. Who are the rightful heirs to the deceased's estate
  - iv. Whether the plots in question belonged to the deceased and who is entitled as the beneficiary.
35. This being a first appellate court, it is duty bound to re-asses, re-consider, and re-evaluate a fresh the evidence tendered before the trial court and arrive at its own independent determination without losing sight of the fact that it did not see nor hear the witnesses testify so as to be able to determine their general demeanour. See *Selle & Another v Associated Motor Boat Co.Ltd & others* (1968 E.A 123.
36. On whether capacity to sue is a prerequisite requirement in law and a party seeking a legal remedy must show that he/she has the same, this court seeks guidance from the case of *Alfred Njau vs City Council of Nairobi* (1983) KLR 625 where the court stated that locus standi literally means a place of standing and the right to appear in court.
37. In the instant case, it was urged that the respondent commenced the appeal herein without letters of administration and therefore, the suit herein is null ab initio. It is important to note that the deceased herein prior to his death professed the Islamic faith and even at the time of death, died as a Muslim. It is trite that the Islamic law provides that only heirs such as parents, siblings, children and spouses have the legal capacity to claim inheritance.
38. It is also safe to restate that the Law of Succession of Act is not applicable for succession of estates of deceased Muslims. Section 48(2) of the Laws of Succession Act, Cap 160 provides:
- 'For the avoidance of doubt, it is hereby declared that the Kadhi's court shall continue to have and exercise jurisdiction in relation to the estates of a deceased Muslim for the determination of inheritance in accordance with Muslim law and any other question arising under this Act in relation to such estates.
39. Etyang J. in the case of *Chelanga vs Juma* KLR (2002) VOL 2. held:
- “The *law of succession Act* does not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim. In view of those statutory provisions, the devolution of the estate of any such person has to be governed by Muslim law.”
40. The applicable law in succession of estates of deceased Muslims is therefore Islamic law. Under Islamic law, letters of administration is not a requirement for purpose of instituting inheritance proceedings. This is because the general rule in Islamic law of succession is that estates do not stay in abeyance; it automatically vests in the heirs. [ Also See *Rashid Zahran vs Zahran & 4 Others*, Civil Appeal No. 55 of 1999; Misc. Application No. 746 of 2011, MSA, In the matter of the estate of Saidi Abdalla [deceased].
41. Noting in this case that the appellant is a son of the deceased and therefore, a direct heir, I find that it was not necessary for him to seek a temporary grant before moving this case.
42. On the second issue, the appellant contended that the rules of procedure were not followed thus denying him an opportunity to tender his evidence and even call witnesses. I have gone through the court record. It is clear that pw1 being the petitioner did not give evidence oath nor affirmed. Further



pw2, pw3, pw4 and Pw5 did not separately testify. Instead, they appear to have testified in a chorus. Further, none of the witnesses was ever cross examined. It was not indicated whether such opportunity was given to the appellant.

43. Having already enumerated how the matter upon being filed was handled till the time when judgment was delivered, it cannot be emphasized that the procedure as provided for under Order 18 on Hearing of Suit and Examination of Witnesses under Civil Procedure Rules (2010) and rule 73 of the Kadhi's rules 2022 was not adhered to.
44. This court is alive to the fact that the Kadhis' Courts are not strictly required to follow the whole provisions of the Civil Procedure Rules. However, the right to fair hearing cannot be overemphasized. Order 18 of the Civil Procedure Rules (2010) is very comprehensive on how a trial should proceed in court including the recording and production of evidence.
45. The same is provided as follows:
  1. Right to begin [Order 18, rule 1]  
The plaintiff shall have the right to begin unless the court otherwise orders
  2. Statement and production of evidence [Order 18, rule 2]  
Unless the court otherwise orders—
    - (1) On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.
    - (2) The other party shall then state his case and produce his evidence, and may then address the court generally on the case. The party beginning may then reply.
    - (3) After the party beginning has produced his evidence then, if the other party has not produced and announces that he does not propose to produce evidence, the party beginning shall have the right to address the court generally on the case; the other party shall then have the right to address the court in reply, but if in the course of his address he cites a case or cases the party beginning shall have the right to address the court at the conclusion of the address of the other party for the purpose of observing on the case or cases cited.
    - (4) The court may in its discretion limit the time allowed for addresses by the parties or their advocates.
  3. Witnesses to be examined in open court [Order 18, rule 3]  
The evidence of the witnesses in attendance shall be taken orally in open court in the presence of and under the personal direction and superintendence of the judge.
  4. How evidence to be recorded [Order 18, rule 4]  
The evidence of each witness shall be taken down in writing by or in the presence and under the personal direction and superintendence of the judge, not ordinarily in the form of question and answer but in that of a narrative, and when completed shall be signed by the judge:  
Provided that—
    - (i) the court may use such recording processes and technology as may from time to time be approved;



- ii. the transcript of such evidence when checked and approved by the judge shall constitute the official record of the evidence.

- 46. In the instant case, the petitioner laid down his case and thereafter, the respondent was given an opportunity to present his case. After the same was done, PW2, PW3, PW4 and PW5 (being MAE, ASE, AYE and HBM) testified together in a chorus manner. Thereafter, PW6, Adoy Buul Alio finally closed the hearing process.
- 47. Of importance to note is the fact that it remained unclear whether the appellant and the respondent did not desire to test the respective party's evidences by way of cross examination and finally re-examination as the proceedings did not capture the same. Equally, it remained a mystery why the Kadhi relied on documents which were not produced during the hearing process in coming up with his judgment contra the provisions of Order 18 Rule 2 of the Civil Procedure Rules (2010). [See Des Raj Sharma vs Reginan [1953] EACA 210]. Similarly, the respondent was equally not given an opportunity nor was he informed if at all he desired to test the report evidence of the surveyor noting that he was self-representing.
- 48. In view of the foregoing, noting that the procedure of recording and production of evidence was not proper, it is my view that the Kadhi fell into error and the whole trial was rendered a nullity. Having held as such, I need not deal with the rest of the issue as that would amount into delving into the merits of the appeal. For those reasons, the proceedings conducted before the trial court are declared a nullity on account of procedural impropriety hence set aside.
- 49. Accordingly, there shall be a fresh hearing to be conducted before another kadhi other than Kadhi Ibrahim Mohamed. If there is no other kadhi within the same station, the file shall be forwarded by the head of station to the nearest station with a kadhi for rehearing and determination on priority basis.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30<sup>TH</sup> DAY OF OCTOBER 2025**

.....

**J. N. ONYIEGO**  
**JUDGE**

