



REPUBLIC OF KENYA



KENYA LAW
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**Ahmed v Bisher & another (Civil Appeal 84 of 2014)
[2026] KEHC 494 (KLR) (27 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 494 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 84 OF 2014
RN NYAKUNDI, J
JANUARY 27, 2026**

BETWEEN

MOHAMED AHMED APPELLANT

AND

ADBULMALIK AHMED BISHER & ANOTHER RESPONDENT

*(Being an Appeal from the Judgment of the Kadhi, Mohammond delivered
on 29th June 2011 in original Kadhi's Petition No. 13 of 2011 at Eldoret)*

JUDGMENT

1. This appeal arises from the Judgment of the Kadhi's Court from which the following decree dated 29th June 2011 was drawn:
 - a. That the death of the one Ahmed Bisher Bin Saleh was ascertained to be on the 1st March 2011.
 - b. That the lawful heirs and beneficiaries of the said deceased according to the Islamic Laws of inheritance are Cheptum as widow and Mohamed, Jamal, Salim, Abdulmalik and Abdulnasir as five sons and Sofiya, Zena, Fatma, Shiekha, Begam and Warda as six daughters.
 - c. That the said deceased left behind an estate consisting of a shamba of 76.7 Acres on the part of Plot No. 8545 as his vested share of inheritance from his late father Bisher Saleh at Eldoret.
 - d. That the sharing and distribution of the estate in accordance with the Islamic Laws of Inheritance will be 1/8 or 16/128 of the whole estate for the widow and the remaining 7/8 of the whole estate to be shared at the ratio 2:1 sons to daughters or every son to get 14/128 and every daughter to get 7/128 of the whole estate.
 - e. That the vested share of inheritance from the estate of the deceased father and mother at Kakamega inform of plots should in turned be inherited by his heirs according to their respective shares.



- f. That the order of transfer to be issued to the effect that the estate to be transferred from the name of the deceased into the names of the heirs according to their respective shares.
 - g. That the administration of this estate to be given to the Petitioner and (h) That the cost of this petition to be borne by the Respondent.
2. From this decree the Appellant was aggrieved and preferred an appeal as evidenced by the memorandum of appeal dated 20th June 2014 raising the seven grounds herein:
- a. The learned Kadhi erred in law in failing to apply and or misconstruing the Islamic law applicable to inheritance determination of legitimate heirs.
 - b. The Learned Kadhi erred in law and fact in making a finding that there was a marriage between the deceased and one Cheptum, the mother of Respondents.
 - c. The Learned Kadhi erred in law and fact in finding the Respondents are legitimate heirs of the Deceased.
 - d. The Learned Kadhi erred in law and fact in failing to conduct DNA test to be carried out among the heirs.
 - e. The Learned Kadhi erred in law and fact in manner he arrived at the mode of distribution of the Deceased estate.
 - f. The Learned Kadhi erred in law and fact by appointing the Respondent as an Administrator.
 - g. The Learned Kadhi erred in law and fact by awarding cost to the Petitioners.

3. Summary of the evidence before the Kadhi's Court comprised of the following witnesses:

The Petitioner Abdulmalik Ahmed told the trial Court that he is a lawful son to the deceased who was married to one Cheptum in 1965 when the Respondent was around 4 years old. He told the Court that when the deceased fell sick around 2010 he was called and he sent his brother Abdulnasir to call the Respondent to bring his vehicle but he did not respond and alternative arrangement was made to take the deceased to hospital. According to PW1 - the Petitioner he took care of the hospital bill to meet the medical expenses of the deceased. During cross examination by the trial Court PW1 reiterated that he is a child of the deceased although he did not have a birth certificate.

3. The next witness who took oath to give evidence is one Zubeda Mary

Cheptum who identified herself as the widow of the late Ahmed Bisher. In her evidence she told the Court that she was married to the deceased in January 1965 at the shamba which is now an estate and apparently those who witnessed the said marriage are all now deceased. It was the evidence of PW2 that after their marriage with the deceased they lived at Pioneer where the late had bought her a house. The witness acknowledged of having been blessed with ten children born out of the marital union with the deceased although one passed away and by the time of the trial she was survived by nine children. She produced before Court birth certificates for some of the children namely Fatuma born on 28th January 1978, Sheikh born on 9th December 1979 and Abdulnasir born on 16th September 1965.

3. Next witness was PW3 who took oath and identified herself as Fatuma Ali resident of Turbo. Her witness was to the effect that when the deceased was getting married to Cheptum the widow she was personally present. That after the marriage her father Ahmed went to the father of the deceased to



Kakamega to inform him that the deceased got married to the second wife and all the relatives of the deceased knew that the deceased had married the 2nd wife.

4. The next witness was PW4 one Salama Bisher who identified herself as the sister to the deceased. The witness in her evidence to Court acknowledged that the late had sired ten children with the PW2 Zubeda although one passed on. The other witness at this trial was Marya Bisher a sister to the deceased who acknowledged knowing PW2 Zubeda as the legal wife to the deceased. She denied that the mother to the Respondent was given 10 hectares by the deceased.
5. From this perspective it was now the turn of the Respondents to give evidence in rejoinder to the issues and facts pleaded by the Petitioner. The first witness of the Respondent was one Mathew Ouma Owino working as a Land Surveyor in Eldoret. In his evidence RW1 told the Court that at one time he was instructed by the elder brother of the deceased by the name Abdulkarim AI Bisher who was given the administration of the estate by the Kadhi of Kisumu with an order of subdivision of the shamba of Bisher to his children consisting of around 299 into six portions of different sizes and area. In that subdivision according to the witness Abdulkarim was to get 90 acres, Ahmed 88 acres, the two sisters Salima and Marya 20 acres each, Feiswal 60 acres and 20 acres for Hawa Bisher. This subdivision was done on 5th of December 2006 where the administrator signed the documents on the scheme of distribution and he surrendered every portion to the respective owners to do whatever they want with their shares. The witness further on oath told the Court that one Ahmed again instructed to subdivide his portion of 88 acres so as to give the Respondent 10 acres where he was to build a house. Further at that trial RW1 told the Court that the deceased again instructed him further to subdivide other 10 area in the rocky area along the river which share was to be given to Gogo Hawa and a further subdivision of 6 acres to be given to one Sosten. In furtherance of his evidence before the trial Court RW1 gave evidence on oath that a further subdivision of 2 acres out of the said plot was undertaken to be given to another person.
6. The next witness for the Respondent was one Jamal who gave a chronology of events on the properties owned by the deceased and the subdivision undertaken to have the estate shared out to the various heirs as recognized under the law more so the codification of Islamic Law. In the same discourse the 3rd witness in line to give evidence was one Feiswal Bisher who identified herself a resident of Kakamega. She talked into detail about the assets of the deceased and how the subdivision was carried out enabled them to benefit from the estate.
7. It is on record from the above summary on record both Counsels filed written submissions for and against the appeal. The above trajectory will form the basis upon which the memorandum of appeal shall stand to be determined.
8. Before delving into the merits of the appeal it is necessary to reiterate the jurisdiction of an appeal's Court;

A Court on appeal will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did. The Court on first appeal has jurisdiction to review the evidence in order to determine whether the conclusion originally reached on that evidence should stand. It is a strong thing for an appellate Court to differ from the finding on a question of fact of the judge who tried the case and who has had the advantage of seeing and hearing the witness. But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate Court might itself have come to a different conclusion. See *Peters v Sunday Post Ltd* [1958] EA 429; *Shah v Aguto* [1970] EA 265. It may be uncertain whether the appellate Court



could have reached the same conclusion on the evidence, but it is important that, sitting in the appellate Court, they should be mindful of the advantages enjoyed of a trial judge who saw and heard the witnesses and were in an incomparably better position than the Court of Appeal to assess the significance of what was said, and, equally important, what was not said. See *Sotiros Shipping Inc v Shmeiet Solholt* [1983] 1 Lloyd's ReP 605.

3. The totality of the evidence before the trial Court must undergo scrutiny based on the standard and the burden of proof now settled in civil cases being that of a balance of probabilities. This is what was discussed by the Court of Appeal:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not....

This position was re-affirmed by the Court of Appeal in *Maria*

Ciabaitaru M'mairanyi & Others v Blue Shield Insurance Company Limited - Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

“Whereas under Section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, Section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

12. This appeal is basically and primarily on the elements of the legality of a marriage union, legitimacy of children and inheritance law. When it comes to Islamic inheritance law it is a critical component of Islamic jurisprudence that governs the distribution of a deceased person's estate amongst rightful heirs in accordance with divine instructions contained in the Quran, Hadith, consensus and analogical reasoning. As one of the most detailed areas in Islamic law, inheritance is considered a divine obligation rather than a humanly constructed regulation making its faithful application both a spiritual and legal imperative for Muslims. In its purposive interpretation, Islamic Inheritance Law is a divinely ordained framework that ensures justice, equity and the protection of heirs in Muslim societies.

13. The foundational texts of Islamic inheritance law are found in the Qur'an, particularly in Surat al-Nisā', verses 4:11, 4:12, and 4:176. These verses assign exact mathematical shares to sons, daughters, spouses, parents, and other relatives, providing a detailed framework for the distribution of wealth after death. To further clarify and implement these rules, the Sunnah of the Prophet Muhammad plays a complementary role. Prophetic traditions often resolved ambiguities or addressed scenarios not explicitly mentioned in the Qur'an. One such example is the Prophet's instruction: “Give the shares to those who are entitled to them. Then, whatever remains should go to the closest male relative” (Sahih al-Bukhari, No. 6732). This hadith contributes to the understanding of residual inheritance and aids scholars in constructing comprehensive inheritance plans beyond the explicitly stated Qur'anic shares (Al-Qaradawi, 1999).



14. In reverence to Allah almighty in the Holy Quran verse 4:11 even specifies the shares of both genders as well and even specifies according to different conditions on inheritance rights as can be demonstrated from the following extract:

“Allah thus commands you concerning your children: the share of the male is like that of two females. If (the heirs of the deceased are) more than two daughters, they shall have two-thirds of the inheritance; and if there is only one daughter, then she shall have half the inheritance. If the deceased has any offspring, each of his parents shall have a sixth shall go to his mother. all these shares are to be given after payment of the bequest he might have made or any debts outstanding against him. You do not know which of them, your parents or your children, are more beneficial to you. But these portions have been determined by Allah, for He indeed knows all, is cognizant of all beneficent considerations.” “And to you belongs half of whatever has been left behind by your wives if they die childless; but if they have any children then to you belongs a fourth of what they have behind, after payment of the bequest they might have made or any debts outstanding against them. And to them belongs a fourth of what you leave behind, if you die childless; and if you have any child then to them belongs one-eighth of what you have left behind, after the payment of the bequest you might have made or any debts outstanding against you. And if the man or woman has no heir in the direct line, but has a brother or sister, then each of these shall inherit one-sixth; but if they are more than two, then they shall inherit onethird of the inheritance, after the payment of the bequest that might have been made or any debts outstanding against the deceased, providing that the bequest causes no injury. this is a commandment from Allah; Allah is All-Knowing. All-forgiving.”

12. Hence as it can be seen the specification of shares of both genders in different conditions due to their respective status is provided for and fulfilled. The Islamic law is also very clear on the kindred to be excluded from the inheritance of the deceased’s estate. This observation of the Court is laudable. In “Mst. Bakhtan v Haji Allah Wasaya”, where there was a suit of pre-emption of land, the Court while relying on Muhammadan Law observed that:

“...it has been stated that if there be no sharer or residuary inheritance is divided amongst the distant kindreds. Under the Rules of Exclusion, the distant kindreds stand excluded in the presence of residuaries. It is thus very much obvious that in order of succession, the residuary comes first and if there be no residuary then the distant kindreds will inherit.” 1985 CLC 2544 [Lahore].

12. The Learned Author M. M. Khan in his treatise echoed as Islamic Law of Inheritance stated that:

“Administration as understood by modern law, was unknown to Islamic jurisprudence. In Islam there is mere distribution of property of the deceased, by the state if not by the heirs themselves. Unlike other modern systems to dispose of the estate of a deceased Muslim, neither there is a need of executor or/and administrator nor probate or/and letters of administration. In the absence of an executor appointed by the will of the deceased, heirs of a Muslim have a right and capacity to dispose of the estate of the propositus according to law. In case they fail or refuse to do so, the Qazi (Magistrate) may appoint an executor’.

12. According to the Appellant he is aggrieved that the Learned Kadhi erred in law in failing to apply and/or misconstruing Islamic law applicable to inheritance determination of legitimate heirs. In answer to this ground, I have the liberty to review the evidence of PW1 – PW4 who laid the foundation on the



nature, character and elements of the Petitioner's case before the trial Court. Having established the prima facie case, it was now the time of the Respondents to summon evidence to contradistinguish the facts in issue as relied upon by the Petitioner and his witnesses. The chronology of both direct and circumstantial evidence which was also tested under intense cross examination by the Respondent in the opinion of the Learned Kadhi the threshold on inheritance was established by the Petitioner to warrant his decision on this limb couched in the following language:

Therefore, whether the grandfather Bisher bequeathed or not the deceased Ahmed Bisher did subdivide 10 Acres and gave them to the Respondent during his life time. Therefore this 10 Acres cannot form part of the estate of Ahmed Bisher as by the time of his death he had already transferred the same that is he does not own that 10 Acres any more. Therefore, out of 90 Acres, 10 Acres which belong to the Respondent and a total of 8 Acres sold by the deceased should be subtracted remaining 72 Acres plus 4.7 Acres becomes an estate of the deceased which the deceased inherited from his mother which comes to a total of 76.7 Acres on Plot No. 8545 becomes an estate of the deceased Ahmed Bisher at Eldoret.

The RW3 stated that there are other estates at Kakamega in form

of Plots of the deceased grand father Bisher and Grandmother Hawa where this deceased Ahmed has got a share on them of which the said share should be in turn be inherited by his heirs. The RW3 mentioned inheritance and succession cause at the Kadhi's Court of Kisumu No. 12 of 2010 and No. 11 of 2011 respectively concerning the original estate of the grandfathers Bisher. Therefore, whatever portion or share of inheritance which will be given to the deceased Ahmed from the estate of his father Bisher and his mother from the said case in turn the said portion and share should be inherited by his heirs. As for the remaining estate mentioned in this case that is the vehicle Nissan No. KAE 216H and the balance of debt Kshs 390,000/= though they were not captured in the proceedings of this case, they should also be inherited by the heirs according to their respective shares.

18. So what is the jurisdiction of this Court on matters of this nature? The answer is to be found in the decision of *Mbogo v Shah* (1968) EA 93 at 96 in which the Court stated:

“The Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice.”

18. With regard to the judgment of the Learned Trial Kadhi he drew parallel convergence legal zones from the evidence and the law which persuaded him to exercise discretion on the issue of inheritance as heavily contested between the Petitioner and the Respondent. The Courts in *Mako Yasin v Hribaye Nane Shege & 2 Others* and *Ahmed Abbas Edin & Abdinasir Adan Somo v Hassan Abdul Adan* [2018] eKLR at 9 observed that:

“Under Islamic law of inheritance, whatever belonged to the deceased or whatever the deceased was entitled to form part of his estate and is available for distribution to the heirs Islamic Law of inheritance makes no difference on the type of property heritable by the heirs provided that it has monetary value and it is halal (lawful).



18. The Court further in *Mohamed Juma v Fatuma Rehan Juma & 6 Others* [2017] eKLR held as follows:

That in Islamic the principle of devolution of an estate is followed and that for a person to inherit from a deceased Muslim, he or she must fall into one of the three categories of heirs. Thus;

“Heirs according to the Mohammedan Law are classified in three

(3) categories herein namely: Ahlul – Faraidh (Quranic Sharers), Asabah (Residuary or agnates), Dhawil – Arham (Distant kindred/Uterine relatives) ... The first rule of intestate succession is that the Quranic sharers must first ... Be assigned their shares. The Quranic sharers are the most important class of heirs who take primary ... the second rule of intestate succession is that whatever is left after assigning the first class their share (residue) should go to the heirs of the second class, names [sic] the Asabah or Agnates, also known as the Residuaries, because they take the residue of the estate of the deceased person The distant kindred or Dhawil – Arham (uterine relatives) ... Assigning these classes of heirs the respective shares if any is done in the following manner: Firstly, the Quranic sharers are assigned to their entitlement in accordance to the primary sources of Sharia. Secondly, if there be any residue after assigning the Quranic sharers the perspective shares the Residuaries become entitled to certain shares as provided by the primary sources of Sharia. Thirdly, the distant kindred can only inherit intestate in the absence of the first and the second class.”

21. What the evidence reveals in this matter is that in pari materia under application of Section 29 of the *Law of Succession Act* the distribution of the deceased’s estate was properly undertaken and effected under Islamic Law and any grievances as agitated by the Appellant finds no force of law for an Appeal’s Court to review the decision, vary it or set it aside as submitted by the Appellant in support of his appeal.

22. On matters of inheritance the law is now settled including the application the Equality Clause in Article 27(4) of *the Constitution* which emphasizes as follows on matters of access to property rights survived of the deceased including those who profess Islamic religion; Thus:

“The provision of equality under Art 27 of *the Constitution* of Kenya in so far as it relates to the question of shariah is qualified by the provisions of Art 24(4) of *the Constitution* which proves that: (4) The provisions of the Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhi’s Courts, to persons who profess the Muslim religion, in the matters relating to personal status, marriage, divorce and inheritance.”

21. The constitutional Courts in Kenya are always faced with litigation touching on the interpretation of the Bureau of Rights as premised in Chapter 4 and equality before law and non-discrimination. The approach taken by Courts is that of purposive and value-oriented interpretation to give effect to the fundamental aspect of the Bill of Rights. Purposive interpretation of *the Constitution* is aimed at teasing out the core values which underpin the listed fundamental rights in an open and democratic society based on human dignity, equality and freedom and then to prefer the interpretation of a provision that best supports and protects those values as provided for in Article 10 of *the Constitution*. Considered in context of inheritance rights any beliefs, religion, customs which tends to tilt the scale so as to deprive



an individual from either gender rights to access property or assets survived of the deceased would be considered a violation of the law. What the arguments by the Appellants present is to ask this Court to review the trial Court decision so as to limit the rights of inheritance as against the Respondents. It is also a constitutional imperative under Article 24 that a law may legitimately limit a right in the Bill of Rights if it's a law of general application that is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom. If this Court was to be persuaded by the submissions and arguments presented by the Appellant towards allowing this ground on inheritance it will defeat the purpose and objective of Islamic law as contextualized in the various Statutes, policies and the Holy Quran. Fortunately for the Respondent, there is no credible or cogent evidence for this Court to exercise appellate jurisdiction on grounds that the learned Kadhi misapprehended the facts and the law on accruing of inheritance rights to the beneficiaries survived of the Deceased's estate. All what one needs to look at is the consanguinity and affinity of the family tree of the deceased during his lifetime which forms the basic structure in which inheritance rights are traceable and shared to the rightful beneficiaries. This ground on the decision of the trial Court arriving at the mode of distribution which is being challenged by the Appellant entirely fails for lack of merit.

21. The second frontier of this appeal is framed in the following language by the Appellant: That the learned Kadhi erred in law and fact in making a finding there was a marriage between the deceased and one Cheptum the mother of the Respondents. The question of marriage is a question of fact giving rise to the threshold of the law. Section 6(1) of the *Marriage Act* provides that a marriage celebrated "in accordance with Islamic law" may be registered under the Act. Section 6(3) provides that "[a] marriage celebrated under ... Islamic law is presumed to be polygamous or potentially polygamous." In the estate of Ramadhan Hassan (Deceased) [2014] eKLR:

"The question whether there was a marriage or not is one of fact ...[Marriage may be proved directly or presumptively; directly by means of the oral testimony of the witnesses present at the marriage or by documentary evidence in the shape of a certificate of marriage signed by both parties and their witnesses; presumptively by statement of parties or by evidence of conduct and reputation.]"

21. Therefore, what constitutes an Islamic marriage is a matter to be proved strictly by way of evidence as provided for under Section 107(1), 108 and 109 of the *Evidence Act*. The High Court in *NNS v SAM* [2002] eKLR held that:

"a marriage certificate is enough proof of" the fact the parties celebrated their marriage according to Islamic law. Although a marriage certificate "is recommended", its non-existence does not invalidate a Muslim marriage.

21. During the hearing of this appeal as a matter of procedural law I had the advantage of sitting with the assessors knowledgeable also in Islamic law its text, statutory framework and application in adjudicatory forums being Hon. Principal Kadhi Idris Myaboga and Hon. Principal Kadhi N. M. Muriuki. In the advisory, they proceeded to observe; That in Islamic jurisprudence, a marriage is established where there is offer and acceptance, witnesses, dowry and wilaya. A written certificate, though useful, is not the sole proof of marriage. Hence, absence of a certificate cannot by itself invalidate an otherwise valid union.

22. What is coming out from the above decisions is that the validity of Islamic marriages relies heavily on compliance with sharia essentials rather than solely on the production of a marriage certificate. Islamic law by this nature is a religious based doctrine, not just local custom or culture and has its own unique requirement for validity. In this context, I draw from the established principles and from the evidence



of PW2 who on oath before the trial Court acknowledged to have attended the solemnization of the marriage as between Cheptum and the deceased. So, what was proven by that single identifying witness was that there was offer from the deceased to the wife to be positively identified as Cheptum and that clear proposal was accepted culminating into the marital union. There is therefore evidence of free consent of the parties involved being the bride and the bridegroom whose invitation involved many people and unfortunately some of them has since passed on save for PW2 who also made it as one of the witnesses in the ongoing proceedings before the Kadhi's Court. There is also a refutable presumption which has not been controverted by the Appellants that before that solemnization of the marriage there must have been payment of Dower that is the groom agreed to pay dowry to the bride's family. In the instant case there were witnesses and one of them happen to be PW2 who were present during the celebration of the marital union between the deceased and one Cheptum. I am therefore unable to agree with the Appellant that there was no valid marriage as between Cheptum and the deceased. Therefore, the issue of the legality and validity of the marriage has not been challenged by any evidential material to warrant this Court to render it voidable.

23. The third controversial limb in this appeal revolved around the question of legitimacy of the alleged children subject matter of the inheritance before the trial Court. The Petitioner in this case before the trial Court placed reliance on her own testimony which was corroborated by PW2, PW3 and PW4. On the part of the Respondents who are now Appellants before this Court vehemently opposed any recognition of the aforesaid children as being sired by the deceased to entitle them of any inheritance rights. The Appellants have sought leave of this Court to issue a declaration for the DNA profile if indeed they are confident that their bloodline is traceable to both the deceased and the spouse positively known as Cheptum.
24. The law on this matter under Islamic law is governed by the Hadith of the Prophet (peace be upon him). In addition, the child belongs to the (marital)bed, and for the adulterer is the stone (destruction). This principle was affirmed in the case of Utbah ibn Waqas as narrated in Sharh Umdat al-Ahkam (6:64), where the Prophet (peace be with him) rejected claims of resemblance and held that a child born in wedlock belongs to the lawful husband. Sheikh Abulwahab Khalaaf has observed that: The legal meaning of marital bed is an existing matrimonial relationship at the beginning of pregnancy. A woman who becomes pregnant and at the beginning of the pregnancy she is a wife, it is then established that the pregnancy is linked to her husband....” Ahkam al Ahwal Ashakswiyyah, P. 186. And Ibn al Qayyim affirmed a consensus on this matter and thus, there is no opposition to that. He states that: Establishment of kinship as a result of an existing marriage is a consensus among the Muslim ummah.” Zaad al Mi'aad, 5:368.
25. On this ground of legitimacy of the children that they did not belong to the lineage of the deceased I find it puzzling in view of the fact that during their lifetime they were acknowledged by the deceased and birth certificates produced and admitted in evidence within the parameters of the *Evidence Act* captured the column of the father as being the name of the deceased. For that matter, the Appellants have not demonstrated the locus standi to contest the rights of inheritance of the children who were duly recognized by the deceased during his lifetime. In other words, this Court is being asked to exclude the children of the deceased from the inheritance table unless and until they undergo a DNA profile test.
26. The question of DNA test falls within Section 48 of the *Evidence Act* and it's a powerful tool to determine the truth, however it must be balanced against the constitutional right to human dignity under Article 28 and right to privacy under Article 31 of *the Constitution* together with the statutory presumption of legitimacy. In essence forced DNA testing particularly on children is considered an invasion of privacy and violation of bodily autonomy. From the comparative heritage the Supreme



Court of India in *R. Rajendran V Kamar Nisha* (2025 INSC 1304): The Court stated that DNA tests require an “eminent need” and should not be ordered casually, highlighting privacy and bodily autonomy concerns under Article 21 which is in equal measure with our Article 31 of *the Constitution* which reads as follows: That every person has a right to privacy. In the same context, the Court in Justice K. S. Puttaswamy v Union of India (2017): The landmark ruling recognized the Right of Privacy as a fundamental right under Article 21, establishing that physical intrusions like sample collection must be legal, necessary, and proportionate. What the law contemplates is that DNA tests should be exceptional and not routine for the reason of the constitutional imperatives which go with it based on the attributes of the rights and fundamental freedoms. In this respect the DNA test is an attempt to infringe the right to privacy, body autonomy and dignity. It is a known fact that paternity establishment has long been a foundation of family law affecting significant matters such as child custody, support, inheritance and succession rights. Courts have been traditionally known that they circumstantial evidence, sworn statements, blood testing or judicial presumptions to conclude contests over biological parenthood. As much as these protocols can be able to resolve the disputes within the framework of the law, they tend to be unreliable, erroneous and based on societal prejudices. That is the very reason why the invasion of DNA testing came as a transformative solution to determine paternity with military precision for the DNA profile’s objective and the scientifically sound instruments or expert evidence. The accuracy has been determined to be over 99.99% as the paradigm shift by the Courts to resolve many disputes relating to paternity.

27. This dispute on paternity and legitimacy in another dimensional definition has to be looked from the word “child” which has different meanings and connotations in different fact situations. However, for the present purposes in this appeal it is of necessity to understand whether if a child for purposes of inheritance has attained the age of majority, in my view it will his or her right and discretion alone to put himself/herself to such DNA test as proposed by the Appellants. On this issue of DNA profile test to prove paternity there are certain surrounding circumstantial evidence which is of significance to be taken into account by the trial Court and I have in mind the subsistence of the marriage between the deceased and the woman before his demise, to this appeal. If the marriage is resolved by death or by divorce whenever a child is born to such a woman or was been maintained and supported by her together with her deceased husband or by dint of divorce the same shall be conclusive proof to the effect that the child so born is a legitimate child to such a couple. The only exception to the said rule on the biological cycle of intimacy between a man and a woman, or a husband and wife as the case may be is if one of them proves that he or she did not have access to the wife or to such a woman at such a time when such child would have been conceived. That threshold was never discharged evidentially by the Appellants at the trial Court. In fact, in this case, if the birth certificates bearing the name of the deceased is anything to go by all this hullabaloo on paternity the spirit of the dead who is the deceased having acknowledged the aforesaid children during his lifetime on earth and went further to consent that his names be included in their birth certificates so that the whole world would know beyond reasonable doubt that he is their father is not capable of being put to test by way of a DNA profile. If indeed the children had nothing to do with the deceased during his lifetime he could have taken positive steps to render them stateless, refugees or asylum seekers in their own motherland. That is not the evidence which has been presented before this Court so that the DNA test which is a last resort in determining paternity be ordered by this Court. What was expected of the Appellants is to lay a plausible theory advanced in such a way that the deceased during his lifetime had no access to his spouse one Cheptum and therefore in that situation it may be possible for the Court to hit to the call to refer this controversy on legitimacy and paternity to KEMRI or the Government Chemist for a DNA test to determine primarily the legitimacy of such children. The Appellants who also participated in the proceedings before the trial Court had a legal duty to displace the case offered by the Petitioners by strong preponderance of evidence and not a mere balance of probabilities on the issue of legitimacy and



paternity of these children who are holding their heads high that their birth rights are well documented by the Registrar General of the Republic of Kenya mandated by law to issue Birth Certificates to every citizen born within the four corners of this great Republic. I am therefore of the considered view that the Appellants have not made out a case on the merits for a declaration to issue that a DNA test be ordered to establish the legitimacy and paternity of the contested children of the deceased. That prayer also fails.

28. From the above discussion it emerges that the appeal on the predominant issues in the memorandum of appeal with regard to the marriage of the widow with the deceased, the legitimacy and the paternity of the children who were part of the subject of adjudication before the Kadhi's Court and the exclusion of such heirs to the estate aimed at depriving each one of them the right to inherit all stand on sinking sand and they collapse by effluxion of the law. As if that is not enough, assuming the worst comes to the worst the interpretation and construction of Section 3(2) & (3) of the *Law of Succession Act* prima facie can come to the aid of the children in question. In addition, the equality clause under Article 27(4) of *the Constitution* if juxtaposed upon the evidential material presented by the Petitioners regarding the legitimacy of the aforesaid children it will display a red colour which serves as a universal signal for "stop" so that there is no further violation or infringement of the rights of the children of the deceased. This essentially means that the arguments advanced by the Appellants lack the full force of the constitutional imperative on equality and nondiscrimination.
29. It is with legal sympathy that I find this appeal wanting on the merits and it is good for dismissal in its entirety with no orders as to costs.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 27TH DAY OF JANUARY 2026

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R. NYAKUNDI

JUDGE

