

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MANDERA
CIVIL APPEAL NO. E004 OF 2024

MOHAMED MATHOBE MAALIM.....
.....APPLICANT

V

**LUL MATHOBE AND ASLI MATHOBE (suing on behalf
of the estate of Mathobe Maalim).....**
.....RESPONDENTS

**(Being an appeal against the judgment of Hon. Mohamed
Sambul (P.K.) and delivered on 22.02.2024 in Succession Cause
No. E050 of 2021 at Mandera)**

JUDGMENT

1. The background of the suit herein stemmed from the fact that the respondents petitioned the Kadhi's court Mandera via a petition dated 27.07.2021 seeking judgment as follows:
 - i. A determination of the estate and legal heirs of the deceased.
 - ii. A determination of the shares of each heir.
 - iii. Distribution of the estate according to Islamic law.

2. The respondents further listed the following as beneficiaries of the estate of the deceased: Hamida Mohamud - Spouse(deceased), Nuria Hussein (Spouse), Ali Mathobe, Sharifa Mathobe (deceased), Zeynab Mathobe, Lul Mathobe, Billow Mathobe, Mohammed Mathobe, Rashid Mathobe, Abdiya Mathobe, Abdirizak Mathobe, Sihat Mathobe, Halima Mathobe and Ali Mathobe.

3. The estate of the deceased was listed to comprise the following: B/Customs Plot at Mandera, Jamhuria Plot at Mandera, 2 farms at Karomey, 1 farm at Solar, 1 farm at Garba Ado river bank plot no.1031, Part 11 farm at Girma plot No.1030 and 1 farm at Maykoo rebe. Plot No. 276 Bura Jamhuria and plot number 236 at custom.
4. The matter proceeded for hearing and the court considered the evidence by the parties and the law and via its judgment delivered on 22.02.2024 subject of this appeal it was ordered that;
 - 1) The first respondent is restrained from obstructing the smooth running of the estate in default the OCS to arrest him.
 - 2) Shares of plot number 1031 Garba and 1030 Jirma be shared according to Islamic law.
 - 3) Principal surveyor to survey the rest of the farms and submit a report to the court within 30 days for further action.
 - 4) Plot number 276 belongs to the estate and the first respondent should vacate within 90 days and in default the OCS to evict him.
5. Aggrieved by the said judgment, the appellant proffered a memorandum of appeal dated 21.03.2024 citing the following grounds:
 - i. **That the learned Kadhi erred in law and fact by failing to consider the pleadings in an earlier petition in Mandera Kadhi Court Succession Cause No. KSUCC**

E050 of 2021 which involved the same parties and the estate herein.

- ii. That the learned Kadhi erred in law and fact by failing to hold that the earlier petition in Kadhi's Court Succession Cause No. KSUCC E050 of 2021 having been determined, the petition No. KSUCC E050 of 2021 was rendered res judicata.**
- iii. That the learned Kadhi erred in law and fact in declining the appellant's request to call his witnesses and thus did not afford the appellant a fair hearing.**
- iv. That the learned Kadhi erred in law and fact in delivering an ambiguous judgment which does not meet the threshold of a judgment as provided under the Civil Procedure Act and Rules.**
- v. That the learned Kadhi erred in law and fact by failing to distribute Plot No. 276 situated at Bulla Jamhuria Part II to the appellants and failed to take into account that the appellant has substantially developed the property to the tune of Kes. 2,976,000/- and that the appellant resides thereon.**
- vi. That the learned Kadhi erred in law and fact by failing to distribute Plot No. 236 situated at Customs Area which was part of the estate and ordered the same to be sold without assigning reasons which necessitated the sale of the said plot.**
- vii. That the learned Kadhi erred in law and fact by concluding the proceedings in Kiraxwein dialect and**

allowed the respondents to address the court in Kiraxwein dialect, being a dialect which the appellant is not conversant with and without affording the appellant the benefit of an interpreter or interpretation in Kisomali dialect, English or Kiswahili which languages the appellant is conversant with and thus denied the appellant a fair hearing.

- viii. **That the learned Kadhi erred in law and fact by ordering the transfer of plot No. 236 before the expiry of 90 days as contained in the judgment.**
- ix. **That the learned Kadhi erred in law and fact by ordering the sale of part of the estate without any justification whatsoever and without indicating the mode of distribution of the proceeds of sale.**
- x. **That the learned Kadhi erred in law and fact by exhibiting open bias against the appellant by issuing adverse and ambiguous orders.**

6. The appellant sought for orders that:

- i. The appeal be allowed.**
- ii. The case be remitted to another Kadhi other than Hon. Sambul for fresh hearing and determination.**
- iii. Costs to the appellant.**
- iv. In the alternative, this Honourable Court distributes the estate in accordance with the law.**

7. The appeal was canvassed by way of written submissions.

8. The appellant in his submissions dated 08.03.2025 urged that he had since abandoned ground numbers 1, 2, 3, 8 and 9 of his memorandum of appeal.
9. Nonetheless, he argued that the borne of contention rested on plot No. 276 situated at Bulla Jamhuria Part II where the appellant resides and which he had substantially developed to the tune of Kes. 2,976,000/-. That the foregoing was not disputed by the respondents and further, the same was confirmed by this court via its ruling dated 15.08.2024.
10. The appellant faulted the trial court for failing to distribute Plot No. 276 situated at Bulla Jamhuria Part II to the appellant and further, failing to assign any reason for not doing so taking into consideration that the appellant resides thereon. Additionally, that the trial magistrate awarded the appellant 7.46% of the share of the estate of the deceased, a share which remained ambiguous as the same was not indicated to a percentage of the whole estate of the deceased or only part of the estate. In the same breadth, that the said percentage did not elaborate the properties to be shared and the respective proportions to each beneficiary.
11. The trial magistrate was faulted for having failed to distribute any portion of Plot No. 276 Bulla Jamhuria Part II to the appellant and in failing to ascertain the appellant's monetary share in the event that the said plot is sold. Similarly, that the Kadhi failed to distribute the estate of the deceased in accordance with the Islamic religion. To that end, reliance was placed on the case of **Chelanga vs Juma KLR [2002]** where the court stated that

devolution of the estate of a Muslim has to be governed by the Islamic law. To that end, this court was urged to allow the appeal as prayed.

12. On the other hand, the respondent in what was referred to as an answer to the petition urged that the deceased was blessed with 12 children to wit 7 boys and 5 girls. That the respondents have no intention to deny the appellant his rightful share of the estate and further, that the properties at Solar and Malkorebi which form part of the estate herein are still in dispute as the requisite documents are still unavailable although the witnesses are present. Additionally, that the upper part of the Garba Farm is also still in dispute and occupied by footballers who are keen to grab the said land. That what is available for distribution are the plots as the farms are still in dispute.
13. This being the first appellate court, it is thus bound to reconsider, re- evaluate and re-assess the evidence tendered before the trial court together with the assessors' opinions and arrive at an independent determination and or conclusion without losing sight of the fact that the trial court had the advantage of seeing and listening to the witnesses to be able to assess their demeanour. [See **Selle and another vs Associated Motor Boat Co. Ltd and others (1968) E.A 123 and Peters vs Sunday post limited (1958) E.A 424**].
14. I have considered the record of appeal, grounds of appeal and the submissions by the parties. Issues that germinate for determination are;

- i. Whether the Plot No. 276 situate at Bulla Jamhuriya formed the estate of the deceased?
 - ii. What are the appropriate orders in the circumstances herein?
15. The Court heard the appeal herein 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 the 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.”
16. The two Senior Principal Kadhis, Hon. Rashid Kokonya Otundo and Hon. Ali Dida Wako in their joint opinion held that the Appellant had abandoned several grounds of appeal, leaving only two issues: whether Plot No. 276 should have been given exclusively to him and whether his 7.46% share was ambiguous or invalid.
17. They emphasized that Islamic inheritance is governed by fixed shares (Fara'id) as mandated in the Quran, and the 7.46% share was simply the mathematical result of applying the formula to a large number of heirs. They rejected the claim that the figure was unclear, stressing that it was precise and consistent with Islamic jurisprudence.
18. On the question of Plot No. 276, the assessors observed that a property held jointly by heirs cannot be appropriated by one person. They were of the opinion that since the plot could not be physically divided among more than fourteen heirs without

destroying its utility, it was in order to have the same sold and proceeds shared in accordance with Islamic law less the value of the improvements done on the subject plot by the appellant. They opined that while the Appellant had invested in developing the land, this did not give him ownership, though he was entitled to compensation for the value of his improvements.

19. They concluded that the Kadhi had acted fairly and within the law thus the appeal was ripe for dismissal. They advised that a professional valuer should assess the estate that the Appellant be given the first chance to buy out the other heirs at market value (minus his improvements), and that if he failed to do so, the property should be sold and proceeds distributed according to Islamic law. Finally, they recommended that each party bear their own costs, since the matter concerned family inheritance.
20. It is worth noting that the list of heirs and or beneficiaries is not in dispute. The key issue for determination in this appeal is the distribution of plot number 276.
21. In as much as this court is not bound by the Kadhis findings, it is important to note that the court has considered the same for guidance in concluding the judgment and orders made herein.
22. From the judgment delivered by the trial court, it is clear that the same was in reference to property known as Plot No. 276 situate at Bulla Jamhuria. This is so since, Plot No. 236 Customs Area was sold by the beneficiaries to defray the litigation costs on the estate. The foregoing is further supported by the letter dated 24.01.2023, from the Mandera County Government,

Ministry of Lands and Physical Planning wherein the properties that were confirmed as forming part of the deceased estate being Plot No. 276 Bulla Jamhuria and Plot No. 236 Customs Area.

23. Additionally, the respondents in the so called answer to petition confirmed that the properties at Solar and Mei Korebi which form part of the estate herein are still in dispute as the requisite documents are still unavailable. Additionally, that the upper part of the Garba Farm is also still in dispute and occupied by footballers who are keen to grab the said land.
24. Equally, farms Kororey and Jirma were to be surveyed and disputes therein be solved before the same could be subjected to succession. It is therefore proper to hold that the disputed properties with no proper legal ownership documents to establish that they form part of the estate cannot be shared out. The beneficiaries can wait until such disputes are resolved and ownership determined by the relevant authorities or Environment and Land Court.
25. Having read the record, the appellant's main contention is the fact that the Kadhi ordered that he vacates the said land within three months and in default, his arrest be effected. That the Kadhi did not factor in the fact that he had developed the property to the tune of Kes. 2,976,000/- and that the same was not disputed by the respondents. Additionally, that it remained unknown how the 7.46% apportionment by the Kadhi came about as it was not indicated whether the same was in reference

to the whole estate of the deceased or the Plot No. 276 Bulla Jamhuria.

26. In the instant case, the estate of the deceased ought to devolve to the children and the spouse of the deceased as per the Islamic law noting that the deceased died while professing the Islamic religion. The same is buttressed in the holding in the case of **Ibrahim Aboobaker and Anor. vs Teik Chand Dolwani and Others. Reported in to AIR 1953 SC 298; (1954) 56 BOMLR6** where it was stated that:

“It’s well recognized proposition of law that the estate of a deceased Mohammedan devolves on his heirs in specific shares at the moment of his death...”

27. On distribution, the heirs under Muhammadan law, heirs are divided into three distinct classes, and the distribution of inheritance follows a clear order. The first class, known as the Dhawil-il-Furudh or Sharers, must always be given priority. They are entitled to fixed portions of the estate as prescribed in the Qur’an and traditions. For instance, in Surat Nisaa (4:11), God directed that a male child should receive a share equal to that of two females; if there are only daughters, two or more, they are entitled to two-thirds of the inheritance, while a single daughter receives half.
28. Parents are also assigned shares: one-sixth each if the deceased left children, and if no children exist, the mother is entitled to one-third, unless there are siblings, in which case her share is

reduced to one-sixth. These portions were described as settled and ordained by God.

29. Once the Sharers have received their allotted portions, any residue of the estate passes to the second class of heirs, the Asabah or Residuaries (Agnates). They are called residuaries because they inherit whatever remains after the Sharers' shares have been distributed.
30. Finally, if there are neither Sharers nor Residuaries, the estate devolves upon the third class, the Dhaw-il-Arham or Distant Kindred, who consist mainly of uterine relations. In this way, the law ensures that the estate is distributed in a structured manner, beginning with the Sharers, then the Residuaries, and lastly the Distant Kindred.
31. As already noted, the deceased herein was survived by 12 children and a spouse as recognized under, the class, known as the Dhawil-il-Furudh or Sharers. And having already determined that the suit property, Plot No. 276 Bulla Jamhuriya belongs to the deceased, the same translates to the fact that all the children herein ought to benefit from the said property. In my view, it was not enough for the appellant to state that he has since settled on the property and therefore, the same ought to be his. Additionally, in as much as it was urged and indeed admitted by the other heirs that he had since developed the said property, nothing was placed before court to support the alleged improvements to the tune of Kes. 2,976,000/-

32. In the case of **In re Estate of Kigen Cheboi Kipchorsoi (Deceased) [2025] KEHC 2048 (KLR)**, Nyakundi J held that”

32...However this court must emphasise the Director of Survey while undertaking the transmission and conveyance of this estate shall factor in the question of existing household and buildings of each individual beneficiary to ensure the legitimate expectation of them continuing to reside in the same units is not negatively impacted during the allotment of the specific shares.

[Also see In re Estate of the Late Stephen Muthuri Karuri - Deceased [2025] KEHC 1439 (KLR)].

33. Having considered this matter in its totality, I find that while the developments on the estate property are significant and must be taken into account, the court should not solely prioritize these developments for the reason that all other beneficiaries are equally entitled to the property herein having in mind that the rest of the properties forming the estate of the deceased are still pending determination of ownership. It is my view that should the other properties’ ownership be resolved; all the beneficiaries herein will still have an opportunity to benefit from the same. The question that lingers in my mind at this time is, what happens if the other properties are found not to belong to the deceased and yet the appellant herein has already fully occupied the property herein?

34. As a consequence of the above, it is my view that Plot No. 276, cannot be physically shared amongst the heirs due to its small

size. Since the plot could not be physically divided among more than the 13 heirs without destroying its utility, I am also of the view that the same should be sold and shared out as per the Islamic law amongst all the beneficiaries herein. This after deducting the value of the improvements made by the appellant. It is prudent therefore to order that the plot in question be valued by a mutually agreed valuer and then the same be sold and the appellant be compensated first to the tune of the value of the developments or improvements done by him and the balance be shared out amongst all the beneficiaries in accordance with the Islamic law.

35. For avoidance of doubt, in case of sale, the appellant shall be given priority to buy the property at the market price.
36. Having held as above, the appeal herein partly succeeds and partly fails to the extent that the following orders shall apply;
 - i. That the beneficiaries shall appoint a mutually agreed professional valuer to value the suit property (plot no.276) and the appellant be given the first chance to buy out the other heirs' shares at market value.**
 - ii. That the appellant shall be entitled to the value of the improvements already made on the said plot and the balance be shared out amongst all the heirs in accordance with the Islamic sharia law.**
 - iii. That the appellant shall not undertake any further development and or improvement on the said property (plot no.276).**

- iv. That failure by the appellant to buy out the other heirs, the property be sold competitively at the market price and proceeds distributed to all the heirs in accordance to Islamic law less the value of improvements done as per (ii) above.**
- v. That any property belonging to the estate which is not subject to any dispute from 3rd parties be distributed to the heirs in accordance with the Islamic law.**
- vi. That any property not shared out due to existing disputes from 3rd parties shall be included in the list of assets and thereafter distributed to the heirs in accordance with the Islamic law after resolution of such dispute before the relevant bodies or land court.**
- vii. For avoidance of doubt, the rest of the assets constituting the state shall be distributed amongst the heirs in accordance to Islamic Law.**
- viii. No order as to costs.**

Dated, signed and delivered virtually this 3rd day of March 2026

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J.N.ONYIEGO
JUDGE