

**IN THE COURT OF APPEAL**  
**AT MALINDI**  
**(CORAM: GATEMBU, MURGOR & NYAMWEYA, JJ.A)**

**CIVIL APPEAL NO. E041 OF**  
**2023 BETWEEN**

**OMAR MOHAMED SAID.....1<sup>ST</sup> APPELLANT**

**BARKE SALIM SAHEL.....2<sup>ND</sup> APPELLANT**

**AND**

**AYMAN AMER MOHAMED.....1<sup>ST</sup>**  
**RESPONDENT**

**SWALAHA AMIR MOHAMED.....2<sup>ND</sup> RESPONDENT**

**MOHAMED AMER MOHAMED.....3<sup>RD</sup> RESPONDENT**

*(An appeal against the whole of the Judgment and decree of the High Court of Kenya at Malindi (Githinji, J.) delivered on 22<sup>nd</sup> November, 2022 in High Court Civil Appeal No. E003 of 2020 consolidated with High Court Civil Appeal No. E008 of 2020)*

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**JUDGMENT OF THE COURT**

This appeal arises from a protracted succession dispute relating to the ***Estate of Amer Mohamed Said (deceased)***, which was originally heard and determined by the Kadhi's Court at Kilifi in ***Succession Cause No. 24 of 2020*** (formerly ***Malindi Kadhi's Court Succession Cause No. 5 of 2018***), and

thereafter escalated to the High Court at Malindi on appeal.

The deceased died on 22<sup>nd</sup> February 2017 at Sayyida Fatima Hospital, Mombasa, aged 54 years. The dispute concerns the distribution of interests in two houses described as “houses without land”, situated in Malindi, a tenure system common in the Coastal region, where ownership of buildings is separate from ownership of the underlying land.

In the original succession proceedings, Ayman Amer Mohamed, Swalaha Amir Mohamed, and Mohamed Amer Mohamed (now the Respondents in this appeal) who are sons of the deceased petitioned for the administration and distribution of the estate of their father.

Omar Mohamed Said and Barke Salim Sahel (now the 1<sup>st</sup> and 2<sup>nd</sup> Appellants respectively) opposed the petition. Omar Mohamed Said is a brother to the deceased, while Barke Salim Sahel is the deceased’s mother.

After the Kadhi’s Court initially determined the succession dispute, the Respondents were dissatisfied with that determination, and appealed to the High Court at Malindi, which on 12<sup>th</sup> March 2020 set aside the Kadhi Court’s Judgment and

remitted the matter back to the Kadhi's Court at Kilifi for a fresh hearing (*de novo*) on specific framed issues. These issues included: the nature of the interest held over landless houses; computation of inheritance shares, particularly relating to Jamila Mohammed Said (Sister of the deceased **Amer**)

**Mohamed Said**); whether improvements on the property could be severed from the original estate; and whether the estate should be shared strictly in accordance with Islamic law or with reference to the Law of Succession Act in the alternative.

The matter proceeded to hearing and the Kadhi court took the evidence of the parties.

At the close of the Respondents' case, the Appellants, who were aggrieved by the manner in which the proceedings were conducted before the Principal Kadhi's Court at Kilifi, filed a Notice of Motion dated 25<sup>th</sup> August 2020 seeking, *inter alia*: i) that the Respondents' be recalled in accordance with **Order 18 Rule 10** of the **Civil Procedure Rules** to adduce evidence afresh and to formally produce documents in compliance with **Order 14 Rule 1** and **Sections 70, 71 and 72** of the **Evidence Act**; and ii) that a scheduled site visit and the taking of evidence from third parties, who were strangers to the dispute and had no demonstrable interest or historical knowledge of the properties in issue, be stayed pending the hearing and determination of the Application.

The Application was premised on several grounds, which are

that; the evidence of the Respondents' witnesses was not taken in accordance with the law and the procedural rules governing the taking of evidence and production of

documents; that the Appellants were not served in advance with the Respondents' documents, contrary to **Order 14 Rule 1(1)** and **(3)** of the **Civil Procedure Rules**; that the Appellants were denied an opportunity to examine, scrutinize, admit or object to the documents produced by the Respondents, and were further deprived of the opportunity to cross-examine the Respondents' witnesses on the admissibility of those documents; that the Appellants had duly filed and served their own documents within time, which provided the Respondents an opportunity to review and respond to them, creating procedural inequality; that the Respondents' failure to serve their documents occasioned prejudice to the Appellants' case, and for these reasons it was necessary that the Respondents' witnesses be recalled and their evidence taken *de novo*, in strict compliance with the rules of evidence and procedure. The Appellants further objected to the court's proposed exercise of "fishing for witnesses" by calling persons who were not parties to the suit and who had no known legal or beneficial interest in the properties in dispute, yet the Appellants had presented witnesses with direct and material evidence, including Jamila Mohamed Said and Omar Mohamed

Said, whose testimony was not taken, thereby raising concern as to the relevance and fairness of calling unrelated witnesses.

By way of a Ruling dated 10<sup>th</sup> September, 2020, the Kadhi held that the court was satisfied that the Appellants were engaged in time-wasting; that the

court accorded all parties ample time to exchange documents; that had the Appellants not been served with the documents complained of, the issue ought to have been raised before the commencement of the hearing; that the matter was not new to the parties, having been first heard before the Malindi Kadhi's Court and thereafter on appeal before the High Court; that all the documents had already been filed when the matter was before the Malindi Kadhi's Court and subsequently before the High Court. With regard to the objection that persons who were not witnesses ought not to be called, the Kadhi stated that all parties had closed their respective cases without calling any witnesses and had indicated that they had none; that it was the court itself which, in the interests of justice, sought to call witnesses of the court. In the circumstances, the Kadhi concluded that the application lacked merit and dismissed it with no order as to costs.

Aggrieved, by the ruling and consequential orders the Appellant, Omar Mohamed Said, filed two identical Appeals before the High Court being Malindi Civil Appeal No. E008 of 2020 and Civil Appeal No. E003 of 2020 challenging the determination of the Appellant's application dated 25<sup>th</sup> August, 2020 on the

grounds that; the Kadhi was in error in failing to appreciate the necessity of recalling the witnesses as prayed in view of the breaches of procedure in the taking of evidence before the Kadhi's Court; in failing to

appreciate that the procedural breaches in the taking of evidence were prejudicial to the Appellant's case and in failing to appreciate that the entirety of the proceedings and the manner in which evidence was taken offended the constitutional principle of a fair hearing.

By an order of court dated 14<sup>th</sup> June, 2021, Hon. Justice Nyakundi consolidated the two appeals and ordered that the matter proceed by way of written submissions. Upon considering the consolidated appeals, the High Court found that there was no basis to interfere with either the Ruling of the Kadhi dated 10<sup>th</sup> September 2020 or its Judgment delivered on 1<sup>st</sup> October 2020. On the issue of the application dated 25<sup>th</sup> August 2020 seeking the recall of witnesses, the court found that the Appellant had fully participated in the proceedings before the Kadhi's Court and had been afforded an opportunity to cross-examine the Respondents. The court observed that the documents complained of had already formed part of the record in the earlier proceedings before the Malindi Kadhi's Court and during the appeal before the High Court. The court agreed with the Kadhi's finding that the application to recall witnesses was an

afterthought and an attempt to delay the expeditious disposal of the matter.

With regard to the substantive appeal against the Judgment of 1<sup>st</sup> October

2020, the court held that the Kadhi properly complied with the directions issued

by the High Court of 12<sup>th</sup> March 2020 to hear and determine the matter afresh on specific issues. The Court agreed with the Kadhi's finding that the alleged 1974 sale agreement relied upon by the Appellant was invalid for want of legal capacity, and that the additional shops constructed by the 1<sup>st</sup> Respondent did not form part of the deceased's estate and were correctly excluded from distribution. The court further found that the Kadhi correctly identified the estate before him and applied the principles of Islamic law in distributing the deceased's interest.

The High Court rejected the allegations that the Appellant was denied a fair hearing, that the burden of proof was improperly shifted, or that the Kadhi exhibited bias or considered extraneous matters. In the Judge's view, the proceedings before the Kadhi were conducted fairly and in accordance with the law. Consequently, the High Court concluded that both appeals were devoid of merit and dismissed them in their entirety, thereby affirming the Ruling and Judgment of the Kadhi's Court.

Aggrieved the Appellants filed this appeal, on grounds that; the learned Judge failed to appreciate that the conduct of the Kadhi in refusing to allow the Appellant to recall witnesses on the

sole ground that the court had set a limitation of time for hearing the case led to a miscarriage of justice; failed to appreciate the Appellants' submission that the taking of evidence by the Kadhi from persons who were not parties to the proceedings and who had no nexus

with the dispute, and doing so in the absence of the Appellant, was an affront to justice, prejudicial to the hearing, and offended the principle of a fair hearing; and failed to appreciate that the proceedings before the court related to the estate of Amer Mohamed Said and not the estate of Mohamed Said Saar, and therefore the court had no jurisdiction to interfere with the estate of Mohamed Said Saar in the absence of a petition for that estate, and treating the two estates as one was legally erroneous.

In response to the appeal the Respondents filed a Notice of Preliminary objection in which they contended that the proceedings do not comply with the timelines of **Rule 77 (2) of the Court of Appeals Rules, 2022** as the Notice of Appeal was filed out of time, and after the stipulated 14 fourteen days had lapsed; that even if the Notice of Appeal was lodged in the “required timelines”, the Record of Appeal and the Memorandum of Appeal was lodged beyond the 60 days’ timeline stipulated by **Rule 84 (1)** of the Rules, after the Notice of Appeal was lodged, and that consequent to the foregoing the suit is bad in law *in limine*.

The Appellants filed grounds of opposition in response to the

Preliminary objection, in which they contended that; they were fully compliant with the rules of this Court; that they duly requested typed and certified copies of the Judgment and proceedings for purposes of preparing and filing the Record of Appeal in

accordance with **Rule 82**; that any delay, if at all, in the filing or service of the Notice of Appeal or the Record of Appeal is excusable.

Both parties filed written submissions. When the appeal came up for hearing on a virtual platform learned counsel **Ms. Mohammed** appeared for the Appellants while Learned counsel **Mr. H. Omar** appeared for the Respondents.

In their written submissions, counsel for the Appellants submitted that the learned Judge was in error in upholding proceedings that violated the Appellants' constitutional right to a fair hearing; that the Kadhi improperly took evidence from persons who were neither witnesses called by the parties nor had any nexus to the dispute, and had done so in the absence of the Appellants, thereby occasioning grave prejudice and offending the principles of natural justice. It was further submitted that the refusal to allow the Appellants to recall witnesses, solely on the basis that the court had set time limitations, resulted in a miscarriage of justice.

Counsel contended that the taking of such evidence

contravened **Article 50** of **the Constitution**, which guarantees the right to a fair hearing, including the right to be informed in advance of the evidence to be relied upon and to challenge that evidence through cross-examination.

On the issue of succession, counsel submitted that the learned Judge misdirected himself by treating the estate of the late Amer Mohamed Said as one with that of Mohamed Said Saar, despite the absence of a petition relating to the earlier estate. It was argued that under the Law of Succession Act, only the free property of a deceased person may be subjected to succession proceedings, and that property purchased by the 1<sup>st</sup> Appellant from Mohamed Said Saar could not lawfully form part of the estate of the deceased. Counsel emphasized that the Respondents themselves were on record as admitting that their father left no free property capable of inheritance, and therefore the court ought not to have entertained or distributed property that did not belong to the deceased.

In the alternative, counsel invited the Court to find that the issues identified by the High Court when setting aside the Kadhi's initial decision were never properly determined upon rehearing. These included the nature of the interest held in the suit property, the computation of shares, and whether developments undertaken by the Appellant could be severed from the original estate. It was submitted that the Appellant had adduced

evidence, including a sale agreement, demonstrating lawful purchase and subsequent developments, which ought to have been excluded from succession proceedings. In the further alternative, counsel urged that if the suit property were to be deemed part of the estate, then equity and justice demanded that the Appellant be reimbursed the

value of the property and improvements thereon. On these grounds, the Appellants prayed that the judgments of both the High Court and the Kadhi be set aside and the appeal be allowed as prayed.

In their written submissions, counsel for the Respondents submitted that the appeal before the Court is incompetent, having been filed in blatant disregard of the mandatory timelines set out under the Court of Appeal Rules.

Counsel further submitted on the effect of time-bound proceedings, and argued that the High Court, acting pursuant to **Articles 163, 164 and 165 of the Constitution**, had expressly directed that the matter be heard and concluded within forty-five days. It was contended that such directions conferred jurisdiction upon the Kadhi's Court to conclude the matter within the stipulated period and that failure to adhere to those timelines would undermine the administration of justice. In support of this position, counsel relied on the Supreme Court decision in the case of **Mevgal Cartons Limited vs Diesel Care**

**Limited & 2 others [2023] KESC 24 (KLR)** for the proposition that jurisdiction is

everything and flows either from the Constitution, statute, or written law. Counsel argued that the Appellants' conduct, including filing applications towards the tail end of the prescribed period, was a calculated attempt to delay the matter and perpetuate suffering upon the Respondents, who were said to be

unemployed while the Appellants continued to enjoy rental income from the disputed property.

Counsel also submitted that parties are strictly bound by their pleadings and cannot depart from them at will; that the Kadhi's Court proceedings culminated in a final determination on 20<sup>th</sup> August 2020 regarding what the Respondents were entitled to inherit, and that the Appellants' appeal, despite having substantially succeeded in their favour, was an abuse of the court process and a waste of judicial time.

Before addressing the merits of the appeal, we will begin by determining the Respondents' Preliminary Objection contending that the appeal was incompetent for having been filed outside the timelines stipulated under **Rules 77(2)** and **84(1)** of this Court's rules in which it seeks to strike out the Notice and Record of Appeal.

In this regard, **Rule 84** (or the present **Rule 86**) of the **of Court of Appeal Rules** provides:

***"A person affected by an appeal may at any time either before or after institution of the appeal apply to the Court to strike out the Notice of Appeal or***

***the appeal, as the case may be on the ground that no appeal lies or that some essential step in proceedings has not been taken or has not been taken within the prescribed time . Provided that an application to strike out a Notice of Appeal or appeal shall not be brought after the expiry of 30 days***

**from the date of service of the Notice of Appeal or Record of Appeal as the case may be.**” (emphasis ours)

In effect, the proviso to **Rule 86** stipulates that a party may, either before or after the institution of an appeal, apply to strike out the Notice of Appeal or the appeal itself on the ground that no appeal lies or that an essential procedural step was not taken or was not taken within the prescribed time. Crucially, the Rule imposes a limitation period of thirty days from the date of service of the Notice of Appeal or Record of Appeal, as the case may be, within which such an application must be brought.

In the present case, the pleadings show that the Respondents did not move the Court by way of an application under **Rule 86** within the stipulated period. Instead, they seek to challenge the validity of the Notice of Appeal through a preliminary objection. Not having made such application under Rule 86, the respondents are by dint of Rule 107(b) barred from raising, without leave of Court, objection to the competence of the appeal. The approach taken is inconsistent with the clear provisions of the Rules and the settled jurisprudence of this Court, and cannot be sanctioned, as a result, the Preliminary Objection is

dismissed and accordingly, we shall proceed to consider the appeal on its merits.

Turning to the appeal, this is a second appeal, where our jurisdiction is circumscribed by **Section 72 (1) of the Civil Procedure Act**, which delineates the limited grounds upon which a second appeal may lie from a decision of the High Court to matters of law only. In the case of **Charles Kipkoech Leting vs Express**

**(K) Ltd & Another [2018] KECA 187 (KLR)**, this Court stated:

***“This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See - (Maina v Mugiria (1983) KLR 78, Kenya Breweries Ltd v Godfrey Odongo, Civil Appeal No. 127 of 2007 and Stanley N. Muriithi & Another v Bernard Munene Ithiga (2016) eKLR), for the holdings, inter alia, that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of Martin v Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 where it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have***

***reached that conclusion, which would be the same as holding the decision is bad in law.”***

From the record and submissions, the appeal turns on three issues: i) whether the proceedings before the Kadhi's Court, as affirmed by the High Court, violated the Appellant's constitutional right to a fair hearing by reason of the refusal to recall witnesses; ii) whether the taking of evidence by the Kadhi from persons who were not parties to the proceedings and who had no nexus

with the dispute, offended the principle of a fair hearing; and iii) whether the Kadhi failed to appreciate that the proceedings before the court related to the estate of Amer Mohamed Said and not the estate of Mohamed Said Saar, and that the court had no jurisdiction to interfere with the estate of Mohamed Said Saar in the absence of a petition for that estate, and treating the two estates as one was legally erroneous.

On whether or not the Kadhi was wrong to decline to recall witnesses, and therefore violated the Appellant's right to a fair hearing, **Order 18 Rule 10** of the **Civil Procedure Rules** grants the Court powers to recall any witness who has been examined. It provides:

***“The Court may at any stage of the suit recall any witness who has been examined, and may, subject to the Law of evidence for the time being in force; put such questions to him as the Court thinks fit.”***

Further **Section 146 (4)** of the **Evidence Act** specifies;

***“(4) The Court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.”***

While the law makes provision for the recall of a witness,

such power is discretionary and must be exercised judicially, and not capriciously, whimsically, or as a matter of course. The exercise of that discretion is guided by settled principles and is contingent upon the circumstances of each case. In

the case of **Samuel Kangu Kamau vs Republic [2015] eKLR**, this Court articulated

the applicable threshold in the following terms:

***“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 determination of the appeal.”***

This position was reiterated by this Court in the case of **Patriotic Guards**

**Ltd vs James Kipchirchir Sambu, Nairobi [2018] eKLR**, where it was expressed:

***“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”***

The exercise of judicial discretion must therefore be anchored in law, informed by relevant principles, and tailored to the peculiar circumstances of each case, with the overarching objective of achieving substantive justice.

In addition, the grounds upon which this Court can interfere with the trial Court's exercise of discretion were set out in the case of **United India Insurance**

**Co. Ltd, Kenindia Insurance Co. Ltd & Oriental Fire & General Insurance Co. Ltd**

**vs East African Underwriters (Kenya) Ltd [1985] eKLR** as follows:

***“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”***

In the case of **Mbogo & Another vs Shah [1968] EA 93**, the Court set out the

circumstances under which an appellate court may interfere with the exercise of judicial discretion, holding, inter alia, as follows:

***“An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which it should be taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice.”***

In the case of **Apungu Arthur Kibira vs IEBC & 3 Others** [2019] eKLR the

Supreme Court reiterated the applicable threshold in the following terms:

***“We reiterate that in an appeal from a decision based on an exercise of discretionary power, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court case of Kacem v Bashir (2010) NZSC 112; (2011) 2 NLRI (Kacem) where it was held [at para 32]:***

***‘In this context a general appeal is to be distinguished from an appeal against the decision made in exercise of discretion. In that kind of case, the criteria for a successful appeal are stricter: (i) error of law or principle; (ii) taking account of irrelevant considerations; (iii) failing to take account of a relevant consideration; or (iv) the decision is plainly wrong.’”***

The cumulative effect of this jurisprudence is that an appellate court will only interfere with the exercise of judicial discretion where the stringent threshold outlined above has been met.

The reason advanced for reopening the case and recalling the witnesses was that the evidence of the Respondents’ witnesses had been taken in breach of procedural and evidentiary rules, thereby prejudicing their case and undermining their right to a fair hearing. Specifically, the Appellants sought the recall of the Respondents’ witnesses on the grounds that their documents were not served in advance, contrary to the requirements of **Order 14 Rule 1** of the **Civil Procedure Rules**, thereby denying the Appellants an opportunity to examine, admit, or object to those documents before they were produced in court, and depriving them of the opportunity to properly cross-examine the

Respondents' witnesses.

The record of the proceedings before the Kadhi's Court shows that, the Appellant actively and meaningfully participated in the hearing. On 3<sup>rd</sup> August 2020, both the Appellant and the 1<sup>st</sup> Respondent appeared before the Kadhi and

formally withdrew their respective advocates, electing to conduct the matter in person. By consent, the matter was fixed for inter partes hearing on 11<sup>th</sup> August 2020, where they confirmed in open court that they had filed their notices of withdrawal of their advocates, whereupon the court directed that the matter proceeds, with the parties acting in person.

The hearing commenced on 18<sup>th</sup> August 2020 when the 1<sup>st</sup> Respondent testified on oath. The Appellant was present and cross-examined the witness. On 19<sup>th</sup> August 2020, the 2<sup>nd</sup> Respondent gave evidence and was similarly cross-examined by the Appellant. On 20<sup>th</sup> August 2020, the 3<sup>rd</sup> Respondent testified, after which the court recorded that all three Respondents had no further witnesses and formally closed the Respondents' case. On the same day, the Appellant testified in his defence, gave detailed evidence on oath, and was cross-examined by the Respondents as well as by the court. Upon conclusion of his testimony, the Appellant closed his case. At no point during the hearing did the Appellant raise any objection to the admissibility of evidence, the production of documents, or the procedure adopted by the court.

As concerns the alleged non service of documents, we have

considered the record and find that the Appellant did not point to any documents served on him for which he took issue. In addition, and as observed by the trial Kadhi, during the trial, he did not object to their production, or apply for an

adjournment so as to be provided an opportunity to interrogate the documents prior to commencement of the hearing. His conduct would lead us to concluded, as it did the Kadhi's court and the High Court, that he was comfortable proceeding with the documents placed before the court and was not in any way prejudiced by them during the proceedings. We are therefore satisfied as were the Kadhi and the learned Judge, that nothing pointed to the Appellant as having been prejudiced by the late service of the documents, or that his right to fair trial was violated.

As concerns the calling of the two court witnesses, at the close of the parties' cases on 20<sup>th</sup> August 2020, the Kadhi directed that a site visit be undertaken and that certain witnesses be summoned by the court. On 26<sup>th</sup> August 2020, during the site visit, the court recorded the evidence of Nuru Mohamed Said and Swaleh Salim Said as court witnesses. During the site visit the Appellant was present and did not object to their testimony, while the 1<sup>st</sup> Respondent declined to attend.

In the application, the Appellant claimed that the two witnesses were strangers to the proceedings. However, a

consideration of the record discloses that Nuru Mohammed is a daughter of Mohamed Said Saar, and a sister to the 1<sup>st</sup> Appellant, and Swaleh Salim Mohamed is the son of the late Salim Mohamed, who was a brother to the 1<sup>st</sup> Appellant. Essentially therefore, they

are also heirs of Mohamed Said Saar's estate, and whom neither the Appellant nor the Respondents opted to call as witnesses. Given their relationship to the parties, they cannot by any stretch of the imagination be considered as strangers in a matter such as this that is concerned with the distribution of the estate of their deceased father. Under the Constitution and Islamic Law, they were equally entitled to be provided an opportunity to be heard, and the learned Kadhi rightly so provided them such opportunity.

Viewed holistically, notwithstanding that the High Court's order to determine the matter in 45 days, we are satisfied that the proceedings before the Kadhi's Court were conducted in a manner that accorded the Appellant a full opportunity to present his case, to cross-examine adverse witnesses, and to be heard. The essential principles governing the taking of evidence were observed, and the Appellant's right to a fair hearing under **Article 50 of the Constitution** was not infringed in any way. In the circumstances, the decision by the Kadhi to decline the reopening of the case and the recall of witnesses was a proper exercise of judicial discretion. We find that in declining to allow the recalling of the Respondents and the taking of evidence of the two

witnesses, the trial Kadhi took into account matters he ought to have taken into account, and properly exercised his discretion having regard to the circumstances of the case, and as a result the High Court rightly upheld that decision.

The final issue is whether the Kadhi appreciated that the proceedings related to the estate of the deceased their father and not the estate of Mohamed Said Saar, their grandfather and therefore had no jurisdiction to interfere with the estate of Mohamed Said Saar in the absence of a petition for that estate, and therefore considering the two estates as one was legally erroneous. A consideration of the Judgment discloses that the Kadhi was alive to the distinction between the two estates. We say this because in the Judgment the Kadhi's observed that:

***“It is common knowledge that the estate in question does not belong to the deceased herein (Amer Mohamed Said) but his father. The petitioners moved to the court and sued for the share of their father from his father Mohamed Bin Said Saar.***

***So, the estate in question is that of the Mohamed Said Saar and from there we will deter mine what is the petitioner's father's share therein”.***

After hearing the parties, the Kadhi concluded:

***“In that regard I thereby confirm that the estate of Mohamed Said Saar consists of:***

- 1. The original bigger house which is four rooms and two shops (house without)***
- 2.The smaller house which is two rooms (house without land). The legal heirs of the***

***late Mohamed Said Saar are:***

***1.....Barke Salim widow (deceased)***

***2.....Salim Mohamed son  
(deceased)***

***3.....Amer Mohamed... son  
(deceased)***

- 4.....**Ali Mohamed son**
- 5.....**Islam Mohamed son**
- 6.....**Omar Mohamed... son**
- 7.....**Nuru Mohamed daughter**
- 8.....**Jamila Mohamed daughter”**

Whereupon the Kadhi distributed the estate of Mohamed Said

Saar in the following manner:

- 1.....**Barke Salim... widow (deceased)**  
**12/96**
- 2.....**Salim Mohamed... son**  
**(deceased) 14/96**
- 3.....**Amer Mohamed son**  
**(deceased)14/96**
4. **Ali Mohamed.....son 14/9**  
**6**
5. **Islam Mohamed.....son 14/9**  
**6**
6. **Omar Mohamed.....son 14/9**  
**6**
7. **Nuru Mohamed 7/96**  
**.....**  
**daughter**
8. **Jamila Mohamed 7/96**  
**.....**  
**daughter**

The Petition brought by the Respondents, related to distribution of the estate of Amer Mohamed (deceased), who was brother to the Appellant and also an heir of the estate of Mohamed Said Saar (deceased). In order to distribute Amer

Mohamed (deceased)'s estate to his heirs, the Kadhi had first to identify the heirs and property of the estate of Mohamed Said Saar (deceased) which had not been distributed since his demise sometime in 2003. Amer Mohamed (deceased)'s share was found to be 14/96 of Mohamed Said Saar (deceased)'s estate.

Having identified Amer Mohamed (deceased) shares of the estate of Mohamed Said Saar (deceased), the Kadhi went on to identify and distribute the estate of Amer Mohamed (deceased) to the Respondents and the heirs of his estate in the following manner:

***“That, the 14/96 share of the late AMER MOHAMED devolves to his legal heirs as follows:***

- |                                       |                                     |
|---------------------------------------|-------------------------------------|
| <b><i>i. FATUMA YAHYA (widow)</i></b> | <b><i>3/24</i></b>                  |
| <b><i>ii. SWALAHA AMIR (son)</i></b>  | <b><i>7/24</i></b>                  |
| <b><i>iii. (son)</i></b>              | <b><i>MOHAMED AMIR<br/>7/24</i></b> |
| <b><i>iv. 7/24”</i></b>               | <b><i>AYMAN AMIR (son)</i></b>      |

As is clear from the Judgment, the Respondents' shares were derived from their father, Amer Mohamed's entitlement from the estate of Mohamed Said Saar. In ultimately distributing Amer Mohamed's share to the Respondents, we are satisfied, that the Kadhi was cognizant of the manner of identification of the share in Mohamed Said Saar's estate belonging to their father, and having so identified Amer Mohamed's share, rightly went on to distribute that share to the Respondents, as heirs entitled to their own father's estate.

In sum, the appeal lacks merit and is as such dismissed. We uphold the Judgment of the High Court at Malindi delivered on 22<sup>nd</sup> November 2022 with costs to the Respondents.

***It is so ordered.***

***Dated and delivered at Mombasa this 13<sup>th</sup> day of March, 2026.***

**S. GATEMBU KAIRU, FCIArb, C.Arb.**

.....  
**JUDGE OF APPEAL**

**A.K. MURGOR**

.....  
**JUDGE OF APPEAL**

**P. NYAMWEYA**

.....  
**JUDGE OF APPEAL**

*I certify that this  
is the true copy  
of the original*

***signed***  
**DEPUTY**  
**REGISTRAR**

