

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

SUCCESSION CAUSE APPEAL NO. E002 OF 2023

(CORAM: HON. CHARLES M. KARIUKI – J)

IN THE MATTER OF ESTATE OF MUSA ALI ISMAIL(DECEASED)

TUMATE ABDULLAH ALIAS HASSAN..... APPELLANT

VERSUS

KHADIJA MUSA.....1ST RESPONDENT

SARAH MUSA.....2ND RESPONDENT

JUDGMENT

A. INTRODUCTION

1. This appeal arises from the ruling of the Kadhi’s Court delivered on 5th October 2023 in Kericho Kadhi’s Court Succession Cause No. E001 of 2021 concerning the estate of the late Musa Ali Ismail (Deceased). The dispute revolves around the administration of the estate and, more specifically, the legality of the sale of Plot No. 48 at Olpusmuru Trading Centre and the subsequent partial confirmation of the grant.
2. The Appellant, being dissatisfied with the said ruling, lodged the present appeal contending that the learned trial Kadhi fell into error in law and fact by, inter alia, misconstruing the nature of the application before him, validating an allegedly unlawful

sale undertaken by a person lacking legal capacity, and failing to address substantive issues raised.

3. This Court, being a first appellate court, is under a duty to re-evaluate, re-analyse and reconsider the evidence and the law and arrive at its own independent conclusion, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses, as enunciated in **Selle v Associated Motor Boat Co. Ltd [1968] EA 123**.

4. THE APPEAL

5. The Appellant Vide amended memorandum of appeal dated 6th May 2025, challenges the entire ruling and consequential orders of the Kadhi's Court delivered on 5th October 2023 in Kericho Kadhi's Court Succession Cause No. E001 of 2021 concerning the estate of the deceased, Musa Ismail Ali. The appeal is principally grounded on alleged errors of law and fact, procedural irregularities, and excess of jurisdiction by the learned trial Kadhi.
6. In essence, the appeal is premised on the contention that the learned trial Kadhi erred in law and fact by misconstruing the nature of the Appellant's application, treating it as an appeal rather than an application seeking to restrain or nullify the sale of Plot No. 48 Olpusmuru Trading Centre. The Appellant maintains that the impugned sale was undertaken by the 2nd Respondent, who lacked the legal capacity to transact on behalf of the estate, she not being an administrator, and that the transaction was conducted without the knowledge, consent, or participation of the Appellant and other beneficiaries, contrary to the provisions of the Law of Succession Act and procedural requirements for estate sales.

7. It is contended that the trial court relied on facts not supported by the record, raising concerns about the thoroughness of its analysis of the sale's legality.
8. Additionally, the Appellant argues that the Kadhi erred in declining to halt or nullify the sale despite clear questions as to its legality and the capacity of the 2nd Respondent, and in admitting and relying on a sale agreement allegedly executed in contravention of prior court directions. The dismissal of the Appellant's application is further impugned on the ground that the court failed to address the substantive issues raised and disregarded the fact that the application was unopposed.
9. The court's exercise of discretion was within its proper bounds, which should reassure the audience of the fairness and legitimacy of the ruling.

10. PARTIES SUBMISSIONS

11. Appellant's submissions

12. The Appellant submits that the impugned ruling of the Kadhi's Court was marred by fundamental errors of law and fact, misdirection on applicable legal principles, and failure to exercise judicial discretion properly, thereby occasioning a miscarriage of justice.
13. On the first issue, the Appellant argues that the learned trial Kadhi fundamentally misconceived the nature of the application dated 25th September 2023 by erroneously treating it as an appeal rather than an interlocutory application properly before the Kadhi's Court. It is submitted that this mischaracterisation led the court to apply incorrect legal principles, thereby abdicating its duty to determine the application on its merits within its original jurisdiction. The Appellant contends that such a misdirection amounts to an error of law sufficient to vitiate the entire ruling.
14. The Appellant further submits that the learned Kadhi erred in law by validating and relying on a sale agreement executed by persons who lacked legal capacity to bind the estate. It is argued that only duly appointed administrators—namely the Appellant and the 1st Respondent—had authority over the estate pursuant to Section 79 of the Law of Succession Act (Cap 160), which

vests the property of a deceased person in the personal representatives. The involvement of the 2nd Respondent and a third party in executing the impugned agreement is said to have constituted unlawful intermeddling contrary to Section 45 of the Act.

15. In support of this position, the Appellant relies on the decision in **Macfoy v United Africa Co. Ltd (1961) 3 All ER 1169**, where *Macfoy v United Africa Co. Ltd* established the principle that an act which is void is a nullity ab initio and incapable of founding any legal rights. The Appellant submits that the impugned sale agreement, having been executed without legal authority, was null and void, and any proceedings founded upon it were equally invalid.
16. The Appellant also contends that the learned Kadhi failed in his judicial duty by dismissing the application without addressing the substantive issues raised, including the legality of the sale and the Appellant's beneficial interest in the property. It is argued that a court is under an obligation to consider and determine all material issues and to give reasons for its decision, and failure to do so amounts to a denial of the right to a fair hearing and renders the decision unsafe.
17. On the issue of administration of the estate, the Appellant submits that administrators must act jointly and that no single administrator—or non-administrator—can unilaterally dispose of estate property. The unilateral sale of Plot No. 48 Olpusmuru Trading Centre without the Appellant's consent is therefore said to have been unlawful and in breach of both statutory provisions and the court's earlier judgment of 24th September 2021, which required that any sale be conducted by agreement of the parties and under the supervision of the Kadhi's Court.
18. The Appellant further challenges the trial court's finding that the suit property was sold and the grant partially confirmed on 21st September 2023, submitting that such findings were not supported by the record. It is argued that there was no application, proceedings, or order evidencing partial confirmation of the grant on that date. Reliance is placed on **Charles Mutua M'anyoro v Maria Gatiria**, where the court emphasised that confirmation of a grant must comply with Section 71 of the Law of Succession Act and Rule 40 of the Probate and

Administration Rules, including identification of beneficiaries and their respective shares, and participation or consent of all dependants.

19. Further, the Appellant submits that the admission and reliance on the impugned sale agreement violated the binding judgment of 24th September 2021, which required that the property be sold by agreement of all parties and through the Kadhi's Court. The Appellant argues that the unilateral execution of the agreement without his participation offended the principles of natural justice, particularly the right to be heard (*audi alteram partem*).
20. On the question of *res judicata*, the Appellant maintains that the application before the Kadhi's Court was not barred. Reliance is placed on the Supreme Court decision in **John Florence Maritime Services v Cabinet Secretary for Infrastructure, Transport & Public Works (2021) eKLR**, which set out the essential elements of the doctrine. The Appellant submits that those elements were not satisfied, as there was no prior determination of the same issues between the same parties.
21. In conclusion, the Appellant urges the Court to find that the learned Kadhi erred in law and fact, set aside the impugned ruling, and grant the reliefs sought, including nullification of the sale agreement and the partial confirmation of the grant, on the basis that the impugned actions were unlawful, procedurally flawed, and prejudicial to the Appellant's rights.

22. Respondent's submissions

23. The Respondents oppose the appeal and support the ruling of the Kadhi's Court delivered on 5th October 2023, contending that the appeal is unmeritorious, procedurally defective, and an abuse of the court process.
24. By way of background, the Respondents submit that the application dated 25th September 2023, which was dismissed by the trial Kadhi, sought injunctive orders to restrain dealings with Plot No. 120 Narok and Plot No. 48 Olpusmuru Trading Centre, as well as orders requiring joint participation of the parties in the sale process. It is their case

that the said application was filed after the judgment of 24th September 2021 had already sanctioned the sale of the estate properties and directed that the sale be conducted through the Kadhi's Court, with distribution of proceeds supervised by the court.

25. The Respondents argue that the Appellant did not appeal against the judgment of 24th September 2021 and instead sought to challenge its implementation through the application dated 25th September 2023. They contend that the application was effectively an appeal in disguise and had been overtaken by events, as the suit property had already been sold on 21st September 2023 and the judgment duly executed. Consequently, the trial court properly dismissed the application as it sought to restrain actions that had already been completed.
26. On the duty of the appellate court, the Respondents submit that this Court, as a first appellate court, is obliged to re-evaluate the evidence and arrive at its own independent conclusions. They rely on the authority of **Selle v Associated Motor Boat Co. [1968] EA 123**, which sets out the principles guiding a first appellate court in reconsidering evidence while bearing in mind that it did not have the benefit of seeing or hearing the witnesses.
27. On the issue of *functus officio*, the Respondents submit that the trial Kadhi had already heard and determined the matter and therefore lacked jurisdiction to entertain the Appellant's application. They argue that once the judgment had been delivered and executed, the court became *functus officio* and could not revisit or vary its decision. In this regard, reliance is placed on **Raila Odinga & Others v Independent Electoral and Boundaries Commission & Others [2013] eKLR**, where the Supreme Court affirmed the doctrine of *functus officio* as a principle underpinning finality in litigation. Further

reliance is placed on **Jersey Evening Post Limited v Al Thani (2002) JLR 542 at 550** and **Chandler v Alberta Association of Architects, [1989] 2 S.C.R. 848**, which emphasise that once a court has rendered a final decision, it lacks authority to reopen the matter except in limited circumstances.

28. The Respondents further submit that the Appellant's recourse lay in filing an appeal against the judgment within the statutory timelines, as provided under Section 79G of the Civil Procedure Act, and not in filing a fresh application long after the judgment had been executed. They contend that the delay and the procedural route adopted by the Appellant were improper.
29. On the merits of the appeal, the Respondents maintain that the sale of the suit property was undertaken pursuant to the judgment and with the involvement of the administrators, and that the proceeds were deposited in court. They argue that the Appellant's challenge to the sale, including allegations regarding lack of capacity and absence of a sale agreement, is inconsistent and constitutes new issues not raised before the trial court.
30. Further, the Respondents submit that the application before the trial court sought injunctive relief after the completion of the sale and was therefore untenable. In support of the principles governing the grant of injunctions, reliance is placed on **Kenleb Cons Ltd v New Gatitu Service Station Ltd & Another, (1990) eKLR**, where the court held that an applicant must demonstrate a legal or equitable right requiring protection and make full disclosure of material facts.
31. The Respondents also contend that the trial court correctly exercised its discretion in dismissing the application, as courts do not issue orders in vain, particularly where the subject matter has already been concluded.

32. On costs, the Respondents invoke Section 27 of the Civil Procedure Act and submit that costs follow the event, and that having successfully opposed both the application and the appeal, they are entitled to costs.

33. In conclusion, the Respondents urge the Court to find that the appeal lacks merit, uphold the ruling of the Kadhi's Court, and dismiss the appeal with costs.

34. Issues for Determination

35. Having carefully considered the record of appeal, the amended memorandum of appeal, and the rival submissions by the parties, the following issues arise for determination:

36. Whether the learned trial Kadhi misdirected himself by misconstruing the nature of the Appellant's application dated 25th September 2023.

37. Whether the sale of Plot No. 48, Olpusmuru Trading Centre, was lawful and undertaken by persons with the requisite legal capacity.

38. Whether the doctrine of functus officio and/or res judicata applied to the application before the Kadhi's Court.

39. Whether the learned trial Kadhi properly exercised his discretion in dismissing the Appellant's application.

40. What orders should this Court make, including on costs.

41. ANALYSIS AND DETERMINATION

42. Whether the trial Kadhi misconstrued the nature of the application

43. The record reveals that the application dated 25th September 2023 sought injunctive and preservative orders to restrain dealings with estate property and to challenge the legality of an alleged sale. The Appellant contends that the learned Kadhi erroneously treated the application as an appeal against the judgment of 24th September 2021.

44. A court is bound to determine matters placed before it based on their substance rather than form. Mischaracterisation of pleadings amounts to a material error of law where it leads to the application of incorrect principles. In **Odd Jobs v Mubia [1970] EA 476**, the Court held that courts should determine issues that flow from the pleadings and evidence.
45. In the present case, by treating the application as an appeal, the trial Kadhi effectively declined jurisdiction to consider the merits of the application. This amounted to a misdirection, as the application raised distinct issues regarding alleged intermeddling and unlawful disposal of estate property, which fell squarely within the court's jurisdiction in succession matters.
46. Consequently, this Court finds that the learned Kadhi erred in law in misconstruing the nature of the application, thereby failing to determine the substantive issues raised.
- 47. Whether the sale of the suit property was lawful**
48. The central issue concerns whether the 2nd Respondent had the legal capacity to dispose of estate property. Section 79 of the Law of Succession Act vests the property of a deceased person in the personal representatives, while Section 45 prohibits intermeddling with the estate.
49. It is a trite law that only duly appointed administrators have the authority to deal with estate property. In **Trouistik Union International & Another v Jane Mbeyu & Another [1993] eKLR**, the Court of Appeal held that no person has authority to deal with the estate of a deceased person unless duly appointed as a personal representative.
50. Further, Section 82(b)(ii) of the Law of Succession Act prohibits the sale of immovable property before confirmation of the grant. Any such transaction is prima facie unlawful unless sanctioned by the court.

51. The Appellant contends that the 2nd Respondent, not being an administrator, executed the sale agreement. If that be so, such an act would constitute intermeddling and render the transaction void. The principle in **Macfoy v United Africa Co. Ltd [1961] 3 All ER 1169** is instructive—that a void act is a nullity and cannot be the foundation of any legal right.

52. The Respondents, on the other hand, assert that the sale was undertaken pursuant to the judgment of 24th September 2021. However, even where a court authorises a sale, it must be conducted strictly in accordance with the law and under the supervision of duly appointed administrators.

53. There is no clear evidence on record demonstrating that the sale was conducted jointly by the administrators or with the consent of all beneficiaries as required.

54. In the circumstances, this Court finds that the legality of the sale was a substantive issue that required full interrogation, which the trial Kadhi failed to undertake.

55. Whether functus officio and res judicata applied

56. The Respondents argued that the trial court was functus officio following the judgment of 24th September 2021. The doctrine of functus officio was discussed in **Raila Odinga & Others v IEBC & Others [2013] eKLR**, where the Supreme Court held that a court becomes functus officio once it has rendered a final decision, subject only to limited exceptions.

57. However, succession proceedings are unique in nature. Courts retain jurisdiction to supervise the administration of estates even after judgment, particularly where issues of implementation, intermeddling, or illegality arise.

58. In **In re Estate of G.K.K. (Deceased) [2017] eKLR**, the court held that succession courts retain residual jurisdiction to ensure proper administration of estates.

59. Accordingly, the application before the Kadhi's Court, which sought to challenge alleged unlawful dealings with estate property, could not be barred by *functus officio*.

60. On *res judicata*, the principles were set out in **John Florence Maritime Services Ltd v Cabinet Secretary for Transport & Infrastructure [2021] eKLR**. The elements include the parties' identities, the subject matter, and the issues directly and substantially in issue.

61. The issues raised in the application concerned the legality of a subsequent sale and were not directly determined in the earlier judgment. Therefore, the doctrine of *res judicata* was inapplicable.

62. Whether the trial Kadhi properly exercised discretion

63. The dismissal of the Appellant's application without addressing the substantive issues raised amounts to failure to exercise judicial discretion judiciously.

64. A court is obligated to consider all material issues and give reasons for its decision. In **Mbogo & Another v Shah [1968] EA 93**, it was held that an appellate court may interfere where discretion is exercised on wrong principles or where the court misdirects itself.

65. Further, courts should not dismiss applications on technicalities where substantive justice demands determination on merits, as underscored in Article 159(2)(d) of the Constitution of Kenya, 2010.

66. In the present case, the trial court failed to interrogate the legality of the sale, the capacity of the parties, and the Appellant’s grievances. This amounted to an improper exercise of discretion.

67. CONCLUSION AND ORDERS

68. In light of the foregoing analysis, this Court finds that the appeal is meritorious. The learned trial Kadhi erred in law and fact by misconstruing the application, failing to address substantive issues, and improperly applying the doctrines of *functus officio* and *res judicata*.

69. Accordingly, the Court makes the following orders:

- i. The appeal is hereby allowed.**
- ii. The ruling of the Kadhi’s Court delivered on 5th October 2023 is hereby set aside.**
- iii. The application dated 25th September 2023 is reinstated for hearing on merit before a different Kadhi or the same court, as may be appropriate.**
- iv. The issue of the legality of the sale of Plot No. 48 Olpusmuru Trading Centre shall be determined afresh in accordance with the Law of Succession Act.**
- v. The Respondents shall bear the costs of the appeal.**

70. It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH THE TEAMS

APPLICATION, THIS 30TH DAY OF APRIL, 2026.

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CHARLES KARIUKI

JUDGE