



**Haji & 4 others v Ali & 3 others (Civil Appeal 340 of 2018)  
[2023] KECA 1120 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1120 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 340 OF 2018  
DK MUSINGA, KI LAIBUTA & A ALI-ARONI, JJA  
SEPTEMBER 22, 2023**

**BETWEEN**

**ZAINAB MOHAMED HAJI ..... 1<sup>ST</sup> APPELLANT  
ALI MOHAMED HAJI ..... 2<sup>ND</sup> APPELLANT  
ABDIKADIR MOHAMED HAJI ..... 3<sup>RD</sup> APPELLANT  
ABDIRAZAK HASSAN MOHAMED ..... 4<sup>TH</sup> APPELLANT  
DEKA ABDULLAHI DABAR ..... 5<sup>TH</sup> APPELLANT**

**AND**

**KHADIJA MOHAMED ALI ..... 1<sup>ST</sup> RESPONDENT  
ASHA ABDULLAHI ..... 2<sup>ND</sup> RESPONDENT  
NUR ABDULLAHI ..... 3<sup>RD</sup> RESPONDENT  
MOHAMED ABDULLAHI ..... 4<sup>TH</sup> RESPONDENT**

*(Being an appeal from the Judgment and Decree of the High Court of Kenya at Garissa (G. Dulu, J.) delivered on 17th June 2018 in Civil Appeal No. 4 of 2016)*

**JUDGMENT**

1. This is a second appeal from the judgment of the High Court of Kenya at Garissa (George Dulu, J.) dated 7<sup>th</sup> June 2018 in Garissa HCCA No. 4 of 2016 between Fatuma Anab Mohamed Haji & 5 Others and Asha Abdullahi & 3 Others, in which the learned Judge allowed the appeal from the ruling of the Kadhi at Garissa (Hon. M. Hassan) delivered on 21<sup>st</sup> October 2016 in Garissa Kadhi's Court Succession Cause No. 28 of 2015 – Khadija Mohamed Ali & 2 Others vs. Fatuma Anab Mohamed Haji & 5 Others.



2. This being a second appeal, we are mandated to confine ourselves to points of law only. As was held in *Chemangong vs. R.* [1994] KLR p.611 and *Kenya Breweries Ltd vs. Godfrey Oduyo* [2010] eKLR, an appellate court will not, on a second appeal, interfere with concurrent findings of fact arrived at in the courts below unless based on no evidence, or it is clear that they misdirected themselves in relying on the wrong principles.
3. The relevant grounds on which the appeal is anchored are that the learned Judge erred in law in: failing to adhere to the mandatory provisions of section 65 of the *Civil Procedure Act*, which requires the Chief Kadhi or two other Kadhis to sit as assessor or assessors in appeals from a Kadhi's Court; failing to appreciate the distinction between physical and constructive possession as known to Sharia law; and in failing to hold that once property has been gifted away in Sharia and evidenced by Ijab and Qabul, then such property ceases to be the property of the donor immediately and, by extension, cannot form part of the donor's estate; and in misconstruing the conditions of Hiba in Islam.
4. We hasten to observe that we find nothing to justify interference with the concurrent findings of fact arrived at in the two courts below; that the first of the grounds of appeal aforesaid is decisive of the appeal before us; and that, therefore, it would be merely academic to pronounce ourselves on the other grounds. In so far as the first appellate court erred in law in failing to adhere to the mandatory provisions of section 65 of the *Civil Procedure Act*, the judgment of G. Dulu, J. was made in error and cannot stand.
5. Section 65 of the *Civil Procedure Act* (Cap. 21) requires the Chief Kadhi or two other Kadhis to sit as assessor or assessors in appeals from a Kadhi's Court. That section reads:

“ 65. Appeal from other courts

1. Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—

....

- (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.”

6. Discussing the use of the word “shall” in statutory provisions, Wessels, JA. in the South African case of *Sutter vs. Scheepers 1932 AD p.165 at pp.173 – 174* laid down the following guidelines:

“The word ‘shall’ when used in a statute is rather to be construed as peremptory than as directory unless there are other circumstances which negative this construction.”

7. In the same vein, the Supreme Court of Nigeria in *Dr Arthur Nwankwo and Anor vs. Alhaji Umaru Yaradua and Ors (2010) LPELR 2109 (SC) at p.78, paras C - E, Adekeye, JSC* had this to say:

“The word “shall” when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.”



8. The *Black's Law Dictionary (6<sup>th</sup> Edition)* defines the word “shall” as follows:

“As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary significance, the term “shall” is a word of command, and one which has always or which must be given a compulsory meaning: denoting obligation. It has a peremptory meaning, and is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears.”

9. It was imperative that the first appellate court sits with the Chief Kadhi or two other Kadhis as assessor or assessors at the hearing of the appeal as mandated by section 65 of the Act. That statutory requirement is not permissive but compulsory. In view of the foregoing, we find that the appeal herein succeeds. Accordingly, we hereby order and direct that:

- a. The judgment of the High Court of Kenya at Garissa(George Dulu, J.) dated 7<sup>th</sup> June 2018 be and is hereby set aside;
- b. The appeal in Garissa HCCA No. 4 of 2016 be and is hereby remitted to the High Court for reconsideration pursuant to rule 33 of the Court of Appeal Rules; and
- c. In view of the nature of the subject matter of appeal, each party shall bear their own costs.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2023.**

**D. K. MUSINGA, (P.)**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

**ALI-ARONI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

