



REPUBLIC OF KENYA



**Masoud v Miriti (Civil Appeal 40 of 2023) [2025] KEHC 5128 (KLR) (25 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5128 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI**

**CIVIL APPEAL 40 OF 2023**

**M THANDE, J**

**APRIL 25, 2025**

**BETWEEN**

**IRENE DELINA KENGA MASOUD ..... APPELLANT**

**AND**

**PAMELLA GAKENIA MIRITI ..... RESPONDENT**

**RULING**

1. The Appellant herein are aggrieved by the ruling of the Hon. Sheikh Twalib B. Mohamed delivered on 15.3.23 in Kadhi Succession Cause No. 30 of 2017 and has filed the appeal herein.
2. The impugned ruling is in respect of an application dated 13.2.23 by the Respondent who was the 1<sup>st</sup> Interested Party in the court below. The Appellant herein who was the 2<sup>nd</sup> Interested Party in that cause opposed the said application vide a preliminary objection and grounds of opposition both dated 2.3.23. The Appellant challenged the jurisdiction of the court to hear the matter and sought the recusal of the Hon. Kadhi. The objection was that the Hon. Kadhi lacked jurisdiction with respect to validity and enforcement of contracts in relation to sale and purchase of land. Further objection was that there was a likely conflict of interest as the Hon. Kadhi had witnessed the sale agreement on behalf of the Appellant and Respondent.
3. In his ruling the Hon Kadhi observed that the succession matter before him was determined by a judgment of 5.10.17 and the estate consisting of land known as Gede/Mijomboni/756 was distributed to the identified heirs of the deceased. The Hon. Kadhi went on to state that the Appellant bought the share of Athman Mohamed Omar (Athman) (now deceased), his share in the estate. She then sold the said share and applied in the succession cause, for an order of survey of the same, which was granted. He then found that the matter before him related to the interest of Athman and not ownership of the estate. He further found that the Appellant being neither an heir or administrator of the estate cannot challenge the jurisdiction of the court. He further faulted the Appellant for filing a preliminary objection and grounds of opposition and not a replying affidavit. He then proceeded to dismiss the preliminary objection.



4. The Respondent filed a Preliminary Objection herein dated 21.6.24 in opposition to the Appeal. The objection is that this Court lacks jurisdiction to entertain the matter pursuant to Articles 165(3) and (5)(b) as read with Article 162(2) of *the Constitution*.
5. The law, is that a court may only exercise that jurisdiction which has been conferred upon it by *the Constitution*, statute or both. This was succinctly stated by the Supreme Court in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, as follows:

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”
6. This Court derives its jurisdiction principally from Article 165 of *the Constitution* which clearly delineates and demarcates what the Court can and cannot do. Article 165(3) confers upon the Court unlimited original jurisdiction in criminal and civil matters. This Court also has supervisory powers over subordinate courts including Kadhi courts. Article 165(6) and (7) provides as follows:
  - (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
  - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
7. By dint the above provisions, this Court has the jurisdiction to call for the record in any proceedings before the subordinate courts including Kadhi courts and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
8. Article 165(5) limits the jurisdiction of this Court as follows:

The High Court shall not have jurisdiction in respect of matters—

  - (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
  - (b) falling within the jurisdiction of the courts contemplated in Article 162(2).
9. Article 162(2) provides:

Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

  - a. employment and labour relations; and
  - b. the environment and the use and occupation of, and title to, land
10. The Court notes that the Respondent submits that the nature of the matter before Court is one contemplated under the provisions of Article 162(2) of *the Constitution* and Section 13 of the Environment and *Land Act*.



11. The matter before this Court is an appeal that challenges the ruling of the Kadhi's court. The *Civil Procedure Act* provides that an appeal from the Kadhi's Court shall lie in this Court. Section 65(1)(c) provides as follows:
  - (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.
12. This is reiterated in Rule 86(1) of the Kadhis' Courts (Procedure and Practice) Rules which provides:

“An appeal against the decision of the Kadhi's court shall be made to the High Court, and against the decision of the High Court to the Court of Appeal.”
13. It is clear from the above provisions that it is this Court and not the Environment and Land Court that has the jurisdiction to hear this appeal which emanates from the Kadhi's court.
14. What this Court will be required to do in this Appeal is to consider whether the Hon. Kadhi erred or misdirected himself in the decision he made. The Court is thus called upon to exercise its appellate and not its original jurisdiction. Accordingly, the issue of the subject matter in the Kadhi's court cannot be a bar to this Court hearing and determining the appeal. The challenge to the jurisdiction of this Court on the basis of the subject matter can only be raised in a matter where the Court is exercising its original jurisdiction. It cannot be raised in an appeal from the Kadhi's court. As such, this Court has the requisite jurisdiction to hear and determine the appeal before it. I say no more lest I preempt the pending appeal.
15. In the end, I find that the Preliminary Objection dated 21.6.24 lacks merit and the same is hereby dismissed. Costs to the Appellant.

**DATED, SIGNED AND DELIVERED IN MALINDI THIS 25<sup>TH</sup> DAY OF APRIL 2025**

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**M. THANDE**

**JUDGE**

