



REPUBLIC OF KENYA



**In re Estate of Faruk Essak Musa (Deceased) (Probate & Administration Appeal
E003 of 2021) [2024] KEHC 2485 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2485 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

PROBATE & ADMINISTRATION APPEAL E003 OF 2021

F GIKONYO, J

FEBRUARY 29, 2024

IN THE MATTER OF THE ESTATE OF ESTATE OF FARUK ESSAK MUSA (DECEASED)

BETWEEN

FARZILA HASHAM APPELLANT

AND

KHATIJBABI ESSAK MUSA 1ST RESPONDENT

FF 2ND RESPONDENT

*(Being an appeal from the judgment of Hon. A. W. Bakari (R.K) in Kericho
Kadhi's court succession cause no. 4 of 2019 delivered on 28th November 2019)*

JUDGMENT

1. The respondent herein filed a petition *vide* Kericho Kadhi's court civil case no. 4 of 2019 against the appellant and the minor herein. She sought a permanent solution to the late Faruk Essak Musa 's estate. Kadhi's court allowed her to petition as the mother of the deceased since she has a right under Islamic law. The Kadhi court allowed her to file the succession and directed her to serve the appellant herein.
2. The Kadhi's court was made aware that the only beneficiaries to inherit from the estate of the late Faruk Essak Musa were three namely:
 - i. Khatijabai Essak Musa (Mother).
 - ii. Farzila Hasham (Wife).
 - iii. FF (Minor)(Son)
3. Since there was no objection, the Kadhi court set the matter down for hearing. The appellant never appeared in person or through a lawyer.



4. On 13/11/2019, Kadhi noted that the appellant was served with the orders granted last, and an affidavit of service had been filed. The Kadhi court having not received any communication from the appellant either in person or written, assigned the matter a date for judgment.
5. The Kadhi's court ordered for a valuation of the entire wealth of Faruq Essak Musa by a certified firm. The valuation was done by the firm of Zenith (management) Valuers Ltd. Copies of the valuation report were filed in Kadhi court.
6. The properties that were valued were;
 - i. LR No. xx/7609-Parklands Nairobi
 - ii. Plot No xx Block 7-narok
 - iii. Plot No xx A Block -narok
 - iv. Plot No57- Narok
 - v. KNG xxx-Vehicle -jeep
 - vi. KYW xxx-Vehicle -isuzu
 - vii. KAP xxx-Vehicle-subaru
 - viii. HAB xxx-vehicle -isuzu
 - ix. KAJ xxx-Vehicle-subaru
 - x. KCH108Y-Vehicle-toyota
7. The reports indicate that the entire estate is valued at Kshs. 165,730,000.00
8. The Kadhi's court after calculating the entire share of the late Faruq, the wealth was valued at 89,063,333 million Kenyan shillings.
9. The Kadhi's court ordered as follows;
 1. That Ahmed Abdi Yusuf & Mohammed Hanif Habib debts of Kshs. 300,000/= and 220,000/= to be paid from Faruq estate.
 2. That the house on Plot No. 93 Narok to remain for Khatijabai Essak Musa alone as it is not part of the inheritance neither is it contested and both the families or brother Farid, Faruq And Naim Who all live there to vacate the building within 14 days from the date of judgment and allow their mother to freely live without pressure or any disturbance.
 3. That the wife Farzila Hasham to get an eight 1/8 of the estate of the late husband which will be 11,132,920/= which is as follows:
 - Toyota Fielder KCH xxxx 830,000/=
 - Subaru Leone KAJ xxx 160,000/=
 - Isuzu Lorry KYW xx 600,000/=
 - Plot No xx Narok 3,333,333/=
 - Total Value 4,923,333/=
 - Total Share 11,132,920/=



Less Total Assets 4,923,333/=

Balance 6,209,587/=

4. That the mother Khatijabai Musa to inherit 1/6 a sixth from the estate of the late son which is as follows. Mother 14,843,888/= Kshs.

Jeep Car 100,000/=

Subaru Legacy xxx 555P 220,000/=

Isuzu Lorry xxx 202C 620,000/=

Plot Garage xxx 9,200,000/=

Plot Total 218 Block 7 4,000,000/=

Total Balance 703,890/=

Total Shares 14,843,888/=

Less Total Assets 14,139,998/=

Balance 703,890/=

5. That the two balances of the wife which is 6,209,584/= plus the mother's balance of 703,890/= plus the debt of the two brothers in order no. 1 of a total 520,000/= Kshs to be deducted from the share of the son which is the Plot No. 209/7607 parklands Nairobi worth 70,000,000/=

6. That the son's share will be from the sell of the parkland's asset worth 70,000,000/= as follows

Son Share

70,000,000/=

7,433,477/=

62,566,523/=

This Will Be FF 's share of 62,566,523/=

7. That Fazal share will be under key locked neither his mother nor his grandmother is allowed to interfere with the child's wealth until when the child has finished his university education and is of sound mind and maturity to freely make sound decisions.

8. That the minor Fazal to be given all the five rights any child is required of by law

1. Health

2. Education

3. Food

4. Shelter

5. Dressing (clothing)It should be noted all this comes from his wealth he should be given 15,000/= for food every monthFee to be paid to the school he is schooling in, directlyHe should be provided with an NHIF card to be paid annual medical insuranceBe given 5,000 for clothing every monthAll this is to be facilitated by his uncles (Farid) every monthConcerning shelter, he will sleep where his mother sleeps



9. That since the family of the late Faruq has been providing for the wife after his death the same enumeration to stop once this distribution has been done since now she is a free woman who has had her rightful share.
10. That the money in Acc No.(Particulars withheld) Equity Bank Narok Branch cash Kshs. 319,568.50 and Habib Bank Ag Zurich Industrial Area Nairobi a/c No. (Particulars withheld) Cash Kshs 54,499 to be divided amongst the three as follows: -
 - 319,568.50 +57,599 =total 377,067.00
 - Mother 1/6 =62,844/=
 - Wife 1/8 =47,133/=
 - Son Rest =267,090.50/=
10. The appellant being dissatisfied with the decision of Hon. A.W. Bakari (Resident Kadhi) filed an appeal to this court vide memorandum of appeal dated 08/06/2021. The appellant has raised 13 grounds of appeal as follows; -
 - i. That learned Kadhi erred in law and in fact in conferring upon the respondent undefined legal interests in Plot No. 93 Narok Township which forms part of the estate of Isaac Mussa (deceased) and not Faruk Essak Musa.
 - ii. That the learned Kadhi erred in law and fact in distributing the estate of Faruk Essak Musa in the absence of viva voce evidence in order to determine the rights and the interests of each of the beneficiaries of the estate of Faruk Essak Musa (deceased) including the objector and her son.
 - iii. That the learned Kadhi erred in law and in fact in issuing orders which in effect were to compel the appellant to vacate her residence on Plot No. 93 Narok Township which forms part of the estate of Isaac Mussa and not Faruk Essak Musa (deceased).
 - iv. That the learned Kadhi erred in law and fact in not satisfying himself that the appellant herein had consented and or voluntarily agreed to the proceedings being taken out for the estate of Faruk Essak Musa(deceased).
 - v. That the learned Kadhi erred in law and fact in issuing a certificate of confirmation of grant in violation of part VII and section 45 of the *Law Of Succession Act*.
 - vi. That the learned Kadhi erred in law and fact allowing the filing of succession cause no. 4 of 2019 at Kericho knowing quite well that there was a registry and a Kadhi court in narok.
 - vii. That the learned Kadhi's findings and judgment demonstrate bias and partiality in the unprecedented speed at which he heard and determined the rights and the interests of each of the beneficiaries of the estate of Faruk Essak Musa (deceased) without the participation of all the beneficiaries thereby causing prejudice to the appellant herein and her son.
 - viii. That the learned Kadhi erred in law and in fact in placing responsibility for the legal representative of the estate of the deceased thereby opening a lacuna for intermeddling and wastage of the estate of the deceased herein.
 - ix. That the learned Kadhi erred in law and fact in acting in excess of his jurisdiction in determining the interests of the beneficiaries of the estate of Isaac Mussa (deceased) who was the father of Faruk Essak Musa in Plot No. 93 Narok Township.



- x. That the learned Kadhi erred in law and in fact delivering a decision and issuing a certificate of confirmation of grant distributing the estate of the deceased herein on 28th November 2019 to the respondent herein in succession cause no. 4 of 2019 without knowledge and/ or consent of all beneficiaries of the estate of Faruk Essak Musa when letters of administration intestate had been issued in Narok kadhi's court succession cause no. 1 of 2019.
 - xi. That the learned Kadhi erred in law and in fact in its judgment and/ or orders granted on the 28th of November 2019 that are ultra vires and or offend the provisions of part VII and section 45 of the Law of Succession, which orders could only have been made or issued by a competent court as representation had been issued by a competent court as stipulated in the law of succession cap 160 of the laws of Kenya
 - xii. That the learned Kadhi acted in excess of jurisdiction and committed illegality by putting a condition that Fazal Faruk the minor and biological son of the deceased could only access his inheritance on completion of university which orders have no legal basis and or foundation.
 - xiii. That the learned Kadhi erred in law and in fact in disinheriting the appellant and her son from their rightful share and or rightful entitlement in the estate of Issak Musa in purporting to distribute the share of the late Faruk Musa(Deceased) in Plot No. 93 Narok Township to the respondent herein in succession
11. The appellant prays that the entire ruling/decree/certificate of confirmation of grant issued on November 28, 2019 be revoked.

Directions of the court

12. On 29/03/2022, this court directed that appeal file no. E003 of 2021 shall be the pilot file.
13. The appeal was canvassed by way of written submissions. Both parties have filed.

The appellant's submissions

14. The appellant submitted that it was erroneous for the court to confirm the grant. The mode of distribution is unfair and prejudicial as it does not favour all the beneficiaries. The same beneficiaries were not given an opportunity to be heard in the petition for grant of letters of administration. Property forming part of the estate of the deceased was presented by concealment from all the beneficiaries. Beneficiaries never attended court for confirmation of the grant. They attended the impugned ruling in which the Kadhi proceeded to adopt the mode of distribution filed on 28/11/2019. The appellant never consented to the grant of letters of administration. The appellant made an application challenging the decision given in succession cause no. 4 of 2019 in Narok High Court Judicial Review No. 2 of 2019 which was dismissed. The appellant therefore submitted that since all the beneficiaries were not involved and or consented to the grant of letters of administration it cannot therefore be said that the grant was made following the law. The appellant relied on article 47 of the Constitution, the rules of natural justice, rule 26 of the Probate and Administration Rules, In Re Estate of Lesinko Sokorte Kirayio (Deceased)[2017] eKLR, section 76 of the Law of Succession Act and Isaac Kireru Njunguna, Succession Cause 1064 of 1994 9(1)
15. The appellant submitted that the appeal is merited and should be allowed in its entirety. The appellant is the wife of the deceased and therefore first in priority. The respondent is the mother of the deceased. The respondent did not obtain consent from the appellant on both the grant and the mode of distribution contrary to Section 26 of the Law of Succession. The grant was coupled with fraud and



concealment. The appellant was not given an opportunity to be heard. She was not involved in the proceedings leading to the order dated November 28, 2019.

16. The appellant submitted that the manner in which the letters of administration were obtained was fraudulent and oppressive. It would be in the interest of justice that the confirmed letters of grant issued be revoked and all the beneficiaries of the estate are involved so that distribution is done in a manner that is fair, equitable, and acceptable to all the beneficiaries in accordance with the law.
17. The appellant prayed that this appeal be allowed in its entirety with costs borne by the respondent.

The respondent's submissions.

18. The respondent submitted that the memorandum of appeal is not part of the record of appeal. Only one ground of appeal has been substantially argued. Therefore, grounds of appeal which have not been argued be deemed to be abandoned. Article 159 of the *Constitution* and oxygen principles should not be a panacea for poor pleadings and bad arguments. The respondent relied on *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others* [2014] eKLR cited with approval in the case of *Nicholas Kiptoo Arap Korir Salat V IEBC & 6 others* [2013] eKLR.
19. The respondent submitted that the appellant submitted to the jurisdiction of the Kadhi. When the petition was filed, the appellant was invited to participate and she granted her consent for issuance of letters of administration. The letters of administration were issued in the names of the three beneficiaries. Issues of jurisdiction ought to be raised at the first instance. The appellant never challenged the jurisdiction of the Kadhi's court at the Kadhi's court or before this court. Therefore, the Kadhi had jurisdiction to hear and distribute the estate. The respondent relied on *Zulekha Salim Bantushi & another v Shebuna Mohammed Modhibiri; Ahmed Modhibiri Mohamed(Interested Party)*2019] eKLR, *In Re Estate Of Hassan Kimani Bin Chege (Deceased)* [2022] eKLR.
20. The respondent submitted that the Kadhi identified the beneficiaries of the estate based on Muslim law. He identified the mother, widow, and son as the beneficiaries. He distributed the estate based on Muslim law. The respondent relied on section 2(4) of the *Law of Succession Act*.
21. The respondent submitted that by application of section 2(4) of The *Law of Succession Act*, rule 26 of the act is inapplicable. Nonetheless, the appellant was invited to appear in court and tender evidence on distribution but she failed to attend and the court proceeded to distribute the estate. Further, the appellant consented to the issuance of the grant.
22. The respondent submitted that the parcel of land known as Plot No. 93 narok township was not part of the properties which were valued since it was not part of the gross estate of the deceased. The appellant has not produced documentary evidence to demonstrate that the property formed part of the estate of the deceased.

Analysis And Determination

23. The first appellate court must analyze and re-evaluate the evidence adduced before the lower court and come to an independent decision while bearing in mind that it neither saw nor heard the witnesses testify. In the case of *Epantus Mwangi and Geoffrey Ngatia v Duncan Mwangi Wambugu* [1982 – 88] 1 KAR 278, the court stated as follows:

“the principle is that a court on appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles.”



24. The main issues for determination are;
- i. Whether there is a Kadhi's court registry in narok
 - ii. Whether the Kadhi erred in distributing the estate of Faruk Essak Musa in the absence of viva voce evidence and /or consent of the appellant.
 - iii. Whether the Kadhi erred in determining interests in Plot No. 93 Narok Township which forms part of the estate of Isaac Musa
 - iv. Whether the Kadhi erred in placing responsibility for the upkeep of the minor in Farid Musa who is not a legal representative of the estate of the deceased.
 - v. Whether the Kadhi erred in putting a condition that the minor could only access his inheritance on completion of university

Kadhi's court registry in Narok

25. The appellant stated in her memorandum of appeal that Kadhi allowed the filing of succession cause no. 4 of 2019 at Kericho knowing that there was a registry and Kadhi's court in Narok.
26. This court confirms that there is no Kadhi or a Kadhi court sitting in Narok or a Kadhi court registry in Narok.

From the onset...

27. The appellant stated that Kadhi granted orders on 28/11/2019 which are ultra vires and offends the provisions of part VII and section 45 of the law of succession which orders could only have been made or issued after a grant of representation had been issued by a competent court as stipulated in the law of succession.
28. Other than the submission, the appellant did not bring or demonstrate how this case falls under part VII or section 45 of the [Law of Succession Act](#).

Kadhi's court: Substantive law and jurisdiction

29. Article 24(4) of the [Constitution](#) addresses the limitation of rights and fundamental freedoms. The said provisions state as follows: -

“The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhi's courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.”

30. The jurisdiction of the Kadhi's court draws upon article 170 (5) of the [Constitution](#) which provides that;

“The jurisdiction of a Kadhi's court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's court”

31. The parties herein profess Muslim religion.



32. From the record, all parties submitted to the jurisdiction of the Kadhi's court. Except the appellant complains that the hearing continued in her absence.
33. In the circumstances, Muslim law applies. The application of the Law of Succession is within that context.
34. The argument that the grant of letters of administration intestate ought to have been obtained first, should be seen within the province of the Kadhi Act, and ask whether there is such requirement.

Consent of the appellant to the proceedings before the Kadhi's court

35. This court has perused the trial court record, and notes a consent to the making of a grant of administration intestate to persons of equal or lesser priority dated 31/10/2019 which was signed by Farzilar Hasham. The appellant did not disprove this consent. Merely alleging that she did not to the issuance of the grant, devoid of evidence is not enough to unravel a grant.
36. The record shows that the appellant was invited to the proceedings but did not attend.
37. The proceedings were therefore, proper and competent in substance.

Determining interests in Plot No. 93 Narok Township which forms part of the estate of Isaac Musa

38. The appellant pleaded that the land parcel Plot No. 93 narok township was the property of one Issak Musa who was the appellant's deceased father. The appellant argued that the appellant's deceased husband ought to have been an heir. Therefore, the property was not available for adjudication before the Kadhi.
39. The issue of this property was considered by the kadhi. Kadhi found that the property belonged to one Issak Musa, the husband of the respondent. He made a finding that the property belongs to the respondent entirely and the appellant should vacate.
40. The Kadhi did not distribute the said property in these proceedings which relate to the estate of Faruk Essak Musa.
41. Notably also, the respondent is the surviving spouse of the late Issak Musa who has rights in law. Nevertheless, any inheritance of the said property should be in the matter of the estate of Issak Musa. And, any claims under the principle of representation should be had in those proceedings. This was merely extraneous matter which should not be a basis for impeaching the proceedings before the Kadhi. This court treats the orders in relation to the said property as such.
42. Has nothing to do with these proceedings.
43. It is not clear whether in the case at hand, it is not disputed that the appellant was a daughter-in-law to Issak Musa (deceased) and that her husband has since died but left children, would it therefore mean that she is entitled to the life interest in the whole residue of the net intestate estate due to her deceased husband? In *Tau Kakungi v Margrethe Thorning Katungi & another* [2014] eKLR, Musyoka J. was of the view that the purpose of section 35 of the Act was to prevent a spouse of the deceased from being impoverished after the demise of the other by distributing the entire estate to the children. The court stated: -

“The effect of section 35 (1) is that the children of the deceased are not entitled to access the net intestate estate so long as there is a surviving spouse. The children's right to the property crystallizes upon the determination of the life interest following the death of the life interest



holder or her remarriage. Prior to that, the widow would be entitled to exclusive right over the net estate...The device is designed to safeguard the position of the surviving spouse. The ultimate destination of the net intestate estate where there are surviving children is the children. It is the children who are entitled of right to the property of their deceased parent. However, if the property passes directly to the children, in cases where there is a surviving spouse, he or she is likely to be exposed to destitution. This would particularly be the case where the surviving spouse was wholly dependent on the departed spouse. She would be left without any means of sustenance.”

44. Similarly, in the case of *Cleopa Amutala Namayi v Judith Were* Succession Cause 457 of 2005 [2015] eKLR Mrima, J. observed thus:

“Be that as it may, under part V of the Act grandchildren have no automatic right to inherit their grandparents The argument behind this position is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents indirectly through their own parents.... The children to the grandparents inherit first and thereafter the grandchildren inherit from their parents. The only time where the grandchildren can inherit directly from their grandparents is when the grandchildren’s own parents are dead...

45. It is emerging from section 35 of the *Law of Succession Act* and case law, that the estate of a deceased person in which the surviving spouse has a life interest is not available for distribution unless that parent bequeaths them whatever he or she pleases to them.

46. This court finds that the trial Kadhi did not err.

Placing responsibility for the upkeep of the minor in Farid Musa who is not a legal representative of the estate of the deceased.

47. The respondent is the one who filed a succession petition in the Kadhi’s Court. She sought among other orders, to be appointed as the administrator of the deceased’s estate.

48. The appellant however fell short of convincing the Trial Kadhi why she should be given the responsibility of the upkeep of the minor and Farid Musa should not.

49. It was the respondent’s testimony that her daughter-in-law had become too extravagant in the usage of her grandson’s wealth and hence she might misuse all the wealth left behind by the deceased to her grandson destitute. Going by the evidence adduced, this court holds a similar view as the Trial Kadhi that no proof was brought forth to demonstrate that Farid Musa was incapable of administering the deceased’s estate. Farid Musa in his testimony stated that he was not claiming anything from the estate of his late brother but wanted to protect the interest of the minor.

50. The Trial Kadhi in the final analysis determined that Farid Musa was the best suited to be responsible for the minor’s upkeep and not the appellant.

51. In law, where a minor is a beneficiary of the estate of the deceased, a resulting trust is created by operation of the law. And, the trust must have two or more persons. Where there is only one administrator, the court appoints a second person for purposes of the trust. This appears to be the case here, and Farid was found to be a suitable person for that purpose. Accordingly, the two are deemed to be trustees of the resulting trust herein.



52. Although not directly in issue here, kinship is now being emphasized as one of the ways of ensuring a child receives protection and a sense of identity, belonging and home. It is a concept rooted in African tradition where the child belonged to, and was taken care of, sheltered and protected by the clan, its physical infrastructure and wealth.
53. This court finds no sound reason to depart from the decision of the Trial Kadhi in appointing Farid Musa as the person responsible for the upkeep of the minor. If at all there will be a need to replace Farid Musa as the person responsible for the upkeep of the minor in the future, the appellant shall be at liberty to move the relevant court for such an order.

The condition that the minor could only access his inheritance on completion of university

54. The trial Kadhi made an order that the minor's share would be under key locked not his mother nor his grandmother is allowed to interfere with the child's wealth until when the child has finished his university education and is of sound mind and maturity to freely make sound decisions.
55. A reading of this order of the Kadhi reveals that the Kadhi was trying to preserve the minor's property from intermeddling or dissipation.
56. The order is in line with the requirements of the resulting trust herein. It is also founded on possibility of extension of parental responsibility beyond the subject's eighteenth birthday especially where the subject is in the University, college or school.
57. This court finds no sound reason to depart from the decision of the Trial Kadhi in that regard. If at all there will be a need to access the inheritance before or after attaining the age of majority, appropriate relief may be sought from the court.
58. In the upshot, except where specifically stated otherwise, the court orders: -
- i. The appeal is dismissed.
 - ii. As these proceedings are amongst family members, each party to bear its costs of this appeal and the lower court.
59. It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 29TH DAY OF FEBRUARY, 2024

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JUDGE

In the presence of: -

1. Court Assistant – Otolu
2. M/s Aluala for Githui for Appellant – Present
3. Mr. Kemboi for Respondent - Absent

