



REPUBLIC OF KENYA



**KENYA LAW**  
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**Sindi v Sindi & another (Family Appeal 2 of 2019)  
[2022] KEHC 10164 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10164 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
FAMILY APPEAL 2 OF 2019**

**JN ONYIEGO, J  
MAY 27, 2022**

**BETWEEN**

**MOHAMED ALI SINDI ..... APPELLANT**

**AND**

**YAYE A. SINDI ..... 1<sup>ST</sup> APPELLANT**

**NYABWANA ALI SINDI ..... 2<sup>ND</sup> APPELLANT**

*(Being an appeal from the ruling of the Honourable the Chief Kadhi of the Republic of Kenya, Honourable Sheikh Kassim, in Mombasa, KCCC No. 33 of 2000 dated the 23rd June, 2005)*

**JUDGMENT**

1. The deceased herein Ali Sindi died on March 16, 1998. He was survived by 3 children namely; Mohamed Ali Nyabwana Ali and Yaye Ali. By a plaint filed before the Kahdi's court Mombasa *vide* civil suit No 33/2000 on 11<sup>th</sup> Agusut,2000, Mohamed Ali Sindi moved the court as the plaintiff against Nyabwana and Yaye seeking distribution of their father's estate in accordance with Islamic law. Secondly, that the defendants not to interfere with his share after distribution.
2. Indisputably, the estate comprised only one asset plot LR MSA/Block XVI/5xx Majengo in Mombasa. From the pleadings and parties' concurrence, the property constitutes a house without land which has a commercial section (eastern side) and the rear side (western side).
3. Apparently, the eastern side which is used commercially as it faces the road has over time been occupied by Mohamed the appellant herein.
4. During the hearing, a protracted dispute ensued as to how to distribute and share out the only property. At some point, the court had to order for valuation of the estate property. A valuation report dated May 6, 2002 carried out by Paul Wambua valuers placed the same at Kshs1, 000,000 for land and house Kshs 500,000.



5. After hearing both parties, the court made a ruling on November 16, 2000. It identified the heirs as Mohamed, Nyabwana and Yaye. The court went further to share the estate with Mohamed getting ½ of the estate and the other half to be shared equally between the two daughters (1/4 each) in accordance with the Islamic law.
6. Subsequently, a dispute arose as Mohamed allegedly demanded his half share of the house after insisting to occupy the commercial section of the house an arrangement his sisters resisted but offered to sell their share to him which offer he was unable to take. Consequently, the respondents also made a demand to occupy the eastern section which was commercially strategic. They also offered to buy the appellant's share so that he could vacate and leave them in peace.
7. On June 29, 2004, the court made a ruling directing that in view of the parties' disagreement, the solution was to give the eastern side to the one who would make the best offer to buy out other beneficiaries' share in default the plot and house be sold for each heir to get his or her rightful share out of the sale proceeds.
8. On July 27, 2004, Mohamed made an offer of kshs 150,000 so as to remain on the eastern side. The sisters refused the offer as it was extremely low thus demanding a sum of kshs 2.5 million in default the house to be sold for each to get his or her share.
9. Mohamed resisted either proposal thus insisting that the property was an inheritance which could not be sold. He further stated that he had occupied the eastern side of the premises even when their father was alive hence it would be discriminatory to evict him.
10. After considering parties' arguments through their respective counsel, the hon Kadhi delivered his ruling on June 23, 2005 directing that an opportunity be given to the beneficiaries to buy off the opposite party/ parties, and in default, the property to be sold and the proceeds to be divided to those who deserve to inherit.
11. Aggrieved by this decision (ruling) Mohamed Ali herein the appellant filed a memorandum of appeal dated July 2, 2005 citing 4 grounds of appeal as follows;
  - a. The learned Chief Kadhi erred in law in ordering for the sale of an inheritance.
  - b. The learned chief Kadhi erred in fact and in law in failing to appreciate that the appellant has continually been residing in the suit premises even prior to the succession proceedings.
  - c. The learned chief Kadhi erred in fact and in law in implicitly ordering the eviction of the appellant
  - d. The learned chief Kadhi erred in law and in fact in failing to consider the appellant's submissions.
12. When the matter came for directions, parties opted to dispose the matter by way of written submissions. Consequently, the appellant through the firm of Obura and Co advocates filed their submissions on September 24, 2019 thus submitting that the appellant has been occupying the eastern part of the building even when their father was alive hence cannot move out to create room for the sale or occupation by the respondents.
13. Counsel contended that the respondents were not staying in the subject property and the demand to evict the appellant for the property to be sold is ill intended. He submitted that the appellant will suffer prejudice if property inherited from a parent is sold.
14. Learned counsel submitted that the chief Kadhi did not consider counsel's submissions in his ruling.



15. On the other hand, the respondents through the firm of Darani & Co Advocates vehemently opposed the appeal thus supporting the ruling. Regarding the question that the appellant had occupied the property throughout his life time, it was submitted that, it is not a good reason for the appellant to claim the viable and strategically commercial side of the property. That the property does not belong to the appellant but to all beneficiaries hence the need to share it according to Islamic law.
16. They further submitted that for over 15 years, the appellant has been collecting rent for his own benefit without sharing anything to other beneficiaries. They opined that the only practical way of sharing the property is by selling the same and share proceed as per their shares.
17. To support the aspect of sale by auction, learned counsel made reference to the case of *Zeinab Khalifa khator & others vs Abdulrazak Khalifa Salim & another* ( 2017) e KLR where the court was of the view that sale of the disputed property was the most desirable and appropriate option .
18. That it is now 22 years since the suit was filed and no distribution has taken place yet.
19. During the hearing, in the presence of Kadhi Juma Abdalla and Habibi Salim sitting as assessors, Mr Obura for the appellant and Aboubakar for the respondent simply highlighted and adopted the content contained in their respective submissions.

### **Determination**

20. I have considered the record of appeal herein, grounds of appeal and oral submissions by both counsel. There is no dispute that the appellant and respondents are the only beneficiaries of the estate. There is no dispute either that their respective shares have been identified and distributed in accordance with Islamic sharia law.
21. It is also not in dispute that the only property in dispute is plot No Msa/Block XVI/5xx in respect of which the appellant is entitled to ½ share while the respondents have each ¼.
22. In their opinion, the honorable Kadhis simply associated themselves with the holding of the hon Chief Kadhi saying that there was nothing un-Islamic in ordering for sale of the property to meet the interest of other beneficiaries regardless of gender.
23. From the year 2002, the beneficiaries have not been able to fully administer and fully distribute the estate to its logical conclusion in the practical sense. The appellant has been in occupation of the premises since time immemorial including the time the father was alive. He was however not a co-owner hence does not enjoy any superior rights over the property than the other children.
24. The only issue for determination is whether the property in question should be sold out to enable each beneficiary get his or her share. From the history of this case, it is unfortunate that the estate has not been administered to completion. It is also clear that the only individual who has been enjoying occupying and collecting rental income from the eastern section of the preemies is the appellant. It is unfortunate and indeed a mockery of justice for litigants to be in the corridors of justice for 22 years simply because of a dispute like the one before this court.
25. It is trite that ligation must come to an end. See *William Kaross (legal personnel representative of Elijah CA Koross) Vs Hezekiah Kiptoo Komen & 4 others* ( 2015) e KLR
26. The appellant is claiming that he cannot part with the property acquired through inheritance. He however did not state the law specifically he was relying on. The aspect of having occupied the premises over a period of time was a privilege that extinguished upon the death of his father. Upon distribution of the estate each beneficiary is entitled to fair treatment.



27. The appellant has severally been offered to buy the property but in vain. He argued that there was not valuation done. However, I saw a valuation done by Paul Wambua valuers. I find this to be self-defeatist argument as he himself did not base his kshs 150,000 offer on any valuation report. Whereas I agree that property cannot be sold without a valuation report the appellant must be agreeable that he will move out to pave way for the sale or when the property is sold will vacate.
28. The claim by each beneficiary wanting to occupy the eastern wing cannot be resolved without resorting to the most viable and practical way. The building cannot be demolished on walls to create boundaries. Again, nobody wants to occupy less valuable part of the house like the rear part of it.
29. The only solution to which I do agree with the hon Chief Kahdi and the Hon assessor Kadhis is to value the property and then subject it to public auction for sell it to the highest bidder and subsequently share the proceeds each according to his or her share. This position was succinctly applied by the court of appeal in *Zeinab Khalifa Khator & 4 others v Abdulrazak Khalifa Salim and another* ( *Supra* ) where the court held that;

“further, if the learned judge considered the length of time the deceased estate(sic) which is occupied by Mr Omar remained undistributed, and the difficult positions taken by him to ensure that he remains in occupation to the suit premises to the exclusion of the other beneficiaries , we have no doubt the judge would have arrived at the same conclusion as we have, that giving the first priority to Omar to purchase the share of the other beneficiaries did not serve the ends of justice as the whole process was prolonged. Accordingly, we think this ground of appeal has merit, the property should be sold to the highest bidder”

30. Indeed, the appellant has successfully played tricks and delaying tactics to deliberately remain in occupation of the premises and enjoy the rent collected therefrom at the expense of other beneficiaries. He must dance within the legal rhythm and not to his own. Since the option of priority in buying out each other beneficiaries' shares has miserably failed, the only fair way and option is to sell the Property through competitive bidding in a public auction after conducting a valuation through a mutually agreed valuer. The auctioneer's charges shall be borne out of the sale proceeds.
31. Accordingly, it is my holding that the appeal herein lacks merit and the same is dismissed with costs to the respondents. The original file to be returned to the Kadhi's court to continue with the process of execution of the distribution process by way of sale as directed by the Chief Kadhi. The court to expedite the process without further delay.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 27TH DAY OF MAY 2022**

.....

**J.N.ONYIEGO**

**JUDGE**

