



REPUBLIC OF KENYA



KENYA LAW
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**Waziri v Nguya & another (Civil Appeal 71 of 2018)
[2022] KEHC 12523 (KLR) (Civ) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12523 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 71 OF 2018

MA ODERO, J

JULY 29, 2022

BETWEEN

MARIAM WAZIRI APPELLANT

AND

WAZIRI JUMA NGUYA 1ST RESPONDENT

FAUZIA WAZIRI 2ND RESPONDENT

*(An appeal from the decision of the Kadhis court of Kenya delivered
by the Honourable Senior Resident Kadhi A.I. Hussein dated the
8th day of June 2018 in Succession Cause Number 18 of 2017)*

JUDGMENT

1. The appellant herein Mariam Waziri filed the memorandum of appeal dated July 9, 2018 challenging the decision of the Hon Kadhi AL Hussein contained in the ruling dated June 8, 2018 delivered in respect of Succession Cause No 18 of 2017.
2. In the said memorandum of appeal the appellant sought the following orders: -
 - a. This appeal be allowed.
 - b. Spent
 - c. The whole ruling of the hon Kadhi's court delivered on June 8, 2018 be set aside.



- d. The order made by the learned Kadhi that the 1st respondent holds property known as LR No. 209/8552/464 in trust of the beneficiaries of the deceased be set aside
3. The appeal was opposed by the 1st respondent Waziri Juma Nguya and the 2nd respondent Fauzia Waziri. Following directions made by this court the appeal was canvassed by way of written submissions. The appellant filed her written submissions on May 10, 2019 whilst the respondents relied upon their written submitted dated July 24, 2019.

Background

4. The matter before the Kadhi Court i.e, Succession Cause No 18 of 2017 related to the estate of the one Halima Juma Nguya alias Veronica Juma Nguya (hereinafter ‘the deceased’) who died intestate on December 11, 2016. A letter dated March 2, 2017 written by the Chief of Township location, Kitui district indicated that the deceased was survived by the following persons –
 - I. Waziri Juma Nguya – Widower
 - II. Mwanajuma Waziri – Daughter
 - III. Jumaa Waziri – Son
 - IV. Marion Waziri – Daughter
 - V. Asha Waziri – Daughter
 - VI. Fauzia Waziri – Daughter
 - VII. Athaman Waziri – Son
5. Following the demise of the deceased the widower and three (3) of the deceased’s children filed a petition dated April 4, 2017 seeking grant of letters of administration intestate in respect of the estate of the deceased.
6. Pending the hearing of said petition the petitioners also filed in the Kadhi Court an application dated April 7, 2017 seeking orders of injunction to restrain the appellant from interfering with their peaceful enjoyment and occupation of the property known as Land Parcel Number 208/8552/46 located in Huruma Area (herein after the ‘suit property’). The petitioners claimed that the suit property formed part of the estate of the deceased and was subject to distribution amongst all the beneficiaries in accordance with Islamic (Sharia) Law. The petitioners further sought orders for preservation of the suit property on grounds that although said suit property was registered in the name of the appellant, the appellant held the property in trust for the other beneficiaries.
7. They complained that the appellant had claimed exclusive ownership of the suit property contrary to the fact that she held the same in trust and despite pleas by family members to have the property registered and recognized as part of the estate of the deceased.
8. The appellant filed in the Kadhi Court a replying affidavit dated April 20, 2017 in which she vehemently denied the claim by the petitioners that the suit property formed part of the estate of the deceased.
9. The appellant asserted that the suit property was her exclusive property and was registered in her name alone. She stated that she had purchased the property in the year 2011 from one Mr Njenga Ihugo and paid a purchase price of Kshs 1,500,000 for the same. The appellant averred that following the



purchase of the suit property, she proceeded to improve and partition the property and leased out several rooms to tenants.

10. The appellant told the Kadhi Court that one of her tenants was her sister Fauzia Waziri (the 2nd respondent herein) who used the rooms which she rented to set up a Nursery School. That since the year 2012 the 2nd respondent faithfully paid the required rent to the appellant by depositing the rent of Kshs 18,000 per month into the appellants account held at Equity Bank.
11. However after the demise of their mother (the deceased) the 2nd respondent suddenly stopped paying the required rent to the appellant. That due to this non-payment of rent the appellant wrote to the 2nd respondent a letter dated March 1, 2017 to formally terminate the tenancy wef, March 13, 2017. The appellant involved the local chief in the dispute but the 2nd respondent defied the orders of the chief that she continue to pay the required rent. Thereafter the appellant engaged a firm of Advocates to pursue debt recovery and distress for rent.
12. Following a proclamation notice dated March 20, 2017 issued by a firm of auctioneers the petitioners filed the application dated April 4, 2017 in the Kadhi Court seeking injunctive orders as well as the petition for grant of letters intestate.
13. During the course of the proceedings before the Kadhi Court the 2nd respondent Asha Waziri and the 3rd respondent Mwanajuma Waziri (both children of the Deceased) filed a notice of withdrawal dated August 28, 2017 indicating that they no longer wished to be parties in Succession Cause No 18 of 2017.
14. After listening to both parties the Hon Kadhi delivered a ruling dated June 8, 2018 in which he found and held that the appellant though the registered owner of the suit property held the same in trust on behalf of her siblings who were the legal beneficiaries of the deceased person. That ruling is at pages 150-1550 of the record of appeal dated July 25, 2018.
15. Being aggrieved by that ruling the appellant filed this memorandum of appeal dated July 9, 2018. The appeal was premised upon the following fifteen (15) grounds.
 1. The learned Kadhi erred in law and fact by finding that the appellant held property known as LR No 209/8552/463 as a trustee on behalf of all the beneficiaries of Halim Juma Nguya alias Veronica Juma Nguya.
 2. The learned Kadhi erred in law and fact and willfully disregarded the entire evidence of the appellant, both oral and documentary.
 3. The learned Kadhi erred in fact and law by deliberately shifting the burden of proof to the appellant where he clearly ought not to have.
 4. The learned Kadhi erred in law and fact by relying on an unsubstantiated and questionable hearsay and irrelevant “conversation” as evidence.
 5. The learned Kadhi erred in law and fact by failing to consider the corroborated evidence of the fact that the appellant is the registered owner of the suit property.
 6. The learned Kadhi erred in law and fact by failing to consider the fact that the 2nd petitioner had been paying rent directly to the appellant with respect to the suit property and never to the deceased.
 7. The learned Kadhi erred in law and fact by failing to consider the unreliability and incredibility of all the remaining witnesses of the petitioners.



8. The learned Kadhi erred in law and fact by failing to consider the inconsistencies in the testimonies of the petitioner's witnesses and their witness statements.
9. The learned Kadhi erred in law and fact by assuming that the appellant was unable to afford buying the suit property irrespective of evidence tendered otherwise of sources of income to the appellant.
10. The learned Kadhi failed to consider the favorable actions the appellant undertook after the death of the deceased for the benefit of all the beneficiaries of the deceased.
11. The learned Kadhi misdirected himself and based his finding on wrong considerations, thus arriving at an unsound and unjust determination.
12. The learned Kadhi erred in fact by failing to take into account and to consider all the evidence adduced on behalf of the appellant.
13. The learned Kadhi erred in law and fact by failing to consider the principles and guidelines laid down by the Koran with regard to ownership of land and land inheritance.
14. The learned Kadhi deliberately ignored and or failed to appreciate the submissions of the appellant by finding in favour of the petitioners herein.
15. In all circumstances of the case, the findings of the learned Kadhi are inconceivable, totally unjust, unpalatable and unsupportable in law and in fact and flies of the face of evidence adduced in writing and orally.

Analysis and Determination

16. I have carefully considered the record of appeal filed in court on July 25, 2018 as well as the written submissions filed by both parties. The main issue for determination are-
 - (i) Whether the appellant held the suit property in trust for the respondent
 - (ii) Whether the appeal ought to be allowed.
 - (i) Whether the appellant holds the suit property interest.
17. This being a court of first appeal I am obliged to re-examine and re-evaluate the evidence adduced in the lower court and to draw my own conclusions thereon. In the case of *Gitobu Imanyara & 2 others vs Attorney General* [2016] eKLR the Court of Appeal stated as follows:-

“An appeal to this court from a trial by the High Court is by way of a re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
18. In *Peter vs Sunday Post Limited* [1958] EA, the Court of Appeal held as follows:-

“whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution: if there is no evidence to support a particular conclusion or it is shown that the trial judge has failed



to appreciate the weight or bearing of circumstances admitted or approved, or has plainly gone wrong, the appellate court will not hesitate so to decide.”

19. The appellant and the 2nd respondent both are daughters of the deceased whilst the 1st respondent is the widower. It is common ground that the property known as LR 209/8552/464 is registered in the sole name of the appellant. This fact is not disputed by the respondents. Annexed to the appellants replying affidavit dated April 28, 2017 is a copy of the title document to the suit land (Annexure ‘MWJ’). The property was registered in the year 2012.
20. The respondents though conceding that the suit property is registered in the name of the appellant claim that said property actually belonged to the deceased and that the appellant merely holds the property in trust for the legal beneficiaries of the estate of the deceased.
21. As a general rule title is deemed to amount to absolute proof of ownership of property. Section 25 of the [Land Registration Act](#) 2012 provides that –
 - “25 The rights of a proprietor, whether acquired on first registration or
(1) subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a)
 - (b)”
22. The law does however recognize a ‘trust’ as an overriding interest in land. Section 28 of the same [Act](#) provides as follows: -

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

 - (a)
 - (b) trusts including customary trusts;
 - (c)” (own emphasis)
23. [Blacks Law Dictionary](#) of the Edition defines a trust in the following terms –

“the right enforceable solely in equity to the beneficial enjoyment of property to which another holds legal title. A property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).
24. The appellant in the Kadhi Court gave a narration of how she acquired the suit property. *Vide* her replying affidavit dated April 28, 2017, the appellant explained that she purchased the suit property from one Mr Njenga Ihugo for a price of Kshs 1,5000,000. She annexed a copy of the sale agreement dated December 9, 2011.
25. The appellant further demonstrated that she made payment for the purchase price in two (2) instalments. The first instalment was paid directly into the account of the seller and Kenya Re Sacco in order to clear a loan owed by the seller to the SACCO. The balance of the purchase price was then paid to the seller in cash.



26. The onus to prove the existence of a trust lay squarely upon the respondents. Section 107 of the Evidence Act cap 80 provides as follows: -

“ 107(1) whoever desires any court to give judgment as to nay legal right or liability depends on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”

27. The seller of the suit property Mr Njenga Ihugo testified before the hon Kadhi. He confirmed that he sold and transferred the suit property to the appellant. The seller further confirmed that he received the full purchase price of Kshs 1,500,000 in two (2) installments. He confirmed that the first installment was paid directly into his account whilst he received the second instalment from the appellant in cash.

28. Further corroboration of the appellants evidence that she purchased the suit property was provided by Eunice Kavere an Advocate of the High Court of Kenya who also testified in the Kadhi Court. The Advocate told the court that she drafted the sale agreement and confirms that after the purchase price had been paid the Advocate facilitated the transfer of the suit property to the appellant. From the evidence on record it is manifest that the appellant single handedly purchased the suit property without any involvement for the deceased or indeed any other party.

29. In support of his finding that the appellant held the suit property in trust for the other beneficiaries of the estate the hon Kadhi relied on an audio-recording of a conversation that allegedly took place on June 5, 2017 between the 3rd respondent Mwanajuma Waziri and Fauzia Waziri (the 2nd respondent). In that Audio recording Mwanajuma Waziri who is a sister to the appellant is said to have stated that her mother (the deceased) told her that –

“ mimi hio nyumba badala ya mimi kuandika jina langu, uandike wewe kakili (appellant) na nyumba iwe ni yangu lakini iandikwe wewe, kama ni we nakupa sababu uangalie hawa watoto wangu we ndio naona unaweza kua kheri.....”

30. In other words the deceased allegedly told the ‘Mwanajuma’ that the house which belonged to Deceased would be registered in the name of the appellant and that the appellant was to take care of the other children of the deceased.

31. It must be remembered that this was not an audio recording of the statement as made by the deceased herself. Rather it is a recording of a narration given by ‘Mwanajuma Waziri’ of what the deceased allegedly told her. It must be remembered that ‘Mwanajuma Waziri’ together with ‘Juma Waziri’ (the 4th respondent) opted to respondent withdraw from the case. As such, she did not even testify in the Kadhi Court to confirm that this is what her late mother had told her. The evidence of Fauzia 2nd respondent regarding what her sister Mwanajuma said to her amounts to hearsay evidence and cannot be relied upon as proof of a fact in issue. Without the testimony of the Mwanajuma Waziri’ to confirm this conversation, I find that the hon Kadhi erred in relying on the audio recording as a basis for his findings.

32. Secondly, it is claimed by the respondents that the suit property actually belonged to the deceased and that the deceased had only permitted the appellant to have the property registered in her name. If as alleged the suit property belonged to the deceased, then there would have been tangible evidence of the involvement of the deceased in the acquisition of said property. Instead, the vendor of the property asserts that at all times he dealt only with the appellant. He never met the deceased at all and had no



contact with her. The sale contract refers only to the appellant Mariam Waziri and the Vendor Mr Njenga Ihugo. No mention is made in the sale agreement of the deceased. The vendor insists that he was paid the money for the purchase price by the appellant and no other person.

33. Similarly the Advocate who represented the appellant in the sale insists that she dealt only with the appellant. The Advocate confirms that the sale agreement involved only the appellant and the vendor.
34. It is trite law that he who alleges must prove. The respondents who claimed that the suit property belonged to the deceased had a legal obligation to prove this allegation. There is evidence that since the year 2012 the 2nd respondent Asha Waziri a sister to the appellant who had rented a room in the suit property was remitting rent every month to the appellant by depositing the rent into the account of the appellant held at Equity Bank. If the 2nd respondent believed that the property did not belong to the appellant then why was she paying the rental income to the appellant. The 3rd respondent only stopped paying the required rent when the deceased died.
35. The respondents in their submissions claimed that the appellant did not have sufficient funds to purchase the suit property. This is tantamount to shifting the burden of proof to the appellant. The appellant though under no obligation to do so did explain where she got the funds to purchase the suit property. I find that the respondent failed dismally to tender proof that the property actually belonged to the deceased. On the other hand I am satisfied that the appellants tendered in the lower court sufficient evidence to prove that she had purchased the suit property and paid for it alone.
36. In conclusion I find merit in this appeal. The same is hereby allowed. The ruling dated June 8, 2018 delivered by the hon Kadhi's is hereby set aside. This being a family matter I make no orders on costs.

DATED IN NAIROBI THIS 29TH DAY OF JULY, 2022.

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MAUREEN A. ODERO

JUDGE

