



Said & another v Mohamed & 2 others (Civil Appeal E003 & E008 of 2020 (Consolidated)) [2022] KEHC 17169 (KLR) (22 November 2022) (Judgment)

Neutral citation: [2022] KEHC 17169 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E003 & E008 OF 2020 (CONSOLIDATED)**

**SM GITHINJI, J
NOVEMBER 22, 2022**

BETWEEN

OMAR MOHAMED SAID 1ST APPELLANT

BARKE SALIM SAHEL 2ND APPELLANT

AND

AYMAN AMER MOHAMED 1ST RESPONDENT

SWALAHA AMIR MOHAMED 2ND RESPONDENT

MOHAMED AMER MOHAMED 3RD RESPONDENT

(An Appeal from the Ruling of Hon. Kadhi delivered at Kilifi on 10th September 2020 and Judgment dated 1st October, 2020 in Kadhi succession cause No. 24 of 2020 (formerly Malindi Kadhi's Court Succession cause 5 of 2018) at Malindi)

JUDGMENT

CORAM: Hon. Justice S. M. Githinji

Mwaure & Mwaure Waihiga Advocates for the Appellants

Atiang Ngunyi & Associates for the Respondents

1. The appellant Omar Mohamed Said has appealed against the Ruling and consequential orders made by Hon. Kadhi sitting at Kilifi on the 10th day of September, 2020 in determination of the Appellant's application dated 25th August 2020 on the following grounds;

1. That the Hon. Kadhi erred in law and in fact by failing to appreciate the need to recall the witnesses as prayed for in the application dated 25th August, 2020 due to a breach of procedure in taking evidence before the Kadhi's court.



2. That the Hon. Kadhi erred in law and in fact by failing to appreciate that the breach in procedure in taking evidence was prejudicial to the Appellant's case.
3. That the Hon. Kadhi erred in law and in fact in failing to appreciate that the whole of the proceedings and taking of evidence offended the principle of fair hearing.

The Appellant sought Judgment against the Respondents as follows;

1. That the Ruling and orders of the Hon. Kadhi delivered on 10th September, 2020 be quashed, set aside and varied and be substituted with an order allowing the recalling of witnesses and taking evidence in accordance with the Rules of procedure.
2. Costs of the Appeal.

The Appellants in Civil Appeal No. E8 of 2020; Omar Mohamed Said and Barke Salim Sahel filed an appeal against the Judgment and Decree of the Kadhi's Court at Kilifi (M. S. Mwambele) dated 1st October, 2020 in Kadhi's Court Succession cause number 24 of 2020 (formerly Malindi Kadhi's Court Succession cause 5 of 2018) at Malindi. The appeal was based on the following grounds;

1. The Honourable Kadhi erred in law and in fact by allowing the petition by the Respondents despite lack of evidence.
2. The Honourable Kadhi erred in law and in fact by failing to consider and analyse the evidence by the appellant.
3. The Honourable Kadhi erred in law and in fact by shifting the burden of proof to the appellant.
4. The Honourable Kadhi erred in law and in fact by exhibiting bias against the appellant and considering extraneous matters.
5. The Honourable Kadhi erred in law and in fact by failing to allow the appellant to call witnesses but went on to admit other witnesses who were never called by either party therefore assuming the role of a litigant and the jury at the same time.
6. The Honourable Kadhi erred in law and in fact by failing to appreciate that the proposition in issue were not available for distribution because they did not form part of the deceased Estate.
7. The Honourable Kadhi erred in law and in fact by failing to appreciate that what was before him was a succession case for the Estate of Amer Mohamed Said and not the Estate of Mohamed Said Saar.

The appellants sought the following orders;

- a. That the appeal be allowed and the Judgment dated 1st October, 2020 be set aside.
- b. The costs of this appeal be in the cause.



Submissions

2. The appeal was canvassed by way of written submissions. The appellants filed submissions, one set filed on the 7th June, 2021 and another set filed on the 10th day of February, 2022. The Respondents did not file submissions despite being granted numerous opportunities to do so.
3. Counsel for the appellant submitted that the grounds of appeal primarily challenged the way the trial was conducted and it was their submission that the Appellant was denied a chance to call his witnesses. Counsel alluded to a court order dated 2nd January, 2018 where the court appreciated the need to call one Jamila to adduce evidence at the hearing but at the hearing, the Honorable Kadhi declined to offer the chance to avail the said witness. Counsel also submitted that the court on its own motion in guise of a site visit took evidence from persons who were not parties to the suit which evidence was taken in absence of the appellant thereby denying him an opportunity to cross examine the said witnesses.
4. It was counsel's assertion that it was not proper for the court to purport to distribute the property of a party in her absence and without her participation. Similarly, since the Kadhi had denied the said witness to testify, there was no justification to proceed to discuss her property and the perceived shares in her absence.
5. She also submitted that the Honorable Kadhi deviated and went into succession of an estate that was not before him and that the Respondents ought to have sought administration of their late father for locus to litigate on behalf of their grandfather's Estate. That essentially, the court ought to have drawn a judgment on whether the petition was for the Estate of Amer Mohamed Said or his father (the petitioner's grandfather) Mohamed Said Saar. Counsel also alluded to the fact that the Respondents/ Petitioners could only seek share of their late father's estate but could not purport to claim equal shares with their uncles on a purported claim in the Estate of their grandfather.

Analysis and Determination

6. I have considered the appeal as well as the submissions by the appellant in the absence of the Respondents participation. In my view the issues for determination are as follows;
 1. Whether the trial court erred in failing to recall the witnesses as prayed for in the application dated 25th August, 2020; and
 2. Whether the appeal is merited based on the Judgment dated 1st October, 2020.
7. In considering whether to interfere with the decision of the lower court, it is trite law that an appellate Court should be slow in interfering with the exercise of the discretion of the Court below. An appellate Court may only tinker with a decision of the lower court, if it is satisfied that the discretion of that court was not exercised judiciously. In *Mbogo & Another versus Shah* [1968] E.A. 93, it was held that:

“An appellate Court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters of which he should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate Court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice.”
8. I have analysed the record and have noted that this matter was initially heard by the Kadhi's Court in Malindi and an appeal preferred against the Judgment of the Kadhi which was decided in favour



of the Respondents. In the Judgment by my brother Honorable Justice Nyakundi dated 12th March, 2020, the court directed that this matter be heard and determined de novo by the Kilifi Kadhi's Court on the following issues; the nature of interest held over land without itemized improvements, the computation of shares of Jamila, whether the appellant share of property improvements can be severed from the original estate and whether the rest of the estate can be shared equally according to the principals in Islamic Law. I will be guided by the above issues in my analysis.

9. The appellant contends that the houses in question are not part of the estate of their father Mohamed Said Saar but a joint ownership amongst the four brothers and essentially according to Islamic law has a share of a ¼. The appellant in his testimony has repeatedly alluded to the fact that their father sold the bigger house to them in 1974 which assertion was not true since the respondent at that time had no legal capacity to enter into the alleged contract. I have considered the analysis by the Honorable Kadhi and I agree that five shops built by the 1st Respondent did not form part of the estate and as such were not considered during the distribution.
10. On the first issue for determination on whether the trial court erred in failing to recall the witnesses as prayed for in the application dated 25th August, 2020, I am guided by the order of this court dated 12th March, 2020 where the court directed that the matter be finalized within forty-five days from the date of the pretrial conference. I have again looked at the record and I note that the appellant sought to recall the Petitioners to adduce and produce documents. I have analyzed the documents that have been alluded to by the appellant as well as the persons he wished be recalled and I note that the application is a mere expedition aimed at wasting the court's time. The appellant sought to have the petitioners recalled but the record clearly shows that in taking their evidence, the appellant fully participated and had the opportunity to cross-examine them. I am not persuaded by the reasons advanced by the appellant in support of the application. I find that this being an appeal that was time bound, the Honorable Kadhi was justified in dismissing the application.
11. On the second issue for determination, I have considered whether the trial court sought to answer the issues presented by the Judgment of this court of 12th day of March, 2020. After careful analysis and consideration of the proceedings before the Kadhi, I find no reason to interfere with the discretion of the Kadhi in all the orders made and to this end, both appeals; Civil Appeal No. E3 of 2020 and Civil Appeal No. E008 of 2020 are in want of merit and are hereby dismissed.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 22nd DAY OF NOVEMBER, 2022.

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S.M. GITHINJI

JUDGE

In the Presence of; -

Ms Marubu Advocate for the Appellants

Atiang Ngunyi & Associates for the Respondents(absent).

