



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CIVIL APPEAL NUMBER 1 OF 2015

FATMA AHMED BWANAMKUU APPELLANT

-VERSUS-

MAHMMOUD MOHAMED BWANAMKUU..... RESPONDENT

(Being an Appeal against the Judgment of the Hon. Sheikh Mshali H. Mshali, the Kadhi at Lamu Succession

Case No.1 of 2014 delivered on 12th March 2015)

Coram: Hon. Justice R. Nyakundi

Aboubakar, Mwanakitina advocates for the Appellant

N.A. Ali & Co Advocates for the Respondent

JUDGMENT

Background

The case before me is based on an inheritance case wherein the petitioner, respondent herein filed the petition on behalf of the Estate of the **late Bwanamkuu Bin Abdallah (deceased)**. The respondent and appellant are paternal cousins and grandchildren of the deceased who died sometime in 1952 intestate. The bone of contention is a parcel of land title number **LAMU/BLOCK – 1/217** measuring 0.13Acres. The deceased was survived by a widow and 8 children. The aforementioned estate was not distributed between the children of the deceased, who are also all deceased now. On the said plot there were four houses, two of which are not in dispute. However, the appellant argued that the two houses belonged to her and her brothers as the same had been sold to them by their father (now deceased), who was a son of the deceased. The parties asked the **Hon. Kadhi** to determine the dispute on the rightful heirs of the two houses in contention.

The **Hon. Kadhi** determined that as the land was still in the name of the deceased and therefore yet to be inherited the houses thereon belonged to the estate and could therefore not be transferred by any of the children of the deceased and declared the two houses as part of the estate and distributed them to the beneficiaries.

The Appeal and Submissions

The appeal before me emanates from the Judgment of the **Hon. Sheikh in Lamu Succession Cause No. 1 of 2014** delivered on 12.03.2015. Aggrieved by the Judgment, the appellant filed a memorandum of appeal on the 09.04.2015. At the hearing of this appeal, directions were taken to have both counsel file their respective submissions. The parties filed written submissions dated 09.11.2017 and 05.11.2018 respectively but did not find it necessary to orally highlight. The appeal is mainly on the Kadhi's finding that the two houses without land on **Plot No. Lamu/Block 1/217** belonged to the deceased's estate as the respondent did not file any proof to support this assertion nor was it pleaded.

The appellant argues that it does not oppose the distribution of the estate of the deceased to the heirs but contend that two of the houses on the aforementioned plot belonged to her and her two brothers as they previously had been sold to her and her brothers. The appellant states that only one mud house was pleaded and not two. The appellant also asserts that the **Hon. Kadhi** did not have any legal basis to find that there were two houses which belong to the deceased and violated a Rule 3 of Order 4 of the Civil Procedure Rules 2010 that states that where the subject matter is immovable property the plaint shall contain a description of the property sufficient to identify it. The appellant contends that it is trite law that parties to a suit are bound by their pleadings and are not allowed to venture outside the same as stated in **High Court**

of Kenya at Migori, Civil Appeal Number 52. Of 2017, Daniel Otieno Migore V South Nyanza Sugar Company Limited and Rule 6 (1) of Order 2 of the Civil Procedure Rules 2010. The Appellant further argues that the Respondent failed to adduce any evidence to show that the two mud houses belonged to the deceased and further that the deceased's children never raised any issue with the houses until they also passed away. They argue that the appellant was in possession, occupation and control of the houses and the Respondent did not raise the same.

The appellant also submitted that even if the respondent had pleaded the same he would have been estopped by Section 120 of the Evidence Act as the respondent's father did not also lay claim to the property in his own lifetime and such the same cannot be raised after his father's death. The finally stated that as the parties had agreed, by consent, that the two houses belonged to the appellant's father the **Hon. Kadhi** should have endorsed the same. They argue that the **Hon. Kadhi** wrongfully shifted the burden of proof to the appellant contrary to Section 107, 108 and 109 of the Evidence Act and the Islamic Law. The appellant concluded that the **Hon. Kadhi** erred in holding that the share of **Saada Bwanamkuu Abdalla** would be inherited by her siblings instead of her children whereas Islamic Law states that heirs are parents, spouses or children and whenever they are present no one else can inherit. They urged this court to allow the appeal with costs.

The respondent on his part argues that by virtue of Section 107 and 109 Evidence Act and the Islamic law, it is trite that whoever alleges must prove, as such a party to a suit be it the suing or sued party raises an allegation they then have an obligation to prove the same to the required standard. They further submit that the said parcel of land belonged to the estate a fact that was not disputed by the appellant and as such the court was bound to find that particular fact to be proved. Further, the Respondent submits that because the appellant alleged that the two houses had been sold to them by their father who was a son of the deceased the she was legally bound to prove the same.

The respondent submits that there was nothing to prove that the two houses had been sold and if they were indeed sold the same would not suffice as the vendor, in this case the father of the Appellant did not have the capacity to do so as the property did not belong to him as it had not been passed from the deceased to the appellant's father.

The Respondent further submitted that as (**PW1's**) evidence the deceased had allowed the appellant's father to live in one of the houses and also that assuming that the appellant's father had indeed sold the houses to her and brothers the same is a doubtful as she would have been about 9 or 10 years old at the time of her father's demise in 1988 who is the alleged vendor while her brothers would have been 2 or 3 years old thus lacking any capacity to enter into such an agreement.

The respondent also submitted that the fact that no one ever approached the court for inheritance means that the estate of the deceased remained uninherited as there is nothing like a de facto inheritance as inheritance must be in line with the law. Thus the alleged transfer by the appellant's father was void and illegal as he lacked capacity. They submitted that one of the children of the deceased cannot purport to take some of the property of the deceased to exclusion of all others without involving the law, he relied on the case of **Asitbhai T.Hussein v Hasham Tarmohamed & Another [2017] eKLR** where the mother had inherited the property of the deceased and had transferred some of it to some of the children to the exclusion of others. The Respondent also submitted that there was no consent filed as alleged by the Appellant as there had merely been a discussion towards settling the same and such discussion was not binding on the court.

On the issue of the caveat the respondent argues that the caveat had to be removed for the estate to be distributed. The issue of the said **Saada Bwanamkuu Abdalla** the **Hon. Kadhi** corrected his judgment and stated that her children and not her siblings shall be beneficiaries. Finally, the respondent argued that the court had ordered the production of the original title deed as an order which was secondary for the purposes of the distribution of the estate and it cannot affect the primary order of the court and that if the title cannot be traced then there will be procedure on replacement of the same. The respondent consequently asked this court to dismiss the appeal for lack of merit.

Analysis and Determination

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions (**See Court of Appeal for East Africa in Peters –vs- Sunday Post Limited [1958] EA 424**). The appropriate standard of review established in cases of appeal can be stated in three complementary principles:

- i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;*
- ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and*
- iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.*

This being the first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified see **Selle & Another v Associated Motor Boat Company Ltd & Others [1968] EA 123**.

Article 169 of the Constitution, creates the Kadhi's court as a subordinate court in Kenya while Article 170 (5), confers jurisdiction on the Kadhi's court in the following terms:

“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 courts.” (Emphasis my own)

Furthermore, Section 5 of the Kadhi's Court Act, cap 11 Laws of Kenya, reiterates the jurisdiction of the Kadhi's Court as follows:

“A Kadhi’s court shall have and exercise the following jurisdiction, namely 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; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.”

The question of jurisdiction of the High Court in this matter therefore resolves itself in the holding of the Court of Appeal in **Re the Estate of Ismail Osman Adam (Deceased), Noorbanu Abdul Razak v. AbdulKader Ismail Osman, Mombasa Civil Appeal No. 285 of 2009** delivered on 5th December 2013 which upheld the choice of Muslim parties to submit to the Kadhi’s Court or to file succession proceedings in the High Court.

The Law of Succession Act, cap 160 Laws of Kenya, Section 2 (1) declares the Act to constitute the universal law of Kenya in respect of all cases of intestate or testamentary succession to the estate of deceased persons dying after the commencement of the Act and to the administration of their estates. However, Section 2(3) delivers a qualification worded as follows:

“(3) Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.

(4) Notwithstanding the provisions of subsection (3), the provisions of Part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim dying before, on or after the 1st January, 1991.”

Having said that I shall now delve into the crux of the matter. Under Islamic law one is entitled to inheritance by blood or marital relationship and religion as provided in **Qur'an: 4:11, 12 and 176 and Sunnah**. The shares are specific and entitlement automatic if the conditions are satisfied. The rational being fairness among beneficiaries for one knows not who is most beneficial to him or her.

“...Your parents or children - you know not which of them are nearest to you in benefit. [These shares are] an obligation [imposed] by Allah. Indeed, Allah is ever Knowing and Wise”. Nisa : 11

It is not in dispute that the deceased, **Bwanamkuu Bin Abdalla** was survived by the following:-

<u>Name</u>	<u>Status</u>
a. Zuhura Abdalla Shariya	- Widow (now deceased)
b. Mohamed Bwanamkuu Abdalla	- Son(now deceased-left children)
c. Ahmed Bwanamkuu Abdalla	- Son(now deceased-left children)
d. Faraj Bwanamkuu Abdalla	- Son(now deceased-left children)
e. Omar Bwanamkuu Abdalla	- Son(now deceased-no children)
f. Abdalla Bwanamkuu Abdalla	- Son(now deceased-no children)
g. Saada Bwanamkuu Abdalla	- daughter (now deceased-left children)
h. Rukiya Bwanamkuu Abdalla	- daughter (now deceased-left children)
i. Juariya Bwanamkuu Abdalla	- daughter (now deceased-no children)

It is also not in dispute that at the time of **Bwanamkuu Bin Abdalla** 's death he left the following unencumbered and available properties as particularized at para 4 of the Petition.

1. Land Portion No. LAMU BLOCK 1/217 measuring approximately 0.13 acres, registry map sheet no.180/4/NW/II.

2. 4 mud houses erected and or built on the same parcel/portion of land

I have considered the evidence, as well as the submission before this court. It is crystal clear from the record of the court that by time of the beneficiaries of the estate’s deaths, the estate of the deceased was not distributed and that some of the children, now deceased decided to appoint themselves caretakers of the estate which they in turn handed over the roles to their own children. Case in point the said **Ahmed Bwanamkuu Abdalla (deceased)**.

I find that there are only two issues for determination:

1. Whether the estate of Bwanamkuu Bin Abdalla (deceased) was properly distributed.

2. Are the two mud houses which are the bone of contention a part of the estate.

I shall now proceed to address each issue.

1. Whether the estate of Bwanamkuu Bin Abdalla (deceased) was properly distributed.

It is clear from the evidence on record as well as both parties concession that the estate of the deceased was never distributed at the time of his demise. There is also no evidence to suggest that the deceased had given any directions on how the estate should be distributed. It would appear that there was some kind of understanding between the children of the deceased on some type of distribution of the estate of the deceased that lasted throughout their lifetime and the same is now challenged by grandchildren of the deceased.

Finally, both parties concede that the parcel of land is indeed the property of the deceased and the same had never been legally distributed among the beneficiaries.

2. Are the two mud houses which are the bone of contention a part of the estate.

The appellant contends that the two mud houses on the aforementioned plot of land were sold to her and her brother by her father, now deceased, in 1983 before his death in 1988. The appellant produced a sale agreement dated 26.10.83 and marked as **exhibit FAB-2** as evidence of the sale transaction between herself, her two brothers and her father **Ahmed Bwanamkuu Abdalla (deceased)**.

However, it is clear from the evidence before this court as presented by both the Appellant and the Respondent as well as the Title deed for the aforementioned parcel of land, before this court that the parcel of land belonged to the deceased.

The legal burden of proof as set out in Section 107 of the Evidence Act, Cap. 80 of the Laws of Kenya is as follows: -

(1) Whoever desires any court to give judgment as to any legal right or liability dependent 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."

As such I find that such transaction did indeed occur however the same would not have been legal as I concur with counsel for the respondent, that the appellant's father (now deceased) would not have had capacity to sell the aforementioned houses to any other person as he lacked the capacity to do so and neither would have the appellant's had legal capacity to buy the said houses as they were still minors.

Further it follows that by the time the appellant's father built and transacted on the **Land Portion No. LAMU BLOCK 1/217** no succession proceedings had ever been filed in respect of the estate of the deceased thus the estate of the deceased had not been distributed. It will therefore not be necessary to belabor the point that any transaction on the estate of the deceased would have been null and void. Section 45 of the Law of Succession Act provides as follows:-

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

In the case of **Bahola Mkalindi v Michael Seth Kseme & 2 others [2012] eKLR** the court held that;

"The Law of Succession Act, Cap. 160 is concerned with the administration of the estate of deceased persons. The estate of a deceased person has been defined by the Act as property which the deceased person was legally competent to freely dispose of during his lifetime, and in respect of which his interest has not been terminated by his death."

Section 55 of the Law of Succession Act stipulates that:-

"No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property unless and until the grant has been confirmed as provided by section 71."

Having considered the evidence before me as well as the exhibits herein produced, it clearly emerges that Section 55 of the Law of Succession Act was not complied with before these properties were transferred. I therefore find that the same transaction was a nullity as the estate of deceased could only have been dealt with under the law of succession Act after his death and not otherwise.

Having said that it is important to note that Section 26 of the Land Registration Act, Act No.3 of 2012 provide as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

As both parties agree that the parcel of land did indeed belong to the deceased then it only suffices to conclude that it is part of the estate of the deceased which had never been distributed. In essence therefore, I find that the deceased was the proprietor of the said parcel of land and therefore all transactions thereafter are null and void as they were not done by the legal representative of the estate of the deceased.

I shall now turn to the issue of the two houses. It is the appellant’s contention that the same were built by her father (now deceased) after the demise of the grandfather who was the proprietor of the land. Not to mince my words this is clearly a case of intermeddling with the property of the deceased as the appellant’s father was never the legal representative of the estate of the deceased (grandfather) how then would he purport to transact and build on the deceased’s property. This then begs the question is the appellant and her brothers a bona fide purchaser for value? In the Uganda Court of Appeal case of **Katende v Haridar & Company Ltd** cited with approval in **Kenya High Court Case Of Lawrence Mukiri V. Attorney General & 4 Others [2013] eKLR** on who is a bona fide purchaser for value. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

“a. He holds a certificate of Title.

b. He purchased the Property in good faith;

c. He had no knowledge of the fraud;

d. The vendors had apparent valid title;

e. He purchased without notice of any fraud;

f. He was not party to any fraud.”

A cursory look at the evidence before this court it is clear that the appellant was never a bona-fide purchaser for value as ; firstly she does not hold a certificate of title, secondly she had no capacity to purchase the property at the tender age of 9 years, thirdly the vendor did not have a valid title as the same was still property of the deceased. The appellant’s contention that she bought the same from her father is neither here nor there.

On the issue of the statement of accounts of the rents on the properties I put my mind to **W. Musyoka** in his casebook on **the Law of Succession at page 581** states that:

“Where the assets have been misapplied by personal representatives and are traceable into the hands of a particular person, the law allows the beneficiaries entitled to such assets to follow them into the hands of the person holding such property.”

I believe this is exactly what the respondent is attempting to do as the legal representative of the estate of the deceased. I’m alive to provisions of Section 73 of the Probate and Administration Rules which provides that:

“73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

It must be noted that the object of the court is uphold substantive justice. It is my considered view that substantive justice will be done by ensuring that all the beneficiaries of the estate of the deceased are not left out when the proceeds of the suit property are shared and are given their share of the Estate in question. It is for that reason, that I invoke the inherent powers of this court granted under Article 159 of the Constitution, Section 74 of the Law of Succession Act and Section 73 of the Probate and Administration Rules and uphold the Judgment of the Hon. Kadhi.

Accordingly, I find that this appeal lacks merit for reasons stated and dismiss it. Each party shall bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF FEBRUARY 2021

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. Ms. Bakari holding brief for Aboubakar advocate for the appellant