



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARSEN**

**CIVIL APPEAL NO. 4 OF 2018**

**OMAR ATHMAN MAAWIYA.....APPELLANT**

**VERSUS**

**SOUD ATHMAN MAAWIYA.....1<sup>ST</sup> RESPONDENT**

**MOHAMED ALI ATHMAN.....2<sup>ND</sup> RESPONDENT**

**Coram: R. Nyakundi, J**

**Katsoleh & Company Advocates for the appellant**

**A.B. Olaba Advocates for the respondent**

**JUDGEMENT**

This is an appeal which arises from the judgment of the Kadhi's Court at Lamu delivered on 12.7.2018 in which the following declarations were made:

- (1) The legal heirs of the late Aisha Ali Fumo are her male and female children.**
- (2) The heirs and beneficiaries of the late Saada Athman Maawiya are her male and female siblings**
- (3) The extent of the two deceased estates are the two houses situated in Lamu Town.**
- (4) The Court has no jurisdiction to entertain the Mombasa house and therefore the prayer concerning it is dismissed with costs.**
- (5) No order is granted to any party for refund and/or account for the monies utilized by them for the last 23 years but rather the status quo to maintain**
- (6) The 2<sup>nd</sup> Respondent herein to claim his money alleged to have lent the Petitioner from the other civil courts.**
- (7) There be evaluation of the two deceases and the report submitted in one-month time.**
- (8) The 1<sup>st</sup> Respondent could not prove his claims on the portions alleged to have been given by his sister Mariam and VIS –a Vis.**
- (9) All the estates in question herein were not distributed in accordance to the Muslim law.**
- (10) The two houses to be distributed to the heirs of the late Aisha Ali Fumo & Saada Athman Maawiya.**
- (11) The mutual understanding enjoyed by the parties herein together with their siblings for the last 23 years is null and void**

The appellant was dissatisfied with the judgment and did prefer an appeal as set out in the memorandum of appeal as follows:

- (1) THAT the Hon. Principal Kadhi erred in law and in fact in not binding himself to the pleadings filed in court by the**

parties in this matter and deliberately mixing up issues.

(2) THAT the Hon. Principal Kadhi erred in law and in fact in concluding that the First Respondent illegally handled the Estate of Esha Ali Fumo, and particularly the house in Lamu, and failing to reprimand him.

(3) THAT the Hon. Principal Kadhi erred in Law and in fact in concluding that the First Respondent illegally benefited from the Estate of Esha Ali Fumo, and particularly the house in Lamu, and failed to address the clear intermeddling by the First Respondent.

(4) THAT the Hon. Principal Kadhi erred in law and in fact in making references to and relying on unfiled documents which were procedurally inserted in the court file despite the same being brought to his attention.

(5) THAT the Hon. Principal Kadhi erred in law and in fact in allowing and making references to and relying on uncertified documents which were also an procedurally inserted in the court file despite the same being brought to his attention.

(6) THAT the Hon. Principal Kadhi erred in law and in fact in not making an order that the said illegal documents be expunged from the record.

(7) THAT the Hon. Principal Kadhi erred in law and in fact in ignoring the fact that the First Respondent didn't consult the other beneficiaries in the manner of collecting and using the proceeds of the house in Lamu belonging to the Estate.

(8) THAT the Hon. Principal Kadhi erred in law and in fact in making orders that were not asked for by any parry contrary to the rules of pleadings and thereby displaying open bias against the Petitioner.

(9) THAT the Hon. Principal Kadhi erred in law and in fact in condemning the Petitioner to pay costs of the suit despite the clear injustice against him.

(10) THAT the Hon. Principal Kadhi erred in law and in fact that the First Respondent was still benefitting from the Estate and receiving procees from the Estate against the law thereby abetting illegality.

(11) THAT the Hon. Principal Kadhi erred in law and in fact in ignoring the fact that the house occupiued by the Petitioner had been bought by the Petitioner from the widow of his late sister and his brother Mohamed, a fact that the First Respondent admitted in court.

(12) THAT the Hon. Principal Kadhi erred in law and in fact in making the ruling contrary to the glaring principles of balance of probability.

Further supplementary grounds.

(1) THAT the Judgment made on the 12<sup>th</sup> April 2018 be set aside and Judgment entered for the Appellant

(2) THAT in the alternative, this Honorable Court do check the Honorable Kadhi's Court record again, and /or reassess the evidence therein and issue a ruling thereon.

(3) THAT the costs of this appeal be paid to the Appellant by the Respondent

The appeal was disposed off by way of brief written submissions. The appellant's submissions are dated on **22.11.2019** and those of the respondents on **10.3.2020**.

The appellants case on appeal is premised on the facts that the dispute revolves around two houses one being plot number 876 in Mkomani within Lamu County and the second house without land situated in **plot number 871 Section (i) Mainland North**, Malindi Road. In Mombasa, within Mombasa County. That the two assets belonged to Asha Ali Fumo now deceased and is the biological mother of the appellant and the 1<sup>st</sup> respondent is amongst the beneficiaries of the deceased estate. The appellant further contended that the house in Mombasa erected in plot Number 871, the deceased never made known before her demise by exercising a transfer in favor of the appellant, 1<sup>st</sup> respondent and 2<sup>nd</sup> respondent father who is now deceased to be held in equal shares. That the appellant is entitled to the proceeds in the Lamu House commonly under lease to foreign nationals. It was also submissions by the appellant that he was entitled to benefit from the house in Mombasa by virtue of the transfer documents dated 25.9.1984. The appellant prayed for the judgment of the Kadhi's court to be set outside and fresh distribution of the estate be undertaken in the interest of justice.

The respondents on the other hand submitted that the appeal lacks merit on the following reasons. In regard to **plot no 871 Section 1 Mainland, Malindi Road** within Mombasa County, the Kadhi's court judgment stated correctly that it had no jurisdiction to entertain the claim for it's within the scope of Environment and Land Court. Secondly, the property particularized as **Plot No. 876 Nkumani; Lamu** which formed the estate of the deceased was to be valued to form a basis within which to distribute the estate to the beneficiaries.

#### **Evidence at the trial**

According to **Omar Athinani Maawiya (PW1** and **Mohamed Athamn Maanuya (pw2)** both of whom do profess and are versed in Islamic religion testified on the chronology of event with regard to the intestate estate of the deceased. Pw1 informed the court that the house in

Mombasa was built by the deceased save that they did contribute the money to have it constructed. That later the deceased wrote a letter selling the house to **Omar Maawiya, Ali Athman, Mawiya and Said Athman Maawiya.**, PW1 further told the court that **Soud Maawiya** took control of the house without sharing any proceeds which he estimated to be Ksh 800,000 within a period of 13 years. The same house was later to be given to **Ali Athman** who also had control of it for 10 years without any benefit accruing to him. In PW1 testimony he acknowledged receipt of Ksh. 400,000.00 from **Mohamed Ali Athman** as rent from the Mombasa house. He therefore claims a share of the proceeds which have accumulated from the lease of the house since the death of the deceased. As for the Mombasa property (PW1) testified that the house belonged to the deceased, and therefore he is entitled by virtue of being a dependant with a right to inherit a share in the Estate of the deceased.

The evidence given by PW2 materially and substantially corroborated that PW1 on the status of the estate and the grievances raised as to its management and subsequent distribution following the death of the deceased.

It was the respondent case in **Soud Athman Maawiya (DW1) and Mohammed Ali Athman (DW2)**. That the house in Mombasa stands on a piece of land which (DW1) contributed to its construction. The house was leased out to a foreign tenant with effect from 1.9.1999. As regards the Lamu house, DW1 and DW2 testified that they are entitled to the portions of the said property.

It was also the evidence by DW2 that there was no loan agreement on the 400,000 with the 1<sup>st</sup> petitioner although he has never demanded the refund of the money. He also told the court that Omar did not contribute the purchase of the Mombasa House. That is the brief evidence brought out by the parties

### **Determination**

The above scenario gave rise to the impugned judgment of the Kadhi's Court Relying on the principles in the case of **Ibrahim Ahmed v Halima Gulet C.A Number 128 of 1967**.

**“The question for this court is whether the decision below is reasonable and can be rationally supported, if so the first appeal court has no mandate to interfere with its findings. The appeal court though has a duty to evaluate and examine the evidence a fresh, it may not in effect try the case denovo and decide for the party. Thus should he win the case and turns on the issue to one entitles on the credibility of witnesses, the weight of the evidence is best judged by the court before whom the evidence is given and not by a tribunal which merely reads a transcript of the evidence”**

In this appeal although the appellant impugned the judgement of the lower court based on many grounds in the memorandum of appeal, the issues at stake are simple and can be reformulated as follows:

**(i) Whether the question on the Lamu property was determined with the finality by the Kadhi's court in respect to distribution to the beneficiaries of the estate**

**(ii) Whether the Kadhi's court in dealing with the claim on intestate estate with regards to plot no 871, Section 1 Mainland, Road in Mombasa was right in declining to grant the orders for want of jurisdiction.**

Turning to first issue, so the trial court found as a fact that Lamu property was free property under **Section 3** of the Law of Succession capable of being distributed to the beneficiaries of the estate identifiable under **Section 29** of the aforesaid Act. However, the only rider being that on the basis of the evidence which had been adduced. It's clear the parties professed Islamic faith as well as the deceased. In arriving at the conclusion on distribution of the property located in Lamu. The trial Court relied on the evidence of the petitioner and the alleged rejoinder given by the respondents. The principal Kadhi took into accounts that the legal heirs of the late Aisha Fumo would be both her male and female children. The authenticity of the evidence of these witness showed that there were simmering issues on statement of account of the monies which came with possession of the respondent for the last 2-3 years and the money loaned to the 1<sup>st</sup> petitioner ascertained to be Ksh400,000. To begin with the Lamu property remains undistributed for the due to the parties failure to comply with the condition of a valuation report of the intestate property of the deceased. It is fundamental to note that the court ordered for such valuation to be undertaken and submitted within a period of one month. I have read the records, there is no evidence to show that parties complied with the order of the court on valuation.

In my opinion the appellant cannot purport to approach this court for a remedy to seek new reliefs as if he was not aware that the foundation of the impugned judgment largely remains unenforced.

Aggrieved as to the benefits that accrued to some of the siblings at the expense of the rest of the dependants distribution that portion of Estate by dependant in the court the valuation report, strictly, speaking this is a proper case where the appropriate scheme on distribution of the estate could have proceeded in respect to the Lamu property pending resolution of the legal tenure as to the ownership of the property referred as **plot No. 871 – Section 1 Mainland North Mombasa**.

It follows therefore to that extent the claim on the Lamu property had not ripened to constitute an issue on appeal to the court. In that case, the inventory of the estate was property captured by the appellants and the respondents on legitimate heirs. What the trial court pointed out were matters arising towards the mode of administration on the uncontested property located at Lamu whereas the Mombasa plot was to remain a subject of determination before the ELC Court.

On the issue of accounts in the judgement of the trial court the findings made were that status quo be maintained with regard to accounts and receivables of the estate in the last 23 years. In my view there are some important exceptions to these generations. Equity is a normative concept concerned with equality, fairness and social justice which formed the fierce discourse in the proceedings before the Kadhi's court. Therefore, it was upon the Kadhi's court to determine what is the place of equality and equity in the inheritance of the estate left behind by the deceased. Calling for status quo is a concept of monumental emptiness given the conflicting evidence that arose in the trial. Equality and

equity and non-discrimination are central to the corpus of rights guaranteed under **Article 27** of the Constitution. The measure of equality and non-discrimination in **section 36,37, 38 and 40** of the Law of Succession between heirs when it comes to the distribution of intestate estate, is a time honoured principle.

Reference was made to plot No. 871 –Mombasa. I derive considerable support for this issue from the decisions of the court of Appeal and Supreme court in the cases of **Owners of Motor vessel lietican v Caltex oil (kenya) Ltd 1989) Eklr, Samuel Kamau Macharia & others v Kenya commercial bank Ltd & 2 others (2012)EKlr**

In the instant case the Kadhi's court jurisdiction is limited to personal status, marriage, divorce or inheritance in which all the persons profess the Muslim religion and submit to that jurisdiction. **(See Section 5 of the Kadhi's Court Act)**. From the judgment being challenged by the appellant, I agree with the decision that jurisdiction on immovable property referred as **plot 871 Mainland** though ancillary to the succession cause being litigated before the Kadhi's court, it was one which he could not render a judgment that is binding on the parties, for want of jurisdiction.

It must be observed that the Law on jurisdiction of the court is neither procedural Law nor substantive Law. It has nothing to do with either the creation or recognition of substantive rights. It is simply a limitation on the power of the court to determine the claim as a court it's an observable fact that the trial court lacked jurisdiction to adjudicate on **plot no. 871 Mombasa**.

In my view on this point, the principle Kadhi exercised his discretion and in accordance with the correct legal principles. He cannot be impugned on this ground on the appeal bearing in mind the guidelines in the **Mbogo v Shah (1968) E.A 93**. In that respect the file is remitted back to the principal Kadhi Lamu to consider the following:

**The issue on the pending valuation report of the intestate estate of the deceased which was to be submitted to the court in a months' time with effect from 12.4.2018. The Kadhis Court will be at liberty in the matter to move and determine the shares and distribution of the estate in relation to the plot in Lamu. The litigation resulting in this appeal has its roots in the principles of equality and equity in the distribution of the net intestate of the deceased. Taking equality and equity as a guiding principles, there are existing emerging issues from the evidence adduced before the Kadhi's court attracting explicit attention in the administration of the estate. As a practical direction, I would with immediate effect allow the appeal partially in a manner that demands of this court to remit the file to the principal Kadhi at Lamu for a retrial on uncontested estate property at Lamu. That upon receipt of the evaluation report the distribution of the estate be undertaken in consonant with the principles of equality and equity.**

There shall be no orders as to costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 26<sup>TH</sup> DAY OF FEBRUARY, 2021**

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**R. NYAKUNDI**

**JUDGE**

**This Ruling has been dispatched electronically to the respective email of the advocate in the matter.**