



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL 10 OF 2020**

**BASILA SULEIMAN.....APPELLANT**

**VERSUS**

**ZAMZAM HUSSEIN.....RESPONDENT**

***(Being an appeal from the Ruling of Hon. Mr. Abdulhalim H. Athman, Principle Kadhi delivered on 16.1.20 in Kadhi Court Succession Cause No. 26 of 2018)***

**JUDGMENT**

**Introduction**

1. The Court heard the appeal herein with the aid of two assessors pursuant to section 65 (1) (c) of the Civil Procedure Act, which provides for appeals to the High Court from original decree of a Kadhi's Court as follows:

*“c) from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or **two other Kadhis shall sit as assessor or assessors.**”*

2. For the hearing of this appeal, I sat with Principal Kadhi A. J. Ishaq Hussein of Nairobi Kadhi's Court and Senior Resident Kadhi Muriithi Muriuki of Meru Kadhi's Court, both of whom gave a unanimous opinion, which, although not binding on the court (see criminal law and procedure analogy in *Kihara v. R* (1986) KLR 473, 479) I agreed with and considered for guidance in concluding the judgment and orders made herein.

***The Principles for consideration of a first appeal***

3. The court has considered the evidence before the trial court as required of a first appellate court see *Peters v. Sunday Post Limited* (1958) EA 424 and *Selle & Anor. v. Automobile Associated Motor Boat Company Ltd.* (1968) EA 123, bearing in mind that on a first appeal the appeal lies on both law and fact; see section 65 (b) of the Civil Procedure Act [as read with Article 169 (1) (b) of the Constitution as discussed in *Siad Adan Bonaya v. Hussein Kuno Tano and Anor.*, MERU HCCA NO. 43 of 2019.

***The appeal before the court***

4. This appeal arises from the Ruling of Hon. Mr. Abdulhalim H. Athman, Principle Kadhi delivered on 16.1.20 in Kadhi Court Succession Cause No. 26 of 2018 in which the trial court find that Plot Numbers 253, 252 A and 252 B are one and the same property and be shared equally between the Appellants and the Respondents herein. The Appellant was aggrieved by the said judgment and has filed this appeal.

5. Her Memorandum of Appeal filed on 12<sup>th</sup> February, 2020 and raises the following grounds of appeal:

a) *“The Learned Kadhi failed in fact and in law to consider any of the compelling evidence adduced by the Appellant at the trial Court.*

b) *That the Learned Kadhi erred in fact and law when he failed to find that the appellant was the sole beneficiary of the estate of Asha Farah Mohamed now deceased.*

c) *That the Learned Kadhi erred in fact and in law by introducing new parcels of land that did not necessarily form the original dispute thus expanding the deceased's estate available for distribution at all times this being to the very detriment of the applicant.*

d) *That the Learned Kadhi erred in fact and law by shifting the burden of proof to the applicant as to the formula used in her having*

her name as the sole beneficiary to the deceased's estate property.

e) That the Learned Kadhi erred in fact and law by admitting a letter that had been challenged at the weight of its authenticity and used the said letter to make a determination adverse to the appellant.

f) In the further result, the Learned Kadhi erred by disregarding and failing to take into account credible and reliable evidence presented by the Appellant on documentation relating to the deceased's estate such as payment receipt save to add that some were even in her name.

g) All in all the Learned Kadhi so misdirected himself on matters of both Law and fact as to occasion a miscarriage of justice against the Appellant.

h) That in light of the foregoing the Learned Kadhi failed to do justice before him in the case at hand.”

6. The appellant prayed for the appeal to be allowed and the judgment of Kadhi's Court delivered on 15<sup>th</sup> January, 2020 be set aside and in the result, the Appellant's claim as pleaded in Kadhi's court be allowed. She also prayed for costs of this appeal.

### **Issue for determination**

7. After considering the appeal, the record and submissions, we find that the issue for determination is *whether the learned Principle Kadhi misdirected himself on the matter of law and fact as to occasion miscarriage of justice against the appellant*. See the test for appellate interference with exercise of discretion by a trial court in **Mbogo v. Shah** (1968) EA 93.

### **DETERMINATION**

8. Firstly, the learned Kadhi misdirected himself on matters of law in a sense that he enjoined *suo moto* and granted leave to the respondent to file reply some 23 days after the judgment, offending principle of finality.

9. It is a trite law that rules of procedure are, intended to, be a handmaiden to the administration of justice, the rules binds the court, advocates and litigants. Pursuant to section 8(1) of the Kadhis' Courts Act, a court is never empowered to order the joinder of a party *suo moto* especially a party with no standing at the stage where the joinder will present practical problems at post judgment phase.

10. The record reflects that the Honorable Kadhi delivered his judgment on 3<sup>rd</sup> September, 2018. The appellant appeared before the trial court on 29<sup>th</sup> September, 2018 registering her difficulties in realizing the fruits of judgment, but the trial court went behind its decree. As a result enjoined the respondent *suo moto* and granted her leave to file reply (post judgment) on the face of Appellant's evidence corroborated two other witnesses.

11. We consider that the court function was done and the attempt to open the proceedings *suo moto* went against the principle of finality as espoused in the doctrine of *functus officio* deep rooted in Islamic law where it's stated that, 'once a decision is rendered by a Kadhi (Judge) such decision is final and conclusive unless the decision is subject to appeal or review. See Mausua al fiqh al kuwitiyya (Encyclopedia of Islamic Jurisprudence) vol. 33 p. 338 read together with Al Ihkam fi Tamyiz Al Fatawa An Al Ahkam Wa Tasarrufat Al Qadi Wa'l-Imam (The Criterion for Distinguishing Legal Opinions from Judicial Rulings and the Administrative Acts of Judges and Rulers) p. 64.

12. Secondly, the learned erred in fact and law by shifting the burden of proof to the appellant, contrary to the Prophetic sayings, **“If people were given in accordance with their claims, men would claim the wealth and lives of other people. Rather, the burden of proof is on the claimant...see Al Bukhari.**

13. The records reflects that on 16<sup>th</sup> October, 2018 when the matter come for an inter-parte hearing the appellant stated that the suit property belonged to her mother Asha Farah but wrongly registered in the name of her sister Fatuma Hussein Ismail objecting to equal distribution of the suit property between her and the respondent. On the other side, the respondent confirmed that the suit property belonged to her grandmother, Asha Farah, initially but later the said that the property was gifted to her mother Fatuma Hussein Ismail but she was not aware if the property was registered in her mother's name.

14. Undoubtedly, the respondent's admission that the property belongs to her grandmother Asha Farah was corroborating the appellant's version of truth, since the admission raised by the respondent shifted the burden of proof, to adduce evidence to prove her assertion that the suit property was gifted to her mother, a claim which was never supported by any evidence. Section 109 of the Evidence Act whose application is permissible under section 6 of the Kadhi's Court Act provides as follows:

#### **“109. Proof of particular fact**

*The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”*

The respondent had the burden of proof on the allegation of fact that the suit property had been gifted to her mother, which burden she never discharged.

15. The trial court's decision that the appellant was to bear the burden of proof of respondent's claim which was unsupported on the facts is

premise on a wrong principle of law in Islamic Sharia as well as the law of evidence which by its section 107 and 108 of the Evidence Act, the burden and incidence of proof are on the Plaintiff. The trial court's holding to the contrary must be set aside.

16. In conclusion, on the merits of the facts in the record of the trial court, we are of the respectful view that the orders made by the trial court cannot not be sustained.

**Orders**

17. Accordingly, for the reasons set out above, the court makes the following orders:

1. The appeal is allowed and the trial court judgment of 15<sup>th</sup> January 2020 is set aside and the appellant's claim in the Kadhi's court is allowed as prayed,
2. The Respondent shall pay the costs of the appeal to the appellant.

*Order accordingly*

**DATED AND DELIVERED ON THIS 19<sup>TH</sup> DAY OF MARCH, 2021.**

**EDWARD M. MURIITHI**

**JUDGE**

**KADHI ASSESSORS:**

*(pursuant to section 65 (c) the Civil Procedure Act, cap. 10)*

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**HON. A. J. ISHAQ HUSSEIN**

**PRINCIPAL KADHI**

**UPPER HILL KADHIS COURT**

**NAIROBI**

.....

**HON. MURITHI N. MURIUKI**

**SENIOR RESIDENT KADHI**

**MERU LAW COURTS.**