



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY APPEAL NO. 28 OF 2019

IN THE MATTER OF HE ESTATE OF GOR OMAR NGWALI (DECEAED)

AGO.....APPLICANT

VERSUS

AGO

HMK

OGO

FOG

HGO

EGO

TGO.....RESPONDENTS

AND

ZSH.....INTERESTED PARTY

(Being an appeal from the Ruling of Hon.Kadhi Sheikh

Mohamed Mwambele delivered on 4th April 2019 and 28th

June 2019 In Mombasa Kadhi's court petition No 84 of 2014)

JUDGMENT

1. Vide succession petition dated and filed on 23rd April, 2014, AGO a daughter to the deceased GON petitioned the Khadhi's court at Mombasa against AG a son to the deceased seeking orders as follows;

- (a) Determination of the entire estate of the deceased estate, heirs and shares**
- (b) All documents of ownership be deposited to court.**
- (c) Distribution of the estate to the legal heirs according to Islamic faith.**

2. Among the listed survivors to the deceased were;

- (1) HMK - widow
- (2) AG - daughter

- (3) LGO - daughter
- (4) CGO - daughter
- (5) MGO - daughter
- (6) HGO - daughter
- (7) EG - daughter
- (8) FG - daughter
- (9) BG - daughter
- (10) PGO - daughter
- (11) MGO - daughter
- (12) AG - son
- (13) OG - son
- (14) SG -son

3. According to the petition, the following assets were listed as comprising the estate;

- (1) A Swahili house with plot at Guraya Mombasa Plot No 1/MN/***
- (2) A Swahili house with Plot at Kisauni, Makaburini, Mombasa**
- (3) An incomplete house with plot at Kisauni, Makaburini Mombasa**
- (4) Swahili house with pot at Mwembe Makumbi in Zanzibar**
- (5) A fishing boat in Zanzibar**

4. In his reply to petition, AGO (the respondent) filed a replying affidavit to the petition dated 19th May, 2020 thereby claiming that the petitioner AGO, CG and MG were not children to the deceased and that their mother had long divorced with the deceased. With regard to the listed properties, he (respondent) claimed that the petitioner had failed to mention three stalls adjacent to Guraya house.

5. The matter proceeded to hearing viva voce and the learned Kadhi Hon Abdulahim H. Athman delivered his judgment on 29th January, 2015 thus recognizing all the beneficiaries listed in the petition as entitled to a share to the deceased's estate. The court found that the children the respondent was claiming not to be the deceased's children among them the petitioner were children to the deceased as they were born before their mother divorced with the deceased. According to Hon.Kadhi, this was evidenced by their birth certificates and the divorce certificate between their parents all of which were tendered in evidence during the hearing by Pw 1 AGO who also stated that the three shops (stalls) were not part of the estate?

6. The honorable Kadhi further held that the widow was entitled to 16/28, each son 14/28 and each daughter 7/25 share. The court further found that the deceased had three houses. The court however made some observation on certain assets which it stated needed further clarification. Among the issues requiring clarification were; firstly, whether the deceased had distributed his estate while alive by giving Kisauni property to H family (house) and G house to R family (house). Secondly, whether P and M were children sired between H and the deceased or the deceased and the Zanzibar wife who is deceased.

7. Subsequently, parties presented a proposal on distribution of the estate. Vide a ruling delivered on 15th October, 2015, the court recognized that the deceased was survived by one widow and 13 children and that he had three families (houses) among them H and R family who were residents in Kenya and a 3rd wife resident in Zanzibar. That H family comprised of one widow, two sons and 4 daughters hence their joint share was equivalent to 62.5%. The court also found that R family comprised of (1) son and (4) daughters representing 42/112 equivalent to 37.5% share. That P and M the Zanzibar family had already been provided for and benefited from Zanzibar property.

8. The properties having been shared out, the court in its ruling directed as follows.

- (1) H family be issued with Guraya property (without three shops) valued at ksh 12,200,000**
- (2) R family is issued with Kisauni property plot No MN/1/******
- (3) Kisauni property plot No MN/1/**** be sold by public auction or private treaty at not less than ksh 5,000,000, and the**

proceeds shall be distributed to fill in the balance of the heirs' shares.

(4) Alternatively, the Kisauni property plot no MN/1/** be shared jointly to the two families or it could be rented and proceeds distributed to the families with the H family getting 58.5% and Rehema to get 41.5%.**

9. Vide application dated 27th June, 2016, HMK, OGO, SGO, FGO, HGO, EGO and TGO claiming to be heirs of the deceased thereof and therefore interested parties sought orders seeking the honorable court to set aside the judgment entered on 29th January, 2015 and all consequential orders and that the petition be heard afresh as they were never involved from the word go.

10. On 22nd September, 2016 parties agreed by consent to compromise the application of 27th June, 2016 as follows (see page 221 of record of appeal.)

(1) The R family to get the house on plot No 6404/** valued at Ksh 5,000,000

(2) The H family to get the house on Plot No 6405/1/** valued at Ksh 7,000,000

(3) G house to be sold and proceeds distributed to heirs

11. On the same day, AGO (the respondent) proposed to be given priority to buy the G house. The court then adopted the consent by parties and directed that the sale of the Guraya house be stopped for the time being. The respondent AGO was given 4 months within which to look for funds and purchase the house failure to which the house to be sold and proceeds shared out to the heirs.

12. The matter was then listed for 23rd October, 2016 when the court delivered what it referred to as a compressive ruling based on the recorded consent and valuation of the properties. The court thus directed as follows;

(1) The H family comprising of one (1) widow (2) sons and (4) daughters their joint share is 62.5% equivalent to 70/12

(2) The R family comprising of (1) son and (4) daughters a joint share of 42/112 equivalent to 37.5%

(3) The share of the widow 12/5%

(4) The share of the daughter 6.3%

(5) The share of the son 12.5%

13. The court further directed that the G house was valued at Ksh 13,000,000 but extension worth kshs 800,000 belong to LG. The respondent's share in this property was calculated at kshs1,525,000. The respondent (AGO) was directed to pay kshs10,675,000 plus Ksh 800,000 within 4 months, failure to which the property to be sold at kshs13,000,000.

14. The distribution of the sale proceeds out of G house was worked out as follows; each daughter kshs 667,187; each son kshs1,334,375 and the widow kshs 1,334,375. Latifa to get an additional kshs 800,000 being the value of the extension on the property.

15. On 20th March, 2017 parties appeared in court and the respondent AGO indicated that the G house was to remain as a family house. AO shifted goals and demanded that all properties be sold and proceeds shared out. The court however insisted on compliance with its orders of 23rd October, 2016.

16. Vide a Notice of Motion dated 24th April, 2017, the interested parties sought for orders that HMK and LGO be appointed to sign all documents for the sale of the Plot Title No Mombasa/Block XVI/**** as legal representatives of the estate of GON (deceased). The court considered the application on 25th April, 2017 and allowed the same. The property was subsequently sold to one Z at Kshs 13,000,000.

17. Later, by a Notice of Motion dated 31st March, 2017, Ali Gora Omar sought the court to set aside the orders of 23rd October, 2016 and urged the court to distribute the estate as per the orders of 15th October, 2015. That stay of execution orders to issue against the orders of 23rd October, 2016 Pending hearing and determination of the application and that in the meantime, he be appointed as the administrator of the estate.

18. Upon considering the application, the court certified it urgent and granted stay of execution orders pending interpartes hearing. Before the application could be heard, the interested parties also filed an application dated 27th September, 2017 seeking orders that the respondent one AG be ordered to vacate and hand over vacant possession of plot title No. Mombasa /Block XV/**** to one ZHSH who had purchased the property.

19. The application dated 27th September, 2017 was canvassed before Kadhi Khamisi who delivered a ruling on 9th February, 2018 thus holding that in the judgment delivered on 29th January 2015 all issues were not canvassed as the existence of the assets was not ascertained and that all heirs were not considered. That in the interest of justice the entire assets be revalued a fresh by a government valuer. The court directed that PGO and MGO be call to appear in person before the Honourable court and LG to produce proper documentation to the stall adjacent to G house. That the sale agreement of the G property dated 5th May, 2017 was defective as it did not incorporate the wishes of all beneficiaries. The court suspended the sale of G house pending eventual distribution of the estate. The court went further to dismiss the

application of 27th September, 2017 vacated orders of 20th March, 2017 and 25th April, 2017.

20. On 15th May, 2018 under unclear circumstances, the Hon. Khamis made directions granting the respondent AGO powers to administer the estate and the affairs of the house at Guraya on Plot No. MSA/Block XVI/**** pending the official sale of the property and final determination of the suit.

21. On 1st August, 2018, the court again revoked the sale of the house at G to ZSHS on grounds that the sale did not involve all heirs/beneficiaries. The land Registrar was directed to cancel the transfer of the said property to Z. The court then ordered all beneficiaries to attend court on 30th August, 2018 for further directions.

22. Subsequently, on 31st January, 2019, ZSHS moved this court seeking to review and set aside the orders of 15th May 2018 and 23rd May 2018. She further sought orders directing the respondent AGO to vacate G property arguing that she bought the property pursuant to a court order and transfer duly effected.

23. Upon considering the said application dated 31st January, 2019, the Hon Kadhi Juma ali Abdallah rendered himself as follows on 4th April, 2019; the respondent Awas given an opportunity to purchase the house but failed to do so hence has no power to stop the sale; that the applicant had demonstrated that the court had infringed her fundamental rights by issuing orders which affected her in absentia; the respondent is occupying the property at the expense of all beneficiaries. The Hon Kadhi allowed the application and directed the applicant to pay or deposit kshs 13,000,000 in court for distribution to heirs. The respondent was granted 60 days to vacate the premises.

24. Aggrieved by the said ruling, Ali Gora Omar moved the court via the application dated 7th May, 2019 seeking orders to vacate all consequential orders of 4th April, 2019 by Hon Juma Ali Abdalla; that the court to appoint a government valuer to value the property a fresh and that all heirs to the estate be involved among them Pili and Hawa.

25. The court in its ruling of 28th June, 2018 which I believe is an error and should read 28th June, 2019 held that, there was no discovery of new evidence to warrant review of the orders of the court.

26. Dissatisfied with the said ruling, AGO (hereafter the appellant) filed a Memorandum of Appeal dated 25th July 2019 citing 17 grounds of appeal challenging the ruling and orders dated 4th April, 2019 and 28th June 2019 as follows;

(1) The honorable Kadhi erred in law and fact by unfairly discriminating against the appellant even though being one of the beneficiaries of the estate of GON as opposed to the 8th respondent.

(2) The honorable Kadhi erred in law and fact by failing to consider that the appellant was in actual possession of the suit property hence any adverse orders would greatly prejudice him notwithstanding having the right to purchase the suit within reasonable payment plan.

(3) The honorable Kadhi erred in law and fact by failing to consider that no valuation of all the properties of the estate has been determined.

(4) The honorable Kadhi erred in law and fact by unfairly disallowing the applicant's notice of motion application dated 9th November, 2018 when in actual fact that is not the only property of the deceased.

(5) The honorable Kadhi erred in law and fact by unfairly directing the appellant to vacate the premises within 60 days notwithstanding that the interested party had only paid 10% of the purchase price

(6) The honorable Kadhi erred in law and fact by unfairly basing his ruling decision on one property only notwithstanding that the deceased had other properties whereof the respondent have interest.

(7) The honorable Kadhi erred in law and fact by unfairly failing to appreciate that the suit property is the appellant's home and any adverse order would greatly affect the appellant.

(8) The honorable Kadhi erred in law and fact by unfairly allowing the applicant's notice of motion application dated 9th November, 2018 when in actual fact that is not the only property of the deceased.

(9) The honorable Kadhi erred in law and fact by unfairly disallowing the applicant's notice of motion application dated 7th May 2019 which sought to bring to the attention of the honorable court that there were other properties of the Estate namely; Plot No. MN/1/** CRNo. 24*** (Kisauni) Plot No MN/1/**** Cr No. 245*** in Kisauni and plot No MSA/Block XVI/**** which form part of the estate hence ought to be administered together.**

(10) The honorable Kadhi erred in law and fact by being selective and/or unfair for failing to consider that the respondent had approached the court with unclean hands by failing to disclose to the honorable court that there were other beneficiaries left out namely PG and HG.

(11) The honorable Kadhi erred in law and fact by failing to perceive that failure to include the other properties was deliberate on the part of the respondents as they are in occupation of the other properties.

(12) The honorable Kadhi erred in law and fact by being selective and/or unfair for failing to order that all the defendants to give account for all the assets of the estate in their possession.

(13) The honorable Kadhi erred in law and fact by wholly relying on the evidence adduced by the respondent yet disregarding the weighty evidence by the appellant.

(14) The honorable Kadhi erred in law and procedure in failing to consider that the purported sale and transfer was unlawful and void by selling the property to the interested party when there was subsisting order stopping sale during the pendency of the suit.

(15) That the honorable Kadhi erred in law and in disallowing the appellant's application dated 7th May, 2019 without considering the adverse effect the said order has on the welfare of some members of the estate.

(16) That the honorable Kadhi erred in law and fact by failing to consider that the appellant has incurred costs in repairing the premises and any other costs.

(17) That the honorable Kadhi erred in law and in fact by failing to appreciate that the appellant stays in the house and/or premise hence imperative that he ought to be given the opportunity to purchase the property within a reasonable timeline.

27. He therefore prayed for orders declaring that;

(1) The appellant herein is a beneficiary of the estate of the deceased and also be enjoined as an administrator of the estate.

(2) The estate of the deceased be valued as a whole by a government valuer and/or in the alternative a private valuer agreed on by all beneficiaries/parties accordingly and respectively.

(3) That the interest of the interested party be extinguished in the plot known as Mombasa/Block XVI/** in G Mombasa County whereof all the transfers/transactions in her favour be cancelled or declared null and void abinitio and in the alternative the property be reinstated back to the estate of the deceased.

(4) The estate of the deceased be distributed as a whole and under the Islamic law.

(5) That the deposit paid by the interested party be declared as a liability to the estate of the deceased GON.

(6) That an order be issued enjoining PG and HG as beneficiaries of the estate of the deceased.

(7) That upon valuation of the entire estate as a whole each party be given the 1st priority to purchase the property in their possession and use accordingly.

28. To canvass the appeal, parties agreed to file written submissions.

Appellant's submissions.

29. Through the firm of Marende Nachesa and company Advocates, the appellant herein one AGO filed his submissions on 3rd May, 2021. The appellant basically adopted the grounds of appeal. He submitted that he was denied a chance to purchase G property yet he has been staying in the same property. He contended that, the respondents intermeddled with the estate by selling the estate before conclusion of the succession proceedings.

30. It was contended that the Hon Kadhi did not consider other heirs and failed to order for valuation of all properties for fair and equitable distribution of the estate to all heirs among them Pili and Hama who were excluded.

Respondent's submissions

31. Through the firm of Mokaya and company Advocates, the respondents filed their submissions on 17th March, 2021. They contended that distribution of the estate was done way back on 23rd October, 2016 in which the estate was equally distributed amongst the heirs as per the Islamic law. That throughout the proceedings, the appellant had participated in person or through a lawyer.

32. It was further contended that the appellant is forcefully occupying the disputed property thus resisting its sale to the detriment of other beneficiaries. That the appellant was on 23rd October, 2016 given an opportunity to buy the property on priority within 4 months but failed. They asserted that the sale of the property to the interested party was done through a court order and that the sale was not complete due to repeated objections. They opined that the appellant was not opposed to the mode of distribution of the rest of the properties yet he is resisting sale of one property.

Interested party's submissions

33. The interested party filed her submissions through Khalid Salim advocates on 20th April, 2021 thus submitting on two issues as follows;

(1) Whether the estate of the deceased was distributed to all beneficiaries of the deceased;

(2) Whether this court should nullify the sale and transfer of the property known as MSA/Block XVI/** situate in G.**

34. The interested party basically supported the respondents' submissions thereby urging that the sale of the property was lawful as it was executed pursuant to a court order after the appellant failed to purchase the property on priority basis. She claimed that she has already paid a deposit of 10% and was ready to pay the outstanding balance taking into account that she has already been registered as the owner of the property.

Analysis and Determination.

35. This is a first appeal. As the first appellate court, this court is duty bound to re-examine, re-analyze and re-consider the evidence tendered before the trial court and arrive at an independent finding, conclusion and determination without losing sight of the fact that the trial court had the advantage of seeing and listening to the witnesses for purposes of assessing their demeanor. See **Mbogo V Shah (1968) E.A 166 and Selle v Associated Motor boat (1968) E.A 123** where the court held that;

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court is by way of re-trial and the principles upon which this court acts in such appeal are well settled. Briefly put, they are that this court must consider the evidence, evaluate it itself and draw its own conclusions though it should also always bear in mind that it has neither seen or heard the witness and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if embraced based on the demeanor of a witness is inconsistent with the evidence in the case generally”

36. I have already given a factual background regarding this appeal. I have considered the record of appeal and submissions by both counsel. The appellant cited 17 grounds of appeal which generally amounts to an appeal against the original judgment delivered on 29th January, 2015 and subsequent orders made on 15th October, 2015 and 23rd October, 2016 which orders are not the subject of the appeal herein. The appellant in submission merely adopted the grounds of appeal and only submitted generally on six issues namely;

(1) He was not given an opportunity to buy the property in question.

(2) The property in question was not valued before sale

(3) Sale of the property was done before completion of the succession proceedings hence intermeddling with the estate.

(4) Some heirs to the estate were not consulted.

(5) Estate was not shared out in accordance with Islamic law

(6) The court failed to consider other properties in distributing the estate.

37. I must from the onset make it clear that the appeal herein is challenging two sets of orders made on 4th April, 2019 and 28th June, 2018 which I believe should read 28th June, 2019 and not the judgment of 29th January, 2015 and orders of 15th October, 2015, and 23rd October 2016 which are still intact and have not been challenged. The appellant cannot use the platform of challenging orders of 28th June, 2018 (sic) and 4th April, 2019 to challenge and overturn through the back door the original judgment and its consequential orders made on 15th October, 2015, and 23rd October 2016 which dealt with the issue of determination of assets and heirs of the estate plus its distribution.

38. Basically, the appeal herein revolves around sale of one property which is contested and the rest of the assets being raised are just but an afterthought and therefore I will not attempt to address grounds of appeal which are irrelevant to the appeal herein.

39. The grounds of appeal herein in my view can be condensed into the following issues for determination;

(a) whether the honorable court properly dismissed the review application dated 7th May, 2019 vide its ruling dated 28th June, 2018 (Sic) by finding that the appellant had failed to establish the grounds for review of the orders made on 4th April, 2019

(b) Whether the lower court vide its ruling of 4th April, 2019 erred in law and fact by setting aside the order of the court made on 7th February, 2018, 15th May, 2018 and 23rd May, 2018

(c) Whether the sale of the property in question was lawfully done.

Whether the honorable court properly dismissed the review application dated 7th May, 2019 vide its ruling dated 28th June, 2018 (Sic) by finding that the appellant failed to establish the ground for review of the orders made on 4th April, 2019

40. In his application dated 7th May, 2019 seeking to review orders of 4th April, 2019, the respondent questioned the grounds upon which the

orders of 9th February, 2018 and 23rd May, 2018 were set aside. The prayer for review was grounded on the allegation that some of the beneficiaries and assets were left out. In his wisdom, the honorable Kadhi did not find discovery of any new evidence or material facts, mistake or apparent error on the face of the record.

41. The principles upon which orders for review can apply are clearly provided under order 45(1) of the Civil Procedure Rules which provides that; a party seeking such orders must prove discovery of important matter or new evidence which after exercise of due diligence was not within his knowledge or could not be produced at the time when the decree was passed; on account of some mistake or apparent error on the face of the record or for any other sufficient cause.

42. It was incumbent upon the applicant to satisfy each and every ingredient of the elements for consideration for review. In the case of **National Bank of Kenya Limited Vs Ndungu Njau Civil Appeal No 2011/1996 (UR)** the court of appeal stated that;

“a review maybe granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter more(Sic) can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law. Misconstruing a statute or other provision of law cannot be a ground for review”

43. Indeed, the fact that the Hon Kadhi in his ruling of 4th April, 2019 arrived at an incorrect finding could not be a ground for review but an appeal. It is trite that a review is not a substitute for an appeal. See **Pancras T. Swai Vs Kenya Breweries (2014) eKLR**. For those reasons, I am satisfied that the applicant in that application now the appellant did not establish the necessary grounds for review orders to issue and the orders of 28th June, 2018 (Sic) which I believe meant 28th June, 2019 dismissing the application of 7th May, 2019 was properly arrived at as there was no discovery of any new evidence or matter nor mistake or error apparent on the face of the record.

Whether the Hon court vide its ruling of 4th April, 2019 erred in law and fact by setting aside the orders made on 9th February, 2018, 15th May, 2018 and 23rd May 2018.

44. Kadhi Khamisi disagreed with his colleague in his ruling dated 9th February, 2018 which was as a result of an application dated 27th September 2017 by one Z an interested party also a purchaser of the contested property and who had sought eviction orders of the appellant from the subject property. Kadhi Khamisi overturned everything (orders) previously done or made thus declaring the existing judgment erroneous as all beneficiaries were not called to testify nor was the distribution properly done. Kadhi Khamisi ordered for re- opening of the entire case for fresh hearing and proceeded to appoint the appellant as the new administrator. He also cancelled the sale of the subject property to the interested party.

45. From the wording of Kadhi Khamis in his aforesaid ruling, I find his orders akin to sitting as an appellate court over a decision or orders of Kadhi Athman who was competent and held concurrent jurisdiction. It is also worth noting that there was no substantive application before him seeking review of the previous orders or judgment. It is the order of Kadhi Khamisi that Kadhi Juma Abdalla also overturned in his ruling of 4th April, 2019 in which he criticized his colleague for issuing orders without inviting the interested party for interpartes hearing.

46. Kadhi Juma Abdalla observed at paragraph 14 page 5 of his ruling that;

“this court has come to conclusion that the applicant has demonstrated that her application falls under the purview of review. She has demonstrated that this court infringed her fundamental rights by issuing orders which affected her in her absence. The answer to this question is in the affirmative”

47. From the above finding of Hon. Kadhi Abdalla, he was acting partly as an appellate court sitting on appeal over his colleague’s ruling. However, on the other hand, he added that there was sufficient cause to set aside the orders of the court made by Kadhi Khamisi on 9th February, 2018 on grounds that the interested party was not given the right of hearing as she was not invited for hearing. On account of establishment of sufficient cause, I find that the review orders of 4th April, 2019 to some extent and in the interest of justice justified.

48. The orders of Kadhi Khamisi in my view were quite revolutionary in the circumstances to the extent that the hon. Kadhi, did undo what he was not asked to do under a wrong application. He also did not take into account the fact that there was never an appeal lodged against the subsisting judgment nor consequential consent orders and further directions made on 15th October, 2015 and 23rd October, 2016 where parties had agreed on the heirs excluding P and H who are residents of Zanzibar and who had already benefited from Zanzibar properties. For the above reasons stated, the ground seeking to set aside the orders of 4th April, 2019 fails.

Whether the sale of the property in question was properly and lawfully done.

49. The most contentious property is G Plot No Mombasa/Block XVI/****. Parties had by consent on 15th October, 2015 and 23rd October, 2016 agreed on the heirs and division of property. The rest of the properties have all along not been contested. The appellant has all along participated in the proceedings where determination of the assets and heirs was arrived at. He cannot start raising this issue a fresh. He is therefore expressly and impliedly estopped from challenging orders arrived at and made with his concurrence in his presence.

50. I will therefore not wish to re-open the subject of determination of heirs and assets. As to inclusion of two other children P and H children of the deceased 3rd wife and who reside in Zanzibar, they were by consent taken care of by benefitting from the Zanzibar properties and they have never come up to challenge these proceedings. The appellant cannot act as proxy. He should have engaged them at the earliest

opportunity possible. In my view, that ground does not hold any water.

51. Concerning the sale of the subject property to Z before valuation, there is a valuation report on record by Lyco valuers dated 3rd June, 2015 which placed the value of the property at kshs 10,000,000.

52. From the record which is alluded to herein, the appellant was given priority to purchase the property within 4 months but failed. He has continued to stay in the disputed property at the expense of the other beneficiaries. Nobody is opposing the sale of the property at kshs13,000,000 which in any event is at a higher price than the valued amount. It is also apparent that the appellant does not want this matter to come to an end. He never opposed the sale of the property when he was offered priority to purchase. At the time he was comfortable.

53. Although a transfer was done before completion of payment, it would be prejudicial to overturn the same sale transaction on that ground alone as the court had recognized the sale and ordered for the money to be deposited in court for distribution to respective beneficiaries. I do find this to be a technicality which is curable under Article 159 (2) (d) of the Constitution. This is a 2014 matter. litigation must come to an end. See **Patrick Gathenya Vs Esther Njoki Rurigi and Another (2008) e KLR.**

54. Taking into account the duration this case has taken in court and the circumstances surrounding the delay, I do not find the appeal herein merited. Accordingly, the appeal is dismissed with costs to the respondents. For avoidance of doubt, the court is inclined to uphold the orders of the Kadhi's court dated 4th April, 2019 by directing that;

(a) The purchaser (interested party) do deposit the full amount of ksh 13,000,000 in court for distribution to the agreed and identified heirs as per the orders 15th October 2015 and of 23rd October, 2016.

(b) That the said amount be deposited within 45 days in default the transfer of the property to the interested party ZH be cancelled and the same be sold a fresh through public auction.

(c) The appellant is directed to move out of the property Plot No Mombasa/Block/XVI/** G within 45 days from the date of this judgment**

(d) Each party to bear own costs.

(e)The original file be returned to the Kadhi's court for implementation and execution of its order of 4th April, 2019 in compliance with the directions given herein above.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF SEPTEMBER, 2021.

J. N. ONYIEGO

JUDGE