



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL APPEAL NO.6 OF 2019

ABDI HASSAN MUSA.....APPELLANT

VERSUS

MOHAMED HASSAN MUSA.....1ST RESPONDENT

FATUMA HASSAM MUSA.....2ND RESPONDENT

(From the original succession suit No.9 of 2018 of Kadhi's Court at Marsabit)

J U D G M E N T

Appeal heard in the presence of Senior Resident Kadhi Galgalo Adan (Garbatulla) and Senior Resident Kadhi Ali Dida Wako (Moyale)

The late **WERIS HASSAN MUSSA** died on 14.8.2012. She was survived by her husband who is now deceased, four sons and six daughters. The respondents who are the deceased's son and daughter filed a succession cause before the Marsabit Kadhi's Court seeking recognition of the deceased's lawful heirs, identification of the estate and shares to the respective beneficiaries as well as account of the rent collected by the appellant. The trial Court in its judgement delivered on 19.1.2018 distributed the estate.

Being dissatisfied with the decision of the trial Court, the appellant preferred this appeal on the following grounds:-

- 1. That the learned Kadhi erred and misdirected himself in law and in fact by ordering the distribution of the estate of the deceased without following the due process of succession and application and confirmation of grant.***
- 2. That the learned Kadhi erred and misdirected himself in law and in fact in arriving at a decision based on no weight of evidence***
- 3. That the learned Kadhi erred and misdirected himself in law and in fact in failing to appreciate that the appellant had equal rights inclusive of other heirs to the deceased's estate but condemned the appellant on false grounds.***
- 4. That the learned Kadhi erred and misdirected himself in law and in fact in ignoring that before the deceased died he had appointed the appellant to be in charge of her properties and even by far distributed some to him.***
- 5. That the learned Kadhi erred and misdirected himself in law and in fact in being biased against the appellant throughout and largely failed to appreciate the fact that the appellant was largely sincere in his evidence that was supported by the respondents.***
- 6. That the learned Kadhi erred and misdirected himself in Law and in fact in arriving at misleading, contrasting and different figures in respect of the deceased's estate.***
- 7. That the learned Kadhi erred and misdirected himself in law and in fact by making a harsh decision detrimental to the rights of the appellant.***
- 8. That the learned Kadhi erred and misdirected himself in law and in fact by not appreciating that the appellant used the proceeds from the income belonging to the estate of the deceased to cater for the welfare of his family including the respondents.***
- 9. That the decision was against the weight of the evidence adduced by the parties.***

The appellant filed written submissions on 25.11.2019. He submitted that there is no dispute as to what comprise the deceased's estate. Similarly, there is no dispute as to the value of the estate as held by the trial Court. The appellant contends that the trial Court failed to consider his evidence relating to his contribution to the estate. The appellant made several payments to the other beneficiaries. The sum of Ksh.15,022 that was held as the appellant's balance of his share is punitive. The appellant seeks to have the estate distributed under Islamic law.

Mr. Lekoona appeared for the respondents. Counsel submitted that the estate was valued at ksh.7.6million and distributed under Islamic law. Each son got about Ksh.880,000. The appellant could not account for Ksh.884,000 he had collected as rent. He was left with nothing as his share was depleted.

This is a first appeal. The Court has to evaluate the evidence afresh before drawing its own conclusion. The record of the trial Court is quite mixed up. The 1st respondent, Mohamed Hassan Musa, testified that the deceased left plot number 3 at Korr and plot number 122 Marsabit. They opened a joint account for purposes of depositing the rent. The appellant opened another account and deposited the rent in that account. The appellant was the one collecting the rent.

The appellant's evidence before the trial Court is that he used to collect the rent. By the time the deceased died the rent was Ksh.29,000 monthly. He used to give his brother Hussein Ksh.12,000 every month. He also paid debt to shopkeepers where his two sisters had collected items. He gave one sister (Amina) Ksh.100,000 to build a house but this was a debt to be paid back. He also renovated the roofing of the house and used to send the respondents money by way of M-Pesa.

The appellant further testified that after the deceased's death the furniture was given to Hussein (son) and Mohamed (1st respondent). The deceased's gold was given to **Isir** (daughter). The deceased built a three roomed house for the 1st respondent at Korr. That house was later demolished by their father who built four shops and four lodges plus a new four roomed house. At one time the appellant stopped collecting rent and their late father was the one collecting the rent until his death.

Ahmed Musa is an uncle to the litigants. He testified that his late brother (parties' father) left a wife and three other young children. The estate belongs to the deceased's children. **SWAFIYA HUSSEIN** testified that the appellant used to clear his ration bill for 1½ years at the rate of between Ksh.5000 to Ksh.10,000 monthly.

The appellant's main contention is that the trial Court did not take into account the amount he used to cater for the other beneficiaries as well as renovate the house in Marsabit. Part of the appellant's contention is that the deceased only built eight (8) rooms on plot number 122 and he added the other three (3) rooms. In his submissions the appellant has raised the following amount as having not been accounted for:

Ksh.150,000 paid to Amina Hassan

Ksh.300,000 paid to Amran Hassan

Ksh.100,000 paid to Hussein Hassan

Ksh.70,000 paid to Mohamed Hassan

Ksh.1,000,000 paid to Farhiya Hassan

Ksh.400,000 paid to Hassan Musa

Total Ksh.2,020,000

The appellant also contend that Hussein and Mohamed used to draw Ksh.10,000 monthly from the rent between 2012 and 2015.

The trial Court took into account the amount paid to the other beneficiaries by the appellant. The trial Court also held that the appellant only collected the rent from 14.8.2012 upto 27.10.2016, a period of four years. The appellant was held to have collected a total of ksh.1,392,000 at the rate of Ksh.29,000 per month for four (4) years. The accounted rent as per the judgement can be tabulated as follows:-

Ksh.90,000 – repair of the roof

Ksh.40,000 – repair of latrines

Ksh.40,000 – paid to one sister

Ksh.100,000 - paid to another sister

Total Ksh.270,000

The trial Court also arrived at another sum of Ksh.288,000 being money paid to cater for ration for two beneficiaries for 1½ years. The total amount accounted for was held as Ksh588,000. A sum of Ksh.300,000 was found to be the balance of the rent.

Given the evidence on record, it is clear that the appellant used to share the rental proceeds with the other beneficiaries. The appellant's

figures amount to Ksh.2,020,000 which amount is above what he could have collected during the period of four (4) years he was found by the trial court to have collected the rent. It is also evident that some of the beneficiaries took personal items such as furniture and gold that have not been accounted for. Further, according to the appellant, the deceased built a house for Hussein and the 1st respondent before she died. The rent used to be collected by the parties' father from 27.10.2016 until his death. Definitely the widower used to share the money with his children.

I am therefore satisfied that it will be unfair to hold the appellant as the only one who benefited from the rent. The trial Court did not deduct the money paid to the other beneficiaries from their respective shares. Further, there is no evidence that throughout the entire four(4) years period, no tenant left the premises. The appellant stated that he built three more rooms. The ideal situation would have been to compute the rent collected by the widower and make it to be part of the estate. I do find that the appellant accounted for the rent proceeds. He should have benefited from the estate and take his full share just like all the other beneficiaries. It cannot be held on a balance of probabilities that the appellant took Ksh.834,000 as held by the trial Court. All beneficiaries benefited from the estate before it was distributed. It is only fair that each beneficiary gets his/her full share of the estate.

In the end, I do find that the appeal is merited and is hereby allowed. The award of Ksh15,022 to the appellant is hereby set aside and replaced by his full 10.7% share which amount to ksh.818,978. Upon distribution of the estate, I do find that the appellant shall be entitled to the share payable to the other sons which share was computed to be Ksh.818,978. It is so ordered. Parties shall meet their own respective costs of the appeal.

Dated, Signed and Delivered at Marsabit this 27th day of January, 2020.

S. CHITEMBWE

JUDGE