



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MARSABIT**

**CIVIL APPEAL NO. 7 OF 2019**

**ABDI HASSAN MUSA.....APPELLANT**

**VERSUS**

**MOHAMED HASSAN MUSA.....1<sup>ST</sup> RESPONDENT**

**FATUMA HASSAM MUSA.....2<sup>ND</sup> 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 **Hassan Musa Diriye** died on the 11<sup>th</sup> day of September, 2017 aged 76 years old. He was survived by one widow (Farthosa Mirgichan), four sons and seven daughters as per the respondents affidavit in support of the petition for letters of administration. The respondents petitioned the Marsabit Kadhi's Court seeking recognition of lawful heirs and distribution of the deceased's estate according to Islamic Law.

The trial Court in its judgement delivered on 19.11.2018 distributed the estate under Islamic law. The appellant who is one of the deceased's son is not satisfied with the trial Court's judgement and preferred this appeal. The grounds of appeal are:-

- 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 his 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 defendant throughout and largely failed to appreciate him.**
- 6. That the decision was against the weight of the evidence adduced by the parties.**

The appellant informed the Court that he would like the deceased's estate to be distributed under Islamic law. They are eight children from his father. His step mother has three children. The deceased put up a house at plot number 3, at Korr. The plot belonged to the appellant's late mother. The appellant contend that a plot was sold and money was banked in his sister's (Farkiya) account. Plot No.48 initially belonged to their grandmother. There were two accounts at Equity bank. One account had Ksh.1.2million and the other one had Ksh.340,000. The appellant denied that he sold some plots forming part of the estate.

Mr. Lekoona appeared for the respondents. Counsel submitted that the only issue for determination is the distribution of the deceased's estate. The appellant intermeddled with the deceased's estate. He sold two and a half plots for Ksh.3.5million. He could not account for

Ksh.2,050,000 from the sale proceeds. The estate was valued at Ksh.18.6million.

This is a first appeal. This court has to re-evaluate and re-assess the evidence afresh before drawing its own conclusion. The 1<sup>st</sup> respondent Mohamed Hasan Musa testified that the appellant sold some plots without the consent of the other beneficiaries. The second respondent **Fatuma Hassan Musa** is the deceased's daughter. Her evidence is that the family met and appointed the appellant and herself to sell plots to help the widow. The appellant went ahead and sold 2½ plots. The deceased also left one motor vehicle and had two bank accounts at Equity bank.

The appellant, Abdi Hassan Musa, testified that it is true that the family authorized him and the 2<sup>nd</sup> respondent to sell some plot. The deceased was building a house but died before its completion. His sister Farhiya completed the house. The 1<sup>st</sup> respondent and **Isir** (daughter) were allowed to withdraw money from the deceased's account and pay back Farhiya but they didn't. That is why he sold the 2½ plots and used the money to clear the debt of Farhiya. One plot was sold for Ksh.1.35million and it was paid to him. He paid Farhiya Ksh.998,000 through her account. He gave part of the money to the other beneficiaries. The second plot he sold was his.

Several witnesses were called to testify. **PW1 ISIR** is the respondents' first witness and the deceased's daughter. She testified that the 1<sup>st</sup> respondent and herself were given an order to withdraw Ksh.1.3million to complete the house started by the deceased. Farhiya wanted to complete the house but she pulled out. They completed the house and remained with Ksh.300,000. Farhiya built the house with the deceased but after his death she pulled out.

**PW2 HASSAN MOHAMED** was the deceased's driver. His evidence is that the deceased started building a house. He collapsed and died in hospital. After his death ISIR (PW1) continued with the construction. The deceased left the house at the foundation level.

**PW3 Boniface Maina** is a mason. He was given plumbing and other work by Pw1 at the construction site. He was paid by PW1. Initially one Robert used to be the mason but left.

**PW4 Robert Dokole** is PW1's secretary. He kept records for the construct expenses. Ksh.980,000 was used at the site. **PW5 Faiza Mohamed** is the deceased's granddaughter. She testified that after the deceased's death, the elders asked Farhiya to complete the home which she did but stopped in the middle. PW1 took over and completed the house.

**PW6 John Wambile is PW1's driver.** He carried some building materials to the construction site. **PW7 Caryawe Mindas** is a family friend to the parties. He told the court that the deceased left the house at the foundation level. Thereafter Farhiya took over but stopped. The 1<sup>st</sup> respondent and his PW1 took over and completed the house.

**RW1 Ali Abdi** worked as a shopkeeper for Farhiya. He was called by elders after the deceased's death and asked to complete the house. Masonry work was done by one Robert but left. By the time Robert left the house had reached the roofing level. ISIR and 1<sup>st</sup> respondent completed the house. He incurred a total cost of Ksh.991,843. He was paid that amount by the appellant. The money was paid directly to his bank account. He has no claim against the estate. He took over the construction from the foundation level.

**RW2 Sujua Ambile** testified that the deceased started the construction. He died before completing the house. He is one of the elders who asked RW1 to complete the house. **RW3 Barchena Abbeles's** evidence is that the deceased started the construction of the house upto the foundation level. RW1 took over the construction. The 1<sup>st</sup> respondent and PW1 completed the house.

**RW4 Mohamed Abdulla** also testified that the deceased started the construction of the house but died when the house had reached the foundation level. Being one of the elders, they instructed RW1 to complete the house. He does not know who subsequently completed the house. **RW5 Abubakar Ngusu's** evidence is that the deceased built the house upto the foundation level. Thereafter RW1 took over the construction. PW1 and the 1<sup>st</sup> respondent later completed the house. **RW6 Robert Ndungu** testified that he is the one who started constructing the house from the foundation upto the roofing and plastering. Fittings and painting was done by another person. He was paid by Farhiya. The deceased only paid him Ksh.12,000. The construction cost was Ksh.245,000. He was paid Ksh.245,000 by Farhiya through her man by the name Gababa. He left the work due to misunderstandings. The house comprise three bedrooms, kitchen and dining room.

The trial Court computed the shares of each beneficiary including the widow. The appellant is entitled to 11.66% of the estate. The total estate was computed at Ksh.18,658,534 giving each son a total entitlement of Ksh.2,175,585. The trial Court found that the appellant sold 2½ plots whose value is given at Ksh.3.5million. He accounted for Ksh.1,450,000 leaving a balance of Ksh.2,050,000. The court found that in succession cause number 9 of 2018 involving the parties deceased mother, the appellant had failed to account for Ksh.833,400. The failure to account for the sale proceeds depleted the appellant's share.

The appellant testified that the elders including Mohamed Chute advised that the 2½ plots be sold so as to clear Farhiya's debt. The appellant further testified that it was agreed that each plot be sold for Ksh.1.5million as a brother to one Abdirizak had made that offer but the sale aborted. The appellant sold one plot to the Majengo Mosque for Ksh.1,350,000. He used this money to settle Farhiya's debt and gave the other siblings some money. The trial court computed the total payments by the appellant as Ksh.1,450,000. This amount was deducted from the estimated sale proceeds of Ksh.3.5million. However, the payment of over Ksh.450,000 to those who benefited was not added to the estate or deducted from their respective share. Be that as it may, it is clear that the appellant sold 2½ plots. The sale proceeds may not have totaled ksh.3.5million as held by the trial court as one plot was sold for 1,350,000 instead of Ksh.1.5million.

The appellant contend that Farhiya completed the house. The house was valued at Ksh.3million. The appellant paid Farhiya through RW1 Ksh.991,843. The deceased left the house at the foundation level. RW1 disagreed with RW6 and that is when Isir and the 1<sup>st</sup> respondent took over the completion of the house. It is evident that ISIR and the 1<sup>st</sup> respondent incurred some expenses to complete the work. That expense was taken from the deceased's bank account (Ksh.1,300,00) through a Court order. The two testified that they had a balance of Ksh.300,000 and this amount was added to the deceased's estate.

The main issue for determination is whether the appellant's share can be held as having been fully satisfied through the sale of the 2½ plots. The appellant's position is that one of the plots was his. He was given the plot by his late father to build. The trial court did not agree with that contention as there is no evidence to that effect. According to the trial court the family allowed the appellant and the 2<sup>nd</sup> respondent to sell the 2½ plots. Minutes were produced to prove that indeed the appellant was given the authority together with the 2<sup>nd</sup> respondent to sell the plots. The appellant admitted to that fact. The appellant's contention that one of the plots belonged to him is an afterthought. He did not produce any tangible proof that the deceased had allocated him one plot. I do agree with the findings of the trial Court that all the plots sold by the appellant formed part of the deceased's estate. The appellant testified that he sold one plot for Ksh.1,350,000 and the half plot for Ksh.540,000. He did not disclose the sell price for the plot he alleged to have been his. The trial court held that the plot was sold for ksh.1.5million and the half plot for Ksh.500,000.

I do find that the appellant sold the 2½ plots as follows:

(1) Plot sold to Majengo Mosque	-	Ksh.1,350,000
(2) Plot sold without price indicated	-	Ksh.1,500,000
(3) Half plot		<u>Ksh. 540,000</u>
Total		<u>Ksh.3,390,000</u>
Less money accounted for		Ksh.1,450,000
Unaccounted balance		<u>Ksh.1,940,000</u>

The money retained by the appellant is therefore Ksh.1,940,000 and not Ksh.2,050,000 as held by the trial court. One of the plots was not sold for Ksh.1.5million as the sale aborted.

Apart from the above finding, I do find that the rest of the findings of the trial Court are justified by the record. The appellant benefited from the estate even before it was distributed. The 2<sup>nd</sup> respondent's evidence that they were to sell the 2½ plots jointly with the appellant is quite true. The appellant failed to account for the sale proceeds of one plot. The deceased had sold five plots before his death out of his 8 plots. It is not clear where the other half plot went but parties are in agreement that instead of three plots, what was to be sold was 2 ½ plots. That being the case, I am satisfied that the 2½ plots formed part of the estate. The Ksh.1.3 million withdrawn from the deceased's account was accounted for by Isir and the 1st respondent.

In the end, I do find that the appeal partly succeed. The appellant is entitled to his share amounting to Ksh.2,175,585 being the share payable to each son. The appellant failed to account for ksh.1,940,000 leaving him with a balance of Ksh.335,585. The trial Court made a caveat that the shares of each beneficiary will depend on the actual proceeds from the estate as opposed to the valuations. The appellant is entitled to Ksh.355,585 being his share balance. Once the estate is distributed, the appellant should be given the balance of his share amounting to Ksh.355,585. The trial Court combined two estates and depleted the appellant's share. The two estates ought to be dealt with separately. That is the estate of the parties' parents.

The upshot is that the appeal partly succeeds. The balance of the appellant's share from his deceased father's estate is held to be Ksh.355,585. Parties shall meet their respective costs.

**Dated, Signed and Delivered at Marsabit this 27<sup>th</sup> day of January, 2020**

**S. CHITEMBWE**

**JUDGE**