



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MARSABIT**

**CIVIL CASE NO.14 OF 2019**

**HUSSEIN MARSHALLO GURACHA.....APPELLANT**

**VERSUS**

**MARSHALLO GURACHA.....1<sup>ST</sup> RESPONDENT**

**FATUMA ABDI LIBA .....2<sup>ND</sup> RESPONDENT**

**J U D G M E N T**

The late Marshallo Guracha died in 1964. He was survived by four children namely, Hussein Marshallo Guracha (appellant), Fatuma Abdi Liban Respondent, Kanu Marshallo Guracha (daughter) and Uhuru Marshallo Guracha (son) The deceased's estate comprise of two plots one at manyatta (Moyale town) and the other one at Lami area of Moyale. Both plots are unregistered. The respondent filed the succession cause before the Moyale Kadhi's Court seeking her share of the estate. The Kadhi delivered a ruling on 25.4.2019 and awarded the respondent Ksh.749,925 plus a two roomed house. Being dissatisfied with that decision the appellant preferred this appeal.

The grounds of appeal are that:-

- 1. The Hon. Learned Kadhi erred in law and fact by holding that the respondent had a share of 16.665% of the deceased's estate.**
- 2. The Hon. Learned Kadhi erred in law and fact in ignoring the fact that the other heirs to the deceased's estate had relinquished their share in favour of the appellant.**
- 3. The Hon. Learned Kadhi erred in law and fact by finding that the respondent was entitled to remain in two rooms belonging to the deceased estate.**
- 4. The Hon. Learned Kadhi erred in law and fact by ignoring the fact that the respondent was offered her lawful share of the proceeds of sale of the deceased's estate but she blatantly ignored to accept the same.**
- 5. The Hon. Learned Kadhi erred in law and fact by not finding that the respondent refused to take her share of two rooms and Ksh.400,000/= by preferring a share of land to be registered in her names and proceeded to grant the respondent Kshs.749,925/=.**
- 6. The Hon. Learned Kadhi erred in law and fact by not appreciating that the criteria used to distribute the deceased's estate did not conform to the law of inheritance according to the Holy Quran(4:7).**
- 7. The Hon. Learned Kadhi erred in law and fact in ignoring the fact that the properties that were mentioned had not been measured to ascertain the worth of the deceased estate.**
- 8. The Hon. Learned Kadhi erred in law and fact by failing to consider the appellant's evidence that he sold the said properties with the consent of the other family members and the respondent never asked for money.**
- 9. The Hon. Learned Kadhi erred in law and fact in ignoring the reason adduced by the respondent that she only wanted the property registered in her name yet the properties were unregistered hence the same was unattainable.**
- 10. The Hon. Learned Kadhi erred in law and fact in ignoring the evidence of the appellant that the respondent was already**

staying in the two rooms.

**11. The Hon. Learned Kadhi erred in law and fact in ignoring the evidence of Mohamed Omar Swalah, Hassan Mohamed Aliow and Chief Abdikadir Hassan which corroborated that the land at Lami was sold by the appellant's mother and not the appellant as alleged by the respondent.**

**12. The Hon. Learned Kadhi erred in law and fact by relying on the evidence of the respondent without considering that the respondent was in occupation of a parcel of land and in fact 2 rooms thereon in the deceased estate and there was no threat or intimidation of eviction.**

**13. The Hon. Learned Kadhi erred in law and fact by not considering that the weight of evidence tendered by the appellant outweighed the respondent's assertions.**

**14. The Hon. Learned Kadhi erred in law and fact by ignoring the fact that the respondent on a balance of probability did not prove her case.**

Mr. Kiogora appeared for the appellant. Counsel submitted that the Kadhi erred in law by not distributing the estate within the lawful criteria. The trial Court did not consider the appellant's evidence plus the evidence of his witnesses. The respondent was married and has her own property at Lami area but is now divorced. The appellant being the elder son shared the estate amongst the siblings. The trial court failed to appreciate that the respondent got a 70X100ft plot at Lami area which she sold to one Nuria Ibrahim.

It was further submitted that the Kadhi failed to appreciate the fact that the remaining plot is where the appellant and his family live and is not sharable. The two rooms awarded to the respondent belong to the appellant. The appellant gave the respondent a place to live after she was divorced. The succession procedures like gazettment and confirmation of the grant were not followed. All the siblings were given their share of the Lami plot.

The respondent in response stated that she has no issue with the Lami plot. Her only issue was the Manyatta plot. The two of them agreed to sell a portion of the plot. The appellant sold the plot for Ksh.4.5million as he had problems. The elders were involved during the sale of the plot. She remained with a section of the plot. She did not receive the sale proceeds. A total of six rooms were built. The appellant had 28 plots at Lami and sold all of them. These plots were part of the estate. The deceased also left cattle but the appellant did not share it.

This being a first appeal the Court has to re-evaluate and re-assess the evidence afresh before drawing its own conclusion. The respondent's evidence before the trial Court is that the appellant sold half of the plot at Manyatta for Ksh.4.5million to one **Sage Dima Koche**. She approached him with elders after receiving the sale proceeds but all in vain. The appellant and the other beneficiaries ganged up forcing her to file the succession cause. The remaining plot has a residential house and six commercial rooms that were built using the sale proceeds.

The appellant's evidence is that the family agreed to sell part of the plot for Ksh.4.5million. The respondent later complained that the remaining plot be given to her. The respondent did not ask for a share of the money. He also gave two rooms plus Ksh.400,000 but she declined. The respondent is living in a two roomed house. The respondent insisted in getting a piece of land.

**UHURU MARSHALLO**, one of the beneficiaries informed the court that he was forgoing his share of the estate in favour of the appellant. The same statement was given by **KANU MARSHALLO**. Other witnesses were summoned by the parties. **MOHAMED OMAR SWALAH** testified that he bought a plot at Lami from the parties' mother and the respondent for Ksh.25,000.

**ABDI DABASO CHUKE** is a neighbor at manyatta. In 2002 he was told to measure a plot and later noted that other people were occupying the plot. **HASSAN MOHAMED ALIOW** is a resident of Lami. He bought a plot at Lami for Ksh.47,000 from the appellant's wife (**Fatuma Ali Wario**).

**ABDUBA JILLO GUYO** is a resident of Manyatta location in Moyale. He stated that at one time the appellant gave three plots to people to plant Sukuma wiki. He did not witness the sale of the land. **ABDIKADIR HASSAN** is a retired chief. He stated that the land at Lami was sold by the parties' mother and the appellant's wife.

The deceased's estate comprise two plots. One at Manyatta in Moyale and one at Lami. Paragraph two (2) of the defence admit that the deceased left behind two plots. According to the appellant the plot at Lami was divided and all beneficiaries got their shares except him. Its not clear how the appellant could have distributed that plot without allocating himself a share. According to the respondent the appellant had 28 plots at Lami. **Hassan Mohamed** testified that he bought a plot at Lami from the appellant's wife. The appellant's contention that he had his own plots at Lami is not supported by any tangible evidence.

I do find that the Lami plot was distributed to all the beneficiaries including the appellant. The beneficiaries sold their respective shares and there is no dispute on that part of the estate. The respondent indicated that she has no claim over the Lami plot. The appellant's view is that the respondent benefitted from the Lami plot and should not claim any portion of the manyatta plot. This line of argument is contrary to his own admission that he offered the respondent Ksh. 400,000 and two rooms. The Ksh.400,000 is sale proceeds from the manyatta plot. The implication is that even the respondent is entitled to inherit the manyatta plot.

Turning to the manyatta plot, there is no dispute that half of it was sold for Ksh.4.5million. The appellant offered to give the respondent Ksh.400,000 out of the sale proceeds. The deceased was survived by two sons and two daughters. The trial Court raised one issue for determination as follows:-

**“Whether the said amount of Ksh.400,000 was offered by the respondent to petitioner is equal to her share from the**

deceased estate”

The trial Court assessed the respondent's share of the sale proceeds as 16.665%. The other two beneficiaries relinquished their respective shares to the appellant. Two of the beneficiaries are male while the other two are female. Two male and two female translate to six shares. The appellant therefore took five shares including those of his brother and sister while the respondent took one share. The parties' mother died before the estate was distributed and therefore her share forms part of the estate and since the beneficiaries are the same there is no issue relating to the share of their deceased mother. I do therefore find that each daughter was entitled to Ksh.750,000 while each son was entitled to Ksh.1.5million. The female's share is a sixth of Ksh.4.5million while the male's share is a third of Ksh.4.5million. The appellant took his sister's share totaling ksh.750,000 plus his brother's share of Ksh.1.5million totaling Ksh.2,250,000. He added his own share of Ksh.1.5million giving him a total of Ksh.3,750,000. This is the Islamic computation of the respective shares.

The next issue is the remaining plot. The appellant went back to the remaining plot and constructed six commercial rooms. Definitely these rooms occupy some space. The respondent is occupying two rooms which seems to have been in existence before the other portion was sold. The appellant contends that he used to live in those two rooms. Its not clear who built those two rooms and their value is not given. The six rooms occupy some space whose value is not known. It is equally not clear whether there is any space remaining as there is no ground report. Paragraph 7 of the respondent's petition indicate that the appellant approached the respondent to sell part of the plot they were residing . The implication is that both parties were residing on the manyatta plot. paragraph 6 of the petition indicate that the parties herein resides in manyatta while the other siblings Kanu and Uhuru reside in Marsabit. The appellant cannot be allowed to sell half of the manyatta plot, build houses on the remaining half and evict his sister from where she is occupying. The court cannot sanction such a process. There is nothing wrong on the part of the respondent to insist that she would like part of the land. One of the respondent's prayers before the trial Court was **“A temporary order stopping the ongoing construction by the defendant next to the house of the petitioner until the matter is determined.”**

Ground 12 of the grounds of appeal is that the respondent is occupying two rooms on the deceased's estate and there was no threat of eviction. The respondent cannot live on the property at the appellant's mercy. She is the deceased's daughter and entitled to part of the estate. The appellant's contention that the manyatta plot is his only share of the estate is not proved. His own witness testified that they bought a plot from his wife. Parties proceeded without valuing the remaining plot. Since what is being shared is not money but the same plot, I see no error on the part of the trial Court. There are eight rooms on the plot and I believe there are empty spaces too. The respondent is occupying two rooms which I find to be her remaining share of the estate. The appellant has six rooms and can take the remaining spaces since the other beneficiaries have relinquished their respective shares to the appellant.

There is a report dated 30.1.2019 from the County Government of Marsabit. It indicates that the respondent raised several complaints against the appellant. One of the complaint was that the appellant had demolished her kitchen that was built by their late mother. From the respondent's petition and the record, I do find that the respondent has been living on the manyatta plot for sometime. There is no evidence that the appellant vacated the two rooms the respondent is occupying and allowed her to live therein. The appellant has benefited from the space he has put up his six commercial rooms. He can equally take any other available space on the plot subject to the respondent's right to move in and out of her two rooms without anything blocking her movement.

Apart from the respective parties own evidence, most of the other evidence relates to the sale of the plot at Lami. The Kadhi's decision cannot be held to be against the weight of the evidence. The distribution of the estate is in accordance with Islamic Law. Ground 6 of the grounds of appeal is that the distribution does not conform to the law of inheritance according to the Holy Quran (4.7). The Holy Quran at chapter 4:7-11 states as follows:-

**For men is a share of what the parents and close relatives leave, and for women is a share of what the parents and close relatives leave, be it little or much - an obligatory share.**

**And when [other] relatives and orphans and the needy are present at the [time of] division, then provide for them [something] out of the estate and speak to them words of appropriate kindness**

**And let those [executors and guardians] fear [injustice] as if they [themselves] had left weak offspring behind and feared for them. So let them fear Allah and speak words of appropriate justice.**

**Indeed, those who devour the property of orphans unjustly are only consuming into their bellies fire. And they will be burned in a Blaze Allah instructs you concerning your children: for the male, what is equal to the share of two females. But if there are [only] daughters, two or more, for them is two thirds of one's estate. And if there is only one, for her is half. And for one's parents, to each one of them is a sixth of his estate if he left children. But if he had no children and the parents [alone] inherit from him, then for his mother is one third. And if he had brothers [or sisters], for his mother is a sixth, after any bequest he [may have] made or debt. Your parents or your children - you know not which of them are nearest to you in benefit. [These shares are] an obligation [imposed] by Allah . Indeed, Allah is ever Knowing and Wise.**

Under the above citation, a male is entitled to two shares while a female is entitled to one share. Therefore the two sons of the deceased form

four shares while the two daughters cumulatively make two shares. This make a total of six shares. The respondent is entitled to one share of the sale proceeds as well as one share of the remaining plot. I do equate her one share of the remaining plot to the space occupied by the two rooms she is occupying while the other beneficiaries can take the rest of the plot. The distribution is therefore within the provisions of the Holy Quran (4:7). The trial Court did not take away the shares of the other beneficiaries and add them to the respondent's share. The appellant is simply adamant. He offered Ksh.400,000 plus two rooms. The difference of that offer and the Court decision is Ksh.350,000. The respondent was already occupying two rooms and is entitled to her share of the sale proceeds. She cannot be forced to go and live elsewhere. The appellant was offering two rooms to the appellant to live in during her lifetime and thereafter revert to him or his children. That cannot be justice. The respondent is entitled to her share of the estate and she can obtain her own title to that share.

In the end, I do find that the appeal lacks merit and is hereby disallowed. The appellant should pay the respondent her share of the sale proceeds totaling Ksh.750,000. The respondent shall continue to live on the two room she is occupying which forms part of her share of the estate. Parties shall meet their respective costs.

**Dated, Signed and Delivered at Marsabit this 22<sup>nd</sup> Day of January, 2020**

**S. CHITEMBWE**

**JUDGE**