



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 36 OF 2017

HARUN OMAR BAUSI.....APPELLANT

VERSUS

AHMED OMAR BAUSI.....RESPONDENT

(An Appeal from the Judgment of Hon. Kadhi Sheikh Mshali H. Mshali,

Principal Kadhi, Lamu Law Courts delivered on 16th June, 2017

in Lamu Kadhi's Court Succession Cause No. 1 of 2017)

JUDGMENT

1. On 15th February, 2017 the appellant filed a petition in the Kadhi's Court seeking a determination of the following issues-

- (i) The legal and rightful heirs;
- (ii) Official inheritance by the deceased's children;
- (iii) Distribution of the intestate estate;
- (iv) Costs of the suit; and
- (v) Any other or further relief that the court may deem fit to grant.

2. The appellant in his succession petition disclosed that the legal heirs and beneficiaries of the estate of his father were him and his siblings namely, Abubakar Omar Bausi, Fatma Omar Bausi, Hafswa Omar Bausi, Ali Omar Bausi and Amina Omar Bausi. He averred that the deceased's estate comprised 2 semi-permanent houses situate within Riadha area in Lamu Island in Lamu County which were in possession of the respondent's wife Amina Kirikoi and the appellant's cousin Zahara Loo and her children.

3. The respondent on 3rd March, 2017 filed a reply objecting to the petition filed by the appellant. He stated that the deceased only left one house which he had gifted to him long before he died. He sought dismissal of the petition.

4. The Honourable Kadhi, considered the pleadings and the evidence of the two parties. He found that the deceased Omari Bausi heirs were one widow and the children that survived him. That the deceased had put Hadhi for his son who is the respondent and that was before he married the appellant's mother. The Hon. Kadhi also found that the deceased had one house at Riadha. He ordered that the house be valued and for a valuation report to be filed before 14th July, 2017. He also ordered the petitioner to pay the costs of the suit.

5. The appellant was dissatisfied with the decision of the Hon. Kadhi and on 6th July, 2017 he filed a memorandum of appeal raising the following grounds:-

- (i) The Hon. Kadhi erred in law and fact by issuing a Judgment in favor of the Respondent without considering facts by the appellants;
- (ii) The Hon. Kadhi erred in law and fact by issuing a Judgment in favor of the Respondent without considering the attendance of the Appellant who was not in Court at the time of the delivery of the same;

- (iii) The Hon Kadhi erred in law and fact by issuing a Judgment in favour of the respondent without considering the facts presented by the witnesses;
- (iv) The Hon. Kadhi erred in law and fact by issuing a Judgment in favor of the Respondent without even listening and taking into consideration the Appellant's pledges thereof.
- (v) The Hon. Kadhi erred in law and fact by issuing a Judgment in favor of the Respondent without considering that he had totally denied accepting what was proposed by the Appellant by consent before the Judgment;
- (vi) The Hon. Kadhi erred in law and fact by issuing an oral judgment in favor of the respondent that was never put into writing at all;
- (vii) The Hon. Kadhi erred in law and fact by issuing a Judgment in favor of the Respondent by adopting what the Respondent had proposed in consent thereof which he had earlier opposed;
- (viii) The Hon. Kadhi erred in law and fact by issuing a Judgment without considering fraud that had been done by the respondent in transferring the estate of 2 houses in his name without another heir's consent;
- (ix) The Hon. Kadhi created delaying tactics to the Appellant not to appeal against the Judgment by denying to give out proceedings and Judgment of the said file; and
- (x) That for the interest of justice, the said appeal has overwhelming chances to succeed.

6. At the hearing of this appeal, this court sat with the Chief Kadhi, Hon. Al Muhdhar A.S Hussein as required. His opinion was that the dispute between the two parties was outside the Kadhi's jurisdiction as it deals with ownership of properties and the same ought to be litigated in the Environment and Land Court.

7. I respectfully disagree with the said opinion. The Hon. Trial Kadhi in the petition filed by the appellant was required to determine the inheritance by the deceased's children and distribution of the estate, among others. Distribution could only have been done after ascertainment of the deceased's assets.

Analysis and determination

8. The duty of the first appellate court is to analyze and re-evaluate the evidence adduced before the lower court and come to its own independent conclusion.

9. The issues for determination are:-

(i) Who the legal heirs of the deceased are;

(ii) If the deceased's estate comprised of one or two houses.

The Deceased's heirs.

10. The deceased was married to one Tima Bahero (deceased) who was the biological mother of the respondent. After her death, he married the appellant's mother by the name Ilaji Ali kame (deceased).

11. The appellant's siblings are Abubakar Omar Bausi, Fatma Omar Bausi, Hafswa Omar Bausi, Ali Omar Bausi and Amina Omar Bausi. The appellant's sister by the name Zeituni Omar Bausi is deceased.

12. The respondent Ahmed Omar Bausi is also a son to the deceased Omar Bausi Tumu, borne by a different mother. He has a sister by the name of Amina Omar Bausi. The beneficiaries of the deceased's estate are therefore well known and the Hon. Kadhi did not err on the said issue.

If the deceased's estate comprised one or two houses.

13. The evidence of the appellant before the Kadhi's Court was that his father died intestate in the year 1980 and left two houses at Riadhwa in Lamu. He stated that he did not know the plot number but they were house numbers 86 and 731. He further said that their father did not leave any documents concerning the two houses but he told them about the houses. The appellant told the Kadhi in the lower Court that some elders namely Omar Baka and Alwi Din knew about the houses and so did Zahra Loo and Fatma Loo.

14. The respondent Ahmed Omar Bausi in his evidence stated that the houses in issue belong to him and that his father gave them to him in the year 1964 and gave the documents for the same to his Aunt who brought him up by the name of Mima Bausi. He produced documents to demonstrate that he was the owner of the houses. He said he was paying yearly rent of KShs. 1,200/= to Riadhwa. He produced receipts to support his evidence.

15. The respondent called a witness by the name of Omar Mbarak Hadii a resident of Riadhwa in Lamu town. He said that his Aunt Mima

Bausi used to tell him that the house at Riadhwa belonged to Umar Bausi. That evidence in its very nature is hearsay evidence as he spoke of being told about the ownership of the house by Mima Bausi who was not called as a witness. The authority of **Central Microfilm Operators Film [1990] Ltd. Vs Teachers Service Commission** [2015] eKLR, states as follows:-

“The failure by a party to call as a witness any person whom he might reasonably be expected to give evidence favourable to him may prompt the court to infer that the person’s evidence would not have helped the party’s case and would have been prejudicial to its case and that the witnesses may have technically avoided to testify to escape being embarrassed on cross-examination.”

16. The respondent called a witness by the name of Alwi Bin Mohammed Ahmed a resident of Riadhwa Lamu. He was a cousin to the parties herein. His evidence was that he was aware of one house and that the deceased’s sister was living in it.

17. Another witness was Idarus Mohamed Said Ali, a resident of Riadhwa in Lamu. It was his evidence that the respondent owned 2 houses because he was the one paying yearly rents.

18. On being cross-examined by the court, he stated that the respondent bought the houses from his father. If indeed that was so, the respondent produced no evidence to prove the said claim. The Hon. Kadhi was able to decipher the wordings and meaning of the documents written in Arabic. He found from the said documents that the deceased had one house situated at Raidha near the hospital. He also found that the evidence of the 2nd witness called by the appellant was to the effect the deceased had one house.

19. The receipts produced by the respondent show that he was paying rent for house No. 86 and there are receipts for House No. 115.

20. Although the Hon. Trial Kadhi held that the deceased owned one house the documents produced by the respondent are for 2 houses. The numbers on the receipts produced by the respondent indicate that he was paying rent for a House on Plot No. 856 which was also mentioned by the appellant. The appellant also spoke of his late father owning house No. 731. A perusal of the receipts produced by the respondent indicate that No. 731 is the plot on which house 886 is situated.

21. This court’s finding from the receipts produced in court is that the deceased owned 2 houses. These are house No. 115 on plot No. 767 and house No. 86 on plot No. 731.

22. In his evidence, the respondent acknowledged that his deceased father owned 2 houses which he gave him in the year 1964. He also stated that the deceased gave the documents for the houses to Mima Bausi. The said person was not called as a witness to confirm that the deceased had given the respondent the 2 houses as a gift. There was no will which was produced to demonstrate how the deceased wanted his estate distributed. Although the respondent was paying land rates for the 2 houses without land, payment of the same would not entitle him to ownership of the houses as they belong to the deceased.

23. The findings of this court of are that:-

(i) The deceased owned 2 houses. The first was House No. 86 on plot No. 731 and the second one was house No. 115 on plot No. 767.

(ii) The 2 houses shall be distributed among the following heirs of the deceased in accordance with Islamic law:-

(a) Ahmed Omar Bausi;

(b) Harun Omar Bausi;

(c) Abubakar Omar Bausi;

(d) Fatma Omar Bausi

(e) Hafswa Omar Bausi

(f) Ali Omar Bausi; and

(g) Amina Omar Bausi

iii. The respondent shall be reimbursed the land rates he has been paying for the deceased’s estate.

24. The appeal is hereby allowed in the above terms. Each party shall bear his own costs of this appeal.

DELIVERED, DATED and SIGNED at MALINDI on this 28th day of February, 2020.

NJOKI MWANGI

JUDGE

In the presence of

Harun Omar BausiAppellant

Ahmed Omar Bausi..... Respondent

Mr. Samuel Kabui..... Court Assistant