



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 35 OF 2018

SAUMU MULANDA WANJE.....APPELLANT

VERSUS

ALI MBARUKU MASHA.....RESPONDENT

(An Appeal from the Judgment of Hon. Salim S. Mohamed, Principal Kadhi, delivered on 11th July, 2018 in Malindi Principal Kadhi's Court Succession Case No. 33 of 2017).

JUDGMENT

1. In a decision rendered on 11th July, 2018, the Principal Kadhi at Malindi Kadhis' Court, Hon. Salim S. Mohamed, made a finding to the effect that the appellant was not legally married to the deceased and as such, she was not entitled to any share in the deceased's estate. The Hon. Kadhi held that Mwanajuma Bakari was the only wife of the deceased. He also held that she was entitled to 1/8th of the deceased's house and 7/8th was to go to the deceased's parents. The latter bequeathed their share to their granddaughters-

- i. Nasra Said Ali Mbaruku;
- ii. Samya Said Ali Mbaruku; and
- iii. Sharikha Said Ali Mbaruku

2. The appellant was dissatisfied with the decision by the Hon. Kadhi and filed a memorandum of appeal on 2nd August, 2018 through the law firm of J. K. Mwarandu & Co. Advocates, raising the following grounds of appeal:-

- i. That the Learned Kadhi erred in law and fact in finding that the appellant was not legally married to the deceased and she was not entitled to inherit any share of the deceased's estate;
- ii. That the Learned Kadhi erred in law and fact in holding that the petitioner's witness one Mzee Ramadhan Mwalili was not a credible witness in respect of the marriage between the petitioner and the deceased without giving any credible or justifiable reasons;
- iii. That the Learned Kadhi erred in law and fact in holding that the appellant's three children, namely Nasra Said Ali Mbaruk (sic), Samya Said Ali Mbaruk (sic) and Sharikha Said Ali Mbaruk (sic) were granddaughters of the respondent born of the appellant and the deceased, yet on the one hand, he held that the appellant was not legally married to the deceased;
- iv. That the Learned Kadhi erred in law and fact in holding that the deceased's parents were entitled to inherit 7/8th of the deceased's estate; and
- v. That the Learned Kadhi erred in law and fact in finding that the only estate left by the deceased to be inherited and distributed amongst his heirs was a 5 bedroomed house situate at Mambui.

3. The appellant's Counsel filed his submissions to this appeal on 1st April, 2019. Mr. Shujaa, Learned Counsel for the appellant submitted that the Hon. Kadhi erred by finding that the appellant was not the lawful wife of the deceased. He stated that the respondent who was the deceased's father did not dispute that the appellant was married to the deceased. He further indicated that what the respondent stated was that he was not aware that she was married to the deceased.

4. Mr. Shujaa further submitted that the respondent was the one who proposed the mode of distribution of the deceased's estate and

suggested the inclusion of the appellant in getting a share of the same.

5. It was stated that the respondent in his evidence indicated that the deceased was survived by 2 widows, a mother, father and 3 children. It was further stated that the appellant had distributed part of the deceased's estate to the two widows when he sold a parcel of land belonging to the deceased and shared the proceeds between them.

6. It was submitted that the other widow of the deceased Mwanajuma Bakari proposed the mode of distribution of the remaining estate of the deceased but the Hon. Kadhi held that the appellant was not the deceased's wife.

7. Mr. Shujaa pointed out that the Hon. Kadhi discredited the evidence of a witness by the name of Ramadhan but he did not give an explanation for doing so. It was submitted that although the said witness had been called by the appellant, the Hon. Kadhi held that the witness was not known by the respondent. It was submitted that the respondent did not cross-examine the said witness. Counsel for the appellant further submitted that there was nothing to demonstrate that the witness was not credible. He prayed for the appeal to be allowed.

8. The respondent's Advocate filed written submissions on 11th July, 2019. Ms Wamucii highlighted the same by stating that the appellant was not legally married to the deceased because she did not produce a marriage certificate.

9. She further submitted that the evidence by the appellant's witness was uncorroborated and the said witness did not disclose the place where the marriage between the appellant and the deceased took place, who the witnesses were and if dowry was paid.

10. The Counsel for the respondent cited the provisions of the 1st schedule of the Mohammedan Marriage and Divorce Act Cap 155 which stipulates the prerequisites of a valid marriage.

11. In reference to the proceedings of the lower court, Ms Wamucii pointed out that the appellant said that she had been given for marriage 21 years back. In Ms Wamucii's view, that would put the appellant's age at 12 or 13 years at the time of marriage, yet there was no evidence of consent being obtained from appellant's parents to marry her off and that her guardians were present at the time of the marriage. It was pointed out that the mother of the appellant did not attend court to testify.

12. Ms Wamucii asserted that the appellant had one wife by the name of Mwanajuma Bakari. She contended that although the appellant's marriage to the deceased was not contested, it was not confirmed that she was married to him.

13. In making reference to the respondent's evidence, her Counsel stated that the appellant's mother declined to accept dowry from the deceased, on behalf of the appellant. It was submitted that no death certificate was produced to confirm that the person who presided over the marriage was dead or that the 2nd witness to the marriage was mentally sick, as no medical evidence was produced. It was further submitted that the Principal Kadhi did not regard Mzee Ramadhan Mwalili as a credible witness because he was not known to the respondent.

14. It was argued that due to the circumstances of this case, the appellant's children were considered illegitimate and could not inherit from their father's estate. Counsel for the respondent relied on the decision **In the matter of the Estate of Ishmael Juma Chelanga (deceased)** 2002 [eKLR], where the High Court held that children sired out of wedlock by a man who professes the muslim faith cannot inherit their father's property.

15. Ms Wamucii concluded her submissions by stating that the Principal Kadhi arrived at a proper finding based on Islamic law as the appellant failed to prove that she was married to the deceased. She prayed for the appeal to be dismissed with costs.

16. In response to the above submissions, Mr. Shujaa stated that the 1st schedule of the Mohammedan Marriage and Divorce Act sets out the particulars to be included by the Registrar of Marriages when issuing a marriage certificate and the said provisions did not apply in this case. He also said that under Islamic law, dowry is paid to the wife.

ANALYSIS AND DETERMINATION

17. The duty of the 1st appellate Court is to analyze and re-evaluate the evidence adduced before the lower court and come to its own independent decision.

18. At the time of hearing of the appeal herein, this court sat with the Hon. Chief Kadhi as required. The opinion of the Hon. Chief Kadhi, Al Mudhar A. S. Hussein was that in the lower court case, there was no question of whether the appellant was married to the deceased or not and that the respondent never questioned the appellant on whether she was married to his deceased son. Further, that the respondent when distributing the proceeds of the sale of the deceased's land at Fundisha gave the appellant Kshs. 200,000/= which means he recognized her as his daughter-in-law. The Hon. Chief Kadhi therefore held a different opinion from that of the Hon. Principal Kadhi who presided over the matter in the lower court.

19. The Hon. Chief Kadhi further expressed the opinion that under Rule 15 of the Marriage (Muslim Marriage) Rules 2017, the lack of registration did not render the marriage of the appellant and the deceased invalid. He concluded by saying that the Hon. Principal Kadhi erred in holding that the appellant was not married to the deceased hence she was not entitled to inherit. The Hon. Chief Kadhi was also of the opinion that the Hon. Principal Kadhi should not have entertained issues that were resolved by the High Court in Succession Cause No. 38 of 2015 in Malindi. The Hon. Chief Kadhi supported this appeal.

20. The issues for determination are:-

i. If the appellant was lawfully married to the deceased; and

ii. Who the rightful heirs to the deceased's estate are.

If the appellant was lawfully married to the deceased.

21. The Succession Petition filed by the appellant on 13th October, 2017 sought:-

- i. Determination of the deceased's rightful heirs and their shares according to Islamic laws;
- ii. That the respondent be ordered to make proper distribution of money/proceeds from the sale of the deceased's piece of land, title No. Malindi/Fundisha/176 to the deceased's heirs according to Islamic laws;
- iii. The deceased's house situated at Mambrui be valued and distributed to the deceased's rightful heirs according to Islamic laws;
- iv. That the above mentioned deceased's house situated at Mambrui be vested upon the heirs upon distribution; and
- v. Any other relief the court deems fit to grant.

22. This court has gone through the proceedings before the lower court. The pleadings which were filed by the parties did not bring out any contestation about the appellant herein not being one of the widows of the deceased. Mwanajuma Bakari Mae did not file an objection to the petition for succession on the basis that the appellant was not her co-wife. The respondent herein did not also file an objection to the said petition.

23. In making reference to the evidence of Mwanajuma Bakari Mae, she refers to the appellant as her co-wife. Documents which were filed in the Kadhi's court by the appellant establish that she was appointed by the High Court of Kenya at Malindi as one of the Administrators of the deceased's estate together with Mwanajuma Bakari. An agreement dated 6th November, 2014 with regard to the sale of plot No. 176 Fundisha Scheme shows that the appellant was included in the said transaction and together with the Mwanajuma Bakari Mae, the respondent, Sofia Ali Mbaruku and Nasra Saidi Ali (the appellant's daughter), they gave consent for the sale of the piece of land which formed part of the deceased's estate.

24. The respondent in his evidence before the Hon. Principal Kadhi indicated that he took dowry to the appellant's mother but she refused to accept the same and said that the deceased was her suitor. The respondent said he was not sure if the appellant got married or not. He however indicated that he could not dispute that she was his daughter (daughter-in-law) and her children were his grandchildren.

25. In the case before the Kadhi's Court, the appellant called a witness by the name of Ramadhan Mwalili who testified that he was present at the time of the appellant's marriage. The marriage was said to have been solemnized by Muslim Hussein Dado. He also said that Ali wa Jeffa was also present during the marriage as at the time when Ramadhan Mwalili Ali wa Jeffa was said to be mentally disturbed.

26. I do concur with the observation made by the Chief Kadhi that there was no issue which called for the Hon. Principal Kadhi's determination as to whether the appellant was the deceased's wife or not. In *Dakanga Distributors (K) Ltd. vs. Kenya Seed Company [2015] eKLR*, the Court adopted with approval the sentiments of the Supreme Court of Malawi in *Malawi Railways Limited vs. Nyasulu [1998] MWSC 3* as follows:-

“It is not part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.”

27. Secondly the balance of proof in civil cases is on a balance of probabilities. Even if there was contestation about the appellant having been the deceased's wife, she would have been expected to prove her case on a balance of probabilities and not beyond reasonable doubt. This court's finding is that the Hon. Principal Kadhi misdirected himself when he held that the appellant was not the deceased's wife. That was not an issue which was before him for determination.

The rightful heirs of the deceased's estate.

28. As per the petition for succession filed in the Principal Kadhi's Court at Malindi, which was not contested, the rightful heirs of the deceased's estate are:-

- i. Ali Mbaruku Masha – Father
- ii. Sofia Ali Mbaruku – Mother
- iii. Mwanajuma Bakari Mae – Widow

iv. Saumui Mulanda Wanje – Widow

v. Nasra said Ali Mbaruku– daughter

vi. Samya Said Ali Mbaruku – daughter

vii. Sharikha Said Ali Mbaruku - daughter

29. At the hearing of the succession cause in the Kadhi's Court, the respondent relinquished his and his wife's share of the deceased's estate to their granddaughters who are listed at number (v), (vi) and (vii) above. The share for Ali Mbaruku and Sofia Ali Mbaruku will therefore be distributed to Nasra Said Ali Mbaruku, Samya Said Ali Mbaruku and Sharikha Said Mbaruku.

30. At the time the case was heard in the lower court, the only asset which was available for distribution was a 5 roomed house situated at Mambui. A piece of land LR No. Malindi/Fundisha/176 had already been sold and the proceeds shared amongst the appellant, her co-wife and the respondent. The appellant was dissatisfied with the fact that she only received Kshs. 200,000/= out of the sale proceeds of Ksh. 1,350,000/=.

31. The decision of this court is that the house situated at Mambui will be distributed to the deceased's heirs as stated in paragraph 28 as read with paragraph 29 of this judgment, in accordance with Islamic laws.

32. As for the piece of land which was sold by the respondent, he failed to account fully for the proceeds of the sale. This Court therefore orders that the proceeds of the sale of the property shall be distributed to the deceased's heirs in accordance to Islamic law, less the amounts which Mwanajuma Bakari and the appellant received, and the amount the respondent retained. The amounts which were expended in payment of professional fees to facilitate the sale of the land shall also be deducted from the proceeds of the sale. The amount expended in educating the appellant's children will be reduced from her entitlement. Any outstanding liabilities to the deceased's estate shall also be payable from the proceeds that were obtained from the sale of the said property. This appeal is allowed only to the extent outlined in this Judgment.

Orders accordingly.

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

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Shujaa for the Appellant

Mr. Mulomi for the Respondent

Mr. Sammy Kabue - Court Assistant