



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 29 OF 2019

OMAR MOHAMED SAID..... 1ST APPELLANT

BARKE SALIM SEHEI.....2ND APPELLANT

VERSUS

IYMAN AMER MOHAMED1ST RESPONDENT

SWALAHA AMIR MOHAMED.....2ND RESPONDENT

MOHAMED AMER MOHAMED.....3RD RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Nyongesa Advocates for the Appellants

Wesley John Austin & Associates Advocates for the Respondent

JUDGMENT

The appellants appeals against the Judgment of the Kadhi's court which on 13.5.2019 distributed the **Estate of Amer Mohamed Said**, to the heirs as particularized in the final orders of the court.

Being aggrieved with the decision, the appellants filed the following grounds to support for the reversal of that Judgment:

- (1). The Honourable Kadhi erred in law and in fact by allowing the petition by the respondents despite the lack of evidence.**
- (2). The Honourable Kadhi erred in Law and in fact by failing to consider and analyse the evidence by the appellants.**
- (3). The Honourable Kadhi erred in Law and fact by shifting the burden of proof to the appellants.**
- (4). The Honourable Kadhi erred in Law and fact by exhibiting bias against the appellants and by considering extraneous matters.**
- (5). The Honourable Kadhi erred in Law and in fact by delivering Judgment in favour of persons who were not parties to the case and who never tendered evidence.**

What then are the facts. As the evidence adduced by **Ayman Amer Mohamed** and **Omar Mohamed** on the real facts is very scanty it can be summarized as follows:

The petitioner gave evidence on the existence of the deceased estate comprising of a house at Barani, with improvements of seven shops. According to the petitioner, his father died and was survived with **Salah Amer** , **Aryman Amer** and **Mohamed Amer**.

In cross examination the petitioner told the court that the house belonged to the grandfather who died in 1993 but he is not aware on the acquisition of the property. His claim before the court was to be recognized as a beneficiary entitled to a share of the property.

On the side of the defence **Omar Mohamed Said** testified and stated that the petitioner is a nephew. The defendant gave evidence to show that the house in dispute belonged to his late father who sold it to the five of them while the mother sold her gold to pay their late father for the house.

According to the defendant, the petitioner has a share of the property. He also complained that he has done some improvements on the property since 1995. Upon consent from his brothers including the petitioner it was also his evidence that the ground rate is being paid to **Rashid Azzan**.

On appeal

Mr. Nyongesa for the appellants' counsel submitted that the trial Learned Kadhi erred for misapprehending evidence as to the nature of the proprietary rights and interest left behind by the deceased.

According to counsel, the legal lines to use and apply to the property ought to have recognized that the appellants further left behind two houses in Malindi erected on a plot owned by Mohamed Azan. The next legal line submitted by counsel was the fact that it was agreed within the family to have Jamila Mohamed to have as a benefit a portion of the small house whereas the bigger house was to be shared between the four brothers.

Counsel invited the court to find that the five shops solely constructed by the appellant should not have formed part of the free property of the Estate of the deceased.

Mr. Atyang acting for the respondents opposed the appeal that the Learned Kadhi was right in his decision to distribute the estate in the manner he did amongst the beneficiaries.

Determination

In deciding which side to choose, the first appeal court is obligated to reconsider the evidence, assess it and make appropriate conclusions on such evidence, but always remembering that it has neither seen nor heard the witnesses. (See **Selle & Another v Associated Motor Boat Company Ltd & Others {1968} EA 123**, **Peter v Sunday Post Ltd {1958} E. A. 424** (See also **G. V. Odunga Digest on Civil Case Law and Practice Vol 2 2nd Edition Pg 1713 at 3581 (B) J**).

In the instant appeal from the Judgment of the Learned Kadhi, certain pertinent issues arise, who is the owner of the land? What kind of proper rights did the grandfather hold before his demise. The dispute involved Succession matters by dint of Section 3 of the Succession of the Law Succession what did the Kadhi understand to be free property to the estate of the deceased.

A further question arose as to certain considerations, that initially, the property had no improvements comprising of seven shops. There is evidence by the appellant that he was the one who developed the property with a loan.

Property ownership is both a legitimate individual right and at the same time in the Law of Succession be used and transferred on the basis of Islamic principles. This estate was collapsed into one free property without first ascertaining whether, the interest held by **Rashid Azzan** who receives the ground rate in the suit land without previous registrable interest under the Land Registration Act or ordinance Act governing the rights and interest over that portion of land. If the owner died before registration was it a possible that the unregistered occupation to Law by the grandfather and later the father to the appellant enjoy to same rights. There is also a part of agreement that Jamil was to benefit out of the estate. That becomes a crucial contest because the share seemed to be predetermined.

In point in line it was necessary for the Kadhi to separate the property bequeathed to the estate without the additional improvement which were not part of the original interest. In this regard, I ask the question whether the judgment should be left to stand?

In the case of **Ephantus Mwangi & Another v Duncan Mwangi Wambugu 1982 – 88 IKAR;**

“an appeal court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is demonstrating to have acted on principle in reaching the finding he did.”

In the instant case, looking at the evidence again and taking into account the facts as stated on appeal, it is difficult to comprehend the circumstances in which the Learned Kadhi distributed the estate without clearly factoring in the various aspects of the claim as submitted by both the appellant and the respondent. There is no evidence with the effect that the appellant proposition with regard to the construction undertaken on the suit property long after the death of the deceased could reasonably be appropriated as free property of the estate. The mere fact that the property improvement is formally tied to the suit land is no basis to conclude to be intestate property.

From the facts of this case, reasonably interpreted matters of this estate as set up in the evidence should be properly dealt with and for purposes of this appeal, to avoid any of it to be mistaken for the other.

Unless there were special reasons why the Learned Kadhi had to incorporate it as part of the estate the preponderance of the evidence is that the latest development in the property was distinct and not available for distribution.

For the above reasons, the impugned Judgment is hereby set aside and a retrial be scheduled before the Kadhi in Kilifi court to hear and determine denovo the following:

(1). The nature of interest held over land without the itemized improvements.

(2). The computation shares of Jamila.

(3). Whether the appellant share of property improvement, can be severed from the original estate.

(4). Whether the rest of the estate can be shared equally according to the principles in Islamic Law and in the alternative draw inspiration on the principles in the Law of Succession Act.

(5). The matter be mentioned on 15th April 2020 at the Kadhi's Court - Kilifi to determine the framed issues by this court and the matter be finalized within forty five days from the date of the pre-trial conference.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 12TH DAY OF MARCH 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Atyang for the respondent