REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL APPEAL NO.13 OF 2019

HABIBA SHARU HIRBO.....APPELLANT

VERSUS

IBRAHIM SHARU HIRBO.....1st RESPONDENT

ABDI SHARU HIRBO.....2nd RESPONDENT

(*Being an appeal from the whole judgement of Hon M.A. Mahmoud Kadhi delivered*

***on 22.3.2019 and decree of the Principal Kadhi's court at Marsabit Succession Case on No.13 of 2019*)**

J U D G M E N T

The late **SHARU HIRBO** died on 23rd March, 2013. He was survived by his widow and ten children – six sons and four daughters. The widow petitioned the court for the distribution of the deceased's estate. The trial Court held that the deceased had distributed part of his estate during his lifetime and distributed the remaining estate namely land located at Sagante, Jaldesa location. The appellant was dissatisfied with the Kadhi's decision and preferred this appeal on the following grounds:-

1. That the learned Kadhi erred in law and fact by holding that Title No. Marsabit/ Mountain/22 does not form part of the estate of Sharu Hirbo (deceased) for the reason that the deceased had already disposed the property during his lifetime without any evidence on record but contrary to evidence on record and also contrary to the law.

2. That the learned Kadhi erred in law and fact by misconstruing evidence on record which confirms that Title No. Marsabit/Mountain/22 is still registered in the names of Sharu Hirbo (deceased) and no transfer forms or consent were ever provided in evidence to confirm the holding by the trial court.

3. That the learned Kadhi erred in law and facts by misconstruing the conditions of a valid will in Islam.

4. That the learned Kadhi erred in law and facts by misconstruing the conditions of a valid Hiba in Islam to warrant the holding and/or affirming the alledged disposal of the suit property by the deceased.

5. That the learned Kadhi erred in law and facts by failing to appreciate that the deceased died a Muslim and hence his personal law should be Islamic law and hence Islamic law of succession has precedence to Burji Culture on inheritance and the latter cannot apply to distribution of the deceased's Estate.

6. That the decision by the honourable Kadhi is discriminatory on the part of the widow and deceased's daughters as it cut them off to the most valuable estate property Title No. Marsabit/Mountain/22 and the distribution to all heirs of deceased the Sagante property put them at a great disadvantage and violating their right to equal protection of the law and property rights.

7. That the learned Kadhi erred in law and fact by holding that a Muslim person is free to deal with his property howsoever he wants including disposal to his heirs and extended family members and hence his judgment is misleading and also contrary to the settled law on the matters.

8. That the judgment by the learned Kadhi lacks clarity as to whether the suit property Title No. Marsabit/Mountain/22 was disposed off, bequeathed or gifted away by the deceased as all the said scenarios have different legal connotation and effects tin law and hence ambiguous and as such cannot be effected.

9. That the learned Kadhi's judgment is manifestly a miscarriage of justice and against the weight of evidence and law relevant to the issues of this case.

Mr. Ali, learned Counsel for the appellant, relied on his written submissions. Counsel submitted that the respondent's position is that the deceased distributed his estate during his lifetime and that under Burji custom once women are married they are not entitled to inherit. This explanation does not explain the status of the widow under the customs. The judgment of the trial Court did not mention the matrimonial home which is located on the land. The house was built by the children for their parents. The deceased was a Muslim and the alledged distribution of the estate under his custom cannot be held to be a will as it is not in line with Islamic law. Counsel contend that the widows 1/8 share and the daughters shares were not provided for. The widow had been in possession of the matrimonial house. Counsel relies on the case of Estate of **Ishmael Juma Chelan'ga (deceased) (2002) eKLR** where the court held that since the deceased died a Muslim his personal law for purposes of intestate succession is Islamic law. The deceased was a Muslim and the Burji customs do not apply. Counsel also relies on the case of **Re Kusundwa (1965) E.A 247** where the Court stated at **page 251** as follows:-

"it has sometimes been argued that Islamic law is to be regarded as applying to Africans as part of their customary law. In my view this is not a sound proposition. Customary law is a body of customs which by usage has acquired the force of law. As such it is constantly changing with changing ways of life. It cannot, therefore, in my view, include a complete and fully developed system of religious law …… I hold therefore that there are two systems of law which may apply in an African Muslim community, religious law in matters peculiarly personal, such as marriage, and customary law which may apply in all spheres of life."

It is further submitted that a Muslim can only gift or will away not more than one third (1/3) of his estate and cannot bequeath properties to persons who are entitled to inherit him. It is alledged that the deceased distributed plot number Marsabit/Mountain/22. There is no evidence that the property was given as gift to the sons within the confines of the Kenyan or sharia law. No deed of a gift was executed by the deceased. In sharia law, a gift is referred to as ***hiba*** and for it to be valid it must meet sharia qualifications namely:

(i) A declaration by the donor which should be unambiguous

(ii) Acceptance by the donee

(iii) **Delivery of possession**

Counsel submitted that the deceased did not give possession of the estate to the respondent. Article 27(1) of the Kenyan Constitution calls for equality and freedom from discrimination. The daughters were discriminated and were not provided for. The appellant is entitled to her share on plot number 22. The widow has been blocked from the matrimonial house.

Mr. Ondari appeared for the respondents. counsel maintain that the Sagante land was distributed to both sons and daughters. What the deceased did was ***hiba*** and not Burji customs. The respondents have no problem with the widow. The deceased distributed to all his sons portions of properties during his lifetime. The Burji custom dictates that once a woman is married she ceases to claim any property from her parents. Plot number Marsabit/Mountain 22 belongs to the deceased and he disposed the property by distributing it among his sons before his demise.

Mr. Ondari further submitted that ***Hiba*** is a gift while a will is the intention of a testator. Under Islamic law a gift has to fulfil three conditions.

1. The gift should be made by the owner of the property.

2. The donee should accept the gift.

3. The donee of the property should take possession.

Counsel relies on the case of **RE ESTATE OF HABIBA GALGALO GUYO (2018) eKLR** where the Court observed as follows:

In a detailed research title 'Distribution of inheritance prior to death' published in the contemporary jurisprudence research journal issue No.85 of February-May 2020, Dr. Abdallah bin Fahd bin Ibrahim Al Hayyid, a lecturer in the Faculty of education, King Saud University found that "distribution of one's property to all heirs before one's death is valid if done on the basis of a son getting twice the share of a daughter." In the instant case, the deceased distributed all her properties to all her children. The sons got a share more than the daughters both in the livestock and parcels of land. Accordingly, we find no fault at her distribution. It was within her legal right. In law, they are not properties of the estate. The distribution of the properties by the deceased are adopted."

This is a first appeal. The Court has to evaluate the evidence and record of the trial Court afresh before drawing its own conclusion. Before the trial Court the appellant testified that the deceased distributed the plot at Shauri Yako during his lifetime. He also testified that the distribution was not in accordance with the Islamic religion. She complained that where her house stands is alleged not to belong to her. The deceased distributed the plot to the sons only and did not give the daughters any land. The appellant too was not given a portion of land for herself. The deceased's estate consists of two plots and a shamba. One small plot was given to one of her daughters while the other plot was given to the sons. She pleaded that the other daughters be considered. She had been asked to get out of the plot. All the other beneficiaries are her children with the deceased. The house she was living in was built by one of her daughters who works for the Prison Department.

The 1st respondent testified that the appellant in his mother. The deceased distributed his estate about 30 years before his death. He has his own house which he built on a portion of the land shown to him by the deceased. He is the deceased's first born. He is not opposed to his sister getting a share of the land in Sangante. Where the appellant is residing belongs to him as he was given that portion by his father. The

deceased left no will but elders witnessed the distribution of his estate. The appellant is residing in the house left by the deceased. The respondents are not interested in getting a share of the Sagante land. Out of the six sons who were allocated land, three have developed their portions. Some sons got bigger portions than others.

The 1st respondent filed witness statements of the 2nd respondent and two other witnesses. Since the three witnesses did no testify, it is not proved that they indeed signed those witness statements. The witnesses were not subjected to cross examination to gauge the truthfulness of their statements. I do find that the witness statement of Abdi Sharu Hirbo, Wata Ibiro and Kadido Oche are of no evidential value and cannot be considered by this court.

The appellant testified that the deceased distributed part of his estate during his lifetime. The respondents have not raised any issue with regard to the plot distributed to their sister, Guyo. There is also no issue in relation to the distribution of Sagante land by the trial Court. The appellant's main complaint is where she resides and the shares of her daughter.

Plot number Marsabit/Mountain/22 is approximately 1.27 hectares. This is about 3.13 acres. The deceased has six sons. What comes out clearly is that the deceased showed each son where to build his house. The contention that each son has fenced his portion is not proved by tangible evidence. The appellant is not seeking more than where the matrimonial home is situated. Her evidence is that there are two houses one house is the family home where the children were born. The other house was built by her daughter who works with the prison department. That is where she was residing until electric power was disconnected.

Beneficiaries to their deceased parents should understand that although the estate could be registered in the name of one parent, the other parent also contribute towards the acquisition or maintainance of the properties. Had the appellant sought for her share of the properties acquired during the marriage, she would have succeeded and managed to get her share. The contention that under Burji customs married daughters cannot inherit their parents goes contrary to Article 27 of the Constitution on equality and freedom from discrimination and is therefore repugnant to the spirit of the Kenyan Constitution. The sharia law recognizes daughters whether married or not and the share of a daughter is half the share of a son. The deceased was a Muslim and his estate has to be distributed in accordance with Islamic law.

From the evidence on record, I do find that the deceased could not have distributed the house where the appellant resides to any of his sons. The appellant is entitled to that house as part of her 1/8 share of the estate. The trial court did not call for valuation of the estate. The appellant's complaint before the trial court was her share of both plot number 22 and the Sagante land. This being the case, I do find that there is no need to call for valuation of the estate. All what I can say is that the appellant is entitled to inherit the matrimonial home and that home shall form part of her share. She is equally entitled to a share of the Sagate land. The deceased did not distribute the house to the 1st respondent.

Although counsels submitted on the issue of gift or hiba, I do find that what the deceased did was to show each son a place to build his house. Seven years after the deceased's death, the land is still registered in the names of the deceased. There is no exact measurements for the portions given to the sons. All what is alledged is that each son has fenced his portion. It is true that the deceased gave the sons land. However, there is no proof as to the exact measurements of each of the six plots. The appellant can be accommodated within the Mountain plot and her share of that plot allocated to her. That share shall be her absolute property and should not be mistaken with a life interest.

With regard to the land in Sagante, the trial Court distributed it equally to the children and also granted the appellant 12.5% share. Having found that the appellant is entitled to the Mountain plot, I do find that her share on the Sagante land shall be a share equal to the other beneficiaries instead of the 12.5%(1/8th) share under Islamic law. Her share will therefore be equal to what the other beneficiaries will get. The appellant told the Court that the daughters can be accommodated through shares from the Sagante land. This is what the trial Court did and I see no good reason to alter the sons' share on plot No.22 and allocate the daughters on that plot.

This being a succession matter there is the need for an administrator to carry out the distribution of the estate. The respondents cannot argue that the deceased already distributed the estate yet they do not have titles to respective portions out of plot number Marsabit/Mountain/22. There is need to have an administrator who will, distribute the estate to all the beneficiaries. The appellant being the mother of all the beneficiaries is best suited to be the administrator.

In the end, I do find that although the deceased had given plots out of plot No.22 to his sons, there is no evidence that the appellant is not entitled to a share of that plot. There is no evidence that the deceased distributed the entire plot number 22 upto the last decimal point to his six sons. All what is proved is that all the six sons were shown places to build. None of the daughters testified. The Islamic law is clear, both the daughters and the widow have their own pre-determined shares which have to be created out of the estate. Plot No.22 therefore forms part of the deceased's estate.

The appeal is merited and is hereby allowed. The appellant is entitled to the matrimonial house where she has been residing and I do find that the matrimonial house shall form part of her 12.5%(1/8th) share. All the daughters and the widow shall share equally with the sons the Sagante plot as ordered by the trial Court. The appellant is hereby appointed as the administrator of the deceased's estate and a certificate of confirmed grant shall be issued to her. The confirmed grant shall be issued after the portions of the sons and the appellant are determined on the ground on plot number 22 as well as the measurements of the shares of each beneficiary out of the Sagante land. Parties shall meet their own respective costs.

Dated, Signed and Delivered at Marsabit this 11th day of March, 2020

S. CHITEMBWE

JUDGE