



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 33 OF 2015

VALI DOST MOHAMED.....APPELLANT

VERSUS

KARIM NAWAZ ISSA.....RESPONDENT

(Being an Appeal from the Judgment and Order of the Hon. Sheith Said Hamisi Bedzenga Kadhi's Court at Kwale dated 29th April 2015 in Kadhi's Succession Cause No. 154 of 2014)

CORAM: Hon. Justice R. Nyakundi

Oloo & Chatur Advocates for the Appellant

Khatib Advocate for respondent

JUDGMENT

This Succession matter was initially filed before the Kadhi's Court at Kwale in Succession Cause No. 154 of 2014. The petitioners claim (Karim Nawaz) is that his grandmother **Jenebhai Haji Vali Mohamed** died in 1992 leaving the parcel of land Kwale Township Plot No. 21.

The petitioner claims that the suit property belongs to her but however she elected not having authority or control over it. She further claims that she has erected a building and which encompasses shops that have been rented out. She asserts the respondent is the one benefiting from the rentals alone.

The petitioners prayed for determination of heir, distribution of estate according to Islamic Law and vesting order of the estate to heir. The petitioner considers herself the heir of the plot in dispute. In an affidavit in reply, the respondent claimed that the deceased was his grandmother and argues he has the right to inherit the disputed suit plot. The respondent did not object to the property being distributed in accordance with the Islamic Law.

The Lower Court in its findings and determination held as follows:

“It has been noted and it is the believe of the parties in this matter and the believe of the surviving relatives of the deceased that the deceased offered the estate in this matter to the petitioner's father who was a son of his brother and adopted him as her own child. The elder Aziz Khan Ismail in his evidence informed this court that is a discussion at home the respondent admitted that the estate/house does not belong to him. The respondent had no question to the witness/elder on his evidence, as such admitting the witness/elder's statement. Admission is a strong evidence in both Islamic and Statute Law. The deceased having offered her property to the petitioner's father or the petitioner himself, the property is no longer estate for inheritance to other relatives except the petitioner. The property or estate constituting of a plot and house on parcel of land Kwale/24 is hereby property and inheritance for the petitioner.”

Having been dissatisfied by the Lower Court's decision, the appellant Vali Dost Mohamed filed an amended Memorandum of Appeal dated 27th November 2015. The appellant appeals against the whole Judgment and decree on the following grounds:

- (a). The Learned Kadhi misdirected himself in treating the evidence of the appellant very superficially thereby erroneously arriving at a wrong decision.***
- (b). The Learned Kadhi erred in misdirecting himself to consider only a part of and not all the evidence presented to him by the appellant consequently arriving at an unfair decision.***

(c). The Learned Kadhi erred in Law by entering a Judgment without giving sufficient basis and reasons for his decision.

(d). The Learned Kadhi misdirected himself by not considering the contribution made by the appellant in maintaining the property in dispute.

(e). The Learned Kadhi erred in Law in entering Judgment in favour of the petitioner and not considering the appellant as a dependent.

(f). The Learned Kadhi erred in Law and fact in entering Judgment in favour of the petitioner without putting into considerations that the said deceased had no children except the from her brothers and sisters the parties herein.

(g). The Learned Kadhi erred in Law and in fact in entering Judgment in favor of the petitioner without putting into consideration that the village elders were not aware of the entire estate after the deceased death.

(h). The Learned Kadhi erred in Law and in fact in entering Judgment in favour of the petitioner without putting into consideration that the said proceeds are to be shared amongst the two parties yet the respondent is not a legitimate heir sharing the same thereof.

(i). The Learned Kadhi erred in Law and fact in entering Judgment in favour of the petitioner by giving some orders instructing the respondent to move out of the suit house where he has been living since his birth to date. It is proposed to ask their court for an order that the Judgment of the said Learned Kadhi together with all consequential orders or decree be set aside and this appeal to be allowed with costs.

Determination

The appellant counsel challenged the trial court Judgment in the context of nine grounds of appeal in the amended Memorandum of Appeal dated 27.9.2016.

However when I distill through each ground of appeal it primarily deals with one central issue. Whether or not the trial court Judgment on possession of the suit land/property had been properly determined in favour of the petitioner.

From the evidence while the petitioner fact of ownership and possession of the suit property stems from being born and brought within the propriety he did not answer to the rights of proprietorship or beneficial interest.

Whilst it might not be contested issue about the petitioner being brought up at the property, the question whether he acquired subsequently the property for valuable consideration or by registration with all the gift inter-vivos, proprietary rights and interest that affect the property is a pertinent issue which could not just be wished away by the trial court.

The evidence on record by the petitioner and his witnesses PW2, PW3 and PW4 is silent on whether or not the petitioner ownership of land was bequeathed under Islamic Customary Law rights or over an overriding rights or interest recognizable under the Land Registration Act.

The petitioners claim in the suit was for a designated parcel of land with all improvements thereon referred as comprising of shops. The case as pleaded and the evidence of PW1 – PW4 claims that the suit property was solely that the petitioner and it is apparently founded an ancestry heritage.

Though the evidence makes reference to Section 29 of the Succession Act an dependency, the petitioner fails to recognize the rights of other children or as the case may be who are entitled to the estate of the deceased. Those rights which accrue after death remain inchoate and are not legally enforceable in any court of Law or otherwise until grant of letters intestate have been issued or according to the personal Laws of the deceased.

In the instant case, I believe the deceased might have professed Islamic religion and Law while still alive. His or her property upon death was available for sub-division and distribution among the beneficiaries in accordance with Islamic Law or Succession Act.

As regards the double barreled allegations that the petitioner acquired rights by long standing occupying and physical possession is not a prerequisite that the suit property or part of it thereof was sufficient proof of ownership cannot be prima facie evidence of a registrable interest or legal acquisition. I must therefore reject it.

Secondly, from what has brought to my attention during the hearing of this appeal there appears to be a question of dependants under Section 29 of the Law of Succession. It is immaterial whether the petitioner was born in the suit land. The question is upon death of the grandmother being alluded to by the petitioner, whatever land she owned had to be inherited in accordance with Islamic Law or the Law of Succession unless she had disposed of it by will before her death, which seems not to be the case here. I am not satisfied with the evidence of PW2 that he grew up and found the petitioner staying in the property.

As indicated in the evidence by the respondent, the deceased grandmother and father had no child upon their demise. They adopted a sum of their relative. The administration of the estate was left in the hands of the respondent's mother. According to the respondent, in the Will left his mother, the petitioner is recognized as a dependant.

In my view, the direct evidence given by the respondent does not appear anywhere in the Judgment of the trial court. Though I sit on appeal

and the principles on **Selle v Associated Motor Boat Company Ltd {1968} EA 123 at 126** are very clear that

“in evaluating the evidence I should bear in mind that I have neither seen nor heard the witnesses and hence due allowance must made for this, I cannot resist the temptation to infer that as between the petitioners story and that of the respondent its plausible to believe the respondent version on the history of the property than the petitioner.”

At least, unlike the petitioner he is candid in maintaining that the petitioner rights to occupation was as a result of an “adoption” by their grandmother. Such was the position that the petitioner was being maintained by the deceased immediately prior to her death.

An application such as this filed by the petitioner could either be determined under Section 26 as read with Section 28 of the Law of Succession or in Islamic Law by giving reasonable provision to the petitioner and not the whole estate in exclusion of the rest of the beneficiaries.

I find therefore as a fact that the petitioner has a beneficial interest to this portion of the suit property that was left behind by the deceased grandmother and later bequeathed to the mother of the respondent who has also since passed on, leaving behind part of the beneficiaries being the respondent.

It is for these reasons that I find the trial Kadhi misapprehended the evidence and the Law when he went straight to grant specific performance in favour of the petitioner leaving out the heir rights of the respondent.

Finally therefore, I allow the appeal, set aside the Judgment and decree of the trial court. Further, I also order that the issue involving this estate be determined by another Kadhi to be appointed by the Chief Kadhi to legitimately identify the issues and make a determination in accordance to the Law so established. Each party to bear the cost of this appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF MARCH, 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Otieno for appellant
2. Khalfa for the respondent