



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

SUCCESSION APPEAL NO. 77 B OF 2018

IN THE MATTER OF THE ESTATE OF RAMADHANI WAMBI TIRIMISI (DECEASED)

BETWEEN

MUSTAFA RAMADHAN.....APPELLANT

AND

KASSIM RAMADHAN.....1ST RESPONDENT

SHABIR RAMADHAN.....2ND RESPONDENT

(An appeal from the Judgment and Decree of R.K. Otundo (SRK) dated 31st July, 2018 in Succession Cause Number 17 of 2017)

JUDGMENT

Introduction

1. **RAMADHANI WAMBI TIRIMISI** (deceased) died sometimes on 26.11.2004. Deceased's estate comprised of **LAND TITLE NO.KISUMU MUN. BLOCK5/53**.

2. Upo the deceased's demise, **MUSTAFA RAMADHAN** (*Appellant*) petitioned for the grant of probate of the deceased's will dated 23.11.1981.

3. After hearing evidence for the parties, the learned Kadhi in a judgment dated 31.07.18 made the following orders:

1) The will dated 23.11.1981 is invalid and illegal for non-compliance with shariah law

2) LAND TITLE NO. KISUMU MUN. BLOCK5/53 be valued and shared equally among male members

3) Plot No. 1039 belonging to deceased's widow be shared equally by the surviving heirs

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 05th October, 2018 filed the Memorandum of Appeal dated 1st October, 2018 in which he raised three (3) grounds that: -

1) The Learned Kadhi erred in disregarding the deceased's will

2) The Learned Kadhi erred in distributing the deceased's widow's property

SUBMISSIONS BY THE PARTIES

Appellant's submissions

5. The Appellant holds the view that the deceased's will was valid since there was no evidence of fraud involved in its making. He asserted that the bequest of **LAND TITLE NO. KISUMU MUN. BLOCK5/53** by the deceased to him and his brother **MIRAJ RAMADHAN** in the

ratio of $\frac{3}{4}$ and $\frac{1}{4}$, though in excess of $\frac{1}{3}$ of the net estate, was valid for the reason the deceased informed the beneficiaries concerning the will and they consented as confirmed by the affidavit sworn by deceased's widow Mrs. Mwajuma Omar and by the statement of the KASSIM RAMADHAN (*1st Respondent*).

6. It is also the Appellant's case that the Kadhi erred in distributing the deceased's widow's property which did not form part of the deceased's estate.

Respondents' submissions

7. The Respondents submitted that the will allegedly made by the deceased did not comply with sharia law and was suspicious since the Appellant was executor and the main beneficiary. It was further asserted that the witnesses to the will declined to testify thereby casting doubt on its authenticity.

ANALYSIS AND DETERMINATION

8. I have carefully considered the record, grounds of appeal and submissions made on behalf of the parties. This is a first appeal and in

the case of **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** the duty of this Court as a first appellate court was stated to be as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

9. Deceased died a Muslim and under the Law of Succession Act, (*the Act*) the law applicable in relation to his estate is Islamic Sharia. Section 2(3) of *the Act* provides:

Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.

10. In paragraph 3 of the Will, the Deceased states:

“I hereby devise and bequeath my Plot No. Kisumu Municipality/Block 3/53 to my two sons MUSTAFA RUSO BOYA RAMADHAN and MIRAJ RAMADHAN in the ratio of $\frac{3}{4}$ and $\frac{1}{4}$ i.e MUSTAFA will get a share of three quarters and MIRAJI one fourth respectively.

11. In the leading case of **Saifudean Mohamedali Noorbhai v Shehnaz Abdehusein Adamji [2011] eKLR** the Court of Appeal opined:

“The limit on a Muslim's testamentary freedom, up to one-third of one's estate, is seen in Islam as a means to ensuring balance between a Muslim's freedom in this regard and responsibility to his or her heirs. Deriving sanction from a Prophetic tradition, it reflects indications in the noble scripture that a Muslim may not “so dispose of his property by will as to leave his heirs destitute”. (Mulla, Ch, IX, Wills, p.141).

12. Further to the foregoing, under Islamic Sharia, a Muslim may not make a bequest in his will in favour of a legal heir. The basis of this is that Allah legislated fixed shares for legal heirs. Any Will that purports to exclude a legal heir or make a bequest to an heir is not valid under Islamic Sharia. Allah's Prophet (SAWS) said: **“Allah has appointed for everyone who has a right what is due to him, and no bequest must be made to an heir. (Abu Dawud). Similar hadith is narrated by Abu Umamah (RA) and reported by Ibn Majah, Ahmad and others”.**

13. The appointed share of every heir is stipulated in the Holy Qur'an in Nisa 4:11:

“Allah instructs you concerning your children [i.e., their portions of inheritance]: for the male, what is equal to the share of two females”

14. Nisa 4:12 provides:

“...And for them [i.e., the wives] is one fourth if you leave no child. But if you leave a child, then for them is an eighth of what you leave after any bequest you [may have] made or debt.”

15. From the judgment of the trial court, I gather that the deceased had two wives, (one is deceased) and 9 children. In spite of this fact, the deceased proceeded to provide for 2 of his sons excluding his other children. The Will also provides for legal heirs whose share is already stipulated in the Holy Qu'ran. The will as was rightfully found by the learned Kadhi is against sharia law given that the deceased's testamentary freedom is limited to $\frac{1}{3}$ of his estate. This is to ensure a balance between giving his property to whoever he wishes and his obligation to his heirs.

16. Concerning the second issue, the cause before the learned Kadhi related to the estate of **RAMADHANI WAMBI TIRIMISI (DECEASED)**. I am therefore persuaded that the Kadhi erred in distributing the deceased's widow's property in PLOT NO. 1039 which did not form part of the deceased's estate.

17. In the end and for the reasons given on the assessment above, this court makes the following order:

- a. The learned Kadhi's decision concerning the deceased's will is upheld**
- b. The learned Kadhi's decision distributing the deceased's widow's property in PLOT NO. 1039 is set aside in its entirety.**
- c. This being a family matter, each party shall bear its own costs.**

DATED AT KISUMU THIS 28th DAY OF July 2020

T. W. CHERERE

JUDGE

Court Assistants - Amondi/Okodoi

For the Appellant - Mr. Odeny of Bruce Odeny & Co. Advocates Respondents - In person

Order

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID - 19 pandemic