REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO: 99 OF 2009

R M.....APPELLANT

VERSUS

Z N J.....RESPONDENT

JUDGMENT

1. R M ***(the appellant)*** has filed this appeal contesting the decision where the Kadhi's court held that:

(i) Plot No. Kakamega/Serem/[particulars withheld] was for the children of the plaintiff (S M).

(ii) Plot No. Vihiga/Serem/[particulars withheld] for the interested party A K

(iii) Plot No. Nandi/Serem/[particulars withheld] by the defendant (Z N J – now Respondent) and her children

(iv) Plot No. Tiriki/Serem/[particulars withheld] to be shared whereby the defendant(Respondent herein) gets $^{1}/_{8}$ and the balance to the recognized children at the ratio of 2 to 1 sons to daughters.

(v) Each party shall bear its own costs.

2. The background to this matter is that S (now deceased and substituted by Ramadhan) and Zulfa (Respondent) were widows to **M A A**a practicing Muslim who died on 9th July 2006 S aged 66.

The deceased had the following issues;

A M– 46 years

R M – 43 years

R M – 41 years

M M – 38 years

K M – 36 years

A M – 34 years

S M – 32 years

A M – 30 years

S M – 28 years

S M – 26 years

With the Respondent, the deceased had

(1) KK – 9 years

(2) AV – 7 years

According to the plaint the deceased had children with 2 other women, the children being:

R M – 48 years

A K – 46 years

The deceased had acquired the Kakamega/Serem***/[particulars withheld]*** and ***[particulars withheld]***, Vihiga/Serem***/[particulars withheld]***, Nandi/Serem***/[particulars withheld]*** and ***[particulars withheld]*** for which the widows sought distribution in accordance with Mohammedan Principles of inheritance and Koranic jurisprudence.

The Respondent was accused of willfully prosecuting matters touching the estate of the deceased before the secular courts in total disregard of their common faith. It was the appellant's case that his mother had jointly and severally assisted the deceased in his business and managed to acquire the said properties.

The appellant thus sought the court to make an order of distribution of assets in respect of the estate of **M A A**in accordance with Mohammedan principles of inheritance and Koranic jurisprudence.

3. The Respondent's defence was that the deceased had divorced the appellant's mother on or before 1997, in accordance with the governing Islamic laws pertaining to divorce. It was her position that the appellant's mother was blessed with the named children which she had with the deceased. However according to her, all the female children named therein had been married under the Christian faith, and no longer subscribed to the practice and/or principles of the Islamic faith.

4. The Respondent's contention was that plots Nos. **KAKAMEGA/SEREM***/[particulars withheld]* and **NANDI/SEREM***/[particulars withheld]* were passed to the appellant's mother and her children **KK** and **AV** by the deceased during his lifetime, at a time when he was in good health and in full control of his mental faculties. Consequently the two parcels would no longer form part of the deceased's estate thus not available for distribution.

5. Further, that the only matter she ever prosecuted against the appellant's mother was pending before the Senior Resident Magistrate's Court at (Vihiga) and did not touch on the deceased's estate, but was to protect the appellant's mother proprietary

6. At the hearing of the matter before the Kadhi, the Respondent's co-wife **S** told the court that when she got married to the deceased, she assisted him in working until they bought land and planted tea bushes. They then got a plot and built some houses – at that time, she did not have a co-wife.

Later when the Respondent got married, she made allegations that the appellant's mother wanted to kill her, and the deceased was so furious that he chased her away without any maintenance.

7. On cross exaM tion she stated that she got married to the deceased in 1975, by which time the deceased had two children **R** and **AGU,** sired with another wife who passed on earlier.

She confirmed that the house where the Respondent lives was built by the Respondent and the deceased, which was on a plot belonging to the deceased's father.

The appellant's mother maintained that the deceased did not write a will, although she remained in the land where the deceased was buried – that is the land No.688 which hosts her house and tea plantation. She also confirmed that there was a workshop comprising three rooms which she was benefiting from but the respondent was using the rest of the building

She denied suggestions that the workshop had been given to **A.**

K M, (son to the deceased) told the court that after the deceased's demise, the family was presented with a piece of paper showing that the Respondent had been given one plot just before the deceased passed on. After the deceased's death, another plot was transferred to the Respondent which action was to be witnessed by two persons in accordance with Islamic Laws but this did not happen. This is why they contested the credibility of that paper.

8. It was his further evidence that it was wrong to will out properties during sickness which results in death and as far as he knew the deceased had been ailing since the year 2004.

He also stated that plot No. 1006 belonged to his father, but after the death he realized it now belonged to the Respondent. He was opposed to transfer of the **TIRIKI** plot.

9. On cross exaM tion he clarified that upon having a meeting which was presided upon by the chief, it was agreed that the Respondent would remain with the **TIRIKI** plot on condition that the house she was staying in was to be disposed of. He confirmed that plot No. [particulars withheld] at **NYANGORI** had belonged to their father, but their mother had taken over it.

He conceded that his mother accepted the land which had ten acres of tea plantation.

10. The witness insisted that he bought part of plot No. ***[particulars withheld]*****/NANDI/SEREM** and sold part of it to **S A** yet it was transferred to the Respondent after his father's death. Although he was shown a piece of paper which indicated that his father had divorced his late mother one, this witness maintained that his father had not divorced his mother.

11. The appellant herein testified before the trial court where he confirmed that at a session chaired by the chief it was decided that plot No. ***[particulars withheld]*** Vihiga be given to the family, the swampy plot No.***[particulars withheld]*** was to be given to Respondent who would then move out of Nandi plot No.***[particulars withheld]***.

That plot No. ***[particulars withheld]*** would be for the family and the shamba was for her son. He was not satisfied with the decision as it appeared lop-sided since his mother's contribution in acquiring the property was not taken into consideration.

12. He confirmed that in 1998/99, the Interested Party **A K,** went to their home claiming that he was a son of the deceased. He stated that he did not know how the Respondent got to have herself registered over property which his mother had assisted the deceased to acquire.

13. He confirmed on cross exaM tion that his father had instructed during his lifetime that the house on plot No. **[particulars withheld]** be given to the Respondent and her children.

14. On cross exaM tion he stated;

> ***"…The late told me No. [particulars withheld] to be used by the sons while the ladies have got their shares in the Quran, therefore even the defendant has got the share over the same."***

He also conceded that his late father recognized the interested party as his son, and even catered for his education.

15. The respondent's evidence was that when she got married to the deceased in 1997, they lived on plot No.***[particulars withheld]*** for 7 years then on plot No.***/[particulars withheld]*** Nandi for 4 years. It was her contention that plot No. [particulars withheld] was given to her and her two children **KK** and **AV**. The plot was in the names of the children and a trustee named **M.**

16. She acknowledged filing case No. **123 of 2006** in **VIHIGA** but insisted that the case related to unlawful collection of rent from plot No. ***[particulars withheld]*** by the appellant.

The appellants filed HCCC No.14 of 2006 in Eldoret relating to plot No. ***[particulars withheld]*** where the court found that the said plot belonged to the children. However plot No. ***[particulars withheld]*** was given to her so as to educate the Respondents children and Vihiga plot No. ***[particulars withheld]*** was given to **A K** as he did not get any education.

17. It was her evidence that the deceased left a will in the custody of his sister **M** who called the entire family and showed them titles for parcels No. ***[particulars withheld]***, ***[particulars withheld]*** and agreement for plots No. ***[particulars withheld]***.

18. On cross exaM tion she admitted that as at the time of getting married to the deceased, he had already acquired the property in question, but maintained that she helped him develop plot no. 1006, it was her evidence that the deceased had distributed part of his estate, and left out other property, she had no objection to the matter being decided in accordance with Islamic Law on inheritance.

19. The deceased's sister **M A** told the trial court that she had a very close relationship with her late brother, whom she said had divorced two of his wives.

It was her evidence that her late brother did not trust anyone and had given her some documents summoned a family meeting in the home of the Appellant's mother, where she informed them about the papers the deceased had left with her. She indicated that the documents showed parcel (i) **NGASIA KAKAMEGA SEREM NO.*[particulars withheld]*** was to go to the Respondent alongside her children **V M** and **KK.**

(ii) TIRIKI SEREM NO.*[particulars withheld]* to M , A and A.

(iii) NANDI/SEREM/*[particulars withheld]* to M 30.2.82.

Her evidence was that only the shamba had not been distributed, and she did not know the circumstances under which the will was written as she was not present. This was the same evidence presented by **A A L,** a brother to the deceased. He maintained that the deceased had divorced the appellant's mother about 15 years earlier.

20. The interested party **A K M** told the trial court that the deceased had divorced has mother **M,** but recognized him as his legal off-spring. He sought to be given a share from plot **VIHIGA** [particulars withheld] which has rental premises and also be given at least $2^1/_2$ acres of land.

21. In his judgment the trial Kadhi pointed out that according to the Sharia, a will (Wasiya) can be verbal or in writing; and has a limitation of $^1/_3$ of all the estate that a deceased is not allowed to will out – the rationale being that the deceased must have some inheritance to the lawful heirs. Further that the validity of such a will depends on whether specific provision has been made for the other heirs.

The trial court held that the document was a will whose contents were partially confirmed by the appellant's mother and her witnesses as well as the Respondent and her witnesses. Further that the only property which was not distributed was plot **No.TIRIKI/SEREM/*[particulars withheld]*** which was distributed in accordance with Section 11 and 12 of the Holy Quran where the Respondent was to get 1/8 of the said estate and the remaining $^7/_8$ was to be inherited by the recognized 9 children of the deceased at a ratio of 2:1 sons to daughters. Plot No. **Vihiga/Serem/*[particulars withheld]*** was given to the Interested Party **A A K M .**

The appellant and his siblings were from **Kakamega/Serem/*[particulars withheld].***

22. The appellant contested these findings on grounds that;

i) The Kadhi failed to identify the estate of the deceased and the beneficiaries as at death thus proceeding on wholly erroneous principles to ascertain the interests

ii) The Kadhi failed to determine whether more that $^1/_3$ of the estate had been appropriated and/or bequeathed, consequently could not distribute on non existent $^2/_3$.

iii) Some of the children were left out in the distribution,

iv) The Kadhi erred by leaving out the appellant's mother in the distribution of the estate on account of an unlawful 'talaka' which had not been proved. That the evidence should the deceased lived with S in their matrimonial home and even observed eddat.

v) There was no basis for accepting the interested party as a beneficiary to the estate.

vi) (vii) the trial court failed to take into consideration the place of hibah (gifts), and upheld an earlier order of distribution to the interested party, yet the same had superceded by the High Court and should not have formed part of the judgment.

23. In the submissions by the appellant counsel it is argued that the will was defective in as far as it bequeathed more than $^1/_3$ of the deceased's wealth to the beneficiary to the exclusion of the others, and that this offended Islamic Law.

24. The authenticity of the will is also challenged on grounds that it does not merit the requirements of Section 11 of the Law of Succession Act because it was not attested by 2 or more people, and it should therefore be declared a nullity.

25. On this limb the respondent submits that title **No. Kakamega/Serem/*[particulars withheld]*** and **Nandi/Serem/*[particulars withheld]*** were given to her and her children during the deceased's lifetime, when he was in good health and in full control of his mental facilities. These, she argues cannot be available for distribution as they do not form part of the deceased's estate.

26. Further that title No. Kakamega/Serem***/[particulars withheld]*** was issued in the year 2002 long before the decease died and its status was determined in **Vihiga CMCC No. 123 of 2006** which had been filed by the minors against the appellant's mother. The court declared that the minors were the registered and/or lawful owners of the plot.

Indeed the trial court in judgment took this into account and stated:

> **"Kakamega/Serem*/[particulars withheld]* has to be excluded from the list of the estate as it is already in the names of the defendant and her two daughters whose title deed was issued on 18.12.2003 long before the death of the deceased, and according to Sharia every person has the right to do anything with his own property."**

27. The crux of the matter is that there has been no appeal against the finding of the magistrate's court regarding ownership of this property, and it cannot fault the Kadhi's findings on it.

28. As regards Nandi/Serem***/[particulars withheld]***, the respondent pointed out that it was common ground that this constitutes the home of the Respondent and her two children. Indeed, the appellant's mother had stated before the trial court that she desired distribution to be in a manner that where the deceased built for the respondent remains for her, and she also remains with the portion built for her and her children.

She stated:

> ***"I would suggest that the defendant to remain where she is living….it is true that where the defendant stays was built by the late and the defendant."***

29. This was fortified by the evidence of PW2 who confirmed that while taking care of his ailing father, they had a conversation where the deceased told him that plot No.***[particulars withheld]*** should be left for the Respondent and her children and he confirmed in cross examination.

> ***"…the house on plot No.[particulars withheld] Nandi, the late himself told me that the same be given to the Defendant and her children."***

30. There seems to be some confusion as there are two parcels bearing the number 53 – from the Kadhi's findings parcel No. **Vihiga/Serem***/[particulars withheld]*** is the one where the Respondent and her children live, and that is what should be left to her. Parcel No. **Nandi/Serem***/[particulars withheld]*** was given to the interested party, who was acknowledged as a son of the deceased whom he had envisaged and lived with for a period, and even catered for his education. Plot No. **Tiriki/Serem***/[particulars withheld]*** hosts a workshop and some rooms – these were given to appellant's family.

31. As regards the properties and their distribution, it appears to me that the major bone of contention is parcel No.[particulars withheld]. Does it constitute family property from which all the dependants should benefit, or was it the portion the deceased had built a home with the 1st wife (appellant's mother).

32. One distinct feature in this matter is that both parties have deliberately not disclosed the size and value of the two properties. However each is quick to point out that parcel No.688 measures 10 acres and has the tea bushes and trees.

33. The respondents own witness (**M)** who described herself as the deceased's close confidant, confirmed in her evidence, in chief that the appellant's mother was still staying in her plot in the shamba of tea plantation at **Nandi** while the respondent is staying at Serem where the late passed away. So if the appellant's mother has been on that parcel, lived on it even during the deceased's life span and used and accessed whatever was on the land, how is it that the simple logic suggested that each wife remains where she had lived becomes elusive.

34. I take note that the Kadhi partially relied on the so called will, whose authenticity was note stablished. However, to be fair to him, he also considered the evidence as presented by the witnesses. Although there seems to have been a swop regarding the two parcels, being No. ***[particulars withheld]*** (one on Vihiga, and another in Nandi) – neither the Respondent nor the 3rd interested party complained about it. I think it is probably because between the two of them they can easily sort out the physical locus, and in any event in the final orders the court directed that the interested party would get **Vihiga/Serem***/[particulars withheld]*****.**

35. The only aspect of this distribution that appears unfair to me is the portion ***[particulars withheld]*** which was directed to be inherited by the Respondent at 1/8 and the remaining 9 children.

If the acreage of the other parcels was not disclosed then what criteria was applied to declare that No. [particulars withheld] should be shared among all the children. It becomes difficult to establish whether deceased bequeathed more than 1/3 of his estate. Then what happens to the portion where the 1st wife had lived and used all along?

36. This would thus take us to the next issue to be considered – i.e what was the status of the appellant's mother as at the time, the deceased passed on? Had she divorced?

<u>Whether the appellant was deceased's legal wife:</u>

37. The appellant argues that there was no documentation to prove that the deceased had divorced S as there was no decree nisi or decree absolute to the court. On account of this it is submitted that for purposes of Section 29 of the Law of Succession Act, S still ought to have

been regarded as a dependant as the provision recognizes a former wife, whether or not maintained by the deceased immediately prior to his death.

38. Counsel submits that evidence showed the appellant's mother was married to the deceased and lived with him until he died, and she should not have been disinherited.

The trial disclosed a very strained relationship – according to S, there had been a rift between her and the deceased, resulting in him writing a letter to her pronouncing talak, and ever since 1997, they had not lived together. This was confirmed by all the witnesses from either side except Ramadhan who claimed that his parents remained married to each other and lived together until the demise of his father.

39. The appellant's counsel is mixing up secular (statutory law) in the matter. She cannot now purport to invoke issues of decree nisi and decree absolute, or even **Section 29** of the Law of Succession, in a matter where parties have opted to apply the Mohameddan law on personal issues of marriage and inheritance.

40. I note that the trial court also very carefully skirted around the issue as to whether the appellant's mother had been divorced from the deceased. Was the first pronouncement of talak sufficient to constitute a divorce, or should there have been other pronouncements of talak. What does the Quran teach about divorce? What is the status of a divorced woman in matters of inheritance?

For divorce to become effective under Islamic law. Talak is pronounced thrice, the first and second talak (divorce) are revocable within the edda (waiting period). **(See Chapter 2 Al-Bga-Bagara verse 229.)**

From the evidence of Sophia, she lived away from the deceased for over 10 years, under the communication of the 1 st tallak. The edda period is for three months – which means the period had lapsed and the divorce remained.

Under **Sura Nisa Chapter 4 versus 11, 12 and 176,** the law of inheritance is spelt out. A divorced woman has not right to inherit property from her former husband and **Section 29** of the Law of Succession does not apply.

41. It would have, been different for the appellant's mother if eddat period had not lapsed before the deceased expired.

42. Under Islamic teaching, a divorced wife is entitled to maintenance during the **eddat** period; and **Quran 2:241, Tallaq 65:1 and 6,**

> **"And for divorced women, maintenance (should be provided) on reasonable scale. This is a duty on al Muttaqeen (the ….) Al Baqara:241…"**

Whether the children of the deceased can be disinherited?

The appellant has contested the Kadhi's finding which found parcel **No.** ***[particulars withheld]*** being shared at $^1/_8$ for the widow and the rest be shared between the remaining 9 recognized children. The statement by itself suggests that there are some children who are not recognized. The trial court did not elaborate who it was that did not recognize the other children, or only recognized the 9, but it is not hard to deduce that the trial court agreed with the proposition that the daughters who were marred to Christians should not inherit from their father.

> **(1) What evidence was presented to confirm that the said daughters were married to Christians.**
>
> **(2) Even if married to Christians that they abandoned the Islamic faith.**
>
> **(3) What does the Quran teach in regard to the two above?**

43. Again falling back on the teachings of the **Quran, chapter 2 Al-Baqara verse 221,** there is spelt out prohibition of marriage between Muslims and persons of other religious faiths, the exception however allows Muslim men to marry women of the beliefs i.e Jews and Christians as provided under **chapter 5 verse 5.** This explains why the daughters who got married and changed their names to Christian/English names have been left out.

44. Is this teaching in contradiction of the Constitutional provision under **Art 27** which prohibits discrimination on grounds of inter alia religion? In my humble view the provision of equality under **Art 27** of the Constitution of Kenya in so far as it relates to the question of shariah is qualified by the provisions of **Art 24 (4)** of the Constitution which proves that;

> **(4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhi's courts, to persons who profess the Muslim religion, in the matters relating to personal status, marriage, divorce and inheritance.**

45. Consequently I find no error in the findings by the trial court so the appeal fails, and is dismissed with costs to the Respondent.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 15TH day of March 2019.

H. A. OMONDI

JUDGE