



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MARSABIT**

**CIVIL APPEAL NO. 8 OF 2018**

**KHADIJA GUBO DARCHE.....1<sup>ST</sup> APPELLANT**

**MUMINA GUBO DARCHE.....2<sup>ND</sup> APPELLANT**

**HABIBA GUBO DARCHE.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**ABDIKADIR GUBO DARCHE.....1<sup>ST</sup> RESPONDENT**

**ABDI GUBO DARCHE.....2<sup>ND</sup> RESPONDENT**

**FATUMA GUBO DARCHE.....3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the original Civil Suit No.90 of 2014 of Kadhi's Court at Marsabit)*

**JUDGMENT**

The parties herein are the children of the late Gubo Darche. The appellants are the deceased's daughters while the respondents are his two sons and one of his daughters. The appellants filed Succession Cause Number 90 of 2014 before the Kadhi's court seeking a share of their father's estate. The Kadhi's court found that the appellants were the deceased's heirs and that the deceased distributed his land to his sons before his death. The appellants were not satisfied with that finding and preferred the current appeal which is grounded on the following grounds:-

- 1) That the Honourable Kadhi erred in law by finding that there was a valid oral will that exempted some properties from succession when the deceased was confirmed to have died two years after making the said will contrary to section 9 (1) (b) of the Law of Succession Act Cap 160.**
- 2) That the Honourable Kadhi erred in law and fact in finding that the deceased whose estate is the subject matter of the suit was a traditionalist but proceeded to divide the deceased's estate according to Sharia Law.**
- 3) That the Honourable Kadhi erred in Law and fact in failing to allow the plaintiffs an opportunity to bring additional witness who was to support their case and controvert the defendants case terming the evidence of PW1 to be sufficient.**
- 4) That the Honourable Kadhi erred in Law and fact in relying on the evidence of witnesses who could not ascertain the day or the year of making of the alleged oral will in making his determination.**
- 5) That the Honourable Kadhi erred in fact and in law in allowing a defence witness to take confirmation of oath on behalf of an alleged dead person and relying on the statement of the said defense witness in his judgment thus putting the plaintiffs in an unfair position in discharge of their evidentiary burden of proof thus violating their constitutional right to fair hearing.**

Mr. Behailu appeared for the appellant. Counsel submit that the trial court erred by finding that the deceased made an oral will contrary to section 9 (1) (b) of the law of Succession Act Cap 160. All the parties are Muslims but the trial court determined that the deceased's estate be distributed according to his traditions. That would have meant that the Islamic law could not apply. Upon finding that the deceased was a traditionalist the trial court lacked jurisdiction to handle the matter. It is further submitted that the allegations that the deceased made an oral will could not be true. The deceased is said to have died after two years of making of the oral will in which he bequeathed the first and second respondent land parcel number 35 at Dakabaricha. The Honourable Kadhi also erred by holding that the deceased was a traditionalist

and therefore exempted plot number 53 DAKABARICHA from the estate and proceeded to distribute the rest of the estate under Islamic law. If the deceased died a traditionalist, then his estate has to be distributed according to the Law of Succession Act.

Counsel further submit that section 9 of the Law of Succession Act provides that no oral will shall be valid unless it is made before two or more competent witnesses and the testator dies within a period of three months from the date of making that will. In the current case the deceased died after over two years of making of the oral will. None of the witnesses could remember when they heard the deceased making the oral will. Counsel also submit that the trial court calculated the income from only one stall yet there were two more other stalls. The memorandum of appeal was filed on time as the notice of appeal was filed at the registry on 4<sup>th</sup> June 2018 while the memorandum was filed on 22<sup>nd</sup> June 2018.

Mr. Maingi appeared for the respondent. It is submitted that evidence adduced before the Kadhi proved that there was an oral will which was valid. The parties involved are Muslims. The trial court was satisfied by the evidence of the respondents. The court complied with mandatory provisions of the law relating to disputes arising from parties who are Muslims. Their appeal was filed on 26<sup>th</sup> of June 2018 and was therefore out of time because the decision of the Kadhi was made on the 22<sup>nd</sup> of May 2018.

This is a first appeal and this court has to evaluate the evidence afresh and make its own decision. The trial before the Kadhi's court took some times as in between an appeal was preferred. PW1 is indicated to be known as MANYARE. She testified on the 18<sup>th</sup> of December 2014 and stated that she was the deceased's widow. Her evidence was that the deceased was married to the appellants' mother. Two appellants namely KHADIJA AND MUMINA are from the same mother and they are the deceased's legitimate children. The deceased had a shamba at Sagante but it belonged to ABDULLAHI GUBO. The town plot was given to her. There is also an 8 acre shamba that was not subdivided by the deceased. The appellants' mother was divorced. The deceased had a first wife by the name DIRAM and the two had a son by the name ABDULLAHI. The deceased then got married to a third wife by the name ZAINAB who gave birth to the first two appellants and a son who passed away. PW1 was the second wife. She gave birth to five children. One passed on. The three defendants are her children. According to her the deceased's estate is made up of a plot within Marsabit town consisting of three doors. One door is a hotel, the second one is a shop and the third one is a butchery. Before he passed on the deceased gave the shop to his elder son ABDULLAHI and she was given the two remaining doors. The land in Sagante is 24 acres but the deceased gave to his son ABDULLAHI. She is the one collecting rent from the butchery while the first respondent has been collecting rent from the hotel as she gave it to him.

The first appellant **KHADIJA GUBO** testified that the respondents are his brothers and sister. All what she wanted was to get her share of the inheritance. When their mother passed away they were still young. The deceased did not leave any will. The deceased could not have given his estate to his sons only. According to their tradition the daughters do not inherit but Islamic law allows them inheritance. They have never heard about the will. They do not know if their brother ABDULLAHI GUBO was given the land. The town plot has three doors. One door was given to ABDULLAHI while the other two were left out for the deceased. The third appellant took oath and testified that she was in agreement with the evidence of the first appellant. The appellants denied her the inheritance and told her that she was married to another community and could not get part of the land.

In their defence the first respondent testified that when the deceased was on his bed while sick he called the elders and made an oral will. The deceased died after two years. Together with the second respondent and the widow, they lived at Dakabaricha for 18 years. They were given the 8 acres and they divided the land between themselves. They have not claimed the 24 acres at Sagante that was given to ABDULLAHI. The 8 acres land had no title deed but it was later processed in the deceased's name. The land was given to him and his brother. He does not know the exact date when the deceased gave out the oral will. The town plot belonged to the deceased. The Dakabaricha plot is number 35. He has been collecting rent of Ksh.2,000 per month from the hotel door.

The second respondent **ABDI GOBO DARCHE** testified that the 8 acre plot at Dakabaricha was given to him and his brother by their father. The appellants cannot claim anything from them. The third respondent **FATUMA GUBO DARCHE** testified that the deceased left 24 acres at Sagante. Their brother ABDULLAHI committed suicide on that land and their father said that the land be given to ABDULLAHI'S widow to help the children. Their father also left another shamba at Dakabaricha measuring 8 acres and said that the land to belong to her two brothers namely the first and second respondents. She was not given anything and she does not know why she was enjoined in the case.

The respondents called three other witnesses. **ALI ADHO** is indicated in the record of the trial court as DW1. He told the court that he knew all the parties as the deceased's children. The deceased became sick and went to live in the house of his late son ABDULLAHI. The deceased called him and another elder by the name **AIBA BOBA** who was a neighbor but passed away. The deceased told him that his land at sagante belongs to his eldest son ABDULLAHI and another shamba at Dakabaricha still belonged to him. Since the deceased had two sons the deceased told him that the Dakabaricha land belongs to those two sons. The deceased also mentioned about a town plot. The deceased said he had two plots and one belonged to his son ABDULLAHI and the other one to his wife. It was only himself, the deceased and the other witness at the time the deceased told them about the estate.

**ISATU HIRBO** was another witness called by the respondents. It is his evidence that the deceased told him in the presence of another person by the name **ALI KUCHE** that the Sagante plot belonged to his elder son ABDULLAHI while his Dakabaricha land belonged to his other two sons namely the first and second respondents. This was said verbally and not in writing. He does not know the exact date when the deceased said that but he could remember it was around 10.00am.

**DW3 ALI KUCHE** testified that the deceased was his neighbor. He was with ISATU HIRBO when the deceased told them that he had two shambas. One shamba is at Sagante and it belonged to his elder son ABDULLAHI. The other shamba is at Dakabaricha and it belonged to his two other sons. The deceased did not tell them about the town plot.

The issue for determination is whether the appellants are entitled to inherit the deceased's estate and whether the deceased distributed his estate during his lifetime through an oral Will.

The evidence of PW1 is that the first two appellants are the deceased's children from the 3<sup>rd</sup> wife. The 3<sup>rd</sup> appellant did not explain from

which house she belongs but there is no dispute that she is the deceased's daughter. My assessment is that she is from the second house. The respondents are their two brothers and a sister. The trial Court found that the appellants are the deceased's children. They are entitled to inherit the deceased's estate.

The trial Court held that plot number 35 Dakabaricha does not form part of the estate. The trial court also found that the deceased used his tradition and gave the eight (8) acre plot to his two sons. The result of that finding left only the town plot as the only available estate for distribution.

The evidence on record does prove that plot numbers 35 and 53 belonged to the deceased. Although the respondents contend that plot number 35 at Sagante was given to the late Abdullahi, their step brother, it is clear to me that the plot belonged to the deceased. This is the 24 acres plot. The evidence of the 3<sup>rd</sup> respondent is that their step brother committed suicide on the land. Their father then told them that the land be given to the widow to help her with the children. The trial Court simply excluded that plot from the deceased's estate. Further, if Abdullahi preceded his father's death, the trial court ought to have made a finding on whether Abdullahi could inherit plot 35 or not. I do find that the late Abdullahi was not the original registered owner of plot number 35, Sagante. The plot belonged to his father whose estate is the subject of this appeal. I do agree with the appellants that the trial court erred by excluding that property from the deceased's estate.

There is no dispute that plot number 53, Dakabaricha belonged to the deceased. The only issue involving that plot is whether the deceased bequeathed it during his lifetime to the first two respondents through an oral Will. According to the appellants the deceased did not make any oral Will. The appellants contend that the purported oral will is invalid as it was made over two years before the deceased's death contrary to section 9 of the Law of Succession Act.

Section 2(3) and 2(4) of the Law of Succession Act states as follows:-

***(3) Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession of 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.***

***(4) Notwithstanding the provisions of subsection (3), the provisions of Part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim dying before, on or after the 1<sup>st</sup> January, 1991.***

Section 2(3) and 2(4) of the Law of Succession Act does not entirely exclude the application of the Law of Succession Act to estates involving Muslims. Under section 2(4) where the issue at hand involves the administration of estate, if it is found that the law of Succession Act is not in consistent with the Islamic Law, then the Law of Succession Act can be applied.

The deceased was a Muslim and all the parties profess the Islamic faith. Although the trial Court excluded the Dakabaricha plot upon its conclusion that the deceased used his tradition to bequeath that land to his two sons, I am satisfied that the deceased's estate ought to be distributed under Islamic Sharia Law and the deceased's tradition has no place once Islamic Law is applied.

Turning to the question of the oral Will, it is clear that the alleged oral Will was made over two years before his death. The trial Court did not lay down a basis as to what are the requirements of an oral Will under Islamic Sharia Law. Can an oral Will be considered as active if it is made over two years before the testator's death? Can an Islamic oral will be made in the presence of a beneficiary? Can a Muslim bequeath all his estate to some of his inheritors leaving other beneficiaries with nothing? All these questions were not answered by the respondents. The appellants cannot simply be dismissed because under the deceased's tradition daughters do not inherit. Even the deceased's tradition is not mentioned. In my view if such tradition does exist, then it is inconsistent with the constitution. There is no good reason being advanced as to why daughters do not inherit their parents under the deceased's tradition. There cannot be any good reasons for such a position and the court cannot support such a tradition. The 1<sup>st</sup> and 2<sup>nd</sup> respondents are advancing that contention simply because it favours their cause of excluding the appellants from the estate.

Given the evidence on record, I do find that the deceased did not make any oral Will. The evidence of DW1, DW2 and DW3 was simply meant to assist the respondents' cause. The Kadhi did not dwell on the issue of the oral Will but simply excluded the Sagante and Dakabaricha plots from the estate leaving the appellants to scramble for the town plot. The trial court visited the town plot and found that the plot was destroyed and formed part of the new market being constructed by the Marsabit County Government.

The deceased did not make any oral Will. Even if there was such a Will, which I find in the negative, the same could not have bequeathed almost the entire estate leaving other beneficiaries with nothing. The deceased, being a Muslim, could have bequeathed his estate to the extent of one third under Islamic Sharia and leave the two thirds for succession. The appellants are within their rights to contest the purported oral Will and I do find that no such will was made. The respondents who are beneficiaries purport that they heard their father bequeathing them the Dakabaricha land. A beneficiary is not supposed to witness a Will made by a Muslim testator. The respondents are simply advancing their own course. The trial court did not make any religious reference to a purported oral Will made over two years before the testator died.

I do find that the deceased's estate comprises of the following:

- (1) Plot number 35 – Sagante measuring 24 acres
- (2) Plot No.53, Dakabaricha measuring 8 acres
- (3) Town plot which had three doors.

This matter is referred back to the Kadhi to have the estate valued and distributed to the deceased's heirs. The Kadhi can decide to leave the 1<sup>st</sup> and 2<sup>nd</sup> respondents inherit the Dakabaricha plot if the value of that land does not exceed their share of inheritance. Abdullahi who is deceased can be considered as one of the beneficiaries and his family given his share. The deceased's widow should also be considered as one of the beneficiaries. The appellants and the respondents and any other beneficiary left out of this case to share the deceased's estate in accordance with the Islamic law.

In the end, this appeal is merited and is hereby allowed in the above terms. Parties shall meet their respective costs.

**Dated, Signed and Delivered at Marsabit**

**This 24<sup>th</sup> July, 2019**

**S. CHITEMBWE**

**JUDGE**