

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CIVIL APPEAL NO. 10 OF 2017

ABDULLAHI ABDIRAHMAN GULLEID.....APPLICANT

VERSUS

MOHAMUD ABDIRAHMAN.....REPOUDENT

*(Being an Appeal from the judgment of Senior Resident Kadhi Hon.Kadhi MR. ALI DIDA WAKO,
delivered on 6/2/2017 in Moyale Kadhi's Court Succession Case No.67 of 2016.)*

JUDGEMENT

The appeal emanates from the decision of the Moyale Kadhi in Succession Cause **67 of 2016**. The grounds of appeal are that:-

1. The respondent didn't prove his case on a balance of probabilities.
2. The Hon. Kadhi erred by failing to find that the respondent was not a beneficiary of the estate.
3. The trial court erred by finding that the respondent was the only beneficiary of the deceased.

Miss Muna appeared for the appellant. Counsel submitted that the respondent didn't prove his case on a balance of probabilities. The Kadhi found that the respondent was the only beneficiary of the deceased. The deceased left six cattle. She shared two during her lifetime. An uncle to both parties testified that the deceased gave him ten cows to take care. Some cattle died due to drought. The cattle were exchanged for camel. One cow each was given to both parties. The respondent's wife took all the camel which belonged to all of them. The appellant proved that the deceased left estate in form of cattle. The witness for the respondent simply gave heresy evidence. He is a village elder who didn't know the background. The camels should be shared out to the beneficiaries.

The respondent submitted that there was only one camel which was his. His only camel was slaughtered by his uncle who had inherited his mother after the death of their father. The meat was sold in a butchery. His uncle gave him one cow. The cows became five and he took them to his mother. The deceased didn't leave any cattle. She left only one plot. In **2005** the elders met and gave the plot to his brother.

This is a first appeal and the court has to evaluate the evidence afresh and make its own conclusion. The appellant was the plaintiff before the Kadhi's court. He stated that his mother died in **1994** at Buna. She left six heads of cattle and was survived by five children, three sons and two daughters. Out of the six cattle the deceased gave one cattle to him and another one to the respondent. Four cattle remained. He asked the court to share out the estate to the beneficiaries.

Abdinoor Maalim Mohammed was the appellant's first witness. He is an uncle to both parties. His evidence is that the parties mother brought to him ten cattle and asked him to take care of them. The cattle died and only two remained. The deceased told him that one of the cows was for the appellant and another one for the respondent. The two cows were left with him and in **1994** the parties' mother died. The cows grew in number. The respondent proposed to exchange the cows with camel. The respondent's wife later took away from him five camels. **Abdikadir Mohamed Gulleid** testified that in **1989** he took six cows to Abdinoor Maalim. One of the cow belonged to the appellant and the other to the respondent.

The respondent testified that he was given one camel which was slaughtered in the butchery. He bought

one cow and the cows became five. At the time of her death the deceased had seven cattle which belonged to him. **Mohammed Adan Ibrahim** was the first witness for the respondent. He testified that the deceased didn't have any property. He heard that the property the deceased had belonged to her elder son. **Osman Ali Hussein** is a village elder. His evidence was that at the time of the death of the parties' father he left three camels. One belonged to the respondent.

The only issue for determination is whether the deceased left any estate to be distributed to the parties. The appellant's evidence is that the deceased left four cattle. The appellant has not distributed the estate. The evidence of **Abdinoor Maalim Mohamed** is that the deceased had ten cattle and all of them died except two. The two cattle were distributed between the parties. The cattle grew in number and were exchanged for camels. The respondent's wife took the camel. That line of evidence is different from that of the appellant. The appellant's evidence is that when their father died the appellant was a baby. He educated his brothers. He is the one who gave the cattle to his mother and the deceased left nothing.

The record shows that the deceased died in **1994**. The case before the Kadhi was filed in 2016, about 22 years later. It is quiet difficult to find and hold that the deceased left any cattle. The parties' uncle testified that some of the cattle died and only two remained. Even if the deceased left any cattle then, it would be difficult to determine the extent of the estate at this time. 22 years is a long period of time to trace how the cattle survived. If the deceased left four cows and there were five children and if each of the parties was given his own share, the end result would be that there is no estate to be distributed to the parties. I do agree with the findings of the Kadhi that the appellant failed to prove his case on a balance of probabilities. The trial court didn't hold that the respondent was the sole beneficiary of his mother. The respondent was the eldest son and was not left with any property in form of cattle by their mother.

In the end, I do find that the appeal lacks merit and is hereby disallowed. Since the parties are brothers, each of them will meet his own costs.

DATED, SIGNED AND DELIVERED AT MARSABIT THIS 24TH DAY OF JANUARY 2018.

S. J. CHITEMBWE

JUDGE