



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MARSABIT**

**CIVIL APPEAL NO. 01 OF 2016.**

**HASSAN DIDA GUYO.....APPELLANT**

**VERSUS**

**MAKAI GALGALO DAE.....RESPONDENT**

*(Being an Appeal from the judgment of Senior Resident Kadhi Hon.Kadhi MR. MOHAMED A. MAHMOUD, delivered on 27/11/2012 in Moyale Kadhi's Court Civil Case No.41 of 2012.)*

**JUDGMENT**

The appellant filed civil suit number 41 of 2012 before the Kadhi's court. He was seeking the recognition of the lawful heirs and beneficiaries of the late **DIDA GUYO** and the distribution of the estate. The Kadhi delivered his judgment on 27<sup>th</sup> November 2012, and held that the only estate of the deceased was Ksh. 70,000/= and a plot. The appellant was not satisfied with that decision and filed the current appeal. The grounds of appeal are that the learned Kadhi erred in:-

1. Basing the judgment on wrong provisions of law.
2. By failing to distribute the estate in accordance with Islamic law.
3. By failing to distribute the estate as per the wishes of the beneficiaries.
4. Conducting the proceedings unprocedurally.
5. Failing to address the issues before him before distributing the estate.
6. Finding that the property comprising the estate belonged to the respondent.
7. Failing to ascertain the value of the estate before proceeding to distribute it.

The appellant informed the court that the respondent is his step mother. She was married to his uncle. He is not satisfied with the Kadhi's decision as he did not get his share of inheritance. According to Islamic law his sisters were to get their shares but they did not. The deceased was his biological father and the respondent was married to his father. His father had two wives. His mother is deceased. He has a sister. The respondent had no children with his father. His late father left two plots, NSSF shares, five goats and two cows. The plots are developed and have houses. The respondent received Kshs. 32,000/= from the NSSF shares. She also sold half of their father's plot without their knowledge.

In response the respondent submitted that the deceased was her husband. She had no children with him.

The deceased left nothing in form of properties. When the deceased married her she had her own plot. She has not touched their plot which belongs to the appellant. She was given a letter by the area chief and went to Meru where she collected her part of the NSSF shares. The shares were Ksh. 70.000/= . Part of the money was given to the appellant and his sister. The deceased did not leave any goat or cow.

This is first appeal and the court has to reevaluate the evidence and make its own conclusion. The appellant testified that the respondent was married to his late father. His father built a house on an empty plot in around August 1992. It is not true that the respondent owned the plot before marrying his father. One **HABIBA** who is an adopted child of the respondent claimed her own property from the respondent. **HABIBA** bought cattle and put up two rooms in addition to the two rooms built by the deceased. **HABIBA** was claiming the two rooms. The deceased also left behind two cattle and five goats. The appellant paid Kshs.6, 000/= and one cow to the respondent as dowry.

The defendant called several witnesses in support of his case. **MOHAMMED NUR** was the first witness for the appellant. He testified that the respondent was given her dowry before the elders in writing and she agreed that she had no claim. However, she went on and raised an objection to the distribution of the NSSF shares. The plot being claimed by the appellant belonged to the deceased. Recently it was claimed that the respondent had sold the plot. The appellant told him that his adopted sister added two rooms on the property. **WAKO DABASA** was another witness for the appellant. They come from the same clan. He stated that the respondent was married to the deceased while she was a resident of Nairobi. As a couple they built a house at the disputed plot at Butiye. He was not aware of the cattle.

**HABIBA ADAN FIRSO** is a resident of Moyale. She testified that the respondent was married to her uncle. She is like her mother as she brought her up. The appellant is like her brother. She was under the custody of the respondent from the age of 8 years. When her uncle divorced the respondent she continued living with her. After the divorce the respondent was married to the appellant's father and they lived in Nairobi. It is the respondent who educated her and she got employment with the prison department. When she was employed the deceased talked to the elders to get a plot for the respondent so that she could build a house for the respondent. They got the plot and the deceased bought ten iron sheets and built a house for the respondent. There were two rooms and they added two other rooms. She bought some animals and the deceased had her own animals. The respondent adopted another girl from Ethiopia who was not in good terms with her. The deceased left behind two cows and five goats. The respondent took them to Bori. Although she had put her contribution in the development of the plot the elders advised her to leave the respondent in peace. She decided to leave without getting anything. She brought down the initial house and built another house.

The respondent testified that the appellant is her step son. Before getting married to the deceased she was married to one **FIRSO HIRBO**. They had no child and they divorced. **FIRSO** was the uncle of **HABIBA ADAN**. Her four children passed away and she adopted **HABIBA**. When she divorced **FIRSO** she still continued living with **HABIBA**. When the deceased married her she was staying in a rental house while doing business between Nairobi and Moyale. She managed to secure employment for **HABIBA** as a prison warder. When **HABIBA** was employed she bought her twenty iron sheets. Her plot was grabbed by other people and she decided to look for another plot at Butiye. The area chief and the committee of elders gave her a plot. **HABIBA** built a house for her but she later turned against her. The elders intervened and told **HABIBA** that the expenses she used to educate her were much more than the house **HABIBA** had built. The elders advised **HABIBA** to leave her alone. Even **HABIBA**'s parents were present during the arbitration by the elders. The appellant went to the area chief to complain about the same plot. He was summoned three times by the chief but didn't turn up. The deceased left no animals behind. She got her portion of the NSSF shares amounting to Kshs.32, 000/= .The appellant didn't give her dowry in form of cattle but only gave her Kshs. 6,000/= which was not part of the dowry. It is her evidence that she got a plot at Butiye through the area chief, councilor and the elders.

**WAKO HUKA** is a resident of Butiye. He knows the respondent from the time she was living in Mathare, Nairobi. The deceased married the respondent in Nairobi. He was working in Nairobi also with adult education department. The deceased was also working in Nairobi. The respondent came to Moyale and asked for a plot. He left Nairobi and went back to Moyale. The respondent was given a plot. When

then respondent asked for the plot she was together with the deceased. The plot has a house on it. It is the respondent who asked for the plot.

**GUYO OLO** is also a resident of Butiye. The respondent is his neighbor. He was among the laborers when a house was built on the plot by the respondent. Later, her husband joined her from Nairobi. The respondent was given the plot by the chief and the committee. She was given the plot alone. **MOHAMED GODANA** informed the court that he was the area chief of Butiye. One elder took the respondent to them and asked for a plot. By that time the respondent was married to the deceased but the deceased was in Nairobi. It is his evidence that the deceased did not approach them for a plot. The plot was later developed but he does not know who developed it. In 2005 he gave another plot to the respondent. The respondent therefore has two plots. He was the chairman of the committee which was allocating land.

The issues for determination are what constitute the deceased's estate and how that estate should be distributed. The totality of the appellant's case is that his late father left behind two cows and five goats and NSSF shares. He also left behind a plot which is built. He estimated the value of the house and the plot occupied by the respondent at Kshs.300, 000/=. The appellant also told the court that the house and plot that used to be occupied by his mother was worth Kshs.200, 000/=. It is the appellant's position that his late father built two rooms in the house occupied by the respondent. **HABIBA ADAN** added two more rooms. He would therefore wish to get his share of his father's estate.

The respondent's position is that she looked for the plot and was allocated the same by the elders. Later **HABIBA** built a house for her on the plot. She disagreed with **HABIBA** who wanted the house back but the elders intervened. The deceased did not leave any animals behind. The record shows that while **HABIBA** was testifying she informed the court that the deceased had a two-roomed house on the plot. The house was brought down and she built a new four-roomed house at a different place. The effect of that evidence is that the house on the suit property was built by **HABIBA**. That is why **HABIBA** was claiming the house when the respondent adopted another child. The elders intervened and the house was left with the respondent. It is clear from the evidence that the deceased had another plot where the appellant's mother was residing. The trial court concluded that the deceased's estate comprised of the plot that was occupied by the appellant's mother and the NSSF shares worth Kshs.70, 000/=.

From the evidence on record it is established that it is the respondent who went to look for a plot. The area chief confirmed that the respondent went alone and looked for the plot. It is possible that the deceased did put up a two-roomed house on the plot. However, that house was brought down by **HABIBA** and another one built. The new house was built on a different place but presumably on the same plot. The new house cannot be held to be part of the deceased's estate. I do agree with the findings of the Kadhi that the plot occupied by the respondent cannot form part of the estate.

In his plaint dated 6<sup>th</sup> September 2012 the appellant states that his late father died in May 1999. The suit was filed in September 2012. There is difference of about 13 years from the time of death to the filing of the suit. Even if the deceased left two cattle and five goats, it would be difficult to account for such property. According to the respondent no animals were left by the deceased. I do find that there is no proof that the respondent was left with two cows and five goats. The NSSF shares were shared amongst the beneficiaries. The deceased's estate was therefore shared out. The respondent is not claiming the plot which was occupied by the appellant's mother. What the respondent is utilizing was developed by her adopted child, **HABIBA**.

In the end, I do find that the appeal lacks merit and is hereby disallowed. Parties shall meet their respective costs.

**DATED, SIGNED AND DELIVERED AT MARSABIT THIS 24<sup>TH</sup> DAY OF JANUARY 2018.**

**S. J. CHITEMBWE**

**JUDGE**