



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL APPEAL NO. 4 OF 2017

KANO WAKO JUMA.....APPELLANT

VERSUS

SALETI ASHANA MANYENGO.....RESPONDENT

JUDGEMENT

The Kadhi's Court delivered its judgement on 6.3.2017 whereby it recognized the respondent as one of the beneficiaries of the late Mustafa Wako and directed that she be given her share of the estate. This prompted the filing of this appeal. The grounds of appeal are that:-

- i. The respondent did not prove her case on a balance of probabilities.*
- ii. The trial court erred by holding that the respondent was a beneficiary of the deceased's estate.*
- iii. The trial Court erred by finding that the respondent is a lawful heir of the deceased.*
- iv. The decision of the trial Court did not consider the weight of the appellant's evidence.*

Miss Muna, Counsel for the appellant, submit that there was no sufficient evidence to determine that the respondent is the daughter of the late Mustafa. Only a clinic card was produced. No birth certificate was produced. A letter from the chief was relied upon. Counsel relies on the case of **MOHAMED HANIF KHERDIN V SHERIFF KHIRDIN, Mombasa Kadhi's case**

No.159 of 2011 (2016) eKLR where the Kadhi held that the area Chief had no jurisdiction to determine rightful heirs under the law. It is the function of the Court of law with competent jurisdiction to make such a determination.

Counsel for the appellant further submits that in its judgment, the trial Court held that it was made to believe that the respondent and her sister were Mustafa's children. The Court was not convinced or persuaded from the evidence if that was true. The estate of the late Jirma Wako was distributed. The respondent was not able to prove which portion belonged to Mustafa. The trial Court only concluded that Mustafa's portion is the one that was left for the parents. The Court relied on the behavior of the appellant rather than the evidence and the law. The court held that the appellant had guilty conscience. The respondent did to prove her case as required under the law.

The respondent submitted that the Kadhi did not favour her. The appellant took all the benefits of Mustafa who used to work at the railway. Mustafa's share is there. The appellant chased away the

respondent.

This is a first appeal and this court is required to re-evaluate the evidence afresh and make its own conclusion. Before the trial Court the respondent testified that she is the daughter of the late Mustafa. Her father used to work with the Kenya Railways. Her mother was the 1st wife. She was called **Redenta Mwikali** while the second wife was called **Jane Wanjiru**. The second wife had one child, **Kamau Mustafa**. The respondent has a sister, **Safiya Mustafa**. It is her evidence that their mother died on 27.12.2005. Her father died and was entitled to inherit from his late father. The appellant is his uncle, brother to her father. The estate of her grandfather was distributed and her father got his share. The suit property is plot number 36, Marsabit. The respondent was seeking her father's share. She has no birth certificate. They lived in Marsabit with her father before they moved to Nairobi.

MOHAMED WAKO JIRMA is the appellant's uncle. He is the son of the appellant's sister (Abu). He was brought up by his grandfather Wako Jirma in Marsabit. He testified that the late Mustafa got married to the respondent's mother who was a Kamba. They had two children, Saleti and Safiya. The house on the land was built by Mustafa. The late Mustafa took her two children to Marsabit where they went to nursery school. After the death of his grandfather, his uncles shared the estate. His mother sold her share. The appellant was taken to the Kadhi's Court in case No.2 of 2010 and forced to distribute the estate. All the children of the late Jirma Wako including Mustafa were to get their respective share. The appellant and his brother, Mustafa, were given their respective shares by their father during his lifetime. The remaining portion on the land belongs to the late Mustafa. There is no marriage certificate between Mustafa and the respondent's mother. The marriage was conducted under Kamba customs before the respondent's mother converted to Islam. Mustafa brought down his parents' grass house and built for them another house with iron sheets.

The appellant testified before the trial court that he does not know the respondent. All the beneficiaries got their shares

and he is holding the remaining portion. He is also in possession of the title deed which is still in the name of Wako Jirma. The estate was distributed and what remains is the portion of the parents. That portion does not belong to Mustafa. He confirmed that there was a grass hut that was brought down and an iron sheet house was built. Their parents passed on while living in that house. One of his brothers by the name Wario was not given his share of the plot. Another brother who passed on called Huka also did not get his share. The plot is 3.36 Hectares. The appellant is not concerned about Mustafa's share. Mustafa was given his portion. He was ordered to distribute the estate by the Kadhi's Court in Suit No. 2 of 2010.

GUFU BONAYA testified as the appellant's witness.

He testified that the appellant is his brother in law. He is married to his sister. He attended the burial of the appellant's parents. All the children were given their shares. By then Mustafa has passed away. It is his evidence that the late Mustafa had two daughters. He heard the names of Saleti and Safiya. Mustafa used to stay in his parents' home. He does not know whether Mustafa was given the portion that was occupied by his parents.

The Court has to determine whether the respondent proved her case on a balance of probabilities before the trial Court. The evidence on record is that plot number 36 Marsabit measuring 3.36 Hectares is registered in the names of the late WARKO JIRMA. A search conducted on 9.12.2016 gives that information. The evidence also shows that Warko Jirma passed on on 2.3.1990. His property was shared among his six sons and three daughters namely Haw, Abu and Mungami.

It is also stated that the beneficiaries of Warko Jirma filed Succession cause No.2 of 2010 and the Kadhi's Court directed the appellant to distribute the deceased's estate. The respondent was claiming her father's share before the Kadhi's Court. The appellant contends that the respondent is not a beneficiary and there is no proof that she is Mustafa's child.

The respondent's evidence is that she is Mustafa's child. She has a sister by the name Sofia. Her witness is her uncle. He testified that the respondent is Mustafa's child. She went to nursery school in Marsabit. Similarly, the appellant's witness did confirm that he heard that Mustafa had two daughters by the names Saleti and Sofia. The evidence on record does sufficiently prove that the respondent is Mustafa's daughter. The contentions by the appellant that he does not know the respondent are untrue. There was no need for a birth certificate. I do find that the respondent did prove that she is Mustafa's child and is entitled to inherit her father's property.

The next issue relates to Mustafa's share. The appellant did confirm that he was ordered by the Kadhi's Court to distribute his father's property, plot number Marsabit/Mountain/36 measuring 3.36 Hectares. It is his evidence that he distributed the property and gave Mustafa his share. I have seen the proceedings in succession cause number 2 of 2010. The claim was filed by ALI WAKO JIRMA against KANU WAKO JIRMA the appellant herein. The pleadings indicate that Wako Jirma was survived by six (6) sons and three daughters. There is a letter dated 11.3.2009 written by the appellant which indicate that the property was shared equally among the beneficiaries. Ali Wako Jirma was given a $\frac{3}{4}$ Hectare plot. The case seems to be still pending and has not been finalized but the parties agreed to distribute the estate. Mustafa was to get his share.

The late Wako Jirma died in 1990. The title deed to the land was issued on 15.8.2002 but still in the name of Warko Jirma. Mustafa died on 2.8.2002 at the age of about 40 years. When the distribution was done, Mustafa got his share. The issue is, where is Mustafa's share. Its unfortunate that the appellant informed the Kadhi's Court to ask the late Warko Jirma where Mustafa's share is. The record show that it is the appellant who divided the property. The late Warko Jirma had divided his land amongst his children. Warko Jirma is dead and could not tell the Kadhi where Mustafa's share is. It is also not clear as to why the original title deed has not been surrendered and fresh titles issued in the names of the beneficiaries.

The Kadhi held that the share of Mustafa is the remaining portion on the ground. The Kadhi visited the site on 20.12.2016 and took physical measurements of that portion. The appellant contends that the remaining portion is for their parents. That cannot be the case as both parents are deceased. This is just an excuse by the appellant to continue utilizing that portion to the exclusion of Mustafa's children. I am satisfied that the remaining portion belongs to Mustafa. I do agree with the findings of the Kadhi.

In the end, I do find that the appeal lacks merit and is hereby dismissed with costs. I do further order that the title deed for plot number Marsabit/Mountain/36 be surrendered to the Marsabit Land Registrar. The Kadhi to send a Surveyor on the ground and sub-divide the land so that the respondent can get her father's share. The Deputy Registrar is hereby allowed to sign all the sub-division and transfer documents since the registered owner is deceased.

Dated, Signed and Delivered at Marsabit this 24th day of January 2018

S. CHITEMBWE

JUDGE