



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL APPEAL NO.8 OF 2017

FATMA NURU MUKURO.....APPELLANT

VERSUS

AMINA ABDI LAMA.....RESPONDENT

(From the original Civil Suit No.90 of 2015 of Kadhi's Court at Marsabit)

JUDGEMENT

The Respondent filed the civil suit No.90 of 2015 before the Marsabit Kadhi's court seeking recognition of the lawful heirs of the late Nassir Abdi Dobo. She also sought her share of the deceased's estate. After hearing the parties the trial court awarded the respondent 6.25% share of what the court determined to be the estate. Being dissatisfied by that decision the appellant who is the deceased 1st wife filed this appeal on the following grounds.

- 1. That the Hon. Kadhi erred in law and in fact in a giving judgement in favour of the respondent when she did not prove her case on a balance of probabilities.*
- 2. That the Hon. Kadhi erred in law and in fact in failing to find that the respondent was not a beneficiary of the estate of the deceased husband in respect of Pioneer Insurance Compensation.*
- 3. That the Hon. Kadhi erred in law and infact in awarding the respondent Ksh.136,125/= out of the carwash the properties of the appellant which were acquired before the respondent's one month marriage to the appellant's deceased husband.*
- 4. That the Hon. Kadhi erred in law and infact in failing not find that the appellant was a lay person who required direction for stay and right of appeal explained to her before committal to civil jail.*
- 5. The judgement of the Hon. Kadhi is against the weight of law and evidence as the appellant's deceased husband marriage to the respondent lasted only one month preceding his death.*

Mr. Kiogora, Counsel for the appellant submit that the trial Court erred in law and fact by holding that the respondent was entitled to the benefits paid by Pioneer Insurance Company totaling Ksh.2,178,000. The money was paid under the Widow's & Children Payment Scheme (WCPS). The money was paid directly into the children's account. A sum of Ksh.150,000 was used to cater for burial expenses. Even the appellant did not benefit from the payment. Therefore, the money was not meant for the widows but the children. Counsel relies on the case of **IN THE MATTER OF THE ESTATE OF ALLOYCE M. OBIERO (DECEASED) (2011) eKLR**. It is therefore submitted that the sum of Kshs.136,125, apportioned by the trial court as the respondent's share is erroneous.

It is further submitted that the trial court erred in law and fact by holding that the respondent was entitled to 6.25% share of the residential house. The residential house was the matrimonial property of the deceased and the appellant. The two resided in the property for 14 years. The respondent has never lived in that property. The deceased had not established a matrimonial home for the respondent. The appellant was very much involved in the building and establishment of the residential house. She contributed both financially and non-financially. The property therefore belonged to the deceased and the appellant and upon the death of the deceased the matrimonial house automatically became the appellant's property. Counsel relies on the case of **BOB NJOROGE NGARAMA VS MARY WANJIRU NGARAMA & ANOTHER (2014)eKLR**. In that case Justice M. Ondo stated as follows:-

“This was the matrimonial home in which the petitioner/applicant lived with her deceased husband. It is submitted that being the matrimonial home this particular property is not open for distribution to the beneficiaries as prayed by the objector/applicant. The Land Act 2012 defines a matrimonial home as any property that is owned or leased by one or both

spouses and is occupied by the spouses as their family home. The petitioner/respondent averred that she lived there and raised all her children including the objector/applicant who is her step-son in that home. The said property has not been transferred and/or sold – it remains the family/matrimonial home and is still registered in the names of the deceased. Section 28 of the Land Registration Act 2012 provides that:

Unless the contrary is expressed in the register all registered land shall be subject to the following overriding interests as may from time to time subsist and affect the same, without their being noted in the register.

a. Spousal rights over matrimony property”

A matrimonial home does not only have fiscal value but also has great sentimental value to a surviving spouse and children of the decease. The objector/applicant’s demand that the same be divided is not tenable given that the petitioner/respondent has an overriding life interest in the same. The property is still registered in the name of the deceased thus the prayer (2) of the present application would have no basis with regard to the Port Reitz plot.

The last issue involves the carwash business. It is submitted that the carwash business was a family property established with the aim of helping the deceased’s sick father who has been bed ridden for over 10 years. The appellant has managed the property and continues to manage it. That business does not form part of the deceased’s estate.

DW1 testified that together with the deceased they opened the carwash business to assist their ailing father. According to the appellant, the respondent is only entitled to 6.25% of the plot the deceased was given by his father plus a share of. The rest of the properties cannot form part of the deceased’s estate.

Counsel for the respondent did not file any submissions.

This is the first appeal and this court has a duty to re-evaluate the evidence on record and make its own conclusion. The respondent told the court that she is the deceased’s widow. All the properties she listed in her plaint belonged to the deceased. The deceased showed his two wives all his properties when he was alive. The area chief forwarded the name of the beneficiaries for the insurance claim without including her name. The deceased had informed her about the insurance. The deceased showed them his share of land that was given to him by his father. There is a rental house and residential house together with a carwash business. A sum of Ksh.2,178,000 was paid by the Insurance Company on 3.6.2015. The benefits from the deceased’s place of work has not been paid.

PW1 Sode Abdi Dofa is the deceased brother. He testified that the rental plot belonged to the deceased and not to his other brother Hussein Abdi. Their father has been sick for over 10 years and he divided his property amongst his children. It is the deceased who set up the car wash business. According to him the respondent was lawfully married to the deceased. He witnessed the wedding between the deceased and the respondent. The plot where the car wash is being conducted is still in the name of their father and it is meant for the entire family. It is the deceased who brought the car wash machine to the premises. **PW2 Dhakiabo Abdu Dofa** is a sister to the deceased. It is her evidence that she attended the wedding between the respondent and the deceased. Their father divided his plot amongst his sons. The residential plot on the land was built by the deceased. Her brother Hussein did not build any house in Marsabit but built a house in Voi. The plot where the carwash business is located belongs to their father but the business was put up by the deceased for himself and not for anybody. The residential house has about 4 rooms and the rental house has about 13 rooms. She does not know the value of the properties.

DW1 Hussein Abdi Dofa is the deceased’s brother. He is a police officer. His evidence is that the respondent is the deceased’s legal wife. His brother informed him about the respondent while he was at work in Kiganjo. He was given his share of land by his father. Their father built the rental houses through the assistance of the deceased. He discussed with the deceased on how they could assist their father and they agreed to put up a car wash business. It is the two of them who discussed about that business. The respondent went to the County Commissioner and complained that her name had been left out as one of the deceased beneficiaries. The respondent is therefore entitled to her share of the estate. According to him, the respondent is only entitled to the gratuity. The insurance payment was paid for the burial and the children. That amount was being deducted as Widow Child Pension Scheme(WPCS). The money was paid directly in the children account. It was paid in the name of the appellant but was later transferred into the account of the children. The four roomed residential house was put up by the deceased. He is the one who built the 13 rooms rental houses. He agreed with the deceased to exchange the plots they were given by their father.

DW2 Sadik Mustafa is an uncle to the deceased. It is his evidence that the deceased introduced him to the respondent as his wife to be. After the deceased passed on the respondent started following up her share. The carwash belong to the family. The deceased built his residential house. There was an agreement between the parties and that is why the chief wrote a letter in one name. The reason why the respondent was not given her share of the money from the insurance is because she went to the chief’s office instead of talking to the community. The deceased’s contribution in the carwash business has not been ascertained. The rental plot is also a family property. The appellant and the deceased were involved in building the rental property. He cannot tell who is the owner of that property. **DW3 Musa Lio** is a cousin to the deceased and a village elder. About three months before the deceased’s death, the deceased married the respondent. After the burial the families of the two widows and elders met and discussed on how to stay peacefully.

DW4 Zainabu Abdi is a sister to the deceased. It is her evidence that the deceased built his own residential house and a rental house. However, the deceased told her that the rental house belonged to his brother Hussein (DW1) who does not reside in Marsabit but sent money to the deceased to build for him. The carwash business is a family business. Their father has given his children space to build. The deceased was given his space to build his residential house. The deceased told him that he had agreed with DW1 to allow him build the rental house on the deceased’s plot. Her sister contributed in putting up the carwash business. **DW5 Almas Abdi Dobe** is the deceased’s elder sister. According to her the residential house was built by the deceased himself. The deceased built the rental house but it belongs to Hussein (DW1) and her sister. The deceased was responsible of the construction. Their father gave his sons space to build their houses.

The record of the trial court shows what the court ascertained to be the deceased’s estate. The judgment of the learned Kadhi partly reads as

follows: -

- 1. That Plaintiff is in fact a lawful heir of the deceased as a second widow.**
- 2. That the share of plaintiff is 1/16 or 6.25% of the whole estate.**
- 3. That the plaintiff to be paid 1/16 or 6.25% of the insurance payment of 2,178,000/= which is Ksh.136,125/= and**
- 4. That the plaintiff to be paid 6.25% of the value of Residential house and the entire plot of the deceased given by his father and the value of half of the car wash business**
- 5. Cost of the case be paid by the defendant.**

The appellant is questioning the entire decision of the Kadhi. This appeal raises the following issues.

- (i) Was the respondent the deceased's wife**
- (ii) What constituted the deceased's estate.**
- (iii) How should the deceased's estate be distributed?**

The evidence from both the appellant and the respondent is that the respondent is the lawful wife of the deceased. The deceased's brothers and sisters testified for both sides that they are aware that the respondent got married to the deceased. It is also the evidence that the respondent's marriage to the deceased lasted for a period of less than three (3) months before the deceased passed on. The length of one's marriage to a deceased does not disqualify him/her from being a beneficiary of the deceased's estate. Once it is proved that the claimant is the deceased's widow, then she would be entitled to inherit the deceased's estate. Such inheritance will not be limited to the claimant's contribution to the estate. She will be entitled to a full share under Islamic law. This is not a matrimonial dispute but one involving inheritance.

Since the evidence does confirm that the respondent was married to the deceased, I do find, just like the learned Kadhi did, that the respondent was the lawful wife of the deceased and is fully entitled to inherit the deceased's estate.

On the second issue, it is the respondent's evidence that the deceased's estate comprised of: -

- (i) Residential house**
- (ii) Rental plot**
- (iii) Car wash**
- (iv) Insurance payment of Ksh.2,700,000.**
- (v) Employment benefits**

The decision of the Kadhi excluded the rental houses. There is conflicting evidence as to who owned the rental house. According to some family members, the rental house belongs to DW1, Hussein Abdi Dofa. It is the evidence of Hussein Abdi Dofa that he is the one who built the 13 rooms rental house. The Kadhi agreed with this evidence and excluded that property from the deceased's estate. In view of the conflicting evidence, I do agree with the learned Kadhi that the rental house did not form part of the deceased's estate.

With regard to the carwash, the Kadhi allocated the deceased 50% of that business. The plot where the business is being undertaken belongs to the deceased's father. I do agree with the findings of the Kadhi on this issue. It was alleged that the deceased's sister also contributed towards the car wash business. That evidence is not supported by the evidence of the other witnesses from both sides.

According to the evidence, the deceased built his residential house. The submissions that the appellant contributed financially and non financially towards the construction of the house is not supported by the evidence. DW1 testified that the four roomed residential house was put up by the deceased. This evidence is similar to that of DW2 Sadik Mustafa and DW4, Zainabu Abdi. The deceased could have decided to take the respondent to that house. The mere fact that the respondent has never lived in that house does not mean that she cannot inherit her share of that house. I do find that the residential house, although it was the appellant's matrimonial home, it formed part of the deceased's estate. The appellant's great sentimental value to the residential house cannot be a reason to bar the respondent from inheriting her share. All what can happen is for the appellant to pay off the respondent her share of that property (6.25%) after the valuation as ordered by the Kadhi's Court.

There is the issue involving the Insurance payment. There is a sum of Ksh.150,000 that was paid as the last expense. That amount normally caters for burial expenses. The appellant contends that the money was meant for the children only and not the widows. The evidence is clear that the deceased had not updated his record with the insurers about his beneficiaries. He had married the respondent a few months before his death. The mere fact that the respondent's name was not included in the list of beneficiaries for the insurance policy cannot exclude her from benefiting from that payment. The Insurance payment formed part of the deceased's estate and the trial Court was correct in sharing it out amongst the deceased's widows and children.

Given the evidence on records, I do find that the respondent was the lawful wife of the deceased. The fact that she lived with the deceased for a period of less than three (3) months cannot make her a lesser beneficiary. She is entitled to a share equal to that of the first widow. The computation by the Kadhi gives each widow 6.25% share. The two widows share is 12.50% of the deceased's estate and are to equally share that part of the estate. The Kadhi correctly ascertained the deceased's estate and proceeded to distribute it in accordance with Islamic law. The appellant seems to be complaining out of frustrations. She feels that she lived with the deceased for fourteen years while the respondent only lived with the deceased for about three months yet they are supposed to share equally. The respondent's share of the Insurance payment has already been computed. The car wash business needs to be valued. I am certain that the instruments used in the business may not be worth more than Ksh.100,000. The respondent's share is only 6.25% of that value. This will translate to Ksh.6,250. With regard to the residential house, the evidence shows that it is a four roomed house. The value may not be that much. Assuming it is worth ksh.1 million then the share for the respondent could be Ksh.62,500. The respondent's entire share of the estate may not even exceed Ksh.250,000. The respondent also lost her husband and is entitled to inherit his estate. The objections by the appellant are not supported by Islamic Law on inheritance.

I do find and hold that the appeal lacks merit and is hereby dismissed. Parties shall meet their own respective costs. This matter is referred back to the Kadhi's court for final distribution of the deceased's estate after the valuation of the estate is completed.

Dated, Signed and delivered at Marsabit this 18th day of April 2018

S. CHITEMBWE

JUDGE