



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL APPEAL NO. 2 OF 2016

HUSSEIN ADAN1ST APPELLANT

MARIAN ADAN2ND APPELLANT

ABDULLAH ADAN3RD APPELLANT

RAHMA ADAN4TH APPELLANT

VERSUS

SHOBA ADAN ABDIRAHMANRESPONDENT

JUDGEMENT

The late Adan Abdirahman died on the 27.10.2013. The appellants are the deceased's children. They filed a suit against the respondent who is their step mother and the fourth wife of the deceased seeking distribution of the deceased's estate. The learned Kadhi heard the dispute and delivered his judgement on the 5.5.2016. This led to the filing of the appeal on the following grounds: -

- 1. That the learned Kadhi relied on an invalid and fraudulent Will***
- 2. That the learned Kadhi erred in law and fact by denying the appellants and other beneficiaries their lawful share of inheritance from their father.***
- 3. The trial court was biased and sided with the respondent***
- 4. The Kadhi erred in law and fact by failing to appreciate that all the properties left behind by the deceased were to be shared according to the law and no beneficiary was to get more than his or her entitlement.***
- 5. The trial court erred by accepting as truth the allegations by the respondent in relation to the ownership of some of the deceased's assets.***
- 6. The decision of the trial court is against the weight of the evidence and the law.***

Parties agreed to determine the appeal by way of written submissions. Counsel for the appellants relied on the record of appeal. Counsel for the respondent submit that the jurisdiction of the Kadhi's court is established under Article 170 (5) of the Constitution. Matters before the Kadhi involve those who profess the Muslim faith and submit to the jurisdiction of the Kadhi's court. All the parties are Muslims and the Kadhi had jurisdiction to hear the matter. Section 6 of the Kadhi's Court Act provides for the rules of evidence to be applied to the Kadhi's court. Under section 6(iii) it is provided that the decision of a Kadhi cannot be reversed or altered on appeal simply because the rules of evidence applicable in the High Court have not been followed unless there was a failure of Justice. It is submitted that the Islamic faith allows for someone to prepare a **Will** under the Islamic sharia which is known as **Al-Wasiyya**. Two witnesses have to be present when the **Will** is prepared. The **Will** can be valid even if there are no witnesses if the deceased signed the **Will** and his signature has not been challenged. The deceased left a **Will** and it is the document that was relied upon by the Kadhi to distribute the estate.

This is a first appeal and I have to evaluate the evidence adduced before the trial Court and make my own conclusion. For purposes of clarity I will re-align the witnesses who testified. **PW1 Hussein Abdirahman** testified that the deceased was his father and the respondent is his

stepmother. The deceased left behind three widows, 8 sons and 16 daughters. He left some property namely Plot No.10 in Sololo Makutano and a land rover vehicle reg. No.KAS 101T. The deceased also had an account with Equity Bank, Moyale Branch. It is his evidence that there was another case before a court in Ethiopia. There is also some money that was paid to the deceased's account but the defendant did not inform them. **PW2 Mariam Adan Abdirahman** is the deceased's daughter. It is her prayer that the property of her deceased father be distributed in accordance with the Islamic Sharia. The respondent has been administering the estate without involving them.

PW3 Rahma Adan Abdirahman is also the deceased's son. It is his evidence that his father died in the year 2013. The deceased gave every mother of his children a plot. The deceased had a plot at Sololo Makutano which has a hotel building. That property was meant for all widows and children. Some elders witnessed the deceased stating how he would like the properties to be distributed. **PW4 Ahmed Adan Dururu** testified that the deceased was his uncle. He was present when the deceased wrote his **Will**. The deceased informed them that he had distributed his property to all his children and that the Sololo property which has a hotel was his for the family. The deceased mentioned some money in the account but did not give a specific figure. The **Will** was an oral one. **PW5 Gidala Churko** informed the court that the deceased was sick at his Moyale township home. The close relatives asked him to show how his estate was to be distributed in case he died. The deceased told them that he had married 5 wives and each of the wives and her children had been given a plot. The Sololo Makutano plot remained and was for the family. The share of the respondent was in another place in Sololo. After 15 days the deceased passed on. **PW6 Adan Noor Abdirahman** is the appellant's uncle. It is his evidence that he took the deceased to Hawasa hospital in Ethiopia. The deceased was operated. The deceased had many children. He asked the deceased to say something about his property so that there would be no confusion after his death. One week before his death the deceased told him that every one of his wives had her own plot/house which she lived. Each of the wives was to own that house. The deceased told him that there was a flat house for himself at Sololo Makutano. That property was for all his children. The deceased told him that there was money but he had to call for a meeting and state how much that money was. Unfortunately he died before mentioning the money. The flat he talked about is a storey building which was not complete.

The respondent testified that together with her late husband they built all the houses. The appellants do not know how the property at Sololo was built. When the deceased was sick he called all his family so that he could write his **Will**. They refused to go to him. The clan elders visited the deceased and witnessed to the deceased writing his **Will**. At the time the deceased is alleged to have made an oral **Will** he was unconscious. After the deceased had passed on the area elders including the chief called a meeting and told the family on what the deceased had told them. According to the elders no one was to claim the inheritance until all the deceased's children had reached the age of 18. The motor vehicle has broken down and it was formerly being used to collect water and firewood for the hotel. There is no lodging business going on because the building is not complete. The other hotel business is operating. There was no money in the deceased's account. The minor children of the deceased are being taken care of from the proceeds of the hotel.

DW2 Guracha Dambala Sora testified that the deceased and the respondent settled at Sololo Makutano in 1985. One day the deceased called them and informed them that he wanted to distribute his property to his family because he was old. At that time the deceased had four wives. He told them that each wife had her own plot which she lived and he had given the wives those plots. There was somebody by the name **Nury Ibrahim Warsame** who was recording. This was on 26.3.2013. The deceased told them that the property at Sololo was to remain for him. The deceased told them that he had called his children but they had refused to visit him. The plot at Sololo Makutano which has apartment is where the respondent lives. The deceased told them that the respondent should cater for the last wife and her children through the hotel business at Sololo.

DW3 Godana Hapi informed the court that in early 2013 the deceased called them as area elders. They visited him on three occasions. On the 3rd day the deceased wrote his **Will** and distributed his property. **Maalim Nura Ibrahim** who is also known as **Nura Aba Shabsa (DW5)** wrote down the **Will**. It is his evidence that the deceased informed them that the plot which has a small apartment is for the respondent. The respondent's elder son is the one to take care of the respondent and the minor children including those of the last wife. The deceased also told them that the plot near the apartment was for his last wife by the name **Kabale**. There is a plot in Sololo town and the deceased told them that if there was any debt, that plot was to be sold to clear his debt. The deceased also mentioned a farm at Dibu Dadacha which he said it should be distributed to his grandchildren.

DW4 Denge Okutu testified that when the deceased was sick he called the area elders including the area chief. The deceased told them that he wanted to mention his properties. They met the deceased on two different occasions. They asked the deceased to call his close relatives. The deceased called his brother in law **Noor Ibrahim** who wrote down the **Will**. The deceased informed them that he distributed his property to his children according to their mothers. Their role was only to hear what the deceased was telling them while **Noor Ibrahim** was writing. The deceased said he had developed a plot in Ethiopia which has four rooms for the respondents while one room was for the last wife called **Kabale Gufu**. The deceased said he had a developed plot in Moyale Kenya which was given to **Mama Asili** with her children. The deceased said he had three developed plots at Sololo Makutano. The plot which has apartment with hotel was for **Mama Shoba (respondent)** and her children. Behind that plot the deceased has another plot which was given to his last wife **Kabale Gufu**. The deceased told them that the respondent was to educate the minor children of the deceased with his last wife **Kabale** until they complete school. The deceased said he had a third developed plot in Sololo Makutano which was for his second wife by the name **Shaku Adan** with her children. The deceased mentioned two farms at a place called **Haroboji**. One plot is registered and the other one which is not registered is at **Dibu Daracha**. These two plots were given to the deceased's grandchildren and his children who may not have benefited. The deceased also mentioned a developed plot and a farm at Sololo Makutano that was to remain for his own use and in the event that he passed on it was to be sold and pay his debts. The deceased told them that he had a lot of debts due to the running of his business. If any money was to remain after the sale of that property, then the balance was to be used to pay school fees for his minor children who are at Sololo. According to him **Noor Ibrahim** is a brother to the deceased's last wife and is the one who recorded the **Will**. The deceased then signed the **Will**. Those who were also present when the deceased was writing the **Will** were: **Denge Okutu, Kulu Okutu, Guracha Dambala, Noor Ibrahim, Did Gufu** and **Did Godana** who is the area chief. The deceased told them that his children had refused to visit him. The meeting was held after the **Asir** prayers on 26/3/2013.

DW5 Noor Ibrahim Warsame testified that the deceased was related to him. The deceased became sick and he called elders from Sololo town and Sololo Makutano. Four elders came from Sololo town and the other elders came from Sololo Makutano. The deceased told them that he wanted to write his **Will** and distribute his property among his family. The elders advised him against that idea. After two weeks the deceased called him and also called **Did Gufu** who was his brother in law. The deceased called two of his wives **Soba** and **Kabale** the last wife. There were six people and the deceased told them that he wanted to write his **Will**. The deceased told them how he wanted to distribute his property and he recorded what the deceased was saying. It is his evidence that he did not sign the **Will** and also the deceased

did not sign. One of the deceased's son was present.

The Kadhi's decision is to the effect that the deceased distributed his estate to his beneficiaries. The Kadhi held that it is lawful for a Muslim to write a will during his life time and distribute his estate.

According to the appellants as per the evidence of PW3, the deceased distributed his estate among all his wives. The appellants contend that what they are claiming is the residue of the estate. The respondent got her share and should therefore distribute the vehicle, money in the bank and the property which has a hotel in Makutano. According to the plaintiff, the deceased left the following properties:

- 1. Plot No.10 Sololo Makutano registered under the deceased's name**
- 2. One operational hotel situated at Sololo Plot No.10**
- 3. One lodging facility with 18 operational rooms.**
- 4. One motor vehicle registration No.KAS 101T make Land Rover.**
- 5. Cash at account at Equity bank which was recently accredited a total of Ksh.881,640 as a compensation fee for road construction.**

The issue for determination is whether the deceased left a valid **Will** or not and if so, which amongst the alleged **Will** distributed the deceased's estate. According to the appellant, the deceased left an oral **Will**. Stating how he wished how his estate is to be distributed. On the other hand, the respondent maintain that the deceased left a written **Will**. The deceased called his children but they did not attend the meeting when he distributed his properties. The trial Court agreed with the respondent's position. The judgment of the learned Kadhi reproduced the entire **Will** as recorded by **Noor Ibrhim Warsame**.

One common point of agreement is that the deceased distributed to each of his wives a property. Each wife was to share with her children. In the written **Will**, the deceased mentioned the male children from each house who are meant to share with their mothers and their sisters. The effect of the plaintiff is that the three properties in Sololo are different from what the deceased distributed to his wives. According to the respondent's evidence, the plots targeted by the appellants were distributed. The hotel building was distributed to the respondent. The respondent was given the responsibility of educating the children of her co-wife, Kabale (Qabale) Adan. It is also clear from the tabulation of the deceased's family that the respondent had many children with the deceased. The 4th wife had five children. The other wife, Kusa Bulcha had one child. Another wife, Fatuma Adan had nine children while the first wife, Asili Konse had three children. The respondent was the fourth wife of the deceased according to the way he married them. The distribution by the Kadhi as per the written **Will** does not leave any property undistributed.

The appellant's contentions as per the grounds of appeal are that the alleged written will is invalid and fraudulent. There is the issue as to whether the **Will** was signed by the deceased. The evidence shows that what **DW5** recorded was witnessed by several people. The area chief was also one of the witnesses. The deceased named other elders whom he wanted to distribute the estate. These are **Haji Halkano**, **Wario Doko** and **Mzee Guracha Dambala**. The written document gives a list of fifteen (15) people whom the deceased mentioned as his witnesses. The deceased died on 27.10.2013. The alleged written **Will** was done on 26.3.2013. The Kadhi observed that at the time the deceased wrote his **Will**, he was not incapacitated.

Given the evidence on record, I do agree with the findings of the learned Kadhi that the deceased left a written **Will**. The alleged oral **Will** does not exist. The appellants evidence is to the effect that the oral **Will** was mentioned to different people at different times. It was made a few days before he died. These contentions cannot replace the detailed **Will** which mentions properties which are not included in the alleged oral **Will**. The farms and the remaining house at Sololo Ramota are not mentioned in the oral **Will**. The Kadhi distributed the residue of the estate to all the beneficiaries in accordance with Islamic Sharia. The appellants are not contesting how the remaining properties were distributed. Their bond of contention is that what was distributed to the 4th and 5th wives by the deceased forms part of the estate available for distribution. The appellant's position is that the respondent's share is somewhere in Sololo but no specific description is given.

There was the allegation that Ksh.881,640 was deposited in the deceased's account after his death. The Kadhi called for the bank statement and only Ksh.1,762/99 was found to be the account balance. No evidence was adduced as to when the money was deposited and who paid the money.

I do find that the deceased distributed his estate during his life time. The mode of distribution was recorded by his brother in law, **Noor Warsame** who is a brother to his 5th wife and not the respondent. Several elders witnessed the deceased distributing his estate. They include the area Chief **DID GODANA**. The trial Court correctly upheld the written **Will** against the alleged oral **Will**. The vehicle was distributed to the deceased's children who reside at Sololo as per the deceased's wishes.

In the end, I do find that the appeal lacks merit and is hereby dismissed. I do further find that there is no need to award costs to the respondent. Parties shall meet their respective costs both for the Kadhi's case and for this appeal.

Dated, Signed and delivered at Marsabit this 11th day of April, 2018

S. CHITEMBWE

JUDGE