



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL APPEAL NO. 1 OF 2018

ADAN ROBA.....1ST APPELLANT

ABDIKADIR ROBA.....2ND APPELLANT

MAKO ROBA.....3RD APPELLANT

VERSUS

ABIBA ROBA GUYO.....RESPONDENT

(Being an Appeal from the Ruling of the Senior Resident Kadhi Hon. A.D Wako dated 26th Day of February, 2018 in the Senior Resident Kadhi's Court Suit No. 77 of 2016, Moyale)

JUDGMENT

The late Roba Guyo died on the 9th of December 2005 at Moyale District hospital. He was a retired army officer. He was survived by the respondent (widow) and 14 children (6males) and (8 female). The three appellants are from the deceased's first wife. The appellants filed a Succession Cause before the Moyale Kadhi's court seeking among other things the distribution of the deceased's estate including rent and profit collected from plot numbers 89A and 89B located in Moyale town. The Kadhi heard then dispute and delivered his judgment on 30th of November 2017. The decision of the Kadhi apportioned the estate into two categories. The first one relate to the proceeds from the estate which was found to be Kshs. 13,283,200. The second category is the property itself that was valued at Kshs. 8,000,000. Each beneficiary was allocated his/her own share.

The respondent filed an application dated 21st February 2018 seeking the following orders:

- 1) This Honourable court be pleased to interpret the implementation of the judgment dated and delivered on 30th November, 2017 which judgment is annexed hereto declaring that the suit property be shared in accordance with Islamic law amongst the deceased's heirs in definite shares.**
- 2) The parties be heard with respect to the interpretation.**
- 3) That the costs of this application be provided for.**

The Kadhi delivered his ruling on 26th February 2018. The appeal herein emanates from the Kadhi's ruling of 26th February 2018. The grounds of appeal are that: -

- 1) The learned Senior Resident Kadhi erred in law and in fact by reviewing his own Judgment without legal basis by ordering that the Respondents be given the share based on the value report.**
- 2) The learned Senior Resident Kadhi erred in law and in fact in maintaining the status quo.**
- 3) That the Learned Senior Resident Kadhi erred in law and in fact by ordering that the distribution of the estate be based on the valuation report.**
- 4) That the Learned Senior Resident Kadhi erred in law and in fact in failing to grant the Appellants time to respond to the Respondent's Application dated 21st February, 2018.**

The firm of SWAN advocates appeared for the appellants. They filed written submissions on 22nd June 2018 as well as skeletal submissions on 24th of July 2018. I have read the two sets of submissions and they provide more or less the same contention. Counsel maintain that the deceased's estate comprises of a commercial property in Moyale situated on plot numbers 89A and 89B in Moyale town. All the beneficiaries are adults and some have retired from employment. The appellants were brought up in the property and would suffer mental anguish if they are to be bought off by the respondents. The Kadhi correctly indicated the ratio of each beneficiary but later on erred when he interpreted his own judgment and allowed the respondent to inherit the entire property and pay off the appellants. The appellants are also entitled to inherit a share of their father's memory. The property gives a net income of Kshs. 267,000 which is an estimate of only 50% of the earnings. It is submitted that the appellants allowed the respondent to utilize the proceeds from the estate from 2005 to 2012 so that she could educate her children. The decision of the Kadhi is now drifting the beneficiaries apart instead of pulling them together. The Kadhi ruled that since the respondent is residing on the property then the status quo should be maintained and the appellants be paid off. The appellants would also wish to get a share of the property itself either in terms of shops and some rooms or be allowed to develop the property together with the other beneficiaries.

It is further submitted that the application by the respondent to interpret the court judgment was heard hurriedly. It was filed on the same day of 26th February 2018, heard on the same day and a ruling was delivered on the same day. The appellants were not given an opportunity to respond to the application. There was no fair hearing. Before the Kadhi's court the appellants were represented by the firm of **HASSAN LAKICHA ADVOCATES** who was not given an opportunity to defend the application. Counsel relies on the case of **ONYANGO VS A.G.(1986 – 1989) EA 456 where NYARANGI J** stated as follows: -

“I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly.” ...

“A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.”

Mr. Owino appeared for the respondent. Counsel submit that the appellants' mother was divorced. The respondent was married while she was 15 years old. The appellants are adults and not orphans as alleged because their mother is still alive. The appellants did not file an appeal against the judgment of the Kadhi. Counsel maintain that a court can review its own judgment. The Kadhi correctly interpreted its own judgment. The appellants accepted payment on the first part of the judgment involving the rent proceeds and refused to be paid their share of the estate. The respondent opened a bank account at national bank and deposited a sum of Kshs. 4,800,000 being the share of the appellants. This amount comprise the appellants share of the income totaling Kshs. 2,905,700 and their share of the estate totaling Kshs. 1,750,000. It is therefore submitted that the appellants are interested in satisfying the decree issued on 30th November 2017 only in part. They are not interested in taking their share of the estate. If the appellants are paid off then the judgment of the Kadhi will be satisfied. Upon such payments then the appellants would have no further interests or claim to the suit property. In the absence of such payment, there would be an unintended continuing obligations by way of income from the estate that would continue to accrue as against the respondent. This was not the intention of the judgment.

Counsel further submit that a valuation report was done by Probity valuers and the same was adopted by both parties as representing the value of the suit property. The Kadhi distributed the estate in accordance with the Islamic law and there is no appeal against that distribution. The distribution is based on the valuation report. The application to interpret the judgement was the only recourse available to the respondent in order to effect the judgment and the decree. The Kadhi gave the respondent the first opportunity to buy out the appellants and it appears that the appellants are resisting this order. The decision of the Kadhi is based on the fact that the respondent is already resident on the property and a majority of the beneficiaries totaling 11 in number are in favour of this approach. It is contended that during the hearing of the case it came out that the appellants have engaged the respondent in various litigation forums and this has affected the parties' relationship. Counsel further submit that the respondent has life interest in the net residue of the estate. That interest will only come to an end upon her death or remarriage as held by justice Maureen Odero in the case of **Bob Njoroge Ngarama Vs Mary Ngarama and another Mombasa Succession Cause Number 307 of 1995. (2014) eKLR.**

Mr. Owino maintain that when the ruling was delivered the first appellant was present in court. The ruling was delivered in chambers and the first appellant was present. This was a simple application which simply sought the indulgence of the Kadhi to explain to the respondent how to go about satisfying the decree in full as opposed to the appellants preferred mode of part payment. During the hearing before the Kadhi's court it was the 1st appellant who represented his co-appellants throughout the case. The contention that the appellants were not accorded humble time is not true. The appellants were fully heard. The Kadhi only provided the clarification of his judgment. The Kadhi has already made his decision and nothing controversial was pending.

The appeal emanates from the ruling of the Kadhi that was delivered on 26th February 2018. The short ruling reads as follows: -

Having considered the submissions of both parties, am of the opinion that the earlier finding of the court ought to be obeyed without further delay, before any application is made, having said that I hereby order the applicant to release the amount of proceeds of estate to the beneficiaries as per the court finding, the part concerning the value was based on value report which was agreed upon by both parties from the first instant. The parties was dragging this matter for 12 years since the death of their father, which force then to approach the court for amicable solutions and to met end of justice. Since the applicant side were residing in the said plot in question and the structure on it is semi-permanent one and also their number (their applicant) side were more than respondents, I find that it is prudent for the parties to maintain the status quo and the respondent be given their share based on the value report that was agreed upon by the parties as per the court finding on 30th November 2017.

The main issue in dispute is the Kadhi's order that the respondent should pay off the appellant's share of the estate. The appellants are not contesting the judgment of the Kadhi that had been delivered in November, 2018. Indeed, the 1st appellant while appearing before the Kadhi on 26/2/2018 stated that the duration of Appeal had already lapsed. The appellant is contesting the subsequent interpretation of the judgment

by the Kadhi.

Prayers 3, 4 and 5 of the appellants' originating summons dated 27th December, 2016 states as follows: -

- 3) That the estate of the deceased be distributed among his dependants/heirs according to Islamic law.**
- 4) That the respondent be compelled to disclose to this Honorable Court the whereabouts and the details of the deceased's other properties be it in the form of shares, bank account or other properties for the sole interest and purpose of equal distribution of the same amongst the deceased's dependants in accordance with the provision of Islamic law.**
- 5) That the profit/rent collection from the deceased plot (number 89A and B in Moyale Town) that have accrued since the death of the deceased on the 9th December 2005 be determined and distributed amongst the rightful heirs as per Islamic law.**

After the Judgment was delivered on 30th November, 2017, a decree was issued on 27th February 2018 in the following terms: -

(i) It is hereby ordered that the distribution of the proceeds of the estate will take the following mode: -

- 1) Widow shall get 12.5% amount to Kshs. 1,660,400/=**
- 2) Each male child of the deceased shall get 8.75%, amount in Kshs. 1,162,280/=**
- 3) Each female child of the deceased shall get 4.375% amount in Kshs. 581,140/=**

(ii) Distribution of the value of the estate based on the value report of Kshs. 8,000,000/= shall be as follows:

- a) Widow shall get 12.5% amount to Kshs. 1,000,000/=**
- b) Each male child of the deceased shall get 8.75%, amount in Kshs. 700,000/=**
- c) Each female child of the deceased shall get 4.375% amount in Kshs. 350,000/=**

When the trial court heard the respondent's application on 26/2/2018, the final order reads as follows: -

- 1) That the applicant to release the amount of proceeds of estate to the beneficiaries as per the Court findings.**
- 2) That parties to maintain status quo and the respondents be given their share based on the value report that was agreed upon by the parties as per the Court finding on 30th November, 2017.**

The appellants contend in their ground three of the grounds of appeal that the trial court erred by ordering that the distribution of the estate be based on the valuation report. There is a valuation report prepared by **probity valuers limited** dated 14th November, 2017. Those indicated to have instructed the Valuers are Adan Roba Guyo (1st Appellant) and Nuru Roba Guyo. The proceedings indicate that the valuations was done by consent. The value of the property is given as Kshs. 8,000,000. The property is stated to be located in the heart of Moyale town. The developments are semi-permanent. It is clear to me that the Kadhi could not have relied on any other valuation other than the one produced in court by consent. The appellants believe that the property can fetch a higher value in view of the expected rate of return on investment. I do find that the Kadhi was correct by basing his distribution on the valuation report.

The appellants also contend that they are equally ready to pay off the respondent. The property is of sentimental value to them and they would like to own a piece of their late father's memory. The essence of succession causes is that the beneficiaries of the deceased's estate would like to have the estate distributed or shared out. This is what the appellants wanted the court to do. There is no dispute on the jurisdiction of the Kadhi's Court. Indeed, it is the appellants who filed the succession cause before the Kadhi's Court. The estate was distributed. The shares of each beneficiary is known and was computed to the last penny.

The appellants' complaint is that they do not wish to be paid off by the respondent. The Kadhi was of the view that since the respondent is residing in part of the premises and is the one in possession, she should then pay off the three appellants. The appellant has the support of her children and form a formidable block of eleven beneficiaries. If each beneficiary was to cling to a portion of a deceased's estate even after distribution is done, then the estate shall remain in force in perpetuity. I believe the appellants have children of their own. What will happen if the appellants passed on. Will their children continue alleging that they have sentimental attachment to the property established by their grandfather. The shares of the appellants' children on the property would have diminished to less than what the appellants are claiming. If each one is to avoid taking his/her share of a deceased's estate, then the essence of distribution of estates will be rendered unnecessary. It reaches a time when beneficiaries must take their apportioned shares of the estate and move on. Another way of settling the dispute is for the property to be sold to a third party. That alternative will not be the best way to go as the respondent is already in occupation and has been part of the development of the property. The problem is also enhanced by the fact that the deceased only left one property. If there were several properties, then the issue of inheriting the deceased's share of memory would not have arisen. Sentimental value or memory in relation to a deceased's estate cannot be part and parcel of the estate. The appellants are now adults who should establish their own homes and leave their step mother and her children on the property.

The appellants have been reiterating the fact that they left the respondent to collect rent for a period of about eight (8) years so as to educate

her children. The deceased died on 9th December, 2005. The succession cause was filed in 2016, a period of about eleven (11) years. The Kadhi computed the income for a period of eight (8) years and made it to be part of the estate. The appellants even pursued their share of that income by filing an application for execution on 25th April, 2018. The amount claimed in the application is Kshs. 2,905,700. Since the appellants have been duly compensated for the previous income, the issue of allowing the respondent to use the rent to educate her children should not arise. The past income was computed and the appellants were paid their fair share of that income. I believe they took their share as the money was deposited in a bank account.

The last issue involves the manner in which the respondent's application was heard and determined. The nature of the application was that the respondent wanted to know how to effect the court judgment. The 1st appellant was served and was present in court. He cannot now claim that he was just pulled to the court and told to proceed. None of the other appellants appeared in court other than on 30/10/2017 when the second appellant testified. The firm of Hassan Lakicha Advocates does not appear in the proceedings. Further, the 1st appellant did not seek adjournment. In fact, the applicant wanted to be given more time as per the Court record of 26/2/2018. The nature of the application was that the applicant wanted the judgment to be interpreted. Even if the appellants were to file an affidavit, it was the Kadhi who was being called upon to explain his judgment. The Kadhi did not require more time to explain himself. He delivered a short ruling explaining how the judgment can be effected. I see no fault on the part of the Kadhi. Explaining one's judgment falls within the inherent powers of the judicial officer who is being called upon to fulfil that task. Such an officer does not need more time like a week or month to explain his/ her judgment. This ground of appeal lacks merit. All what happened is that the Kadhi explained his judgment. The appellants cannot allege that they were condemned unheard. The decree that was extracted after the judgment indicate that distribution was to be made based on the valuation report. The applicant was ready to distribute but the appellants refused to take their share. The Kadhi's only explanation is that the respondent and the other ten beneficiaries were better placed to retain the property and pay the appellants their share. I see no problem with that explanation.

I am satisfied that the deceased's estate has been properly stated and has been distributed. Beneficiaries should not compete to buy off each other simply because they are capable of doing so. The appellants should not postulate on how the respondent will benefit from the rental income. This is a business which may succeed in future. It may equally be affected by unknown factors.

In the end, I do find that the appeal lacks merit and is hereby dismissed with costs.

Dated, Signed and Delivered at Marsabit this...24th...Day of September 2018.

S. CHITEMBWE

JUDGE