



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**FAMILY DIVISION**

**CIVIL APPEAL 23 OF 2013**

**MAHMOUD MOHAMED BWANAMKUU.....APPELLANT**

**VERSUS**

**ABUBAKAR ALI KAREMA.....RESPONDENT**

**JUDGEMENT**

***(An Appeal from the Judgement of Hon. Sheikh Abdulhalim H. Athman, Principal Kadhi delivered on 27.6.13 in Mombasa Kadhi Succession Cause No. 120 of 2009)***

1. The Appeal herein arose from the Judgment of Hon. Sheikh Abdulhalim H. Athman, Principal Kadhi delivered on 27.6.13 in Mombasa Kadhi Succession Cause No. 120 of 2009. Abubakar Ali Karema, the Respondent herein had through his Originating Summons dated 21.5.09 and amended sought orders for distribution of the estate of Mariam Mohamed Sadik, the deceased, to him and the named heirs in accordance with her will and in accordance with Islamic Sharia. The deceased died on 3.5.09 and left a house without land on Plot No. 79 Section II M.N. Mishomoroni (the House). The deceased left a will in which she bequeathed her house to her children. The Respondent averred that the deceased had during her lifetime built the House and paid land rent in respect of the same. The Originating Summons was subsequently amended to enjoin Mahmoud Mohamed Bwanamkuu, the Appellant herein.

2. The record shows that the deceased was survived by 3 sons including the Respondent and 5 daughters. The deceased was married to the Appellant but divorced in 2006. They had one son together. The Appellant lays claim to the House and contended that it was he and not the deceased who built the same.

3. In his judgment, the Hon. Principal Kadhi held that the House belonged to the deceased and not the Appellant and the same was distributed to the heirs in accordance with Islamic Sharia which provides that each son is entitled to twice the share of each daughter.

4. The Appellant being aggrieved by the Judgment filed the Appeal herein, the summarized grounds of which are that the Hon. Principal Kadhi erred in law and fact in that he:

- a) Found he had jurisdiction to determine a disputed of ownership of the House.
- b) Found that the will of the deceased though invalid is confirmation of ownership of the House by the deceased.
- c) Found that the House belonged to the estate of the deceased and ordered that the same be vested in her heirs.

5. The Appellant prayed that the Appeal be allowed and that the judgment and order of the Hon. Kadhi delivered on 27.6.13 be set aside and the Originating Summons be dismissed. He also prayed for costs.

6. The parties through their respective counsel filed written submissions which were highlighted before the Court and in the presence of the Hon. Chief Kadhi as assessor as required by Section 65(1)(c) of the Civil Procedure Act. The parties narrowed down the issues for determination to the following:

- i) Whether the House belonged to the deceased and therefore formed part of her estate.

ii) Whether the Kadhi's Court had jurisdiction to determine the matter before it.

Whether the House belonged to the deceased and therefore formed part of her estate

7. The Appellant submitted that the Hon. Kadhi's finding that the House belonged to the deceased was premised on conjecture and speculation. The Hon. Kadhi erred in finding that because the building plan and agreement produced by the Appellant had dates post the death of the deceased, they were doctored and fabricated to support his claim.

8. For the Respondent, it was submitted that the Appellant and the deceased were married on 22.6.89 and cohabited in the House together with the children of the deceased from a previous marriage. Upon the divorce on 28.8.06, the Appellant made no steps to recover the House from the deceased. The Appellant exhibited a building plan prepared long after the demise of the deceased. Further, he signed an agreement over the House with the landlady on 22.5.09 the day after the suit in the Kadhi's Court was filed and 19 days after the demise of the deceased. This in the Respondent's view was intended to disinherit the deceased's children as a revenge for the divorce and the sum of Kshs. 120,000/= he had paid to her as past maintenance.

9. From the evidence and documents adduced in the Kadhi's Court, it is not possible to state with certainty who the House belongs to. There are receipts in the name of the deceased issued by Mbarak Khamis Shikely & Others for the period 1995 to 1997. The record contains a building plan in the name of the deceased that was approved on 27.12.04. It however refers to Plot No. 149 Sec 11 MN. The will of the deceased is undated and unattested. Further, it does not provide the plot number of the house. There are receipts in the name of the Appellant issued by Mbaruk K. Shikely & Others. The payments were however made between 2009 and 2010 after the demise of the deceased. Other receipts are issued by Khamis Bin Rashid's family. 1 receipt is in the name of Khamis Kombo and Charles Karabu for payments made between 1984 and 1988. There is also a building plan which shows that the client is the Appellant. However, the same was submitted for approval on 31.12.08 and approved on 7.7.09. Again this is after the demise of the deceased. There are receipts for building materials for the year 1988. The receipts show that in April 1988 2 bags of cement cost Kshs. 300/=, in June 1988 1 bag of cement cost Kshs. 508/= and in May 1988 1 bag of cement cost Kshs. 300/= and in October 1989 1 bag of cement cost Kshs. 175.50 and in November 1989 1 bag of cement cost Kshs. 87.65. The discrepancies are inexplicable. As a result of the foregoing, it is not possible to state with certainty to whom the House belongs.

Whether the Kadhi's Court had jurisdiction to determine the matter before it

10. The issue of jurisdiction was raised by the Appellant before the Kadhi's Court. In his judgment the Hon. Kadhi stated:

***The jurisdiction of the court to hear the matter had not been pleaded, raised at any stage during proceeding (sic) of this trial except in the final written submissions of Ms. Sega for the Respondent. Jurisdiction is critical in every trial. It is everything. It is the reason it has to be raised and dispensed with as the first issue before the trial begins. It cannot be raised at the end of the trial where, as in this case, the other party, in this case the petitioner, could not respond to it.***

11. The record shows that the issue of jurisdiction was raised at the submissions stage after the hearing of the case. While it is true that an issue of jurisdiction is best raised at the earliest possible opportunity, nothing bars a party from raising it at any time before judgment. I find that the Hon. Kadhi misdirected himself when he found that the issue of jurisdiction could not be raised at the end of the trial. I am fortified in my finding by the decision in Stanley Muiruri Muthama v Rishad Hamid Ahmed & 2 others [2018] eKLR where the Court of Appeal observed:

***It is trite law that an issue of jurisdiction, as the one that was argued by the 1st respondent's counsel, can be raised at any time, in any manner, and even by the Court itself.***

12. Article 170(5) of the Constitution confers jurisdiction upon the Kadhi's Court as follows:

***"The jurisdiction of a Kadhis' court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts."***

Section 5 of the Kadhi's Court Act replicates the above provision.

13. The Respondent in his Amended Originating Summons sought a determination that the House formed the estate of the deceased and determination of the heirs and the distribution of the estate to the heirs of the deceased. The Appellant stated that the deceased neither built the house nor contributed to its construction. He contended that he solely built the House using his own resources without any contribution from the Deceased. The issue of the heirs of the deceased and their respective shares therein was not disputed. The issue of ownership of the House as between the deceased and the Appellant however became highly contested. The Hon. Kadhi therefore proceeded to analyze the evidence before him and purported to make a determination that the House belonged to the deceased and not the Appellant. In so doing, the Hon. Kadhi exceeded the jurisdiction conferred upon him by Article 170(5) of the Constitution and the Kadhi's Court Act.

14. Article 162(2) of the Constitution of Kenya which provides:

***"(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—***

**a) ...**

**b) the environment and the use and occupation of, and title to, land.”**

Parliament did in 2011 enact the Environment and Land Court Act which established the Environment and Land Court with the status of the High Court to hear and determine disputes relating to the use and occupation of, and title to, land.

15. Hon. Al Mudhar A. S. Hussein, Chief Kadhi opined in his assessment based on the submissions by counsel that the Appeal should be allowed. He stated in part:

***It’s my opinion that the learned Kadhi erred in his findings which were based on ownership of property which is out of Kadhi’s Court jurisdiction, Article 170 (5) of Constitution and Section 5 of Kadhis Act (sic) Chapter 11 is clear on jurisdiction of the Kadhis Court.***

16. The jurisdiction of any Court is conferred upon it by the Constitution or statute or both. This was the holding of the Supreme Court in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR:

***“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation”***

17. The Kadhi’s Courts jurisdiction is exhaustively provided in the Constitution and the Kadhis’ Courts Act. The Hon. Kadhi in the instant case therefore misdirected himself by purporting to expand the Court’s jurisdiction by judicial craft and innovation. Upon realizing that the dispute herein went beyond the determining the heirs of the deceased and their respective shares in her estate, the Hon. Kadhi ought to have downed his tools. When he ventured into the determination of ownership of the house, he arrogated to himself jurisdiction he did not have. In the circumstances, I allow the Appeal and set aside the judgement of the Hon. Kadhi delivered on 27.6.13. There shall be no order as to costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 21<sup>st</sup> day of September 2018**

**M. THANDE**

**JUDGE**

**In the presence of: -**

.....for the Appellant

.....for the Respondent

.....Court Assistant