



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL 2 OF 2014 (formerly 16 of 2006)

MOHAMED ABDILLAHI MOHAMED BAASBA also known as

ABDUL ABDILLAHI MOHAMED BAASBA APPELLANT

VERSUS

SAADA ISLAM AWADH RESPONDENT

JUDGEMENT

(An Appeal from the Judgment and Decree of Hon. Sheikh Ismail A. Abdalla Kadhi delivered on 28.1.06 in Lamu Kadhi Court Civil Cause No. 28 of 2005)

1. Saada Islam Awadh, the Respondent herein filed a plaint dated 2.8.05 in Kadhi Court Civil Cause No. 28 of 2005 at Lamu against Mohamed Abdillahi Mohamed Baasba also known as

Abdul Abdillahi Mohamed Baasba, the Appellant, seeking distribution of the estate of one Abdillahi Mohamed Baasba (deceased) to the rightful heirs. She also sought distribution of the rental income from the 2 houses forming part of the estate of the deceased. According to the plaint, the deceased left a 2 storey house on Plot No. 748/1, Lamu, a house without land in Langoni on Plot No. 1288/1, Kshs. 16,000/=. A safe, box of clothes and house furniture. The record shows that the Deceased had 3 wives including the Respondent but at the time of his demise, had divorced all of them. The deceased was survived by 7 sons including the Appellant and 3 daughters.

2. In his judgment, the Hon. Kadhi held that the estate of the deceased comprised of 2 houses on Plots Nos. 748/1 and 1288/1, Lamu, Plot No. 748/14, a box of clothes, house furniture, 2 big sufurias and rent from both houses which as at October 2005 was Kshs. 202,400/=. The Hon. Kadhi further ordered the Appellant to pay rent from June 2004 “to-date and up to finalization of this matter. Each of the 7 sons of the deceased was to get 2/17 share of the estate of the deceased while each of the daughters was to get 1/17 share. The Hon. Kadhi further held that the expenditure incurred by the Appellant would only be considered if and when approved by all the heirs.

3. The Appellant being aggrieved by the decision of the Hon. Kadhi preferred the Appeal herein. The Grounds of Appeal are that the learned Kadhi erred in law and fact in that he:

1. Found the Appellant liable to pay rent in respect of the houses of his father’s estate.
2. Failed to apportion costs of the repairs incurred by the Appellant.
3. Failed to give any weight to the defence on record.
4. Failed to find that the Appellant was not properly served.
5. Failed to consider the Appellant’s submissions.

4. The parties through their respective counsel filed written submissions which were highlighted before me with the Hon. Chief Kadhi sitting as assessor pursuant to Section 65(1)(c) of the Civil Procedure Act which provides:

“(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court...”

(c) from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors."

5. I have given due consideration to the record of appeal, as well as the submissions by counsel. Ground 4 of the Appeal was abandoned. The issues that fall for determination are:

1. Whether the Appellant is entitled to reimbursement for repairs done in the houses that form part of the estate.
2. Whether the Hon. Kadhi erred in ordering the Appellant to pay rent from 2004.

6. This being a first appeal, the Court is guided by the holding in **Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**, where the Court of Appeal had this to say with regard to the duty of a first appellate court:-

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

This Court must therefore re-evaluate the evidence, assess it and reach its own conclusions the only caveat being that this Court has neither seen nor heard the witnesses and must therefore make due allowance in this regard.

Whether the Appellant is entitled to reimbursement for repairs done in the houses that form part of the estate.

7. On the issue of repairs, it was submitted for the Appellant that the record shows that he had indeed carried out repairs on the properties. The Hon. Kadhi failed to pronounce himself with clarity on this issue. His finding was evasive and he made no proper finding on the same. For the Respondent however, it was argued that it was not clear at the hearing whether repairs were done or not. The Hon. Kadhi found some of the receipts challengeable as they had discrepancies. The authenticity of the evidence could not be verified and the Hon. Kadhi found the receipts to have been cooked. Further, the Appellant's Defence did not have a prayer for repairs. The Respondent therefore contends that the Hon. Kadhi was right in rejecting to dismiss the issue of repairs.

8. The Statement of Defence does not contain a prayer for repairs. Paragraph 8 however has a breakdown of the repairs the Appellant claims to have undertaken. The Court takes cognisance of the fact that the parties were unrepresented in the lower Court. In line with the provisions of Article 159(2)(d) of the Constitution, Courts are required to administer justice without undue regard to procedural technicalities. The Court therefore finds that the Hon. Magistrate was right in considering the issues of repairs notwithstanding that there was no specific prayer for the same in the Defence.

9. I have looked at the documents produced by the Appellant. They include receipts of building materials, a letter of offer of a loan of Kshs. 170,000/= from Kenya Commercial Bank to the Appellant dated 21.4.04 and a schedule of rent collected. It is noted that they were produced after the close of both parties' respective cases. The Appellant claimed that the house was falling and so he took a loan of Kshs. 170,000/= to repair the same. In his evidence however, he did not state how much he spent save that he took a loan of Kshs. 170,000/= to repair the house which was falling. Other than producing receipts, he did not give any evidence in support of the receipts. The amount in the said receipts is Kshs. 164,605/=. The Appellant further stated that he collected rent amounting to Kshs. 202, 400/= for the period between June 2004 and October 2005.

10. Further the Appellant stated in his statement of defence that the deceased had prior to his demise initiated repair of the 2 houses but died before completing the work whereupon the Appellant did the remaining work which cost him Kshs. 268,000/=. The letter of offer for the loan is dated 21.4.04 while the deceased died on 14.7.04. It would appear therefore that the loan was taken for a purpose other than the repairs of the houses which the deceased was himself undertaking.

11. It is trite law that he who alleges must prove. The Evidence Act, places the burden of proof of any fact on the person who wishes to rely on the same. Section 107 provides:

"107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person".

12. The Appellant would want this Court to believe that he spent moneys on repairs of the houses belonging to the estate. However, in his testimony before the Court, he did not state how much he spent nor did he state what kind of repairs he undertook. The Respondent did not also tell the Court what he did with the rent he collected. The evidence produced before the Hon. Kadhi by the Appellant did not support the claim of repairs amounting to Kshs. 268,000/= as stated in his statement of defence. It is not enough for the Appellant to just produce receipts. To discharge his burden of proof, he must show a nexus between the receipts and the repairs. The claim for reimbursement of the alleged repairs fails, the Appellant having failed to discharge the burden of proof that lay squarely upon him in this regard.

13. The Hon. Kadhi while rejecting the receipts stated in his judgment:

From the foregoing it shows that these receipts were cooked up for the purpose of proving his claim

14. Having so found, the Hon. Magistrate ought to have rejected and dismissed the claim for reimbursement for the alleged repairs. In the

premises, I do find that the Hon. Kadhi misdirected himself when he made a finding that:

The Defendant's expenditure can only be considered if and when approved by all heirs.

Whether the Hon. Kadhi erred in ordering the Appellant to pay rent from 2004.

15. The Appellant further submitted that the Hon. Kadhi erred in holding that he was liable to pay rent from June 2004. The Appellant maintains that he lived in the house with consultation of the other heirs. He moved into the house during his father's illness to assist him as he had divorced all his 3 wives. Some of the 10 children of the deceased live outside the country and it was impossible to get the consent of all of them. There was no requirement for consent of all the heirs and further that he stayed on in the house to provide security. The Hon. Kadhi thus erred in ordering the Appellant to pay rent.

16. For the Respondent, it was submitted that the Appellant admitted that the house he occupied belonged to all the heirs. The Respondent argues that the Appellant seeks to unjustly enrich himself having stayed in the house for 14 years since the demise of the deceased. The other beneficiaries are equally entitled to benefit from the house. It was therefore right and legal for the Hon. Kadhi to order that he pays rent for the period he had occupied the house from the demise of the deceased.

17. In his testimony, the Appellant acknowledged that he had no right to continue staying in the house after the demise of the deceased as the same belonged to all. He convened a family meeting and 6 of his siblings told him not to move out of the house until a meeting of all siblings was convened. This however never happened as the Respondent moved to Court. The Appellant's brother Feisal testified that he communicated with his brothers in Arabia who stated that they wanted more time for consultation. Even Fatma stated that it was too early to deliberate on the issue. The Appellant's sister Sofia also stated that in the meeting they agreed that the Appellant continue to stay in the house to provide security until the siblings in Germany and Mombasa were consulted.

18. It would appear from the evidence on record that there was no consensus of all the heirs of the Deceased that the Appellant continues to stay in the house of the deceased. It would also appear that those heirs who said the Appellant should stay on intended that that he does so to provide security pending consensus of all. What then transpired is that the Appellant continued to stay in the house and to benefit from the same alone to the exclusion of the other heirs. From the evidence on record, this was not the intention of the heirs of the deceased. In the circumstances, this Court finds that the Magistrate was correct in directing that the Appellant pays rent to the other heirs of the deceased from the date of the demise of the deceased. While computing the amount payable to the heirs however, it must be taken into account that the Appellant is also an heir.

19. Hon. Al Mudhar A. S. Hussein, Chief Kadhi in his opinion stated:

- Therefore it's my opinion to the Hon. High Court Judge that, the judgment of the Hon Kadhi was not bad in its findings and reservation regarding the orders.

- I would opine to the High Court Judge to order the Kadhi to frame issues and refer them to trial on two issues:

i. Consent from all beneficiaries to waive the rent ordered by the Kadhi on this condition.

ii. Whether the renovations/repairs were done in the house subject of this succession case by the appellant.

20. I agree with the Hon. Chief Kadhi but with respect I decline to remit the matter to the Hon. Kadhi to reopen the issues of the rent and the repairs which were litigated conclusively.

21. In the result I find that the Appeal partly succeeds. I set aside order (c) and (e) of the judgment of 12.1.06 and substitute therefor the following orders:

i) The Appellant shall pay to the heirs of the deceased the rent in respect of the house from July 2004 to date less 2/17 being his own share.

ii) The prayer for reimbursement of repairs is hereby dismissed.

iii) This being a family matter there shall be no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 21st day of September 2018

M. THANDE

JUDGE

In the presence of: -

..... **for the Appellant**

..... for the Respondent

..... Court Assistant