



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL APPEAL NO. 13 OF 2015

MARYAM ABDIKER.....APPELLANT

VERSUS

MOHAMED NUR JIBRIEL HILLOW.....1ST RESPONDENT

ABDIFATAH JIBRIEL HILLOW.....2ND RESPONDENT

(From the judgment in Mandera Kadhi's Court Succession Case No. 21 of 2014 – Adan Galgalo, Kadhi II)

JUDGEMENT

1. This appeal arises from the judgement of the Kadhi's Court in Mandera where the Kadhi concluded as follows-

“The respondent to return back all the monies she had withdrawn from the deceased's account and the one she withdrew from her account regardless of court order so as the court give fair distributions to all the beneficiaries, or the court shall recover from the respondent's and her children shares.

All the plots left by the deceased shall be shared among the beneficiaries.

Mode of distribution shall be in due course upon application.

All the parties bear their costs.”

2. In the judgment, the Honourable Kadhi also allowed the parties thirty (30) days to appeal, if dissatisfied with his judgement, which was delivered on 16th February 2015.

3. Subsequently, the appellant Maryam Abdiker, who was the respondent then came to this court through Nzili & Co. Advocates on appeal on various grounds as follows-

1) The learned trial Kadhi erred in law and in fact in disregarding vital legal and factual issues while making his judgement.

2) The learned trial Kadhi erred in law and in fact when he failed to consider the appellant's testimony concerning the bona fide aspect of the deceased's estate and the beneficiaries thereof.

3) The learned trial Kadhi erred in law and in fact in failing to consider the applicable law to the dispute before the court.

4) The learned trial Kadhi erred in law and in fact in showing open bias and discrimination against the appellant.

5) The learned trial Kadhi erred in law and in fact in failing to consider relevant facts in arriving in his decision by including non-beneficiaries to share up the deceased's estate.

6) The learned trial Kadhi erred in law and in fact in going outside his mandate in law by ordering for opening of appellant's personal account and transferring its proceeds to the respondents which did not form part of the estate of the deceased.

4. Though parties' counsel agreed to proceed by way of filing written submissions, on the hearing date which was 25th September 2018, Mr. Nzili for the appellant had not filed any written submissions and though Ms. Ndindi who held his brief said that he would file written submissions, before judgment but he did not do the same.

5. On the other hand, Ms. Hassan N. Lakicha & Co. Advocates for the respondents filed written submissions on 21st September 2018 raising a number of issues, and asked for a judgment date.

6. This is a matter where the Kadhi's Court was dealing with beneficiaries of a deceased's estate who were Muslims, and the deceased was also a Muslim who died in Mandera. The appellant is the remaining wife of three wives married by the deceased, one of whom had died and the other divorced. The respondents are two children of the deceased who had nine (9) children, and stepchildren of the appellant.

7. Having perused the record and judgement of the Kadhi's Court, it is clear from the evidence that when the deceased died, the appellant withdrew Kshs.150,000/= from his bank account and closed it. Thereafter, the employer of the deceased by the name Pact Kenya approached the family and indicated that they had money which they would pay to the family but wanted to deposit the same in one account of any of the survivors or beneficiaries, and the family members agreed that the amount of Kshs.5,066,000/= be deposited in the personal account of the appellant No. 1000162540242 at Equity Bank Mandera Branch.

8. Despite the money being for the family, the appellant interpreted the "family" to mean herself and initially withdrew Kshs.1,000,000/= from the bank, and thereafter, even after a court order was issued against any further withdrawals, the appellant on 2nd December, 2014 withdrew another Kshs.2,000,000/=.

9. At the trial before the Kadhi, where all the parties herein testified together with other witnesses, the above facts were not contested by the parties except the narrow interpretation of family by the appellant. From the evidence on record, the Kadhi's Court came to the conclusion which I have highlighted earlier in this judgement which means that all the people who claimed to be beneficiaries of the estate are required to go to the Kadhi's Court in the Succession matter for the distribution of the assets in accordance with Islamic Law of Inheritance.

10. In my view, the Kadhi properly directed himself on the issues raised in the evidence and gave appropriate orders in accordance with the jurisdiction conferred on Kadhi's Courts under Article 170 of the Constitution. The parties have thus to go back to the Kadhi's Court for determination of the beneficiaries and the mode of distribution of the assets in accordance with Islamic Law, which has its own definition of dependents or beneficiaries, which is slightly different from that contained in the Law of Succession Act (Cap. 160). The mode of distribution of assets or shares to be inherited by beneficiaries is also different from those contained in the Law of Succession Act.

11. I thus find no merits in the appeal, and dismiss the appeal herein. Parties will have to go to the Kadhi's Court for appropriate orders.

12. As this is a family matter, I order that parties bear their respective costs of the appeal.

Dated and delivered at Garissa this 25th October, 2018.

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George Dulu

JUDGE