



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
FAMILY DIVISION
CIVIL APPEAL 2 OF 2015

ALIYA W/O JAGANATH RAMA CHARAN

NAGIA alias MAHMOUD ISSA..... APPELLANT

VERSUS

HUSSEIN ISSA NAGIA

NAGIA RAMCHARAN NAGIA

PUSHPA RAMCHARAN NAGIA.....RESPONDENTS

RULING

(An Appeal from the Judgement of Hon. Sheikh Abdulhalim H. Athman, Principal Kadhi delivered on 22.1.15 in Mombasa KCC No. 179 of 2009)

1. The Appeal herein arose from the Judgement of Hon. Sheikh Abdulhalim H. Athman, Principal Kadhi delivered on 22.1.15 in Mombasa KCC No. 179 of 2009. In the said Judgement, the Hon Principal Kadhi made a determination on what constitutes the estate of **Jaganath Ramachand Nagia (“the Deceased”)**, **the heirs and their respective shares.**
2. The brief background of this case as can be gleaned from the record is that the Appellant is the widow of the Deceased. The marriage of the Deceased and the Appellant was not blessed with children. However, the Appellant had her own children from a previous marriage. She married the Deceased after the death of her husband and the Deceased helped her raise the children. The Deceased is survived by his widow the Appellant, 2 brothers and 1 sister, the Respondents herein. His parents predeceased him.
3. The Respondents filed suit against the Appellant in the Kadhi’s Court at Mombasa seeking accounts of their brother’s estate, determination of heirs and their shares and distribution of the estate according to Islamic Sharia. The Respondents claimed that the Deceased left a house at Mkomani, a bank account and insurance money. The Appellant on the other hand claimed that the money in the bank being Kshs. 80,000/= was utilised by her for her *eddah*. She further claimed that the house was registered in the joint names of the Deceased and herself. That the property was purchased in 1985 for Kshs. 50,000/= out of which the Appellant and the Deceased contributed Kshs. 15,000/= while the balance of Kshs. 35,000/= was paid by the Appellant’s children. On the property were constructed a house and shops which began in 1986 and was completed in 1988. The Deceased had Kshs. 60,000/= while the Appellant’s children assisted them with Kshs. 405,000/=. The property was thereafter charged to Housing Finance Company of Kenya Limited for Kshs. 4,000,000/=. It would appear that there was default and half the property

comprising the shops was sold by private treaty to settle the loan.

4. The Hon. Principal Kadhi in his Judgement found that the estate of the Deceased comprised:

i) (½) share of the house at Mkomani known as 3560/2 Section I/MN CR 56795.

ii) Kshs. 80,000/= being credit balance in the Deceased's account with Middle East Bank.

The heirs of the Deceased and their respective shares were determined as:

Aliya Salim Ahmed	Widow	5/20
Hussein Isar Nagia	Brother	6/20
Nagia Ramcharan Nagia	Brother	6/20
Pushpa Ramcharan Nagia	Sister	3/20

The Appellant was ordered to refund Kshs. 60,000/= of the funds in the account as she was only entitled to Kshs. 20,000/=. She was further given first opportunity to own the house in Mkomani provided that she pays the other heirs the value of their respective shares therein.

5. The Grounds of appeal in summary are that the learned Principal Kadhi erred in law and fact in that he:

a) Failed to hold 3560/2 Section I/MN CR 56795 (“the Property”) was jointly owned by the deceased and the Appellant and therefore devolved absolutely to the Appellant upon the death of the deceased.

b) Failed to hold in the alternative that the portion of the Property available for distribution was 10-15% based on the contribution of the Deceased as the Appellant and her children contributed 85-90%.

c) Failed to hold that and Kshs. 80,000/= was jointly owned by the Deceased and the Appellant and was used by the Appellant for her *eddah* and upkeep.

6. The parties through their respective counsel filed written submissions which were highlighted before the Court and in the presence of the Honourable Chief Kadhi as assessor.

7. For the Appellant, it was submitted that the Deceased and the Appellant held the Property as joint proprietors and therefore upon the demise of the Deceased, the same was transferred to the Appellant as the surviving proprietor. She relied on Section 49 of the Land Act. It was further submitted that in the alternative, the Hon. Principle Kadhi ought to have found that the estate only owned 15% of the property based on the contribution of the Deceased. It was further submitted that the finding that the Kshs. 80,000/= belonged to the estate was also erroneous. This was used by the Appellant as *eddah* as the relatives of the Deceased refused to take care of her during the period of *eddah*.

8. For the Respondent, it was submitted that when a matter is before the Kadhi Court, only 3 things are for determination namely assets of the estate, heirs and their respective shares. There is no dispute regarding the heirs and their respective shares. The only dispute is in respect of the assets of the estate namely the Property and the sum of Kshs. 80,000/=. It was submitted that when a person dies, everything they leave behind belongs to the estate. The Appellant had no right to spend the money as this amounts to intermeddling. On joint ownership of the property, no evidence was brought to show that the property was jointly owned and the issue is an afterthought as the same was not claimed before the Kadhi.

9. I have considered the Record of Appeal, as well as the submissions by counsel. The issues for determination are whether the Hon. Kadhi erred in finding that the Property and the amount of Kshs.

80,000/= formed part of the estate of the Deceased. It is the duty of this Court as a first appellate court to reconsider the evidence, reevaluate it and make its own conclusions. A court of appeal will not normally interfere with a finding of fact by the trial court unless it was based on no evidence or it was based on a misapprehension of the evidence or it is shown that the court acted on wrong principles in reaching the finding that it did.

10. The Appellant claims that the Hon. Kadhi failed to hold that **the Property was jointly owned by the deceased and the Appellant and therefore devolved absolutely to the Appellant upon the death of the deceased**. It is not disputed that a portion of the Property on which was erected shops was sold to settle a debt owed to Housing Finance Company of Kenya Limited. The remaining portion on which the house stands was the subject of the suit in the Kadhi's Court. The Hon. Kadhi stated:

“I have examined the 13th May 1985 transfer between Malkit Singh Grewal and Ajaib Singh Heran on the one part and Jagannath Ramchand Nagia and Alia Mahmoud Ramchand Nagia. It provides the property Plot No. 3560/I/MN [original 3369/41] is transferred in consideration of KES 50,000.00 to the said Jagannath and Alia as joint proprietors. This leads me to find the property belonged jointly to the two in equal shares.”

11. I have perused a copy of the said transfer and noted that the property was indeed transferred to the Deceased and the Appellant as joint tenants. Section 2 of the Land Act 2012 defines joint tenancy in the following terms:

“joint tenancy” means a form of concurrent ownership of land where two or more persons each possess the land simultaneously and have undivided interest in the land under which upon the death of one owner it is transferred to the surviving owner or owners;

The Act goes on to provide at Section 49:

“49. Transmission on death of joint proprietor

If one of two or more joint proprietors of any land, lease or charge dies, the Registrar shall, on proof of the death, delete the name of the deceased from the register by registration of the death certificate”.

12. A joint tenancy such as the one between the Deceased and the Appellant carries with it the right of survivorship. By the principle of survivorship the Property herein passed automatically to the Appellant upon the demise of the Deceased. All that the Appellant needed to do was to provide the Registrar of Lands with proof of death of the Deceased, whereupon the name of the Deceased would be deleted from the register.

13. On the principle of survivorship in joint tenancy, I am further guided by the Court of Appeal in Peter Mburu Echaria v Priscilla Njeri Echaria [2007] eKLR, where the Court expressed itself thus:

“The first statement of the law by Gachuhi JA, that in a joint tenancy each party owns an undivided equal share therein is not, with respect, entirely correct. It is in a tenancy in common in equal shares where each tenant owns an undivided equal share in the property. On the contrary, one characteristic of a joint tenancy is that the joint tenants have a unity of interest, that is to say, that, although they have separate rights, the interest of each joint tenant is the same in extent and duration and in reality they are in the position of a single owner. A second characteristic of a joint tenancy is a right of survivorship. On the death of one joint tenant his interest accrues to the other joint tenant(s) by right of survivorship (jus accrescendi)”.

14. With respect I do find that, having rightly found that the Deceased and the Appellant held the property as joint proprietors, the Hon. Principal Kadhi misdirected himself in reaching the holding that *“the property belonged jointly to the two in equal shares”*. There was no basis in law to come to such a finding.

15. It was submitted for the Respondent, that the claim of joint ownership was an afterthought as the same was not raised in the trial court. From the record and as stated above, the Hon. Kadhi did himself state in his finding that the property was transferred to the Appellant and the Deceased “*as joint proprietors*” and went on to say, “*the property belonged jointly to the two in equal shares*”. The issue of joint ownership is what in my view informed the Hon. Kadhi’s decision that the Property formed part of the estate of the Deceased. It cannot therefore be said to be an afterthought.

16. The Appellant in the alternative claims 85% - 90% of the Property based on the financial contribution of her children towards the purchase of the property. Her testimony in the trial court was that her children contributed between 85% - 90% of cost of purchase and development of the Property; that this was done at the request of the Deceased. In a joint tenancy as stated in the Echaria case (supra) “*joint tenants have a unity of interest, that is to say, that, although they have separate rights, the interest of each joint tenant is the same in extent and duration and in reality they are in the position of a single owner*”. The interest of each joint tenant is the same in extent and duration. Thus the contribution made by each of the joint tenants or indeed by third parties has no bearing on the entitlement of the joint tenants in the Property.

17. On the credit balance of Kshs. 80,000/= which was in the Deceased’s bank account **with Middle East Bank**, the Appellant submitted that she used the same for eddah as the Deceased’s relatives refused to take care of her during this period. She argued that the Hon. Kadhi erred in failing to hold that the said amount of **Kshs. 80,000/= was jointly owned by the Deceased and the Appellant and was used by the Appellant for her eddah and upkeep**. It is not disputed that the Deceased’s account had a credit balance of Kshs. 80,000/= at the time of his demise. The said sum of Kshs. 80,000/= forms part of the estate of the Deceased. The Appellant is not the sole beneficiary of the same and it is immaterial that the Deceased’s relatives refused to take care of her during eddah. Her entitlement under Islamic Law of Succession is $\frac{1}{4}$ or Kshs. 20,000/=. She is therefore under a legal obligation to account for the sum of Kshs. 60,000/=.

18. The Hon. Chief Kadhi as an assessor opined in his assessment that the Judgement of the Hon. Principal Kadhi should be upheld. He stated in part:

“The Hon. Kadhi was right in his findings that the appellant and the deceased were jointly owners of the property in subject matter at 50-50.

Islamic Law of Succession treats all the properties, benefits, shares or any Monies in Bank account or possessions gained by a deceased or shall be gained after the death of any person, these shall form part of the estate of deceased Muslim person.”

19. I do agree with the Hon. Chief Kadhi that all property of a deceased person whether moveable or immovable forms the estate of such deceased person. However in the instant case, the Property being jointly owned by the Deceased and the Appellant was not available for distribution as it does not form part of the estate of the Deceased. Upon the demise of the Deceased, based on the legal principle of survivorship, the property automatically passed to the Appellant, the surviving joint proprietor. Joint tenancy or proprietorship by its very nature excludes property held jointly from the estate of a joint proprietor as the property accrues to the surviving joint proprietor. In this regard therefore, I differ with the Hon. Chief Kadhi’s opinion.

20. In the premises and from the totality of my evaluation of the evidence and the law relevant in this matter, my finding is that the Appeal partially succeeds. It is therefore ordered as follows:-

i) Plot Number 3560/2 Section I/MN is hereby declared not to form part of the estate of the Deceased.

ii) All orders in the Judgement of the Hon. Kadhi delivered on 22.1.15 are hereby upheld save for those relating to Plot Number 3560/2 Section I/MN;

iii) There shall be no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 24th day of February 2017

M. THANDE

JUDGE

In the presence of: -

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

..... **for the Respondents**

..... **Court Assistant**