



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
FAMILY DIVISION
CIVIL APPEAL 25OF 2015

MOHAMED MADHUBUTI.....APPELLANT

VERSUS

JELANI MOHAMED HABIB.....RESPONDENTS

RULING

(An Appeal from the Ruling of Hon. Sheikh Abdulhalim H. Athman, Principal Kadhi delivered on 20.8.15 in Civil Cause No.140 of 2013 OS)

1. The brief background of this case as can be gleaned from the record is that Sheikh Una Mohamed (Sheikh Una) and his brother Abubakar Mohamed (Abubakar) purchased by public auction, a property known as L. R. No. 36/VII/533 in Eastleigh, Nairobi, (“the property”) as joint tenants, on 26.11.65. On 11.3.66, Harris, J as he then was, issued a Vesting Order in favour of Sheikh Una Mohamed and his brother Abubakar Mohamed.

2. By an accord dated 23.4.66, Sheikh Una and Abubakar agreed that they were joint tenants and that upon the death of either of them, the other would be entitled to the property with the rider that in the event Sheikh Una died first then Abubakar would give the widow her entitlement in the property under Mohamedan law applicable to them.

3. Sheikh Una died on 2.10.75 and was survived by his widow Amina Kombo. He had no children. Grant of Letters of Administration in Nairobi Succession Cause No. 379 of 1977 was issued to his brother Abubakar on 26.10.77. In the schedule to the Certificate of Confirmation of Grant issued on 30.10.01, the estate of Sheikh Una was distributed as follows:

Amina Kombo	25%
Jelani Mohamed Habib	30%
Abubakar Mohamed Habib	30%
Kamar Mohamed Habib	15%

4. The estate consisted of several assets including the property. The Certificate of Confirmation of Grant was rectified on 21.9.12 with Jelani Mohamed Habib the Respondent herein as Administrator. The shares of the beneficiaries remained the same.

5. Abubakar died on 17.6.07 and Halima Mohamed Alamin, Mohamed Bunu Ali and Mohamed Abubakar aka Mohamed Madubuti, the Appellant herein were appointed Administrators of his estate in Succession Cause No. 654 of 2008. Prior to his death, Abubakar had in 2001, applied for conversion of the registration regime of the property from Government Lands Act to Registration of Titles Act. A new Grant No. I. R. 129387 was issued to Sheikh Una and Abubakar as tenants in common in equal shares for a leasehold term of 99 years from 1.7.01.

6. The property was sold to a 3rd party for Kshs. 32,500,000/=. The share of the estate of Sheikh Una is Kshs. 16,250,000/= and is held by Ekuru, Kabage, Nyamathwe & Company Advocates. By a Deed of Settlement and Release dated 18.2.13 (Deed of 18.2.13) between Kamar Mohamed Habib, Jelani Mohamed Habib and Mohamed Abubakar, Mohamed Bunu and Mohamed Abubakar, 3 persons namely Habib Mohamed Habib, Mwanaisa Mohamed Habib and Tima Mohamed Habib said to have been erroneously omitted from the estate of Sheikh Una were recognized as additional beneficiaries. The distribution of the said estate was therefore revised as follows:

a. Abubakar Mohamed Habib (deceased) brother	19.44%
b. Habib Mohamed Habib (deceased) brother	19.44%
c. Mwanaisa Mohamed Habib (deceased) sister	9.72%
d. Tima Mohamed Habib (deceased) sister	9.72%
e. Kamar Mohamed Habib sister	9.72%
f. Jelani Mohamed Habib brother	19.44%
g. Amina Kombo (deceased) widow	12.5%

7. The Appeal herein arose from the Ruling of Hon. Sheikh Abdulhalim H. Athman, Principal Kadhi delivered on 20.8.15 in Civil Cause No. 140 of 2013 (OS) (hereinafter “the OS”) filed by the Appellant herein against the Respondent. In the OS, the Appellant sought the following prayers:

a. That the document dated 23.4.66 (“the 1966 document”) between Sheikh Una Mohamed and Abubakar Mohamed in respect of the property is legal and binding as a testamentary instrument and cannot be altered by any third party without the express free and willing consent of the beneficiaries of the estate of Abubakar Mohamed Habib.

b. That the Deed of Settlement and Release dated 18.2.13 (“the Deed of Settlement”) between Kamar Mohamed Habib, Jelani Mohamed Habib, Mohamed Abubakar and Mohamed Bunu Ali is illegal and void *ab initio* on account of coercion and want of free consent of the beneficiaries of the estate of Abubakar Mohamed Habib in respect of the residual $\frac{3}{4}$ of the estate after paying $\frac{1}{4}$ thereof to estate of Amina Kombo (deceased) as per the 1966 document.

c. That the estate of Sheikh Una Mohamed is not entitled to the sale proceeds of the property and that only the estate of Abubakar Mohamed $\frac{3}{4}$ and the estate of Amina Kombo $\frac{1}{4}$ are entitled as per the 1966 document.

d. That the Respondent as the administrator of the estate of Sheikh Una Mohamed be compelled to list all real properties of Sheikh Una Mohamed. Those given out during his lifetime and those not given out.

8. In his Ruling, the Hon Principal Kadhi made a determination as follows:

a. That the 1966 document cannot be questioned as it was considered by the High Court in Succession Cause No. 379 of 1977 in the matter of the estate of Sheikuna Mohamed Habib.

- b. That the 1966 document does not meet the requirements of conferring a gift and was a simple appreciation by the brothers to interpret their partnership as joint tenants and to be governed by Islam.
- c. That the change of the property from joint tenancy to tenancy in common was both legal under statute and Sharia and cannot be questioned by the heirs.
- d. That Sheikh Una Mohamed and Abubakar Mohamed had 50% share each in the property which should devolve to their respective heirs.
- e. That the Deed of Settlement in principle conforms to Sharia but has an error in the computation of the shares of the heirs.
- f. That the heirs of Sheikhuna Mohamed Habib and their respective shares are:

Amina Kombo	Widow	25%
Abubakar Mohamed Habib	Brother (deceased)	18.75%
Habib Mohamed Habib	Brother (deceased)	18.75%
Mwanaisha Mohamed Habib	Sister (deceased)	9.375%
Tima Mohamed Habib	Sister (deceased)	9.375%
Kamar Mohamed Habib	Sister (deceased)	9.375%
Jelani Mohamed Habib	Sister (deceased)	9.375%

9. The Grounds of appeal in summary are that the learned Principal Kadhi erred in law and fact in that he:
- a. disregarded the 1966 document and held that the same being hiba ruqba was inconsistent with sharia.
 - b. failed to hold that the proceeds of sale of the property are an entitlement of the estate of Amina Kombo (25%) and the estate of Abubakar Mohamed (75%) pursuant to the 1966 document.
 - c. held that the change of tenure of the property from joint tenancy to tenancy in common by Abubakar Mohamed was legal under statute and Sharia and beyond question contrary to evidence on record that Abubakar Mohamed had only applied for conversion of the registration regime from Government Lands Act to Registration of Titles Act.
 - d. failed to appreciate that though the principle of survivorship is inconsistent with Sharia, the principle takes precedence in property interests and land tenure holding.
 - e. found without any evidence that the certificate of confirmation of grant in respect of the estate of Sheikh Una Mohamed had excluded some heirs.
 - f. found that the Deed of Settlement and Release in principle conformed to Sharia yet it was by law an illegal contract and vitiated by coercion.
 - g. failed to appreciate the principle of *res judicata*.
 - h. failed to uphold the principle of vertical *stare decisis* following the Ruling of Achode, J. of 16.12.14 in High Court Succession Cause No. 379 of 1977.

10. 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.

11. For the Appellant, it was submitted that the property was purchased by Sheikh Una Mohamed and Abubakar Mohamed Habib and that by a Vesting Order the property was registered in the two purchasers as joint tenants; that Achode, J. in her ruling made a determination that the property is held in joint tenancy. That under Article 170 of the Constitution Kadhi's Court does not have jurisdiction over proprietorship of land. For the Respondent, it was submitted that the issue of proprietorship was not before the Kadhi's Court and that the Appellant ought to confine himself to the issues before the Kadhi's Court.

12. The Appellant argued that the High Court having dealt with the issue of proprietorship, the Hon. Principal Kadhi could not reopen the findings. For the Respondent, it was submitted that it was the Appellant who filed the OS in the Kadhi's Court. That during the pendency of the proceedings, the Appellant made an application before the High Court seeking a stay of the proceedings before the Kadhi's Court which Achode, J declined. It was further submitted that the Appellant has been forum shopping moving from court to court seeking what he wants and not necessarily the cause of justice. It was argued that the Kadhi's court only dealt with the Sharia law perspective as factual matters had been dealt with by the High Court in Nairobi. That this Court therefore should not be used as an avenue to revisit issues of 1966 which have already been determined.

13. It was further submitted that the Hon. Principal Kadhi erred regarding the percentages of the heirs of the estate. It was contended that the share of Amina Kombo having been taken out, the rest of the estate should go to Abubakar's estate. For the Respondent it was argued that the proceedings before court related not to the property but to proceeds of sale thereof. That the estate of the Appellant has taken its 16,250,000/= and what is in contention is the balance of Kshs. 16,250,000/=. It was contended that the Appellant had changed the face of the proceedings and has gone into interpretation of Achode, J's ruling which could only be done by Achode, J. herself.

14. The Appellant contended that the Hon. Principal Kadhi erred in failing to appreciate the principle of hiba ruqba. That there was no evidence before the trial Court on conditions for a hiba ruqba to be valid or invalidated. It was submitted extensively on the conditions of a gift (hiba in Islam). To this, the Respondent argued that the Hon. Principal Kadhi found that the 1966 document was not hiba ruqba. That the Appellant, a son of one of the 2 brothers wished to disinherit his uncles i.e. brothers of Sheikh Una. Under Islamic law, no document can disinherit heirs under Islamic law.

15. It was further argued for the Appellant that the Hon. Principal Kadhi erred in failing to find that there was coercion in signing the Deed of Settlement. He also erred in including other beneficiaries of Sheikh Una beyond Amina Kombo whereas the property was not available to the estate of Sheikh Una.

16. I have considered the Record of Appeal, as well as the submissions by counsel. It is the duty of this Court as a first appellate court to reconsider the evidence, reevaluate it and make its own conclusions. This duty was set out by the **Court of Appeal** in the case of *Kenya Ports Authority versus Kusthon (Kenya) Limited (2009) 2EA 212* wherein it was held *inter alia*, that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

17. After reconsidering and reevaluating the evidence, I have drawn the conclusion that there is only one issue for determination and that is whether Kshs. 16,250,000/= being 50% of the proceeds of sale of the property should go to the estate of Abubakar Mohamed or to the siblings of Sheikh Una, after deduction of ¼ share for Amina Kombo. All other matters including the extensive submissions on hiba ruqba are in

my view irrelevant.

18. The Hon. Principal Kadhi in his Ruling found that $\frac{3}{4}$ of the amount ought to go to the siblings of Sheikh Una after issuance of the $\frac{1}{4}$ Quranic share to his widow Amina Kombo. He then set out the share of each heir in percentages. The Appellant is aggrieved by this finding. According to the Appellant, this amount after deduction of $\frac{1}{4}$ due to the estate of Amina Kombo ought to go to the estate of Abubakar Mohamed. /jh

19. In her Ruling of 16.12.14, Achode, J found inter alia:

“That Sheikhuna and Abubakar wished to subject themselves and their estate to Islamic law, which wish was honoured by Abubakar who survived Sheikhuna”

She further directed that the proceeds of sale be

“distributed in accordance with Islamic Law as was desired by the two deceased brothers and now by all the beneficiaries”.

20. The Hon. Principal Kadhi in making his finding exercised his jurisdiction as set out in Article 170(5) of the Constitution which provides:

“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.”

21. Abubakar was the initial administrator of the estate of Sheikh Una. It would appear from the Certificate of Confirmation of Grant that he did not proceed on the basis that he and his brother held the property as joint tenants. If he did, he would not have included the property as part of the estate of Sheikh Una. Instead, he would have procured the registration of Sheikh Una’s death certificate against the title to the property whereupon he would have become the sole owner. Further, assuming he proceeded on the basis of joint tenancy but chose to honour the 1966 document to give Sheikh Una’s widow 25% of the property, then the remaining 75% percent would have accrued to him and thereafter to his heirs upon his death. Again he chose not take this route. Little wonder then that Achode, J declined to grant the prayer sought by the Appellant for a declaration that the property accrued to Abubakar upon the death of Sheikh Una by operation of the principle of survivorship.

22. I have also considered the Vesting Order by Harris, J., as he then was. He states in the recitals *inter alia*

“...whereas on the 26th day of November 1965 the said property was sold by public auction to the purchasers hereinafter named as joint tenants in fee simple, free from encumbrances..”

However, in the declaration, the learned Judge states

“...now therefore this Court having heard counsel for the purchasers doth hereby DECLARE that ALL THAT piece or parcel of land ...is VESTED in the purchasers SHEIKH UNA MOHAMED and ABUBAKAR MOHAMED both of Post Office Box Number 13028, Nairobi, Kenya...”

23. From the above declaration, the Vesting Order does not in fact vest the property in Sheikh Una and Abubakar as joint tenants. This perhaps explains why when Abubakar applied for conversion of the Title from Government Lands Act to the Registration of Titles Act, the new Grant No. I. R. 129387 was issued to Sheikh Una and Abubakar as tenants in common in equal shares. As stated earlier, this was the position adopted by Abubakar when as Administrator of the estate of Sheikh Una he obtained Confirmation of the

Grant setting out the distribution of the estate to the widow and siblings of Sheikh Una in the specified percentages.

24. It is my view that the remedy for the Appellant lay not in the Kadhi's Court but in the High Court in Succession Cause No. 379 of 1977 or in the Court of Appeal. Indeed I find that the Deed of 18.2.13 and the allegation of coercion is a non- issue. The Appellant's father Abubakar had long before the Deed of 18.2.13 obtained a Certificate of Confirmation of Grant in which $\frac{3}{4}$ of the property was distributed amongst the sibling of Sheik Una. Being aware of the distribution of the estate to the widow and siblings of Sheikh Una, the Appellant ought to have applied for review of the Confirmation of the Grant or appealed against the same.

25. I note that Achode, J did not address the Deed of 18.2.13. She however directed that the proceeds be "*distributed in accordance with Islamic Law as was desired by the two deceased brothers and now by all the beneficiaries*". The Hon. Principal Kadhi in his Ruling found that the Deed of 18.2.13 conforms to Sharia but revised the percentages of the shares of the heirs. In spite of the finding of the Hon. Principal Kadhi, the Deed of 18.2.13 which purports to redistribute the estate cannot hold unless and until the Confirmation of Grant dated of 31.9.12 is set aside and the additional beneficiaries included and redistribution done with the sanction of the Court. This can only be done in Succession Cause No 379 of 1977.

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

"It is my opinion that the 1966 document whatever name will bear is not binding under Islamic Law of Succession and the same should be ignored and the Islamic Law of Succession should prevail over all other laws or documents.

I am of the opinion that, Kadhi's ruling was within the scope of understanding of Islamic Law of Succession and it should be upheld.

The Islamic Law of Succession does not disinherit any qualified person from inheritance for any reason other than killing of a deceased."

27. I do agree with the Hon. Chief Kadhi to the extent that Islamic Law of Succession does not disinherit any qualified person from inheritance for any reason other than killing of a deceased. Given that Sheikh Una did not have children his siblings are entitled to $\frac{3}{4}$ of his estate after payment of the Qur'anic $\frac{1}{4}$ share to his widow Amina Kombo.

28. In the premises having evaluated the matter herein, I see no reason to disturb the trial court's Ruling. My finding therefore is that the Appeal lacks merit and the same is dismissed but with no order as to costs.

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

M. THANDE

JUDGE

In the presence of: -

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

..... **for the Respondent**

..... **Court Assistant**