



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 62 OF 2012

MARIAM AHMED HIRSI1st APPELLANT

REHEMA MOHAMED ABDI.....2ND APPELLANT

-VERSUS-

HALIMA ISSA OSMANRESPONDENT

(Being an Appeal from the Ruling Hon. Rashid Ali Omar delivered on 13th August 2012 in Kadhi's Court at Nairobi in Kadhi's Cause No. 223 of 2012)

JUDGEMENT

1. The appeal herein arises from a decision of the Nairobi Kadhi in proceedings that had been initiated in the Nairobi Kadhi's Court in Cause No. 223 of 2012 by way of originating summons. The suit had been commenced by the respondent herein, seeking a declaration that the respondent and her daughters were the rightful legal heirs of the deceased, and praying that the estate of the deceased be distributed as per Islamic law.
2. The matter was disposed of by the lower court by way of oral evidence. Counsel appearing for the parties also addressed the lower court at length on the issues before the court. In the end the lower court delivered a ruling on 13th August 2012, where it was declared that the appellant was not a legal wife of the deceased as at the time of his death she had obtained a judicial divorce dissolving their marriage, and granted her only one prayer directing that her deferred dowry, being a set of gold and Kshs. 50, 000.00, be paid to her out of the estate of the deceased before distribution.
3. Being dissatisfied with the said decision, the 2nd appellant moved this court challenging the said decision on several grounds, among them:-
 - a. **That the decision was biased against her;**
 - b. **That the court had erred in failing to hold that she was a widow of the deceased;**
 - c. **That the court had erred in failing to hold that there was no valid divorce between her and the deceased which conformed with *sharia* law;**
 - d. **That the court had erred in failing to find that the failure to register the divorce would have rendered an otherwise valid divorce invalid;**
 - e. **That the court erred when it failed to hold that the proceedings wherein the divorce decree was granted were attended by irregularities which rendered the decision invalid; and**
 - f. **That the court erred in failing to hold that there was re-unification between the deceased and the 2nd appellant.**

4. Directions on the disposal of the appeal were given on diverse dates in 2014. It was directed that the appeal be disposed of by way of written submissions to be highlighted before the Judge, sitting with Chief Kadhi as assessor.
5. I have carefully gone through the record before me, and noted the written submissions on record by the respondent. I have not come across the written submissions of the appellants, although the submissions by the respondent clearly point to such written submissions having been filed by the appellants. I have noted that both sides did file their respective lists of authorities.
6. The appeal was heard on 19th February 2015, when counsel for the two parties addressed the court, sitting with the Chief Kadhi, Sheikh Al-Muhdar A. S. Hussein, as assessor, extensively on the issues of law raised in the appeal. The parties gave vent to the averments in their pleadings.
7. The appellants' case was that although a decree dissolving the union between the 2nd appellant and the deceased had been pronounced by the court in Kadhi's Court Civil Case No. 75 of 1998, the said decree had become invalid as the court had not followed the correct procedure and the 2nd appellant had not been given a fair hearing. It was further submitted that there had been reconciliation and reunion, resulting therefore in the parties remarrying. The respondent submitted that there had been a valid decree pronounced dissolving the marriage and there was therefore no error made by the Kadhi in Kadhi's Court Civil Case No. 223 of 2012.
8. The Chief Kadhi compiled his opinion as assessor and signed the same on 23rd March 2015. In his view, the proceedings in Kadhi's Court Civil Case No. 75 of 1998, which culminated in the decree of divorce, were defective as they did not comply with the provisions of the Civil Procedure Act, Cap 21, Laws of Kenya, which is the law which guides the process in the Kadhi's Courts. It is his opinion that the appeal ought to be allowed in view of the alleged flaws in the proceedings in Kadhi's Court Civil Case No. 75 of 1998.
9. The Chief Kadhi sat with the court as an assessor. As a matter of procedure the ultimate decision in the matter rests with the Judge, the assessor provides an opinion only on matters of Islamic law with respect to which the Judge may not be familiar. The effect of this is that the opinion of the Chief Kadhi as assessor is not binding on the court.
10. The proceedings that gave rise to the appeal before me were those conducted in Kadhi's Court Civil Case No. 223 of 2012, where it was held that the 2nd appellant was not a widow of the deceased, she having divorced him in proceedings that she had herself commenced in Kadhi's Court Civil Case No. 75 of 1998. The trial court in Kadhi's Court Civil Case No. 223 of 2012 followed the decision of the court in Kadhi's Court Civil Case No. 75 of 1998 as it felt bound by it.
11. The appellants appear to me to be grounding the appeal on the argument that the decision in Kadhi's Court Civil Case No. 223 of 2012 was wrong as it was founded on the outcome of proceedings conducted in Kadhi's Court Civil Case No. 75 of 1998 which in their opinion were defective and therefore rendering the resultant decree invalid.
12. I have carefully gone through the entire record of appeal. It is not disputed that the 2nd appellant did file divorce proceedings in Kadhi's Court Civil Case No. 75 of 1998, which culminated in an order dissolving the marriage. She is specifically said to have had collected the divorce decree. It would appear that she did not lodge an appeal against the decree in Kadhi's Court Civil Case No. 75 of 1998. The court in Kadhi's Court Civil Case No. 223 of 2012, which was on the estate of the deceased, relied on the outcome of the proceedings in Kadhi's Court Civil Case No. 75 of 1998 to declare that the 2nd appellant was not a widow of the deceased in view of the divorce decree.
13. To my understanding, the appellants are inviting the court to declare the proceedings in Kadhi's Court Civil Case No. 75 of 1998 invalid so as to lay the basis for reviewing the decision in

Kadhi's Court Civil Case No. 223 of 2012. The appellants, to my understanding, acknowledge the said proceedings and appreciate that the latter proceedings were legitimately determined on the basis of the earlier proceedings. They are indirectly therefore asking me to sit on appeal on the decision in Kadhi's Court Civil Case No. 75 of 1998, which is not what is before me.

14. I am not satisfied that there are sufficient grounds for reviewing the orders made in Kadhi's Court Civil Case No. 223 of 2012. I am convinced that the court in Kadhi's Court Civil Case No. 223 of 2012 was entitled to the conclusion it came to in view of the earlier decision in Kadhi's Court Civil Case No. 75 of 1998. As observed here before, the earlier decision had not been reversed on appeal and therefore it was valid and intact as at the date when the decision in Kadhi's Court Civil Case No. 223 of 2012 was made. It was binding on the trial court. The hands of the trial court were tied. The court could not ignore nor disregard it and proceed as if it did not exist. Neither could it hold that the same was invalid for it could not sit on appeal on a decision of a court of a concurrent jurisdiction.

15. In the end I hold that the appeal before me is not merited for the reasons given above, and I do hereby dismiss the same with costs to the respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 27TH DAY OF MAY, 2016.

W MUSYOKA

JUDGE