



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 21 OF 2014

AHMED SALIM SAID APPELLANT

FAIZ SALIM SAID APPELLANT

VERSUS

MUNAA AHMED SALIM RESPONDENT

JUDGEMENT

This appeal is from the judgement of the Malindi Kadhi delivered on 19th May, 2014. The grounds of appeal are that: -

- i. **The learned Kadhi erred in law and in fact by holding that the house on Plot number 94R and 95R Malindi reverted to the deceased Salim Said Alamoody after the death of his wife.**
- ii. **That the Kadhi erred by treated the sale agreement dated 22nd March, 1986 the same way as a wakf.**
- iii. **The Kadhi erred in law by holding that the deceased, Salim Said Alamoody was the sole heir of his late wife Barke Salim Bawazir.**
- iv. **The learned Kadhi misapprehended the law on determining the estate of Salim Said Alamoody and erred in his mode of distribution.**

Counsel for both parties agreed to have the appeal determined by way of written sub missions. Counsels also agreed that the appeal be heard without the attendance of two other Kadhis as is always the case in appeals from the Kadhi's Court.

The appellants' position is that the respondent did not prove her case before the Kadhi's Court. She did not establish that the deceased was the registered owner of the house on Plot numbers 94R and 95R or that that property formed part of the deceased's estate. The property was transferred on 22nd March, 1986 to Barke Salim Bawazir who is the appellants' mother. The appellants reiterate that upon their mother's death, the property formed part of her estate and their father could only become one of the beneficiaries of his wife's estate. The property did not revert to the deceased.

The appellants further contend that there was no evidence that the deceased left a pajero motor vehicle. According to the appellants, upon the death of Barke Salim, the deceased inherited a quarter $\frac{1}{4}$ share of the house as a widower. The respondent is only entitled to $\frac{1}{8}$ share out of her late husband's $\frac{1}{4}$ share. The property was valued and the deceased's quarter share is equivalent to Kshs.3,625,000/= as the total value of the property is Kshs.14,500,000/=. The respondent is entitled to $\frac{1}{8}$ share out of the sum of

Kshs.3,625,000/=.

On his part, counsel for the respondent maintains that the deceased, Salim Said Alamoody, was the original owner of the property. He transferred it to his wife. Upon his wife's death the property formed part of Salim Said Alamoody's estate. The deceased also left motor vehicle registration number KBE 671L. The vehicle was valued at Kshs.1.5 million. The distribution by the Kadhi was lawful and in accordance with Islamic Law. The deceased died on 4th October, 2010 and his estate was to be distributed from that date.

The record of the trial court shows that the respondent testified as the first witness. She testified that she got married to the deceased on 14th February, 2004. She was later divorced but got remarried on 21st June, 2010. The deceased had divorced her on 11th June, 2009. She used to live with the deceased at Malindi on Plot number 94R and 95R. Upon the death of her husband she was removed out of the house. The deceased left the house and two Pajeros. The deceased also had accounts with several banks. She lived with the deceased for seven years.

FAIZA SALIM ALI is a relative to the deceased and testified as a witness to the respondent. Her evidence is that she was present when the deceased died at home. The first appellant asked for the house keys and then took the respondent to seclusion. ESHA HASSAN, another witness is the mother to the respondent. Her evidence is the first appellant took all the documents relating to the estate. The respondent was given her Eddah maintenance but no money for medication was paid. She knew the appellants' mother, Barke, who was illiterate and had no property of her own. HASSAN KASEWA YERI testified for the respondent. He testified that the deceased had a house at Barani Roundabout. He rented a flat in the house in 1983 and used to pay rent of Kshs.15,000/= that time.

The first appellant, AHMED SALIM SAID informed the trial court that their mother was Barke Salim Bawazir. She died in November, 2002. Their late father left debts totaling Kshs.3.6 million. The house on Plot number 94R and 95R belongs to their mother. Their mother left the house to her children. He paid the Eddah maintenance to the respondent who is his step mother. Their father transferred the house in 1986 to their mother. He is still paying Kshs.99,000/= monthly to clear the debts left by his father.

FAIZ SALIM SAID, the second respondent also testified before the trial court. His evidence is that the respondent got married to their father. She was divorced but later remarried. Their father left some debts. They paid the respondent her maintenance. The house where they lived was transferred to their mother before the respondent got married to the deceased. The rental proceeds from the house is Kshs.70,000/= monthly.

After hearing the parties, the learned Kadhi distributed a shop and a flat or flats this being 1/8 share of the house standing on plot numbers 94R and 95R Malindi. He also valued a Pajero motor vehicle at Kshs.1.5 million and assessed the respondent's 1/8 share as Kshs.187,500/=. The respondent was awarded costs of Kshs.75,000/=.

The main issue for determination is what constituted the estate of the late SALIM SAID ALAMOODY and how the estate should be distributed within the provisions of Islamic Law. The main contention by the appellants is that the house in dispute did not belong to their late father. The Kadhi held that the deceased genuinely transferred the house to his wife Barke Salim. According to the Kadhi, upon Barke's death, the house automatically reverted to the transferor who was still alive, that is the appellant's father. The Kadhi held that since Barke died in 2002, the property reverted to her husband who had transferred it to her. The husband died in 2010 and the house was formed part of the estate.

The record shows that an agreement to transfer the house in dispute was signed on 22nd March, 1986 before Mrs. G.N. Kitonga Advocate of Nairobi. Paragraph 3 of the agreement states as follows: -

That at signing of this Agreement hereof the said property shall vest in the transferee and the transferor shall have no further claim on it.

According to the agreement, the house is without land meaning that there is no title deed to the property. The findings by the Kadhi are not backed by any Islamic citations such as books or the Koran. It is not established that upon the death of Barke Salim Bawazir, the property automatically reverted to her husband. Several issues arise from the transfer. It could be possible that Barke could have transferred it to her children. She was the owner. Had there been a proper title deed for the house, the registered owner would have been Barke Salim Bawazir. Upon her death, her beneficiaries were entitled to inherit her. I am not persuaded that there is any Islamic principle that a gift automatically reverts to the giver upon the death of the beneficiary. What if the gift was something like a vehicle that became depreciated after several years of being utilized? Could it still revert to the gift giver? What if the gift was a consumable item and the beneficiary opts to donate it to a third party. Could the giver recall his gift back?

Given the evidence herein, it is established that Salim Said Alamoody gave the house to his wife. The agreement clearly indicates that Salim Said Alamoody, the transferor, would have no further claim on the property. The agreement was done way back in 1986. This was six years before Barke Salim's death in 2002. There is no evidence that the agreement is a forgery. It is clear that Salim Said Alamoody continued to live in the same house after the transfer agreement. He married the respondent in 2004 and lived in the same house he had transferred to his first wife, Barke Salim Bawazir. It is not proved that the deceased took back the house from Barke Salim.

During the hearing, counsel for the respondent requested for a valuation report by a Government Valuer. This was done by AGNES NDMBU a Ministry of Lands Government Valuer. The property was valued at Kshs.14.5 million.

The appellants contend that the house belonged to their late mother. I do agree with that contention as the property was transferred to Barke Salim by their father in 1986. Salim Said Alamoody was only entitled to inherit a share of that house upon Barke Salim's death. The house could not have reverted to him automatically, under Islamic sharia, Salim Said Alamoody was only entitled to $\frac{1}{4}$ share of the property. The respondent is entitled to get her inheritance share from that one quarter share. There is no equal distribution of the property between the children and their father. The record shows that Barke had four children. The appellants are therefore not the only beneficiaries of the $\frac{3}{4}$ share of the property. If the other children of Barke are deceased but left children, then the Islamic sharia shall apply to Barke's estate.

There is the issue of the Kadhi's finding that the deceased left a motor vehicle. I do agree with that finding. The respondent would not have just made those allegations. The registration number of the vehicle KBE 671L was also given. I entirely agree with the value of the vehicle assessed by the Kadhi of Kshs.1.5 million as well as the distribution of Kshs.187,500/= being $\frac{1}{8}$ share due to the respondent.

I do find that the house standing on Plot numbers 94R and 95R formed part of the estate of Barke Salim Bawazir and not Salim Said Alamoody. I do further find that upon the death of Barke Salim in 2002, Salim Said Alamoody was entitled to $\frac{1}{4}$ share of the property. Upon the death of Salim Said Alamoody, the appellants are entitled to inherit that $\frac{1}{4}$ share of their father while the respondent is entitled to $\frac{1}{8}$ share of the $\frac{1}{4}$ share. The property has been valued as herein stated. $\frac{1}{4}$ share translates to Kshs.3,625,000/=. Out of this amount, the respondent is entitled to $\frac{1}{8}$ share amounting to Kshs.453,125/=. This amount shall be added to the sum of Kshs.187,500/= being the respondent's share of the vehicle. This would give the respondent a total distribution value of her late husband's estate of Kshs.640,625/=. The deceased's estate comprised the $\frac{1}{4}$ share of the house which is equivalent to Kshs.3,625,000/= and the vehicle assessed at Kshs.1.54 million. This gives a total value of the deceased's estate as Kshs.5,125,000/=. The respondent's $\frac{1}{8}$ share amounts to Kshs.640,625/=.

In the end, I do find that the appeal is merited and is hereby allowed. Since the house belonged to Barke Salim Bawazir, the respondent cannot be given an equivalent of a shop or a flat out of the property. The best way out is for the appellants to pay off the respondent's share. The appellants should pay the respondent her share of the deceased's estate within forty five (45) days hereof. Since the parties are related by two sons of the deceased and their step mother, I do order that each party bare their own costs

of both this appeal as well as the suit before the Kadhi's Court.

Dated and delivered in Malindi this 14th day of June, 2016.

S.J. CHITEMBWE

JUDGE