



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT GARISSA

CIVIL APPEAL NO. 4 OF 2015

BISHAR HASSAN AHMED.....APPELLANT

VERSUS

ATHAR ALI MOHAMED.....RESPONDENT

*(In the matter of the estate of the late ABDULLAHI OMAR AHMED – Deceased from
the decision in Garissa Kadhi’s Court case No. 241 of 2014 – M. S Hassan Kadhi I).*

JUDGMENT

This appeal has been brought to this court by Bishar Hassan Ahmed from a decision of the Kadhi’s Court in an intestate succession matter, determined by the Kadhi’s Court under Islamic Law of inheritance. In hearing the appeal, this court was assisted by one assessor, Hon. Kadhi Hassan Daffa as required by the Civil Procedure Act (cap.21).

The appeal was filed by Paul Mugwe and Company Advocates counsel for the appellant on 26th January 2016, on the following grounds:-

1. The learned Kadhi erred in law in finding that plot Number GSA/B/20229 is part of the estate of Abdullahi Omar.
2. The learned Kadhi erred in law in ordering the County Government to transfer plot number GSA/B/20229 from the registered owner Halima Shakul Kassim to the late Abdullahi Omar.
 - a. The learned Kadhi erred in Law in making the above Order (2) as he did not have the jurisdiction to entertain matters relating to ownership and occupation of land.
 - b. The learned Kadhi erred in law and in fact in making the above Order (2) as he condemned the registered owner of plot number GSA/B/20229 unheard.
3. The learned Kadhi misdirected himself in law and in fact in finding that the declaration of a gift by the deceased was not witnessed and was thus a forgery.
4. The learned Kadhi erred in law in giving judgment in favour of the respondent despite evidence tendered in support of her case being of lower probative value as compared with evidence tendered by the appellant specifically.

- a. The respondent did not tender any documentary proof or call witnesses.
- b. The appellant tendered documentary evidence.

During the hearing of the appeal, learned counsel for the appellant Mr. Nyaga submitted that the Kadhi's court lacked jurisdiction to deal with matters of ownership, occupation and use of land and relied on Gazette Notice No. 5178 for 25/07/2014 and section 26 of the Environment and Land Act, as well as Section 9 of the Magistrate's Court Act (cap.10)– all of which excluded the Kadhi's Court from the definition of the magistrates' court which had specific jurisdiction on land matters.

According to counsel, the Kadhi herein erroneously conferred on himself jurisdiction to deal in land matters by determining ownership to land and directing the County Government to revert the land to an alleged original owner.

Counsel faulted the Kadhi's Court in finding that the subject land had changed hands after the death of the deceased, while the evidence on record was otherwise, as there existed a declaration of a gift by the deceased ABDULLAHI OMAR to his mother HALIMA

SHAKUL KASSIM on plot GSA/B/20229 before he died. Counsel was of the view that the subject land did not form part of the asset of the deceased estate.

Counsel also faulted the Kadhi for making a finding of forgery of documents and emphasized that the donation of the gift was witnessed by an advocate Mr. Kullow who was not summoned by the Kadhi to testify. HALIMA SHAKUL HASSAN the donee of the gift was also not called by the Kadhi to testify.

According to counsel also, the Kadhi erred in finding for the respondent while her evidence was of lower probative value than that of the appellant, who tendered sworn evidence and called a witness, and produced documents.

Lastly, counsel submitted that the deceased left property at Ifo Refugee Camp which the respondent had already sold for Kshs 75,000/-.

In her submissions, the respondent supported the Kadhi's decision. She maintained that the property (land with two houses) was for the two orphaned children of the deceased as their inheritance from their late father.

She submitted that before his death, the deceased did not tell her that he had given a gift of the two houses to his mother. According to her, she lived in one of the two houses for about 4 years after the death of the deceased, and the appellant wanted to inherit her under Somali customs, but when she decided to get married to someone else and moved to the new husband's home, the problem started.

According to her also, the houses were then locked by the appellant and though she approached elders to resolve the issue, it was not resolved, and she thus went to the Kadhi's court for relief.

She maintained that she was merely pursuing the rights of the two orphaned children of the deceased and stated that the document witnessing the gift was not genuine as it was not witnessed by two people as required under Islamic Law.

I have considered the appeal, perused the record and also considered the submissions on both sides. This is a first appeal. As a first appellate court I am required to consider the evidence afresh and come to my own conclusions and inferences – see the case of *Selle –vs- Associated Boat Co. Ltd (1968)EA 123*.

This is an appeal from the decision in the Kadhi's court, and this court was thus assisted by a Kadhi as an assessor during the hearing.

After the close of submissions on both sides, the Hon. Kadhi assessor Hon. Kadhi Hassan Daffa, gave his

opinion that the gift donation document was not signed by two witnesses as required by the Koran. He also stated that the purported registration of the gift into the name of Halima Kassim, was done after the death of the deceased which appeared to be suspicious. The Kadhi finally observed that the appellant was not a beneficiary of the estate of the deceased.

The jurisdiction of the Kadhi's courts is donated under Article 170(5) of the Constitution of Kenya 2010, which states as follows:-

“170(5) The jurisdiction of a Kadhi's 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”.

In my view, it is clear from the above provisions of the Constitution that the Kadhi's court has jurisdiction, among Muslims who submit to it, to determine inter alia inheritance of a deceased property whether it is in cash or physical assets, including land. Therefore, in my view the Kadhi court has powers to deal with land properties of deceased person, if the issue relates to inheritance under muslim law. The above are Constitutional provisions and are thus superior to anything contained in Statutes. It is only where a valid substantive dispute on land exists that the Kadhi cannot deal with the subject land until such dispute is resolved in favour of the estate of the deceased, and thereafter the Kadhi's court will have jurisdiction under muslim law to determine its inheritance.

Counsel for the appellant has submitted very strongly, that the Kadhi did not have powers to decide on ownership of land and order the County Government to change the registration of records on plot No. GSA/B/20229. Was there in existence a dispute on the subject land?

The appellant does not claim to be the owner of the land. He did not claim to be the owner of the land before the Kadhi He does not claim to be a beneficiary of the estate of the deceased. My understanding is that adult brothers of a married Muslim are not beneficiaries to the deceased's estate where a wife children and parents or a parent of the deceased is alive. In the present case the deceased left behind a wife, two children and his mother. The appellant thus is not a beneficiary of the estate.

The appellant claims to be making his claim on behalf of his mother HALIMA KASSIM. There is no single document however filed which shows that he could claim the two houses on behalf of his mother HALIMA HASSAN who is said to be in the United States of America, and occupy the houses and collect rent.

The documents relied upon by the appellant were all hearsay evidence because the mother HALIMA KASSIM who signed the donation document did not come to testify before the Kadhi. Even the alleged witness to that document Mr. Kullow Advocate did not come to court to testify.

It cannot be correct to say that the Kadhi should have summoned these people. The Evidence Act (cap.80) under Section 107 puts the burden of proof on the person who wants the court to believe the existence of a certain fact. Section 107 provides as follows:-

107(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

The burden was thus on the appellant to bring witnesses to support his documents and his stand. He did not.

The appellant did not also bother to call anybody from County Government of Garissa to clarify the authenticity of documents relied upon, purportedly emanating from the County Government. The

documents relied upon by the appellant before the Kadhi's court could not thus help him. They were hearsay and not admissible. It thus follows that there was no dispute on the subject land before the Kadhi's court.

It is clear from the oral evidence on both sides that the deceased died in 2010, while the purported registration of the ownership of the donee of the gift HALIMA SHAKUL HASSAN was done in 2012, which was two years afterward. There is also no dispute in all the admissible evidence that the plot belonged to the deceased and that the two houses were built by the deceased on his own plot. Therefore, in my view, by the time the deceased died he was the legal owner of the plot and houses, and as such the same formed part of his estate.

In my view, the Kadhi did not go into the issue of ownership of land, as the land was obviously the property of the deceased by the time he died. The person who also came to make a claim, the appellant, did not have any interest in the estate to protect and had no legal basis of claiming on behalf of another. He also did not tender admissible evidence to support his position. If the mother of the deceased HALIMA SHAKUL KASSIM wanted to make a claim on the plot, then it was incumbent upon her to do so. She did not do so. The Kadhi had no basis to craft a claim for her.

In my view, the Hon. Kadhi merely made findings and orders under Muslim Law to facilitate the inheritance of the deceased's estate by the heirs. The Kadhi had that jurisdiction.

Consequently, I find that the appeal herein has no merits. I dismiss the appeal and uphold the decision and orders of the Kadhi's court.

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

Dated and delivered at Garissa this 26th day of July, 2016

GEORGE DULU

JUDGE