



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. 130 OF 2009

FAUZI SAID ALI.....1ST APPELLANT
KHALID SAID AHMED ALI.....2ND APPELLANT
FAURUZ SAID AHMED ALI.....3RD APPELLANT
HAWA SAID AHMED ALI.....4TH APPELLANT

VERSUS

SAID AHMED ALI (DECEASED).....1ST RESPONDENT
ILHAM ABDALLAH MOHAMED.....2ND RESPONDENT

JUDGMENT

The Appeal arises from a Judgment and decree given in the Eldoret Kadhi's Court in Miscellaneous Application cause No. 13 of 2009. Judgment was delivered on 20th May, 2009.

In the Miscellaneous application cause, the following orders were sought vide a Chamber Summon dated 20th February 2009.

1. **That this Honourable Court be pleased to order for all the deceased debts to be cleared first.**
2. **That the Respondent to surrender all the estate Title Deeds and the deceased personal documents to this honourable court.**
3. **That all the heirs involved to submit the accounts and inventories of all the estates.**
4. **That this Honourable court be pleased to determine the shares ordained of all the Lawful heirs in accordance with Islamic Laws of Inheritance.**
5. **That the incoming generating estates to be maintained and its income to be deposited into the family bank account but the rest of the estates to be distributed and transferred to the lawful heirs according to their shares.**
6. **That this Honourable Court be pleased to make any other orders as may be deem fit and just to grant.**

7. That this Honourable Court be pleased to order for the cost of this application.

The Appellants herein were the Applicants. The Supporting Affidavit was sworn by Fauzi Said Ali and Khalid Said Ahmed Ali on 20th February, 2009. They were described in the said application Miscellaneous as the Petitioners.

At this point, it is important to note that by the time the Miscellaneous application was filed before the Kadhi's court, there was pending High Court Succession Cause No. 186 of 2008 at the Busia High Court. The deponents were therefore the Petitioners in the Succession Cause.

All the properties (assets) of the deceased Said Ahmed Ali were listed in paragraph 5 of the Supplementary Affidavit whereas the liabilities were listed under paragraph 6 thereof.

It was contended under paragraph 10 that parties (beneficiaries) had executed a Trust Deed by which they had agreed that in the event of a dispute among the heirs the same shall be determined by the Kadhi's Court under the Islamic Law of Inheritance. That is how the miscellaneous application was filed.

The surviving widow of the deceased, one Ilham Abdallah Mohamed opposed the application. She swore a Replying Affidavit on 9th March, 2009 which was filed on 10th March 2009. She deponed that it was pre-mature to have the estate distributed in the Kadhi's court when there was still pending the succession cause that had not been concluded.

She conceded that parties had entered into a Trust Deed for purposes of managing the estate. She had however lost trust in the Applicants due to constant threats and intimidation from them.

Vide a decree dated 20. 8.2009 and issued on 5th March, 2010 the judgment of the Kadhi's court was on the following terms;

- 1. That land parcel LR No. South Teso/Angorom/1615 with the developments thereon shall vest in the second Respondent and her two children as distributed by the deceased himself.**
- 2. That the first Applicant and his sister shall have the properties on the side of Uganda as distributed by the deceased.**
- 3. That the claim by the Applicant and his sister shall have the properties on the side of Busia Kenya as distributed by the deceased.**
- 4. That the claim by the Applicant for determination of shares is groundless as the deceased distributed his properties during his life time.**
- 5. That if there are any properties of the deceased that were not distributed during his life time then the shares of the heirs of the deceased shall be per CAP.4 Sec.11 and 12 of the Holy Qoran where the second Respondent as a widow gets 1/8 of the whole and the remaining to be distributed at the ratio of 2:1 sons to daughters where there are three sons and three daughters comes to a total of nine shares after giving 1/8 to the Respondent.**
- 6. That if the Applicants have invested anything in the estate out of the Trust Deed then accounting be taken to settle out.**
- 7. That the deceased's debts amounting to Kshs 2,065,400/= (Kenya shillings two million sixty five thousand and four hundred only) to be cleared first and foremost before any disposal of estate.**
- 8. That the second Respondent to surrender the estate deeds to the respective heirs and the personal documents of the deceased for the disposal through this Honourable Court.**

9. That each party to shoulder his/her costs.

The Applicants were dissatisfied with the judgment and they preferred his appeal.

In a Memorandum of Appeal dated 24th August, 2009 they listed 11 grounds of appeal thus;

- 1. That the Kadhi erred in Law and fact in purporting to entertain proceedings touching and/or concerning the estate of the late SAID AHMED ALI without first ensuring that there was full compliance with the provisions of Part VII of the Law of Succession Act, Chapter 160 Laws of Kenya relating to the administration of estates (whether of Muslims or not) and in the circumstances the entire proceedings and consequential decree and/or orders are a nullity.**
- 2. That the Kadhi erred in Law and fact in entertaining proceedings in which one of the parties was already dead.**
- 3. That the Kadhi erred in Law and fact in unreasonably failing to find on the evidence adduced before him that the late SAID AHMED ALI died intestate and that in the circumstances the whole of his estate was governed by principles of Islamic law of inheritance set out in the Holy Qoran.**
- 4. That the Kadhi erred in Law and fact in purporting to adjudicate over the estate of the late SAID AHMED ALI in contravention of the provisions of Section 6 of the Civil Procedure Act, Chapter 21 Laws of Kenya when the same estate was the subject of proceedings in Busia High Court Succession Cause NO. 186 of 2008 which had not been determined and no grant had been issued.**
- 5. That the Kadhi totally misapprehended and misinterpreted the evidence of witnesses particularly that of ABDALLAH AHMED ALI, AHMED WAKIA OMAR AND BENEDICTO MUMIA.**
- 6. That the Kadhi erred in law and in fact in unnecessarily giving undue weight to age when there is no settled principle of Law that old people are less likely to lie or to show partiality in any matter when giving evidence.**
- 7. That the Kadhi erred in Law and fact in purporting to take into account as property of the late SAID AHMED ALI property which clearly belonged elsewhere.**
- 8. That the Kadhi erred in law and fact and showed an extremely injudicious and biased bend of mind in awarding land Reference No. SOUTH TESO/ANGOROM/1615 situated in Busia Municipality (being the most valuable asset of the deceased's estate and valued at approximately Kshs 12,000,000 (twelve million shillings) constituting 60% of the estate) to the second Respondent alone with her two children to the exclusion of the deceased's other children who are the appellants and giving the said second respondent and her children a further share in the other less valuable properties of the deceased.**
- 9. That the Kadhi erred in Law and fact in disinheriting the second and the forth appellants from their legitimate share of their father's estate.**
- 10. That the Kadhi erred in Law and fact in paying mere homage to the Islamic principles of inheritance as laid down in the Holy Koran and in failing to strictly observe and apply those principles to the matter before him.**
- 11. That the Kadhi erred in Law and fact in failing to find that there was not sufficient proof of an oral will before him and in totally failing to observe the limitations imposed by Law on any bequest under Islamic Law.**

The appeal was disposed of by way of filing written submissions. Those of the Applicants are dated 6th March, 2014 and were filed by M/s Kamau Lagat & Co. Advocates. It was submitted as follows:

First, that the Appellants went before the Kadhi's Court by way of a Miscellaneous Application yet distribution of the estate ought to be done through a substantive cause as provided by Section 51 of the Law of Succession Act.

Two, that it was wrong for the Kadhi's Court to entertain the proceedings in which the deceased was named as the first Respondent.

Three, that whereas the Qoran is silent on whether the will ought to be oral or written, the Islamic scholars have stated that it ought to comply with the law. It was specifically argued that it did not comply with Section 2(4) and 9 of the Law of Succession Act.

Four, it was improper for the Kadhi to entertain the application when there was pending the Busia High Court Succession Cause No. 186 of 2008.

Five, that the witnesses evidence was not credible.

Six, that the Kadhi disregarded the provisions of the Qoran specifically Chapter 4 verses 11 and 12.

On behalf of the Respondent, M/s Ngigi Mbugua & Co. Advocates filed submissions dated 24th April, 2014.

It was submitted as follows:

First, that the Appellants had submitted themselves to the jurisdiction of the Kadhi's Court upon concession that all parties profess the Muslim faith, hence they could not now turn around and state that the Kadhi's Court had no jurisdiction.

Two, that the Miscellaneous application before the Kadhi's Court was properly filed.

Three, that it is the Appellants and not the 2nd Respondent who enjoined the deceased as the 1st Respondent in the Miscellaneous application.

Four, that the manner of the distribution of the estate by the Kadhi's Court cannot be faulted because it was guided by the evidence before him and the Holy Qoran.

Five, that it was proper to do the partial distribution of the estate as it was guided by the oral will of the deceased. After all, final distribution would be done after the compilation of the inventory of the estate.

Six, the appeal was premature as final distribution of the estate had not been done.

Seven, that part VII of the Law of Succession Act applies to the distribution of the estate of a deceased Muslim only if it was in tandem with the Islamic Law.

From the foregoing, I arrive at the issues of determination to be;

- a. ***Whether the Kadhi's Court had the jurisdiction to entertain the matter.***
- b. ***Whether the Kadhi properly applied the evidence and facts in arriving at the decision he did.***
- c. ***Whether the proceedings before the Kadhi's court were properly filed.***
- d. ***Whether this appeal is merited.***

I shall consider issues (a) and (b) simultaneously.

The jurisdiction of the Kadhi's court is spelt out under Section 5 of the Kadhi's Court Act which provides

as follows;

“A Kadhi Court shall have and exercise the following jurisdiction, namely 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; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.”

My understanding of this provision is that even where all parties profess the Muslim faith, in matters relating to personal status, marriage divorce or inheritance, they may nevertheless file their proceedings before the High Court or a subordinate court as nothing under the aforesaid Act bars them from so doing.

The spirit and letter of Section 5 of the Kadhi Court Act is replicated in Section 2 of the Law of Succession Act which provides as follows;

2. (1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.

(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.

(3) Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of this death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.

(4) Notwithstanding the provisions of subsection (3), the provisions of Part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim dying before, on or after the 1st January, 1991.

Part VII of the Act (Law of Succession) which is referred to in Sub-section (4) above relates to the administration of estates. Under this part are Sections 47 to 50A which deal with jurisdiction of courts in matters of distribution of estates.

For purposes of this appeal, Section 48 thereof is the most relevant and I duplicate it as under;

48 (1) Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a resident magistrate shall have jurisdiction to entertain any application other than an application under section 76 and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings:

Provided that for the purpose of this section in any place where both the High Court and a resident magistrate’s court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act.

2. For the avoidance of doubt it is hereby declared that the Kadhis’ courts shall continue to have and exercise jurisdiction in relation to the estate of a deceased Muslim for the determination of questions relating to inheritance in accordance with Muslim law and of any other question arising under this Act in relation to such estates.

Again, the spirit and letter of this Section does not exclude other courts from entertaining matters in

which parties are Muslims. But my understanding of sub section (2) of Section 48 and Section 2 is that where the parties profess the Muslim faith in matters as spelt out in Section 5 of the Kadhi's court Act, they are encouraged to file them in the Kadhi's Court.

In the present case, parties herein initiated the succession proceedings at Busia High Court. Midway before the grant was issued and or confirmed, the Appellants, moved to the Kadhi's court and amongst the prayers they sought was that the court determines what each of the heirs was entitled to in accordance with the Islamic Law of Inheritance.

The Applicants referred to a Trust Deed which all parties executed before a lawyer which bound them to move to the Kadhi's court for purposes of distribution of the properties. The 2nd Respondent too conceded that indeed the parties had executed the said Trust Deed but she had lost trust in the Applicants.

To buttress this contention, Applicant's witness NO. 4 (AW4) Philip Ipapu Zakali, a lawyer confirmed that he is the one who prepared this trust deed which all parties executed.

But again, there is the question of the content of the said Trust Deed. From the Supporting Affidavit, the Trust Deed bound all parties to resolve any dispute that may arise amongst the heirs in accordance with the Islamic Law and this was reiterated by AW4. No witness indicated to the court that the Trust Deed provided that the distribution of the properties be referred to the Kadhi's court. It is unfortunate that a copy of the said Trust Deed was not exhibited before the Kadhi. Even the lawyer who was its maker made no attempt to detail its content and terms.

Be that as may, it is the Appellants who filed the application. They named all the parties and under prayer (4) asked the Kadhi to determine the entitlement of all the heirs. Therefore, as rightly submitted by the 2nd Respondent's counsel, the Appellants cannot now renege on their decision to go to the Kadhi's Court. Having submitted themselves to the said court, they are estopped from alluding that that court had no jurisdiction.

Suffice it say, though, the 2nd Respondent also conceded that the Kadhi's court had the jurisdiction to determine the issue of the distribution of the estate. Therefore, all the parties having submitted themselves to the said court and pursuant to the fact that they all professed the Muslim faith, nothing stopped the Kadhi from distributing the deceased's estate. Again, although in the Replying Affidavit the 2nd Respondent appeared to denounce the jurisdiction of the Kadhi's court, in the submissions, she conceded that the court had the jurisdiction to entertain the matter. It then appears that the parties had entirely abandoned the Busia High Court Succession Cause and as far as the distribution of the estate was concerned, they affirmed the jurisdiction of the Kadhi's Court.

So then, did the Kadhi properly distribute the estate?

Upon hearing the evidence of the witnesses, the Kadhi arrived at a finding that the deceased left an oral will under which he bequeathed **LR No. South Teso/Angorom/1615** together with the developments thereon to the 2nd Respondent and her children. He also distributed a few other properties to the Appellants, which he also observed was in accordance with the will. He then directed that an inventory of other properties be filed.

This is where the hell broke lose. I say so because, even if the Kadhi may have properly found that a valid oral will existed, his partial distribution of the estate was a total misdirection. He ought to have taken into account what other properties existed and distributed the entire estate together. Of course, when doing the distribution regard ought to have been given that one family had already benefited largely from one property. In any case, the existence of the other properties was already within the knowledge of the court (See paragraph 5 of the Supporting Affidavit). It was therefore a misdirection on his part to have proceeded to do the partial distribution of the estate.

As to the validity of the oral will, I do not wish to delve so much into it because having found that the distribution of the property was irregular, I will be inclined to order that the distribution of the estate be

done a fresh.

However, it is important that I point out that, the parties having subjected themselves to the Islamic mode of distribution of the estate, the same ought to be done under the Islamic Law. That is to say that a valid oral will under the Islamic Law should be in accordance with Chapter 2 verses 181 and 182 of the Holy Qoran which read as follows:

“180. It is prescribed for you, when death approaches any of you, if he leaves wealth, that he makes a bequest to parents and next of kin, according to reasonable manners. (This is) a duty upon Al-Muttaqun.

181. Then whoever changes the bequest after hearing it, the sin shall be on those who make the change. Truly, Allah is All-Hearer, All-Knower..”

As such, the validity of the alleged oral will shall not and ought not to be guided by Section 9 of the Law of Succession Act. But should the parties renege in their pursuit under the Islamic law they are at liberty to revert to the Succession Cause in the Busia High Court.

The parties must however pursue only one legal system. They cannot partially have the estate distributed by Kadhi's Court and partially by the High Court. The choice is theirs. See **Ahmed Shariff Swaleh & 3 others -vs- Abdulagader Sharif Swaleh & 3 others (2014), HC at Mombasa Misc. Application NO. 32 of 2013**, in which my sister Odero, J stated as follows;

“As it turns out the beneficiaries are divided regarding the forum in which to conduct probate proceedings. The Respondent and three (3) others wish to have the estate determined by the Kadhi in accordance with Islamic Sharia Law. However the Applicant and 3 other beneficiaries have declined to submit to the jurisdiction of the Kadhis Court and seek to have the estate determined by the High Court under the law of Succession Act. It is a fact that Kadhi's Courts were set up to cater for the interests of Muslim faithful in matters of marriage, divorce and succession. However the fact that one professes the Muslim faith does not oblige one to submit their disputes for determination in the Kadhi Court. Article 170(5) of the Constitution of Kenya 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 court” (my emphasis).

Therefore to quote my own ruling in JR No. 9 of 2013 MARIAM S. SWALEH & 4 OTHERS –VS- THE CHIEF KADHI & 3 others:

“What this means is that there must be consensus between the parties that a matter of inheritance be determined in the Kadhis court”

Clearly here no such consensus exists. The Applicant and others have chosen (as they are entitled) not to subscribe to the jurisdiction of the Kadhi Court over this matter. I am fully mindful of the fact that a section of beneficiaries seek to have the estate determined by the Kadhi, whilst an equal number do not wish to subject themselves to the jurisdiction of the Kadhi. An estate cannot be partially administered by the Kadhi and partially under the law of succession. It must be under one or other regime. In view of the fact that Article 170(5) is a constitutional provision and in view of the fact that the Kadhis court is subordinate to the High Court I am inclined to allow the application to transfer the matter to the High Court.”

At the risk of repeating myself, let me emphasize the provision of Article 170 (5) of the Constitution which is that;

“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 court.”

Being the supreme law of the land, the Constitution gives the choice to parties, notwithstanding that they are all Muslims, to either subscribe to the jurisdiction of the Kadhi's Court or of the regular courts (High Court or subordinate court). This Article then clearly captures my observations in relation to the interpretation of Section 5 of the Kadhi's Court Act, Sections 2 and 48 of the Law of Successions Act. In the instant case, as I have said, there is no doubt as to where the parties want to settle their dispute; and their choice is in the right direction.

As to whether the application was properly filed before the Kadhis court, the Appellants submitted that the proceedings were commenced by way of a Miscellaneous application contrary to part VII of the Law of Succession Act, hence rendering the entire application a nullity. The 2nd Respondent however submitted that the same was valid.

The first thing I fault the Appellants on is that they are the persons who initiated the proceedings before the Kadhi's Court. They are therefore estopped from challenging the format of the application.

Under Section 50A of the Law of Succession Act, the Honorable the Chief Justice in a consultation with the Chief Kadhi is required to make rules of procedure that ought to be applied under Sections 47, 48, 49 and 50 of the Act in relation to estates of deceased Muslims. The said section provides as follows:-

“ The Chief Justice may in consultation with the Chief Kadhi, make rules of the court for the better carrying into effect in relation to the estates deceased Muslims of the provisions of Section 47, 48, 49 and 50 and, in particular for regulating the exercise of the jurisdiction conferred by the Act”.

So far, the contemplated rules have not been made. Hence, there does not exist a standard procedure by which proceedings in the Kadhi's Court may be commenced. It is my view then that the miscellaneous application was properly filed.

The Appellants also argued that the proceedings before the Kadhi's Court did not comply with part VII of the Law of Succession Act. This part relates to the administration of estates. As far as it relates to Muslims (Section 48) it shall apply when all or either party of Muslim faith have declined to submit to the jurisdiction of the Kadhi's court. So where all parties submit to the Jurisdiction of the Kadhi's court, the applicable law is the Islamic law and the Law of succession Act in such circumstance does not apply.

The Appellants also argued that the deceased Said Ahmed Ali was wrongly named as the 1st Respondent. I entirely agree with them, but they ought to fault themselves as they are the parties who commenced the proceedings. All the same, the inclusion of the deceased as a party is an issue of form that does not bar the court from considering the issues before it. That error would also have been corrected by the Kadhi's court. But in the circumstances that the estate shall be distributed a fresh, the issue shall have been overtaken by events. The parties are also advised to only name persons who are living as parties.

Finally, it is my considered view, that this appeal is merited. As I said earlier in this Judgment, the Kadhi erred in partially distributing the estate. The net effect of that finding was that some heirs have already commenced earning benefits from the properties that were distributed to them. Some other heirs are in the wilderness uncertain of what shall be bequeathed to them. The latter shall of course eye the former with jealous. Discontent has also certainly built up. As I said, it is for this reason that the hearing on the distribution of the estate must commence afresh. In the instance, it was fruitless for this court to delve into the issue of the validity of the alleged oral will left by the deceased. This is a matter that shall be left to the Kadhi who will commence the distribution of the estate again. Suffice it to say, all the parties have declared their submission to the Kadhi's Court and unless for other reasons they wish to deviate from

that course, the distribution of the estate ought to be done by a Kadhi's court.

In the result, I set aside the entire judgment of the Kadhi's Court. I also annul the partial distribution of the estate as done by the Kadhi's Court. The titles to those properties shall revert into the name of the deceased pending fresh distribution. The distribution of the estate shall be done by the Kadhi's Court, Nakuru and not in Eldoret. The last order is given bearing in mind that the Kadhi's Court, Eldoret, having written a judgment, gave orders with finality. And that decision having been overturned by this court, for justice to be seen to be done, it is only fair that another Kadhi's Court distributes the estate. I further order that the cost of transferring the respective titles into the deceased's name be borne by the party that was given the respective properties. Each party shall bear its own costs of this appeal.

DATED AND DELIVERED ON 30TH DAY OF OCTOBER 2014

G. W. NGENYE – MACHARIA

JUDGE

IN THE PRESENCE OF:

Mr. Akello for Appellants

Mr. Koros holding brief for Ngigi Mbugua for 2nd Respondent