



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC APPEAL NO. 27 OF 2018**

**ABUBAKAR ABDALLA.....APPELLANT**

**VERSUS**

**NURU SALIM MBARAK & 2 OTHERS.....RESPONDENTS**

**RULING**

1. The application before me is that dated 28 November 2018. There are two substantive orders sought. The first is for leave to appeal out of time and the second is for stay of execution pending hearing of the appeal. The decision sought to be appealed from is the decision of the Kadhi's Court in Mombasa, Succession Case No. 174 of 2012 delivered on 13 October 2016. The application is opposed.

2. The decision of the Kadhi is annexed, and from it, I can discern that what was in issue is the Estate of one Johra Salim Mbarak (deceased). There was a petition filed by Nuru Salim Mbarak, Ashgar Salim Nuru Mbarak, and Madina Salim Mbarak and the respondent is Abubakar Abdalla, the applicant herein. At stake was a Swahili house built on the plot LR No. 219/I/MN located in Jomvu. The applicant was nephew to the deceased and lived in this house. The petitioners (siblings of the deceased) sold this house to one Ashgar, who issued notice to the applicant to vacate the house. The matter went before the Kadhi. The Kadhi framed three issues as follows :-

*(i) What constituted the estate of the deceased.*

*(ii) The legal heirs and their respective shares.*

*(iii) Distribution of the estate.*

3. On the first issue, the Kadhi found that the house constituted the estate of the deceased. On the second and third question, he found that one Hassan Ali Salim was the husband of the deceased and thus a beneficiary of the estate. He held that under Islamic law, the widower is entitled to half share of the estate, and the remainder to the siblings, with the male getting twice the share of the female where there is no child. He thus held that Hassan was entitled to half share of the property and the siblings of the deceased the other half which he shared amongst them. He found that the applicant had no proprietary interest or inheritance in the property and since he was in control of the property, he was ordered to render accounts from April 2003. It is this judgment that has aggrieved the applicant thus the subject application before me.

4. In opposing the application, Mr. Hamza, learned counsel for the respondents, inter alia submitted that the applicant has filed this application in the wrong court. He submitted that this is an appeal from the Kadhi's court which should have been filed in the High Court. Mr. Mwachisi for the applicant, did not seriously contest this point, and simply submitted that if the application was filed in the wrong court, then it should be transferred to the correct court.

5. It is apparent to me that this is a pure succession dispute that was before the Kadhi's Court. In as much as what is at stake is land, the central issue concerns the distribution of the estate of the late Johra Salim Mbarak. The intended appeal is actually an appeal that seeks to challenge the manner of distribution of her estate. It is an appeal on a succession matter. The Environment and Land Court does not hear succession disputes. These are heard by the High Court. It is therefore the High Court which should hear appeals arising out of succession matters heard by Magistrate's Courts and Kadhi's Courts. This comes out in Rule 6 of the Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in Other Courts, Gazette Notice No. 5178. It provides as follows :-

*(6) All cases touching on inheritance, succession and distribution of land under the Law of Succession Act, Cap 160, Laws of Kenya shall continue to be heard by the High Court or the Magistrates Court of competent jurisdiction.*

6. A matter touching on the distribution of the estate is a succession matter and should be heard by the High Court, the Magistrate's Court

and/or the Kadhi's Court.

7. This intended appeal and the application have therefore been filed in the wrong court.

8. I direct that the same be transferred to the High Court Mombasa for disposal.

9. Orders accordingly.

**DATED AND DELIVERED THIS 22ND DAY OF APRIL 2022.**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA.**