



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL APPEAL 177 OF 2008

TAHERALI NURDIN HASSANALI.....APPELLANT

VERSUS

AHMEDALI NURDIN HASSANALI.....RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of the Chief Kadhi in Kadhi's Court Succession Cause No. 89 of 2007, delivered on 16th October, 2008.

In the lower court, the petitioner Appellant sought distribution of the estate of Nurdin Hassanali Noorbhen in accordance with Islamic law. The deceased was the father of both the Petitioner and Respondent. The dispute revolved around the ownership of a firm known as Nurdin Shipping Contractors, which the deceased owned jointly with a third person. The Petitioner alleged that the deceased's half share in the said firm had been sold to him prior to the deceased's death, and was therefore not available for distribution to all the deceased's heirs.

2. The Chief Kadhi found:

“.....3. That one half of the company Nurdin Shipping Contractors belongs to all the heirs of the late Hassanali Noorbhan and its profits since the death of the deceased should be shared to all the beneficiaries according, to the mode given above [in the Deceased's will]”.

3. The Appellants grounds of appeal were as follows:

- 1. The Learned Chief Kadhi erred both in fact and in law when he found that the deceased person owned one half of the shares of the Appellant's Company Nurdin Shipping Contractors even without proof from the Respondent.**
- 2. The Learned Chief Kadhi erred both in law and in fact when he rejected the accounts submitted by the Appellant without sound legal basis.**
- 3. The Learned Chief Kadhi erred in fact and in law in disregarding the testimony and or evidence of the appellant.**
- 4. The Learned Chief Kadhi erred both in fact in law in shifting the burden of proof to the Appellant**

4. At the hearing on 21st June, 2012 before me, sitting with Chief Kadhi Mudhar Al Hussein, Ms

Muganda for the Appellant argued that:

- The Kadhi assumed that the parties had a half share.
- The lower court should have appointed an auditor to determine the value and ownership of the deceased's share if any.
- The by the time the Appellant came on board the disputed firm, it was dying and his investment in it was not taken into account for purposes of determining losses and profits.

5. The Respondent, represented by Mr. Lewa, argued:

- That the appeal was filed out of time.
- That there was no evidence in the lower court that the deceased sold the company to the Appellant.
- That the Appellant admitted in evidence that he did not have evidence that the company was sold to him.
- That there was overwhelming evidence that the Deceased wanted his shares in the company to benefit the welfare of the family generally.

6. We have carefully perused the record of appeal and considered the arguments and representations of the parties. The Chief Kadhi sat in this matter as assessor and his view concurs with mine. There is only one real issue. It is whether or not the Deceased was the owner of a half share in the firm known as Nurdin Shipping Contractors at the time of his death.

7. The evidence on record is as follows. The deceased died on 19th May, 1988 as shown in the certificate of Death at page 26 of the record. A certificate of Registration of Change of Particulars under the Registration of Business Names Act shows that as at 4th September 1984, prior to his death, the owners of the business were Nurdin Hassanali Noorbhan and Taherali Noordin Hassanali. The latter is the Appellant. This certificate is at page 27 of the record of appeal.

8. A subsequent certificate of Registration of Change of Particulars dated 18th September 1989, sixteen months after the death of the deceased shows that the Appellant was the sole proprietor of the said business. A receipt dated 21st October 2008, at page 29 of the record is given as evidence of the filing of the certificate.

9. In the absence of any document evidencing the sale of the deceased's share in the said business prior to the date of his death, the evidence that is on record shows that at the time of his death the deceased was still recorded as a joint owner of the said business. The position in law as to business firms where more than one person has a share is set out in the Partnership Act Cap 29 Laws of Kenya. Section 28(a) thereof provides as follows:

“28. The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement express or implied between the partners, by the following rules –

(a) All the partners are entitled to share equally in the capital and profits of the business and must contribute equally towards the losses whether of capital or otherwise sustained by the firm;.....” (underlining mine)

10. On the foregoing basis, in the absence of any formal agreement, the beneficial ownership of the firm was vested equally in both the Appellant and the deceased. As such the deceased's share could properly be distributed in accordance with the terms of his will, as ordered by the lower court.

11. Further I take cognisance of the fact that the Appellant, during cross examination, did admit that:

“There is no evidence that the company was sold to me.” (page 17 record of appeal)”.

This supports the finding of the Chief Kadhi in the lower court.

12. Given all the foregoing matters, the appeal is hereby dismissed and the lower court’s decision is hereby upheld, with costs to the Respondent.

Dated, signed and delivered this 31st day of July, 2012.

R.M. MWONGO
JUDGE

Read in open court
Coram:

1. Judge: Hon. R.M. Mwongo
2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d)