



REPUBLIC OF KENYA

High Court at Mombasa

Civil Appeal 109 of 2007

1. **THUWEIBA MAKI**
2. **FATMA MAKI**
3. **RUKIYA MAKI**
4. **AZIZ MAKI.....APPELLANTS**

VERSUS

1. **AISHA JUMA**
2. **MALIK ABU SHEE.....RESPONDENTS**

(An appeal from the Judgment of the Honourable Chief Kadhi HAMMAD M. KASSIM given on the 6/4/2006 in K.C.C.C No. 234 of 2005)

JUDGMENT

The Appellants through Memorandum of Appeal dated 21st July 2007 appealed against the decision of the Hon. Kadhi Twalib B. Mohamed in KCCC No. 147 of 2005 and dated 18th July 2007.

The Memorandum of Appeal raises 3 grounds:-

1. **That the learned Kadhi erred in law and fact in rejecting the Respondent's evidence without legal reason or authority.**
2. **That the Learned Kadhi erred in law and fact in finding for the Petitioners with regard to the Guraya house in the absence of tangible evidence.**
3. **That the Kadhi erred in law and fact in considering irrelevant matters without proof, which lead to a miscarriage of justice.**

The Appellants pray that the appeal be allowed with costs; Judgment of the Hon. Kadhi set aside.

I have considered the memorandum of appeal together with the record of appeal and submissions by counsel.

This Court in deciding the appeal was sitting with two kadhis as assessors, Kadhi Sheikh Sukyan and

Kadhi Halim.

In summary the present Appellants and Respondents are siblings of the same mother but different fathers. The claim is with regard to the Estate of Pungu Bint Fathil their mother which was filed as Succession Cause KCCC No. 147 of 2005.

The Appellants contend that the Estate consisted of three houses and the Kadhi rejected to include as part of the Estate a house in Guraya and therefore they are aggrieved by the said decision.

As put by counsel for the Appellant in his oral submissions the only issue for determination is whether the Estate is comprised of 2 houses as per the decision of the Kadhi's Court or it comprises of 3 houses as claimed by the Appellants.

It is the Appellants case that the Estate is comprised of 3 houses which includes the house in Guraya which belonged to their mother. They claim that it was wrong for the Kadhi to leave out the Guraya house merely because they did not file a counter-claim. Counsel for the appellant argued that this was merely a technicality and the judgment was unfair to the Appellants therefore it should be set aside.

The Appellants pray that the House in Guraya should be considered as part of the Estate and should sold and the proceeds distributed in cash to the beneficiaries.

Learned Counsel Mr. Hamza for the Respondents opposed the application. Counsel argued that the Appeal is unfounded, has no basis and should not be allowed.

Counsel submitted that the Kadhi's Judgment was based on law. The Kadhi considered whether the house belonged to the Estate by considering the evidence on record. Counsel stated that the burden of proof was on the Appellants to show that the house formed part of the Estate. Counsel further submitted that the Respondent has adduced evidence that the house was purchased by them.

Counsel submitted that the actual position of the law is that the Appellants should have filed a counter claim. He argued that the Kadhi could not go outside the petition in determining the case.

From the proceedings it is clear that the Kadhi made a determination of whether the Guraya House formed part of the Estate. The court referred to exhibit No. 2 which is an affidavit by Mashaka Binti Mbwana Salim which was commissioned by former Hon. Kadhi of Mombasa/Kwale stating that she sold the house in Guraya to Malik Abu Shee Malik and Esha Juma for kshs. 50,000/=.

From the record the affidavit is dated 25th April 1989 and there is the thumb print of the deponent before the Kadhi of Mombasa/Kwale District. The document fairly describes the parties, property and the interest of the seller and states the consideration paid for the property. A copy of the I/D of the deponent also shows that it corresponds with the information in the affidavit. The death certificate of Mashaka Binti Mbwana Salim shows that she died on the 7.12.1993 which is after the said transaction.

On the basis of the above document unless it is otherwise proved that it was a forgery then the Kadhi was right in coming to the conclusion that the house in Guraya did not form part of the Estate of the deceased. In fact no one petitioned the court for this property after the death of Mashaka Binti Mbwana Salim.

The Estate of the Deceased has already been distributed in accordance with Islamic law.

I am not persuaded by the arguments of the Appellants that the Guraya House forms part of the Estate of the deceased. I find no basis in interfering with the decision of the Hon. Kadhi in succession cause No. 147 of 2005.

I dismiss the appeal with costs to the Respondents.

Dated AND Signed At Nairobi ON THIS 16TH Day Of AUGUST 2012.

M. K. IBRAHIM
JUDGE

DATED AND Delivered at Mombasa on this 20TH day of SEPTEMBER 2012.

J.W. MWERA
JUDGE

Delivered in the presence of: Mr. Gitonga for Appellant

Mr. Magiye for Responden