



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Civil Appeal 65 of 2001

KHAMIS ALI KHATIB & OTHERS APPELLANT

VERSUS

YUSUF WAZIRI RESPONDENT

(Appealing from the Judgement of the Principal Magistrate's Court at Kitui M.N. Gicheru of 9th May 2001)

JUDGMENT

1. This Appeal raises only one issue: whether plot No. 53 Kitui Municipality forms part of the estate of the late Ali Khamis Khatib who died intestate on 9/1/1980. The learned Principal Magistrate, Njeru Ithiga Esq. had on an 8/5/2001, upon hearing the parties, ruled that the “**plot belongs to the family of Juma Muhsin and the objector as a direct descendant of Juma Muhsin should ...be able to inherit it.**”

2. The evidence before the learned magistrate which led him to his decision was as follows:-

Khamis Ali Khatib, a son of the deceased said that both plots Nos. 53 and 60 at Kitui Municipality “**are registered**” in the names of his deceased father but in his evidence a number of important issues arose viz:

- i. that letters of allotment in respect of the two plots were issued in June 1993;
- ii. that although his father in fact died in 1983, the death certificate indicates that he died in 1980;
- iii. that although he is not related to Juma Muhsin, the said person occupies plot No.53 and no steps to evict him have ever been taken and that the plot was developed in 1993.

Baby Hassan Kinuthia, a daughter of the deceased said that her father died in 1980 and that he left behind plots Nos. 53 and 60. That plot No. 53 is occupied by Yusuf who is no relation of the deceased. She did not know how her father acquired the plot but that the allotment letter in his name was issued in 1993 and the address used is P.O Box 649 Kitui, which belongs to Kitui Municipal Council, her employer.

Mariam Khatib, another daughter of the deceased gave evidence similar to that of her siblings and went on to suggest how the two plots should be inherited.

For the objector, Yusuf Wazir gave evidence that plot No. 53 belongs to his grandfather, Juma Muhsin and that on 17/12/1927, he paid Kshs.6/= as rent and that ever since then, his family has lived there and

no one ever asked him to move out. He suspected that Baby Hassan, an employee of the Municipal Council of Kitui may have tampered with records regarding the plot to deny him his inheritance.

3. I have taken into account the submissions by advocates for the parties and I have perused two documents tendered in evidence. The first is a copy of a receipt for Kshs.6/= issued on 17/12/1927 and it is headed “**LOCAL NATIVE FUNDS**” and the payment relates to plot No. 70 Kitui. The payment is shown to be made by one Juma Muhsin. Initially, I had doubts about the connection between plot no. 70 and plot No. 53 but the clarification was made by Baby Hassan Kinuthia who said this in her evidence;

“I know the plot was originally No. 70.”

4. I take it therefore that plot No. 53 was originally plot No. 70 and the payment made on 17/12/1927 was in respect of the presently disputed plot.

5. The second document is a letter of allotment issued by the Commissioner of Lands on 21/6/1993 to one Ali bin Khamis of P.O Box 694 Kitui in respect of the same plot.

6. My understanding of the law is that neither Juma Muhsin nor Ali Khamis are registered owners of the plot because payment of rent or allotment thereof confer no registrable interest per se but on the basis of the documents presented, one may claim an interest that can be recognized upon registration. Having so said the letter of allotment dated 21/6/1993 was issued more than 10 years after the allottee Ali Khamis died. How that was done is impossible to tell because his children led no evidence whatsoever in that direction.

7. There is also no evidence on the record that Ali Khamis ever occupied the plot but all parties agree that Yusuf Wazir occupies it and in his own evidence, since his birth, more than 50 years ago. How could his family have occupied it and his grandfather, Juma Muhsin paid rent in 1927, if Ali Khamis had any interest in it? How come he did not claim it in his lifetime and why would it take more than 10 years after his death for the allotment to be made to him and for his children then to claim it?

8. Like the learned magistrate, I can only resolve the questions above by saying that it is quite possible that Baby Hassan, an employee of Municipal Council of Kitui, had something to do with the allotment letter being issued and this may explain the evidence of her sister, Mariam Khatib who said this in evidence.

“Plot No. 53 should be divided between myself, Khamis Ali, Baby Hassan and Hadijah.”

Plot No. 6 was to be distributed to other children of the deceased.

9. Whether Baby Hassan in fact tampered with records at the council as claimed by Yusuf Wazir is neither here nor there in any event because my reading of the evidence on record would lead me to clearly conclude that Plot No. 53 at Municipal Council of Kitui does not form part of the estate of Ali Khamis and is not available for distribution as such and I have said why.

10. The Appeal is without merit and is dismissed with costs.

11. Orders accordingly.

Dated and delivered at Machakos this **14th** day of **October** 2008.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Kimeu h/b for Mr Kalili for Appellant**

N/A for Respondent

ISAAC LENAOLA

JUDGE