



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA  
Civil Appeal 161 of 2002**

**1. AWEOHA MOHAMED SAID**

**2. TIMA KALE.....APPELLANT**

**- Versus -**

**KHADIJA ABEID JUMA.....RESPONDENT**

**JUDGEMENT**

This is an appeal from the judgment of Mohamed A. Mahmoud, the Kadhi in Lamu District given on 11th September 2002 in the Lamu Kadhi's Court Civil case No. 25 of 2002 in which he found that the late Mohamed Ahmed Bangure (the deceased) left two shambas at Mkunumbi – Mpeketoni, a plot at Mokowe and a permanent house at Sargoi in Mombasa and ordered the distribution of those properties amongst the deceased's heirs in accordance with Islamic Law.

In that judgment the learned Kadhi excluded from the estate a house without land at Mkunumbi which he found to have belonged to the Respondent, Hadija Abud Jumaan. Bwana Mzee Athman Mohamed Mzee a brother to the deceased and one of the heirs and Tima Kale one of the widows and heir of the deceased being dissatisfied with that decision have appealed to this court on two main grounds. The first one is to the effect that the evidence of eight witnesses, two from Mombasa, two from Malindi, two from Mokowe Lamu and two from Tiwi which evidence the Kadhi's court relied upon is missing from the typed record. The second ground of appeal is that the learned Kadhi erred in relying on the evidence of PW 1 and holding that the house without land at Mkunumbi belonged to the Respondent and not to the deceased. As regards the first ground of appeal the record does not show that any such evidence was called and the judgment of the learned Kadhi does not show that he relied on any such evidence. In the circumstances I dismiss that ground of appeal.

The second and main ground of appeal was to the effect that the learned Kadhi erred in holding that the house without land at Mkunumbi belonged to the Respondent and not the deceased and thus excluded it from the properties left by the deceased for distribution. The second Appellant contended both before the Kadhi's court and in this appeal that if the house without land at Mkunumbi belongs to the Respondent then the permanent house at Sargoi in Mombasa should be held as belonging to her as she also built it with the assistance of the deceased.

I have carefully perused the lower court record. Apart from the Respondent's evidence that she built the house without land at Mkunumbi, albeit with the assistance of the deceased, there was also evidence of PW 1 that when the deceased divorced the Respondent he lived with the witness for about two weeks. When he asked the deceased why he vacated the house with all his belongings the deceased told him that the house belonged to the Respondent. There was also evidence that the Respondent transferred the house to her grand children during the deceased's lifetime without any objection from him. In addition to that evidence the Respondent, according to the Kadhi's judgment took a denial oath under Islamic law that the house did not belong to the deceased.

Messrs Twalib B. Mohammed, the Kadhi of Mombasa and Abdulrahim H. Athman the Kadhi of Kwale, who sat with me as assessors in this appeal both concurred with the trial Kadhi that on the basis of the evidence placed before him, the trial Kadhi was right in holding that the house at Mkunumbi belonged to the Respondent. The Mombasa Kadhi was, however, doubtful as to whether the Respondent actually took the denial oath. The record only shows that she offered to take it. He therefore opined that for justice to be done and to be seen to have been done the Respondent should take the denial oath before another Kadhi

or the Chief Kadhi and if she does then the trial Kadhi's judgment should stand intact. The Kwale Kadhi was of the view that the Respondent took the oath. He opined that the distribution of the estate was not in strict accordance with Islamic Law. However, as this was not an issue in this appeal, I hold that the trial Kadhi's distribution of the estate shall stand and should not be disturbed.

As regards the denial oath the second Appellant did not at any time offer to take it. But the Respondent did. It is however not clear that she actually took it even though the trial Kadhi said in his judgment that she did take it. This is what she is recorded as having said:-

**“Your honour, I am ready to take the denial oath that the house belong (sic) to me though the late helped me building it but the house belongs to me. I am taking a denial oath that the house don't (sic) belong to the late Bangure it belongs to me but the late helped me according to his capability.”**

In his final submissions the first Appellant stated that if the Respondent would take a proper denial oath with the Quran then the house at Mkunumbi should be excluded from distribution. This together with what the Respondent is recorded to have said raises doubt as to whether the Respondent actually took the denial oath. In the circumstances, I agree with the Mombasa Kadhi that the Respondent should take a proper oath and I direct that she takes it before the Chief Kadhi in the presence of the Appellant within one month or such reasonable time as the Chief Kadhi shall determine. If she does take it then the trial Kadhi's judgment shall stand intact and this appeal shall stand dismissed. If, however, she declines to take it then this appeal shall be deemed to have been allowed and the house be included in the distribution.

To avoid this kind of situation trial Kadhis are advised to ensure that when parties offer to take the denial oath the record should show that the same is actually taken in strict compliance with Islamic Law and the words of the party taking it are recorded verbatim.

This being a family issue, I order that each party shall bear its own costs in any event.

DATED and delivered this 26th day of July 2005.

**D. K. MARAGA**

**JUDGE**