KENYA LAW
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Tego v Tego (Civil Appeal E006 of 2024) [2025] KEHC 6283 (KLR) (15 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6283 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARSABIT

CIVIL APPEAL E006 OF 2024

FR OLEL, J

MAY 15, 2025

BETWEEN

OSHE TEGO .... APPELLANT

AND

HIRBE AMBA TEGO .... RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon A.D. Wako (Principal Kadhi) Delivered on 5th August 2022 In Moyale Kadhi Case Kcsucc No. E012 of 2020)

JUDGMENT

A. Introduction

1. This Appeal challenges the Judgement-decree issued by Hon A.D Wako (Principal Kadhi) in Moyale Succession Cause No KCSUCC E012 of 2020, dated 5th August, 2022, where the trial court distributed the deceased's estate amongst his beneficiaries and also directed that the plots based at Moyale be valued and that the said valuation report be presented to the court for proper guidance.

2. Being dissatisfied with the said award, the Appellant, pursuant to leave granted by the High Court on 8th February 2022, filed his Memorandum of Appeal on 9th February 2024 and raised five (5) grounds of Appeal, namely;

   a. That the honourable Kadhi erred in law and fact in disregarding a Valid will left by the deceased.

   b. That the honourable Kadhi erred in law and in fact in finding that a case for invalidation of the deceased's will had been established.

   c. That the honourable Kadhi erred in law and fact in finding that the appellant had not established his ownership of part of the property said to be part of the estate of the deceased.

   d. That the honourable Kadhi erred in law and fact in ordering the distribution of the estate in an inequitable manner.

e. That the decision by the honourable Kadhi was against the weight of evidence tendered.

3. The appellant therefore prayed that the judgment of the trial court be set aside and the estate of the deceased be distributed in accordance with his last will.

B. Facts of the Case

4. PW1 Hirbe Oshe Burje, testified and stated that the deceased was her husband, and they were blessed with 10 children, including the respondent. After her husband's death, she summoned the appellant to discuss the distribution of her late husband's estate, but he failed to heed her summons. She therefore opted to approach the court to have the distribution effected in accordance with Islamic Sharia law.

5. It was her further evidence that the deceased's estate comprised one residential plot, which had seven (7) commercial rooms and also nine (9) residential rooms. The deceased also owned land at a place known as Gubaticha, in Ethopia. She also confirmed that the said commercial plot was developed during their marriage.

6. Under cross examination, the respondent in the appeal stated that after the death of her husband she left the appellant to collect rent from the residential houses and it was not correct for the appellant to allege that she was intermeddling in the deceased estate. She also affirmed that the deceased died intestate but made an oral will concerning the land at Gubaticha, which parcel of land had been taken over by the Ethiopian government.

7. PW2 Amina Amba Tego, clarified that she was also known as Amina ume, which was her marital name. She was a daughter of the deceased, who owned a commercial plot comprising of seven (7) commercial rooms and three residential houses which had three rooms each. One house belonged to the respodent, the second house belonged to Kadiro and the third house belonged to Abdirizak. It was also true that the deceased was blessed with ten children, which comprised of seven (7) girls and three (3) boys.

8. PW2 further confirmed that the deceased owned another parcel of land, but the same was based within Ethiopia and had been acquired by the Ethiopian government. The said parcel of land was outside the court's jurisdiction and thus could not be subject of the succession filed. Finally, she also confirmed that the estate property was developed during the life time of the deceased, apart from the house built by Abdikadir.

9. Under cross examination PW2 confirmed that Kadiro, was also known as Abdikadir and she was also not aware of any will left behind by the deceased giving instructions on how to distribute his estate.

10. The appellant (OW1) testified and confirmed that the petitioner was his mother, while his deceased father, who estate was under dispute had passed on19.05.2020 leaving behind five daughters and three sons as his beneficiaries. Prior to his death the deceased on 28.02.2008 had made a will in the presence of the respondent, his elder brother Kadiro and also Nuria. All of them had boldly signed the said will and it was therefore dishonest for the respondent to claim that she was not aware of its existence.

11. It was his further evidence that as per the will, he and his brother known as Amba were to share the Moyale plot, while the plot in Yabalo was to be bequeathed to Amba. There was also a parcel of land at Harmum which had been bequeathed to Mohamed. He confirmed that all the parcels of land were bought and/or developed by their deceased father and he therefore had the right to bequeath them as he pleased. He also emphasized that the respondent had not produced any evidence before court to rebut his evidence, regarding the exitance of the valid will left by the deceased.

12. OW2 Kadiro Amba confirmed that he was present when his deceased father made his will. Others present included their mother the appellant, their sister known as Nuria, and other unnamed family

members. It was therefore false for the petitioner to mislead the court and assert that no will be existed, yet the same was made in the presence of eight family members, and everybody had received their rightful share. He urged the court to respect and uphold the said will.

13. OW3 Woshe Lolo, testified and stated that he had known the deceased as their clan elder from his childhood and confirmed that in February 2008, the deceased had read his final will in his presence after which, he had signed the said will as a witness. He further confirmed that the petitioner, too, was physically present when the said will was read and that all beneficiaries got their share of the estate. It was therefore dishonest for the respondent to deny the existence of the said will.

14. The trial court considering the merits of the case and submissions filed, and did find that under sharia law, a will could not be valid unless the heirs consented to the bequest made. Since the respondent had disowned the said will, the same could not be enforced, and the default position was that the estate of the deceased would be distributed as governed by Islamic Law of Succession.

C. The Appeal

15. The Appeal was canvassed by way of written submissions.

(i) The Appellants' Submissions.

16. The Appellant submitted that the deceased died on 2nd December, 2020, and was survived by his wife, the respondent, and ten children (three sons and seven daughters). At the time of his death, he owned the suit property currently occupied by the respondent and a farm in Manyatta location, which was not distributed amongst the heirs.

17. It was his contention that the deceased died testate and urged the court to find that the learned Kadhi had erred in rejecting the deceased's final will dated 28th February 2008 and had wrongly proceeded to distribute the estate under Islamic law, yet the validity of the said final will was not disapproved. Reliance was placed in the case of Re; the Estate of Ismeal Osman Adam (deceased), Noorbanu Abdul Razak Vrs Abdulkader Ismail Osman, Mombasa Civil Appeal No 285 of 2009, as cited in RB &RGO Vrs HSB & ASB.

18. Further, the Appellant confirmed that under Islamic law, a person professing Muslim faith was allowed to bequeath upto a third of his estate to a third party/non heir and the deceased will be had not breached this rule. It was therefore an error for the learned Kadhi to invalidate the said will solely on the basis of the widow's lack of consent, without considering other legal parameters which had not been breached. Reliance was placed in Hussein Vrs Hussein (2011) 2 KLR, & Tariq Vrs Zubair (1999) 1 AHRLR III.

19. The appellant also faulted the learned Kadhi for wrongly concluding that that the plot occupied by the respondent and the farm at Manyatta location, should form part of the deceased estate, yet the same had been bequeathed to the Appellant and his brother Kadir Amba in accordance with Islamic inheritance principles and uncontroverted evidence had been adduced to support this position.

20. Based on this error, the learned Kadhi had wrongly proceeded to inequitably distribute the estate, disregarding his specific entitlement to a portion of the said estate. This finding therefore had failed to meet the standards of fairness and equity as outlined under Sharia law/Kenya law governing Inheritance and had to be set aside. Reliance was placed in Republic Vrs Kadhi's court of Mombasa (2015) Eklr, Bashir Vrs Hajj Ali (2017) Eklr, & Muslim Community Vrs Kihara (2010) eKLR to emphasis this point.

21. The Appellant thus urged the court to find that his Appeal had merit and proceed to set aside the mode of distribution as decreed by the learned Kadhi.

(ii) The Respondents' Submissions.

22. The respondent submitted that under Islamic law, a person professing Muslim faith was allowed to draw a will to distribute part of his/her estate after death. However, the law restricted the amount of the estate he/she could bequeath to the third party to not more than one-third of his estate, with the remainder being distributed in accordance with fixed shares for heirs. She emphasized that any will that had edicts contrary to this teaching would be invalid and in violation of the teachings of the Holy Qur'an. Reliance was placed in Noorbanu Abdulrazak Vrs Ismail Osman (2017) KEHC 5643(KLR),& In Re;Estate of Saleh Ahmed Hassan(Deceased),(FamilyAppeal No 8 of 2020), (2023)KEHC 1165(KLR), where it was emphasized that the Holy Qur'an at Nisa 4:11 & 4:12 had expressly stipulated Allah's instructions concerning inheritance.

23. Secondly, the respondent had denied any knowledge of the said will and also did not agree with the proposed mode of distribution made hereunder as the said will had bequeathed the entire estate property to the appellant and his brother Kadir Amba to the excluded all other family members, who also had not consented to this mode of distribution. To that extent, the said will was unenforceable under Sharia law and was therefore null & void.

24. Finally, it was also the respondent's submission that the learned Kadhi had not erred in the mode of distribution effected. The rule for intestate succession was that "sharers" came first before all others, and the allotment of these shares was to be done in line with Quran teachings. The wife was to get a share equivalent to one-fourth of the net estate if there was no child, but if the deceased had children, then the wife would get one-eighth of the net estate after considering any bequest made to a third party, and provision made for debt. The same teaching also provided that a male heir would get what is equal to the share of two female heirs.

25. The learned Kadhi had appropriately distributed the estate based on these teachings/edicts of the Quran and apportioned each heir their rightful share of the estate. His findings, therefore, could not be faulted and the respondent thus urged the court to dismiss this Appeal.

D. Analysis and Determination.

26. I have considered the pleadings, evidence presented, and submissions of the parties in this appeal. This court, first and foremost, is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions. As held in Selle & Another Vs Associated Motor Boat Co ltd & others (1968) EA 123 it was stated that;

> " I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court is by way of retrial and the principals upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (Abduk Hammed Saif V Ali Mohammed Sholan(1955), 22 E.A.C.A 270,

27. Also in the court of appeal case of Ephantus Mwangi and Another Vs Duncan Mwangi Civil Appeal No 77 of 1982{ 1982 -1988}1KAR 278 the appellate court did state that;

> "A member of an appellate court is not bound to accept the learned judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

28. The issues which arise for determination in this appeal are;

    a. Whether the deceased's will dated 28th February 2008 is valid.

    b. Whether the learned Kadhi properly applied the law in distributing the deceased estate.

    c. Who should bear the costs of this Appeal .

i. Whether the deceased will dated 28th February 2008 is valid

29. From the evidence adduced, it is not in dispute that all the parties herein profess Muslim faith and by dint of the provisions of Section 2(3) of the *Law of Succession Act*, Cap 160, the Applicable law in determining distribution of this estate is Islamic/sharia law. The Appellant is the deceased son, and he contends that the deceased died testate and his estate should be distributed in accordance with the deceased will dated 28th February 2008. The respondent herein, who is the deceased wife and the appellant's biological mother disputes this contention and denies knowledge of the said will.

30. Both parties concur that under Islamic law, the deceased could not will away more than one-third of his estate to a third party/non-heir, and primarily this is justified because Allah had legislated fixed shares for legal heirs of a deceased Muslim. Allah's Prophet (SAWS) states that;

> "Allah has appointed for everyone who has a right what is due to him, and bequest must be made to an heir. (Abu Dawud). Similarly, hadith is narrated by Abu Umamah (RA) and reported by Ibn Majah, Ahmed and others."

31. Further, the Holy Qur'an in Nisa 4:11 proved that;

> "Allah instructs you concerning your children {i.e, their portion of inheritance}; for the male, what is equal to the share of two females."
>
> Nisa 4:12 provides
>
>> " ...... And for them (i.e, the wives) is one-fourth if you leave no child. But if you leave a child, then for them is an eighth of what you leave after any bequest you (may have) made or debt."

32. Based on these clear Qur'an edicts, the will dated 28 February 2008 is invalid as it purports to "gift" the deceased sons the entire estate to the detriment of the deceased wife and daughters. Secondly, as regards the parcel of land at "Gubalticha" purported to have been bequeathed to the whole family, it is noted that no proof of title was placed before court to show that it exists and it is also situated in Ethopia, which is outside the jurisdiction of the succession court and correctly could not be considered as part of the deceased estate within this jurisdiction.

33. Secondly, the respondent also strenuously denied ever signing the will dated 28th February 2008, while the Appellant and his witnesses insisted that she did sign the same. Under the said circumstance's, the said fact remained unproved based on section 3(4) of the *Evidence Act*, which provides that, " A fact is not proved when it is neither proved nor disproved". The learned trial Kadhi, was therefore right in his holding that the will dated 28th February 2008, was invalid and proceeded to distribute the estate on the bases that the deceased died intestate.

ii. Whether the learned Kadhi properly applied the law in distributing the deceased estate.

34. The learned Kadhi, correctly observed that the deceased was survived by one widow and ten (10) children and that there was no dispute as to who the legitimate heirs were, given that they were all "Dhawil-Furudh" (Qur'anic sharers).The learned Kadhi then proceed to distribute that estate in accordance with provisions of chapter 4:11 and 4:12 of the Holy Quran, specifically outlining the shares due to the deceased wife and all children.

35. The law on distribute by Qur'anic sharers was adhered to by the learned Kadhi and he specifically gave all heirs of the deceased their legitimate share. Again, on this ground of Appeal the learned Kadhi was right in his application of the law and his findings to that effect cannot be faulted

Disposition

36. Having exhaustively analyzed all the issues raised in this appeal I find that this Appeal lacks merit and dismiss the same with no order as to costs since the parties are family members

37. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT MARSABIT THIS 15TH DAY OF MAY 2025.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 15TH DAY OF MAY, 2025.

In the presence of: -

Ms Nyanki - Appellant

Ms Wangere - Respondent

Mr. Jarso - Court Assistant