



In re Estate of Ramadhan Hassan Kisarasara & 3 others (Deceased) (Family Appeal E002 of 2022) [2024] KEHC 1984 (KLR) (18 January 2024) (Judgment)

Neutral citation: [2024] KEHC 1984 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E002 OF 2022
G MUTAI, J
JANUARY 18, 2024**

BETWEEN

HASSAN RAMADHAN APPELLANT

AND

KHAMIS SOUD KIBIRINGO 1ST RESPONDENT

MOHAMED RAMADHAN HASSAN 2ND RESPONDENT

(Being an appeal from the judgment and orders of the Hon. Habib Salim Vumbi, Principal Kadhi – Mombasa, in Succession Petition No. 1 of 2019, delivered on 20th January 2022)

JUDGMENT

1. The National Lands Commission (NLC) acquired, through compulsory acquisition, part of property Plot No. 1748/Section VI/ MN for the purpose of construction of Magongo and Oil Refinery Road (A109). Two buildings stood on the said property. There was a business in one of the buildings. The said buildings were Swahili mud houses. A few heirs resided in the building on the property without paying rent. They made improvements on or reconstructed the estate house upon its weakening or collapse. The NLC made separate compensation awards for the acquired land, properties and business thereon amounting to Kes.15,018,444/-. It was made to specific persons interested in the land. The awards were for:-

Land Kes. 3,000,000/-;

Valuer of improvement Kes. 9,400,000/-;

Disturbance 15% of compensation



2. The title of the property is registered in the names of four deceased sons of Hassan Kisarasara, who had seven children. The distribution of the money paid by the NLC precipitated the petition and this appeal.
3. The Petitioner filed an amended succession petition in the matter of the estate of Ramadhan Hassan Kisarasara, Abdalla Hassan, Fatuma bint Hassan and Suleiman bin Hassan for orders for:-
 1. Determination of estate, heirs and their shares according to Islamic law; and
 2. An order from the Hon. Court to appoint Hassan Ramadhan, Aisha Ramadhan, Rukia Abdalla and Kassim Abdalla Hassan as the representatives of the deceased estates and be given powers of administration.
4. The Court, upon hearing the parties and witnesses, entered judgment and made the following orders:-
 1. The sole estate property, Plot No. 1748 / Section VI/MN, belonged to the seven siblings: Rukia, Suleiman, Amina, Fatuma, Salima, Abdalla and Ramadhan Hassan Kisarasara;
 2. The Court will not disturb the award made in favour of Swaleh Said Ali by the National Lands Commission.
 3. The court will not disturb the award made in favour of the deceased persons. The same in its entirety will be distributed to heirs herein in accordance with Islamic law.
5. Dissatisfied with the judgment, the petitioner filed this appeal on the grounds that:
 1. The Honourable Kadhi made an error of law and fact in failing to distinguish between house without land that was built by the Appellant and his sister from Plot No 1748/Section VI/MN, which constituted the estate for distribution, yet the said fact was admitted by the Respondents before the Kadhi;
 2. That the Honourable Kadhi committed a palpable error in law and fact in concluding that the estate consisted of Kes.15,018,444/- when the same was not supported by evidence on the record;
 3. That the Honorable Kadhi erred in law and fact in illegally judiciously amending the title deed to include parties that were not part owners in the title deed when the same is not within his jurisdictional mandate as a Kadhi and outside the purview of the Kadhi's Court;
 4. That the Honourable Kadhi committed a palpable error of law in raising and considering issues that were not raised in the suit as a basis of reaching a judicial finding;
 5. That the Honourable Kadhi erred both in law and fact in answering the question of who constituted the lawful heirs and beneficiaries to the estate;
 6. That the Honourable Kadhi erred in law in failing to consider any evidence whatsoever that was brought forward by the Petitioner/ Appellant;
 7. That the Honourable Kadhi erred in law in failing to render adequate reasons or any reasons whatsoever on the decision to lump together the land and the house built thereon by the Appellant and his sister;
 8. That the Honourable Kadhi erred in law and in fact by discriminatively treating the parties and the two properties on the subject land, by on one side acknowledging that one Swaleh Said Ali was entitled to compensation for the house he built on the land while refusing the



prayers that the Appellant and her sister be, on the same breath, compensated for the house they constructed on the land;

9. That the Honourable Kadhi erred in law in the manner he treated the issue of who was entitled to the disturbance allowance of business by failing to acknowledge exactly who had undergone the said loss and disturbance, hence reaching an unjust and unfair conclusion; and
 10. That the Honourable Kadhi erred in law and fact in the mode of distribution of the estate and used a mode that is manifestly unjust and unfair to the Petitioner/Respondent.
6. In my view, the issues for determination in this appeal are:-
1. Does the estate belong to the four children of Hassan Kisarasara only or to all his seven children? And
 2. Are the improvements and business part of the estate, or do they belong to those heirs who actually built them and ran the business?
7. This being a first appeal I have a duty to reconsider, re-evaluate all the evidence on record and come to my own independent conclusion bearing in mind that Islamic law applies to estates of deceased Muslims and appreciating the fact that the trial Kadhi had first-hand assessment of the witnesses.
8. The trial Kadhi held the land and the improvement of one of the properties on the land belonged to the estate because the ‘assertion (that the title consisted of only four but was for all seven siblings due to limitation on the number of persons who can be registered on in a title) was not contested and remained unchallenged, notwithstanding the fact that it was registered in the four deceased only.’ He went on to determine equal shares to each of the deceased seven children of Hassan Kisarasara.
9. It is not contested that the title of the estate property is registered in the names of the four deceased ‘as tenants in common in equal shares’, in the 1970s. This issue ought to have elicited heated arguments at trial. It appears from the proceedings that it did not elicit much opposition at trial. The appellant did not oppose the heirs inheriting the remaining plot/ land. Under cross-examination he stated ‘the plot was meant for all.’ The Kwa Hola Chief’s letter dated 3rd December, 2018 to the NLC listed the heirs of the four deceased and stated they stand for other siblings. The main concern of the petitioners was on the improvement on the land not being part of the estate. This is open to contrasting interpretation. It is instructive though, that the petitioner’s response to the respondent’s reply to the petition is clear the estate belongs only to the four deceased. There is not much evidence to support the respondent’s claim on the alleged omission of the other children of the late Hassan Kisarasara in the registration of the title of the property either.
10. Most families make oral agreements on serious issues contrary to both Islamic and statutory laws with grave consequences. Muslims are bound by their agreements. Strictly under Islamic law, notwithstanding registration, if evidence establishes property to belong to the deceased, it ought to be so declared. The evidence of the title registration is so strong as to need stronger evidence, such as admission, to counter it. In my view, there was insufficient evidence to lead to the finding that the property belonged to the patriarch Hassan Kisarasara and therefore available for inheritance to all his heirs.
11. The improvement made on the estate land fall under the house without land ownership unique and common in the coast region of Kenya. HCCA 74 OF 2007 *Shaban v Mwajuma Ulaya* cited with



approval the case of *Famau Munye & 19 others v Mariam Binti Said*, Malindi HCCA 34 of 2005, the court held:

"I have at the beginning of this judgment observed the unique features of the land tenure known as house without land and the fact that the terms in this particular instance were not reduced to writing; no matter what that arrangement is called, in my view it is a lease within the meaning of Sec. 105 of the transfer of property Act..."

12. In *Salim & Another v Mohamed* KLR EAC 1, the court stated:

"This case arises partly because of a peculiar land tenure phenomenon known only in Mombasa as house without land, defies the existing definitions of land in our laws but because of its notoriety the court has been forced to give it some measure of judicial notice. It has thus been recognized in various decisions that one may legitimately own a house temporary or permanent constructed on land owned by another person. I think the current initiatives towards reform of our land laws must come to terms with such phenomenon".

13. Owners of houses on land belonging to others cannot transact in the sale of their houses without consent and payment of lease amount / fees to the owner. The Kadhi was correct in not disturbing the awards to the beneficiaries as described by NLC. Any dispute on the beneficiaries ought to have been made at the NLC. However, those beneficiaries ought to pay the estate a fee for selling their said properties as is the practice on transactions involving houses without land. 20% to 30 % of the improvement awards to be paid to the estate would in my view be reasonable.

14. The upshot is that the appeal is merited. It be upheld save that the beneficiaries of the awards of the improvements on the land pay the estate 20% or 30% as the Hon. Judge will deem just to grant. This amount together with the award on the land will form the estate for distribution to the heirs of the four deceased herein, whose shares are as described by the trial Kadhi.

DATED AND SIGNED AT MOMBASA THIS 18TH DAY OF JANUARY 2024

GREGORY MUTAI

JUDGE

In the presence of:-

Mr. Adalla for the Appellant;

The Respondents (in person);

Arthur – Court Assistant

