



REPUBLIC OF KENYA



**KENYA LAW**  
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**Suya v Suya (Family Appeal E024 of 2022)  
[2024] KEHC 14198 (KLR) (18 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 14198 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
FAMILY APPEAL E024 OF 2022  
G MUTAI, J  
JANUARY 18, 2024**

**BETWEEN**

**MWANAKOMBI OMAR SUYA ..... APPELLANT**

**AND**

**MOHAMED OMAR SUYA ..... RESPONDENT**

*(Being an appeal from the ruling of the Hon. Habib Salim Vumbi, the Principal Kadhi, Mombasa in Kadhi Succession Petition No. 83 of 2007; Mohamed Omar Suya vs Mwanakombo Omar Suya, delivered on 15th July 2021)*

**JUDGMENT**

1. The Appellant was the Applicant in the matter before the Kadhi Court which is the subject of this appeal. In his decision the learned Kadhi held at the penultimate paragraph of his ruling that:-

“According to the current valuation, which has been adopted by this Honourable Court, the property is valued at Kes.16,000,000/-Therefore the Applicant is to buy the property at the current valuation, failure to it, any willing buyer will be at liberty to buy the property.”
2. The Appellant was aggrieved by the said decision and filed an appeal against the same. The appeal raises 3 grounds which I shall set out below:-
  1. The learned trial Kadhi erred in both fact and the law in considering irrelevant matters which were not material to the application before him which matters caused the Honourable Kadhi to make a wrong decision;
  2. The learned trial Kadhi erred, both in fact and the law, in failing to consider the relevant issues before him for determination thereby making a wrong decision; and



3. The learned trial Kadhi misapprehended the law thereby committing a grave error which occasioned a miscarriage of justice to the Appellant.
3. The Appellant thus seeks vide the subject appeal to have the said decision set aside and substituted with an order granting the application.
4. I have perused the Record of Appeal, considered the submissions and authorities filed in court and sought and obtained the opinion of the Chief Kadhi, the Honourable Abdulhalim Athman with whom I sat during the hearing of this matter.
5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
4. In the case of *Mbogo and another vs Shab* [1968] EA 93 the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
5. The duty of the first appellate Court was settled by Clement De Lestang, VP, Duffus and Law JJA, in the case of *Selle & another vs Associated Motor Boat Company and Others* [1968]EA 123, where they stated as follows:-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”
6. An appellate court has to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that observed the demeanor and truthfulness of those witnesses. However, documents speak for themselves.
7. What then was the evidence before the trial Court? I have perused the Record of Appeal and note that the late Omar Mohamed Suya died in 2000. His estate, heirs and their shares were determined in 2009. He left nine properties and ten sons and eleven daughters. The appellant and her children live in one of the estate properties, a house without land in Majengo, Mombasa. They were given leave to buy it Kes.4,000,000/- in 2010. She came to court to buy it at the same price in 2020. The Respondents do not object to her buying it but aver that she must do so at the current market price.
8. The Respondent filed succession petition dated May 8, 2007 in the matter of the estate of the deceased herein for orders for:
  1. Determination of estate; and
  2. Distribution of estate to the legal heirs.
9. The court (per Hon. Twalib B. Mohamed), upon hearing the parties and witnesses entered judgment delivered on March 10, 2009. He made findings on what constituted the estate, the legal heirs and



- their shares under Islamic laws of inheritance. He took the views of the legal heirs on the mode of distribution and directed that the properties be valued.
10. On November 29, 2010, the trial court adopted the valuation of Kes.4,000,000/- for the house without land at Majengo, Sokoni, Mombasa Island, and gave first priority to any heir to buy the house otherwise it would be sold through public auction.
  11. Through Notice of Motion dated October 8, 2020, the Appellant prayed for orders for leave for the firm of Aboubakar Mwanakitina & Co. Advocates to act for her in place of the firm of Maranga Maosa Advocates and that she and her children be allowed to buy the house without land at Majengo at Kes.4,000,000.00, pursuant to the ruling of November 29, 2010.
  12. The application was opposed as it was allegedly below the market price as eleven years had passed since the last valuation. The Respondent produced what he said was a current valuation indicating the market price of the property then as being Kes.16,000,000/-.
  13. The Hon. Habib Salim Vumbi on July 16, 2021 ruled on the application adopting the valuation of the property as being Kes.16,000,000/- and gave the Appellant the first priority to buy the property, failure to which any willing buyer would be at liberty to buy the same at market value.
  14. Counsel of parties filed written submissions.
  15. Mr. Aboubakar for the Appellant submitted that the prayer to allow the Appellant and her children to deposit shares of her siblings was not considered by the trial Kadhi. He submitted further that no application for review of the value had been filed. He further submitted that the learned Kadhi ought to have referred to the ruling on of November 29, 2010 and determine whether the property was a house without land and if the Appellant could use her share of the estate and pay balance if any.
  16. Mr. Oddiaga for the Respondent submitted that the appellant failed to purchase the property in 2010 and that it is not beneficial to the estate to sell the property at the price of 2010 when the market value has increased due to inflation.
  17. The key issue for determination in this appeal is what is the correct time to consider value of estate property for distribution to heirs in dispute. Is it at the time of pronouncement of judgment or actual time of distribution or upon demand?
  18. In arriving at my decision I have the duty to reconsider and to re-evaluate all the evidence on record and come to my own independent conclusion of facts and law. I will only depart from the findings by the trial court if they were not based on evidence on the record, where the court is shown to have acted on wrong principles of law as was held in *Jabane vs Olenja* [9168] KLR 661 or where the discretion was exercised injudiciously as held in *Mbogo & Another vs Shah* [1908] EA 93.
  19. Fairness and equity are cornerstones of distribution of estates of deceased Muslims. Heirs have, as a matter of right and general rule, the first priority to buy estate properties of their deceased.
  20. It is the duty of the court upon determination of estates available for distribution, legal heirs and their respective shares to have proposals on mode of distribution of the estates. In cases where the estate consists of more than one property, the mode of distribution should be based on the value of the estate properties and the respective shares of each or group of heirs. The Saudi Judicial Journal Vol. 12



1440H, at page 301 cited with approval Ahmad ibn Ghanim Shihabudin Al Naqrawy's '*Al Fawakih al Dawany ala risalat ibn Zaid Al Qairawany*' at vol. 2 page 243 stated:

'Valuation is a must if the joint ownership is immovable property or animals. Consideration cannot be given to acreage if it is immovable property or numbers if it is in the form of animals.'

21. The value of the property for distribution is considered not at the time of death of the propositus but at the time of demand or distribution of the estate. Valuations have first to be adopted by court which then either allocates properties to heirs considering among other factors the value of their shares. The court ought to set a time-frame to settlement of any balance due to other heirs to avoid prejudice resulting from inflation and other economic factors. The court has discretion to review the share or price payable to the estate if there has been inordinate delay in the settlement of payment. In *Durarul Abkam fi Shirh Majallat Al Abkam* it is stated:-

'it is imperative, whether it is through consent or court, that distribution of estates is just, according to the shares without one or some of the heirs getting far less than their requisite shares. For this reason a claim of great disparity in value, if proven, may be allowed and earlier distribution revoked or reviewed.'
22. According to the judgment of the trial court, there are nine properties of the estate. The property in issue in this appeal is the House without land at Majengo Sokoni. The direction to valuers should be clear and very specific on the property in issue.
23. It is noted that the court had declared Swahili house on Plot No. 251/ XVI Mombasa part of the estate. There are two valuations for Mombasa/ Block XVI/495 in the record. One done by Paul Wambua Valuers in 2010 which puts the value of the property at Kes.7,000,000.00 and one done by Basemark Valuers in 2020 which put the value of the same property at Kes.16,000,000/-. Notably the 2010 valuation only valued the developments and did not include the value of the land as the land does not belong to the estate.
24. It noted the land, on which the property is developed, has a freehold title held by Salim Bin Yumen and Mohamed Ahmed Bin Yumen. The Basemark Valuation for the land is Kes.7,500,000/-, while that of the developments thereon is Kes.8,500,000/-. Their valuation for the entire property was Kes.16,000,000/- There is no record the court ordered that the property be valued or that the Appellant was given a corresponding leave to do her own valuation.
25. The valuation adopted by the Court in 2010 is no longer current as more than ten (10) years have lapsed since it was done. It is only just and fair that the court directs and adopts a new valuation of the estate property. In this regard the trial court did not err.
26. However, the valuation of Kes.16,000,000/- is misleading and incorrect as it includes the value of land which does not belong to the estate. The learned Kadhi erred in this regard.
27. More than two years have since passed since the last valuation. The Respondent's valuation, even if it was proper, is no longer valid.
28. In the circumstances I find and hold that the appeal has merit. The decision of the Hon Kadhi is set aside. The Swahili House without land on Mombasa/ Block XVI/495 is to be valued afresh by the Government Valuer. The valuation shall take into consideration the estate's interest in the property. The valuation report shall be filed at the Kadhi's Court for purposes of adoption.



29. I direct that the Appellant shall settle the value of the share of her co-heirs within six (6) months of the date the fresh valuation is adopted by the Kadhi's Court.
30. I direct that all the assets of the estate be distributed to the beneficiaries in accordance with Islamic law as the distribution of the estate of deceased herein is not fully settled. I note with concern that it has been done piecemeal.
31. This being a family matter each party shall bear own costs.
32. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 18<sup>TH</sup> DAY OF JANUARY 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

Mr Aboubakar for the Appellant;

Mr Oddiaga for the Respondent; and

Arthur – Court Assistant.

