



**In re Estate of the Late Abdallah Lutomia (Succession Cause
10 of 2019) [2024] KEHC 2835 (KLR) (12 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2835 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 10 OF 2019
PJO OTIENO, J
MARCH 12, 2024**

BETWEEN

ABDULAZIZ ABDALLAH APPELLANT

AND

SOPHIA ANZETSE ABDALLAH RESPONDENT

*(Being an appeal from the judgment of Hon. Shaban Issa M (SRK)
in Kakamega Kadhi's Court Succession Cause No. 3 of 2018)*

JUDGMENT

1. By way of a plaint dated March 7, 2018, the respondent sued the appellant on claims that the appellant had encroached on to land that was meant for inheritance by the daughters of the deceased and fraudulently procured and obtained land title in respect to the property which he again subdivided.
2. The respondent's case was that prior to the deceased's death, the deceased had allocated land to his sons from his two houses and retained a portion which he directed would be shared by the daughters. At the time of the deceased's death, only the appellant from among the sons of the deceased had not procured a title for the share that he had been allocated to him by the deceased and so when he sought the transfer process, he combined his share with that which was meant for the daughters and obtained a joint title in respect thereto.
3. In his statement of defence filed in court on 11/6/2021, the appellant denied the claims by the respondent and stated that the deceased had transferred to him the land in question.
4. In a judgment of the trial court delivered on 30th July, 2019, it was a finding of the court that the parcel in dispute namely Isukha/Shirere/3533 measured 0.32 Ha, whereas the deceased had bequeathed the appellant land measuring 0.24 Ha. The trial court thus ordered the cancellation of title No. Isukha/Shirere/5344 and 5345 which were a culmination of the subdivision of Isukha/Shirere/3533 and directed that the property reverts to its original state of registration so that the portion of land intended



for the first wife go to the respondent and her sister as inheritance and that rental houses be divided equally between the two houses.

5. Aggrieved by this decision, the appellant lodged a memorandum of appeal dated 29th October, 2019 which is premised on the following grounds;
 - a. That the Senior Resident Kadhi erred in fact and law in deciding in favour of the respondent when the respondent had not proved her case on the required standard.
 - b. That the Senior Resident Kadhi erred in fact and law in failing to properly analyze the evidence on record and thereby arrived at a wrong decision.
 - c. That the Senior Resident Kadhi erred in fact and law in failing to give due regard to the contradictory evidence adduced by the respondent in support of her case.
 - d. That the Senior Resident Kadhi erred in fact and law in rejecting the evidence of the appellant.
6. The appellant thus prays that the appeal be allowed and the decision of the lower court be set aside.
7. The appeal has been canvassed by way of written submissions, in which submission the appellant contends that the respondent moved the court in Kakamega CMC Succession Cause No. 308 of 2019 and had parcel of land known as Isukha/Shirere/3533 registered in her name. He claims that prior to his death the deceased had subdivided Isukha/Shirere/2712 into 3533,3534,3535,3536,3537,3538 and 3539 and transferred them save for 3533 which he subdivided into 5344 and 5345 and then transferred 5344 in his name. He further asserted that the deceased died on 4/2/2012 and not on 4/2/2010 as indicated in the plaint.
8. It is her submission, the respondent posits, that Isukha/Shirere/3533 was not subdivided by the deceased and that the copy of the register from the land registry dated 12/11/2018 and that dated 20/3/2019 captures different national identity card numbers for the same deceased.

Issue, Analysis and Determination

9. Looking at the record of appeal and the submissions by the parties, the sole issue to be determined by the court is whether the subdivision of parcel of land known as Isukha/Shirere/3533 was effected so as to take away what the deceased intended as inheritance to the respondent.
10. It is not disputed, from reading of the proceedings before the trial court, that prior to his death the deceased had subdivided Isukha/Shirere/2712 into 3533,3534,3535,3536,3537,3538 and 3539 and transferred them to his sons save for 3533. The contention now arises with the parties arguing whether or not the deceased then again subdivided Isukha/Shirere/3533 into 5344 and 5345.
11. Though the dispute at hand appears to relate to land, Section 47 of the *Law of Succession Act* and rule 73 of the *Probate and Administration Rules* accords this court the inherent powers and jurisdiction to entertain and determine any disputes on succession between beneficiaries and pronounce orders it deems fit. In addition, the trial court proceeded from the very clear premises that the dispute was over inheritance and the matter is before the court by way of appeal on the courts jurisdiction under article 165 (3) as read with section 7 of the *Kadhis Court Act*.
12. Being a first appellate court, the law cautions against free and indiscriminate interference with factual findings of the trial court as the trier of facts. The appellate court would only interfere with findings of fact in circumstances where such findings are not supported by evidence or just perverse. The court



is guided by the decision in *Susan Munyi v Kesbar Shiani*, Civil Appeal No. 38 of 2002, the Court of Appeal underscored that restraint on appellate court in the following words: -

“As a first appellate court, our duty of course, is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions. In undertaking this task, however, we always bear in mind that unlike the trial court which had the advantage of hearing and observing the witnesses, we make our conclusions from the evidence as captured in the cold letter of the record. We therefore operate under a decided handicap as there is much to be gleaned from the demeanor and nuanced communication of a live witness that is inevitably unavailable, indeed lost, on the record. For precisely this common sense reason, an appeal court must accord due respect to the factual findings of the trial court and will be circumspect and slow to disturb them.” (Emphasis provided)

13. In coming to its conclusions the trial court, as the trier of facts, which had the benefit of listening to the parties and observed the witnesses as they gave evidence did render itself as follows;

“In my view, if the respondent was given 0.24 Ha. as per his title deed then he needs to stick to what he was allocated, then the remaining portions ought to be given to the other inheritors because 0.32 Ha. is slightly higher than his share of (0.24 Ha.).”

14. That finding sits well with the evidence led and arises from the due analysis by the trial court. It invites no interference and the court finds that it must be upheld.
15. The appeal is consequently dismissed to enable the trial court’s determination be implemented. The decision of the trial court cancelling the subdivision of Isukha/Sherere/3533 is upheld. Let the decision of the trial court be implemented forthwith.
16. On costs the court notes that the dispute pits a brother against a sister. Each shall bear own costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 12TH DAY OF MARCH, 2024.

PATRICK J O OTIENO

JUDGE

In the presence of:

Mr. Isiaho for Mukavale for the Appellant

Respondent in person

Court Assistant: Polycap

