



REPUBLIC OF KENYA



**Omar v Kassim (Civil Appeal 35 of 2017)
[2024] KEHC 11677 (KLR) (Family) (12 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 11677 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY
CIVIL APPEAL 35 OF 2017**

PM NYAUNDI, J

JULY 12, 2024

BETWEEN

KARAR OMAR APPELLANT

AND

ASHRAF ABDUL KASSIM RESPONDENT

(An appeal from the Judgment of Honourable A.I. Hussein, Senior Resident Kadhi, delivered on 22nd May 2017 in Nairobi Kadhi Succession Cause No. 22 of 2015)

JUDGMENT

Background

1. The dispute herein revolves on what properties comprise the estate of Maryam Juma (deceased) who died on 11th March 2010. The Appellant herein contends that Kibera Plot No. 40 was not solely owned by the deceased and that he and others are entitled to a portion of the land. The dispute centers around the relationship, if any, of the estates of 3 deceased persons; namely Khadija Abdalla Juma (Mother to the Appellant; Succession Cause No. 1493 of 1991); Abdalla Juma (Grandfather to the Appellant, Succession Cause No. 1790 of 1995, Estate of Abdulla Juma Khandi) and MaryAm Juma (sister to Abdalla and grand aunt to the Appellant).
2. Upon the death of Maryam Juma, Ashraf Abdul Kassim filed a petition for grant of probate will in Nairobi H.C. Succession No. 689 of 2010. The will subject of the Petition is dated 3rd October 2009. The appellant objected to the Petition, challenging the validity of the will. The basis of the challenge is that the deceased purported to bequeath assets that do not comprise part of her estate and that actually formed part of his mother's estate.



3. On 26th June 2014, Honourable Justice Luka Kimaru (as he then was) referred this matter to the Kadhis court for hearing and determination.
4. Apart from High Court Succession No. 689 of 2010. The Parties have also litigated in Succession Cause No. 1790 of 1995, Estate of Abdulla Juma Kibanda (who died in 1995) in which Sitna Juma, Maryam Juma and Khadija Abdalla (all deceased now) were appointed administrators of the Estate of Abdulla Juma Kibanda upon revocation of grant issued to Ibrahim Musa and Karar Omar (The Appellant herein).
5. The Estate of Abdulla Juma Kibanda was the subject in Kadhi's Court Civil Case No.94 of 1999 in which by order dated 22nd May 2000, the Court held that the lawful beneficiaries of his estate were Sitna Juma, Maryam Juma and Khadija Abdalla and determined their shares to be 192/456, 192/456 and 72/ 456 respectively. The Court pointedly held that the Appellant herein (who was the plaintiff) was not an heir to Abdulla Juma Kibanda.
6. Pursuant to the directions of the Court in Nairobi H.C Succession No. 689 of 2010, the Appellant lodged Succession Cause No. 22 of 2015 (Nairobi Kadhi Court) in which he challenged the validity of the will and specifically staked a claim to Plot No. 40 Kibera Lindi stating he was entitled to the share of his late mother, Khadija Abdalla Juma. In Judgment of 22nd May 2017, the Court dismissed the suit and found that the will of the deceased was valid and affirmed the earlier judgment in in Kadhi's Court Civil Case No.94 of 1999, that identified the beneficiaries of the estate of Abdulla Juma Kibanda, Deceased.
7. The Appellant herein was dissatisfied with the Kadhi's decision and filed a memorandum of appeal dated 25th May 2017 raising the following grounds of appeal:-
 1. That the Honourable Kadhi erred in fact and in law in finding that the applicant and other beneficiaries of the estate of the deceased have no legal claim against the estate of the deceased.
 2. That the Honourable Kadhi erred in fact and in law by failing to make into account the interests of the Applicants and other beneficiaries to the estate by generalizing the deceased's properties to include that which never formed part of the disputed estate.
 3. That the Honourable Kadhi erred in fact in failing to take into account the findings of the site visit conducted by the trail court in he course of its proceedings.
 4. That the Honourable Kadhi erred in fact and in law by condemning the appellant to pay costs of the suit as the Petition Succession Cause 689 of 2010 filed in the High Court and that inevitably led to Succession Cause 22 of 2015 filed at the Kadhi's Court was instituted by the Respondent.
 5. That the Honourable Kadhi erred in fact and in law by failing to take into account the evidence adduced by the appellant and his witnesses thereby arriving at a wrong conclusion.
 6. That the Honourable Magistrate erred in law by failing to pronounce an explicit ruling on the mode of distribution of the estate as per Justice L. Kimaru's directions.
 7. That even after the Honourable Magistrate found that under Islamic law testate succession is subject to two principal restrictions, this being that a testator is entitled to dispose his property only to one third and the other being that disposition is not to be made in favor of legal heirs, he still upheld the will in favor of the Respondent without saying anything further as with regards to distribution of the estate of the deceased to the supposed intestate beneficiaries.
 8. The appellant prayed that the appeal be allowed and each party bear their own costs.



9. This being a first Appeal the Court is obligated, as was stated in *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 and *Peters v Sunday Post Limited* [1958] to re-evaluate the evidence before the trial Court as well as the judgment and arrive at its independent conclusion bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.
10. In the case of *Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021)* [2022] KEHC 282 (KLR) (6 April 2022) (Judgment) Hon. Mativo J (as he then was) further enunciated on the role of the Appellate Court as follows
11. A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.

Summary Of Evidence In Trial Court

12. PW1, Hassan Hussein told the court that Abdullah Juma was his grandfather. His evidence was that Abdullah Juma and their siblings owned some rooms. Abdullah Juma went to work in Labon and left Khadija (his wife) to manage his rooms. When Khadija died, the property was managed by Abdullah Juma. After the death of Abdullah Juma, the properties were managed by Sitna, then Maryam Juma and then Ashraf. They had a family meeting after the death of Maryam but did not agree on how to distribute the deceased's estate. Ashraf started collecting rent from the estate and built a house without consulting the other beneficiaries.
13. PW2, Aziza Hussein, told the court that when Maryam died, a meeting was held and the elders told Ashraf to distribute properties registered in Maryam's name to all the beneficiaries. The children adopted by Maryam did not get any inheritance. According to him, it is not fair for Ashraf to inherit properties belonging to Abdullah Juma and mama Khadija Juma.
14. PW3, Ismail Ramadhan, told the court that Abdullah Juma was his grandfather. Maryam did not give any inheritance to her adopted children. She bequeathed all her property to Ashraf. According to her, Ashraf denied the appellant her inheritance.
15. PW4, Karar Omar told the court that Maryam Juma was a sister to his grandfather. Maryam Juma did not leave any inheritance to her three adopted children. He was supposed to inherit from his grandmother's estate. According to him, Ashraf is entitled to inherit from the estate of Sitna Juma but not Abdullah Juma. The properties in dispute are 97 rooms which belong to his mother and grandfather. Maryam had 30 rooms. The remaining 30 rooms belong to the other beneficiaries. Zahra has 3 rooms. The will presented by Ashraf is misleading the court. The rooms in dispute are not 176. Plot number 41 is mentioned in Maryam Juma's will.
16. During cross examination, he stated that he was given letters of administration in High Court Succession No. 1790 of 1995. The court held that he was a beneficiary of his mother's estate. He did not inherit Abdalla's property from his mother. The property in dispute is plot no. 41, not plot no 42. Abdullah Juma owned 41/F. He did not have a good relationship with Maryam Juma .



17. In re-examination, he stated that in Islamic law, one cannot inherit property belonging to a sibling if the grand children of deceased are still alive. Sitna's children cannot inherit from his mother's estate.
18. The appellant closed his case and the Respondent testified and called three witnesses.
19. Kassim A. Abdul testified as DW1. He told the court that he was the petitioner in Succession Cause No. 689 of 2010 and he is the respondent in Succession Cause No. 22 of 2015. That the estate belongs to Maryam and Khadija. Maryam Juma Kibanda inherited 28 acres from her parents. He has a claim in Maryam Juma's estate. When Abdallah Juma died in 1995, Mr Ibrahim and Karar moved to court to obtain letters of administration in Kadhis Successiion Cause 94 of 1999. According to him, Karar inherited 70 rooms which belonged to his mother; his mother sold some rooms after the demise of her mother. Maryam Juma had 174 rooms while Abdallah had 174 rooms. Maryam inherited her father's property.
20. During cross examination, he stated that Abdallah Juma's properties were plot no. 40 and 41. They had 174 rooms, Sitna had 36 rooms. Sitna's properties are under Suleiman Kassim. Abdallah Juma had 54 rooms in Kibera. The property was divided between two sisters and a wife. The court made a decision in Maryam Juma's estate that Khadija should get 2/5 of her assets but it was not divided. He told the court that Maryam did not have biological or adoptive children. HCCC No. 1790 of 1995 was consolidated with P&A 689 of 2016 and was concluded. The estate of Abdallah Juma was heard and determined by the court.
21. DW2, Ali Yusuf, told the court that he testified in Kadhi's Succession Case No. 94 of 1995 and HCCC No. 1790 of 1995. His evidence was that Maryam left a will appointing Ashraf as the executor. Maryam called him and informed him of her decision. He was a witness in the will.
22. During cross-examination, he stated that Maryam was not ill when she wrote the will. She also understood what she was bequeathing and to who.
23. DW3, Suleiman Kassim told the court that he is the father of Ashraf and an uncle to Karar. The applicant did not have a good relationship with Abdallah Juma. Abdallah Juma gave Karar 60 rooms, which was his mother's share.
24. During cross-examination, he stated that Khadija predeceased Abdallah and Karar was given his mother's share. Abdallah gifted his property to his sister and Karar's mother.
25. The appellant testified on 16/1/2017. He told the court that Maryam inherited property from his grandfather and Khadija. Maryam had properties in Kibera, Mombasa and Athi River. Maryam Juma inherited property from his mother and grandfather.
26. During cross-examination, he stated that the property in Kibera was never distributed. Plot No. 41 Kibera belongs to his mother and the whole family. Plot No. 40 has no title.
27. The Court directed that the matter be canvassed by way of written submissions. Both parties complied and filed their respective submissions.

Appellant's Submissions.

28. The Appellant's submissions are dated 17th January 2024. The Appellant identified the following as issues for determination;
 - a. Whether the appellant and other beneficiaries have a legal claim against the estate of the deceased and what forms part of the esttae in dispute.



- b. Whether the honourable Kadhi erred in fact and in law by condemning the appellant to pay costs.
 - c. Whether the Honourable Kadhi erred in law and in fact by upholding the will in favour of the Respondent.
29. On the first issue, it was argued that the estate of Maryam Kibanda is comprised of the estate of the late Khadija Abdalla and the late Abdalla Juma and all the beneficiaries of all the estates should benefit. It was argued that Maryam Kibanda did not have biological children but she had adopted three girls who according to Islamic law, they should be recognized and also get a share of the deceased's estate. Reliance was placed on the decision in *In the matter of the Estate of Ishmael Juma Chelanga (Deceased)* [2002]eKLR.
30. On the second issue, it was argued that Section 27 of the *Civil Procedure Act* states that costs follow the event in civil cases. On this issue, it was argued that this is a family matter and the appellant should not have been condemned to pay costs. Also, the court did not give reasons as to why the appellant was condemned to pay costs. Reliance was placed on the decision in *In re Estate of Priscillah Cherono Chepkwony (deceased)* [2021] eKLR.
31. On the third issue, it was argued that the will of Maryam Kibanda had been challenged in the Kadhi's Court on the ground that she was of unsound mind when she wrote the will. The will had errors especially where the deceased indicated that her father's name is Abdul Kassim Suleiman instead of Mzee Juma Kibanda. Relying on the decision in *In re Estate of OSS (Deceased)*, Succession Cause 89 of 2012 on restrictions as to the extent the deceased can bequeath and to whom, it was submitted that the Kadhi erred by upholding the will in favour of the respondent.

Respondent's Submissions

32. The Respondent's submissions are dated 27th March 2024. The Respondent identified the following as issues for determination;
- a. Whether the honourable court misguided itself on the judgment delivered of 22nd May 2017.
 - b. Whether this court ought to interfere with the decision of the Kadhi Court.
33. On the first issue, it was submitted that the Kadhi's court agreed with the decision of Honourable Kassim which was in line with Muslim law. It was argued that the high court referred back the matter to the Kadhi's Court because all the parties were Muslims. The Kadhi's Court had the opportunity to hear and determine the suit before the court.
34. Relying on the decision in *Shah versus Mbogo and Another* [1967] EA 116, The Respondent argued that this court should be slow to interfere with the decision of the Kadhi.

Analysis And Determination

35. Having considered the pleadings herein, the submissions filed, authorities cited and the relevant law, I discern the issues for determination to be
1. Whether Will dated 3rd October 2009 is valid
 2. Whether this Court should reverse the Order of the trial Court condemning the Appellant to pay costs



3. Who should pay costs of the Appeal On the 1st issue, Section 5 of the *Law of Succession Act*, provides that any person who is of sound mind, and who is not a minor;
- may dispose of all or any of his free property by will
36. The Appellant’s claim turns on his assertion that his deceased mother Khadija Abdalla Juma Kibanda had a share in the estate of his deceased grandfather Abdulla Juma Kibanda. The question of who the heirs to the estate of Abdulla Juma Ibrahim was determined in Kadhis Court Civil Case No. 94 of 1999.
37. As stated earlier the Court expressly stated that the plaintiff was not one of the heirs of the late Abdalla Juma Kibanda, this was on 22nd May 2000. The Appellant has not appealed against that decision. The Appellant was the Plaintiff in that matter.
38. Having so observed, I agree with the trial magistrate that the issue of the rightful heirs to the estate of Abdalla Juma Ali has been determined and is not open to challenge at this stage.
39. On whether the properties do not form the free state of the deceased (Maryam Juma), the Appellant has not placed any evidence before Court that amounts to a sustainable challenge to the title of the deceased. Accordingly I decline to nullify the will and uphold the decision of the trial court and find that the will of the deceased is valid.
40. On the 2nd Issue, whether the trial Court erred in directing that the Appellant meet the costs, The defendant relies on Section 27 of the *Civil Procedure Act* which provides
- Section 27 provides: -
- “(1)Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”
41. In Republic v. Rosemary Wairimu Munene (Ex parte Applicant) v. Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application No. 6 of 2004 Mativo J. (as he then was) held that the issue of costs is the discretion of the Court and is used to compensate the successful party for the trouble taken in prosecuting or defending the case and not to penalize the losing party. This position was adopted by the court in Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & Another [2016] eKLR .
42. The import is that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exists some other good reasons and or cause for not awarding costs to the successful party.
43. Any departure from this trite law can only be for good reasons which the Supreme Court in Jasbir Singh Rai & Others vs Tarlochan Rai & Others [2014] eKLR noted includes public interest litigation since in such a case, the litigant is pursuing public interest as opposed to personal gain.
44. The factors should be taken into consideration when determining the costs of suit were addressed by the learned judge in Morgan Air Cargo Limited v Evrest Enterprises Limited [2014] eKLR to include:
- a. the conduct of the parties



- b. the subject of litigation
 - c. the circumstances which led to the institution of the proceedings
 - d. the events which eventually led to their termination
 - e. the stage at which the proceedings were terminated
 - f. the manner in which they were terminated
 - g. the relationship between the parties and
 - h. The need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of *the Constitution*.
45. In this case the court has not been shown any cause why it should deny victor the costs. Accordingly the appeal fails on this ground too.
46. The Appeal having failed, I give directions on how the matter will proceed as I note that the Petition is yet to be gazetted.
47. Accordingly the Petitioner in High Court Succession Cause No. 689 of 2010 should now proceed to have the matter gazetted and process the same for issuance of grant
48. These then are the final orders herein
- a. The Appeal is dismissed in its entirety with costs to the Respondent.
 - b. High Court Succession Cause No. 689 of 2010 be mentioned before the Deputy Registrar Family Division on 13th August 2024 to confirm the same is ready for gazette and to take further directions

SIGNED, DATED AND DELIVERED VIRTUALLY IN NAIROBI ON 12th DAY OF JULY, 2024.

P M NYAUNDI

HIGH COURT JUDGE

In the Presence of:

Fardosa- Court Assistant

Ms. Martina for Respondent

Ms Odhiambo h/b for Mbuthis Kinyanjui for Appellant

