



REPUBLIC OF KENYA



**Mfumanze & 3 others v Athman & 3 others (Family Appeal
14 of 2020) [2024] KEHC 16735 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 16735 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL 14 OF 2020
G MUTAI, J
OCTOBER 17, 2024**

BETWEEN

**MWANAIIDI MFUMANZE 1ST APPELLANT
ALI NASSER ATHMAN 2ND APPELLANT
TUBA SABRA ATHMAN 3RD APPELLANT
ARAFAT ABDALLAH ATHMAN 4TH APPELLANT**

AND

**HALIMA ATHMAN 1ST RESPONDENT
FAIZ ATHMAN 2ND RESPONDENT
HAMDAN GANDI ATHMAN 3RD RESPONDENT
BAKARI SHANDALA ATHMAN 4TH RESPONDENT**

JUDGMENT

1. Before the Court is an appeal against the decision of the Hon Khamis Ramadhan, Senior Resident Kadhi, delivered on 13th February 2020. Vide the said decision, the learned Senior Resident Kadhi distributed the estate of the deceased and also ordered that the costs of the suit be borne from the estate.
2. The appellants were aggrieved by the decision and filed the appeal herein. The Memorandum of Appeal is dated 13th August 2020 and was filed on an even date. The appeal raised seven grounds to wit:-
 1. The honourable trial Kadhi erred on law and, in fact, by holding that the estate of Athman Ali Masa (deceased) did not comprise any of the properties in Tanzania;
 2. The honourable trial Kadhi erred on law and, in fact, by holding that the properties in Tanzania were solely part of the estate of Mwajabu Mwidadi (deceased), who was 1st wife of Ali Athman



Masa (deceased), in spite of glaring evidence to the contrary and the fact that the said Mwajabu Mwidadi (deceased) did not have a known source of income in her lifetime;

3. The learned trial Kadhi erred in law and, in fact, by arriving at a judgment which essentially handed over at least half of the estate of Athman Ali Masa (deceased) to only a few of the heirs of the estate;
 4. The honourable trial Kadhi erred in law and fact by holding that the property known as Peleleza Bar was not part of the estate of Athman Ali Masa (deceased) but was instead part of the estate of Ali Shandalla (deceased);
 5. The honourable trial Kadhi erred in law and fact by declaring that the old Post Office building standing on Plot No. 5 situated at Mazeras, Kilifi County, is the private property of Amina Nangera, who was not a party to the succession proceedings before the Court, and by following this declaration with a contradictory declaration that all the improvement made on the said plot were part of the estate of Athman Ali Masa (deceased) and therefore subject to a fair and just distribution to all the heirs of Athman Ali Masa (deceased);
 6. The honourable trial Kadhi erred in law and, in fact, by relying on extraneous matters neither pleaded nor advanced during the hearing of the proceedings before him in arriving at his decision;
 7. The learned trial Kadhi erred in law and, in fact, by delivering a judgment contrary to the law.
3. This being a first appeal, this court is under a duty to re-evaluate and reassess 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 Shah* [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. The appeal was canvassed by written submissions, which the parties highlighted on 8th July 2024 before the Judge and two Kadhis.
 7. Ms Katama, learned counsel for the Appellant, submitted that the Honourable Senior Resident Kadhi erred in law by holding that Tanzanian properties were not part of the estate. This, she submitted, was contrary to the evidence adduced in the lower Court by the witnesses and contradicted the evidence



- that was produced, which showed that the Tanzanian properties formed part of the estate of the deceased.
8. It was submitted that by excluding the Tanzanian property the estate of the deceased was reduced by half and that by dint of that, only a few heirs largely benefitted from the estate of the deceased.
 9. Regarding Peleleza Bar, it was submitted that the Kadhi erred by holding that it wasn't part of the estate and that it belonged instead to Ali Shandala, who was the father of the deceased herein. Counsel submitted that since the deceased was the only heir of Ali Shandala, Peleleza Bar belonged to him by dint of section 38 of the *Law of Succession Act*.
 10. Counsel urged that the learned Kadhi also erred in declaring that the old Post Office building standing on Plot No 5 Mazeras belonged to Amina Nangera, who was not a party to the proceeding and also by making a contradictory finding that improvement on it formed a part of the estate. Ms Katama submitted that there was no evidence that the deceased made a bequest to Amina Nangera on account of her having been born out of wedlock. She stated that Ms Nangera wasn't called to testify to that effect. It was counsel's submissions that under Islamic sharia a bequest ought to be in writing to be effective.
 11. Counsel urged that the learned Kadhi relied on matters which were not pleaded and made his decisions on matters that were not advanced during the hearing.
 12. Ms Katama prayed that the appeal be allowed.
 13. The respondent opposed the appeal. Mr Mwadzogo learned counsel for the respondent submitted that the appeal was against a part of the estate and not the whole of it. It was his submission that there was no contestation as to who the heirs of the estate were and what properties formed the estate. He submitted that the dispute was fictitious.
 14. Counsel submitted that there was insufficient evidence to support the allegation that there were Tanzanian properties. Counsel made reference to pages 102 to 109 of the Record of Appeal. The said documents, he argued, did not show that the deceased had properties in Tanzania. Counsel disputed this Court's jurisdiction over the Tanzanian properties.
 15. Regarding Peleleza Bar, Mr Mwadzogo urged that it belonged to the father of the deceased. He, therefore, submitted that the finding of the Court in this regard was sound.
 16. Mr Mwadzogo agreed with Hon. Kadhi that Ms Amina Nangera was the daughter of the deceased, born out of wedlock. The property was gifted to her by the deceased. Since the said property had been gifted to her the same wasn't part of the estate. He submitted that the said fact had been recognized by the beneficiaries of the estate.
 17. Counsel urged that even if the Court found the appeal merited, it shouldn't interfere with the distribution of the estate, which ought to be allowed to proceed. The basis for this is that the disputed properties could be sequestered until a resolution was reached, even as the rest were distributed.
 18. I have considered the appeal, the record of the proceedings of the court below and the oral and written submissions of the parties. I must now determine if the appeal ought to be allowed or not.
 19. In my opinion, the Honorable Kadhi properly identified the estate of the deceased, the heirs and their respective shares in accordance with Islamic Law. I note from the record of appeal and also from the submissions of the parties that there was no serious contestation as to what assets formed the estate and who the heirs were. For instance, the Petition dated 17th June 2013, filed by the 1st Respondent, listed the estate properties and the beneficiaries. The Appellant filed a reply to the Petition dated 23rd



of June, 2014 and in paragraphs 3 and 4 of the said reply, did acknowledge the persons mentioned in the Petition as the heirs and beneficiaries and also agreed that the assets of the estate had been properly identified, save that added other properties allegedly belonging to the deceased in Tanzania. With that, the issue relating to the estate properties disclosed in the Petition, as well as the heirs, was through consensus. In my view, the court below correctly and properly identified the shares in accordance with Islamic Law.

20. On the issue of Tanzania properties, the Honorable Kadhi made some observations in relation to the evidence produced before it. My understanding of the Honorable Kadhi's finding is that there was no sufficient evidence to link the said properties to the Deceased. It is a trite Islamic law principle that he who alleges must prove. The Honorable Kadhi ought not to be faulted for not making a definite determination on the issue of Tanzanian properties as the evidence before it was scanty. Further, the doors are not closed for the Appellant to still seek to have any property distributed should there be evidence of the same belonging to the deceased. Further, the issues raised by the parties in relation to the property were largely about ownership. It was, therefore, prudent that the Kadhi did not proceed to distribute or make a conclusive opinion on them. My view is that only the free property of the deceased is available for distribution. That said, the alleged Tanzanian properties cannot hinder the distribution of the remaining estate. I also do not agree with them the Honorable Kadhi gave half of the estate to the respondent is not sustained.
21. I must also state that there would be jurisdiction questions regarding the power of a Kenyan Kadhi to distribute an estate of a deceased Kenyan situated in Tanzanian.
22. Regarding the bequests made to Ms Amina Nangera, I note from the proceedings that the parties recognized Amina Nangera as their sister. The major contention is whether she was bequeathed with the house at Mazeras. Islamic Law allows a bequest of not more than a third of a testator's property, and it does not necessarily require it to be in writing. From the evidence on record, it is evident that some, if not most of the beneficiaries, had knowledge of the said bequest and knew that the deceased made it. I see that to be proper and in accordance with Islamic law.
23. On the issue of the Peleleza bar, it was not contested from the submissions of both parties that the same belonged to the deceased's grandfather Ali Shandala. As there are other heirs, who were not part of those proceedings, the Honorable Kadhi cannot be faulted for not distributing it. In any case, the other beneficiaries were not made part of the proceedings.
24. The upshot of the foregoing is that I haven't found merit in the appeal. The appeal is for dismissal.
25. I sat with 2 Kadhis during the hearing. We discussed this decision. Both Kadhis agree with this decision.
26. As this is a succession matter between close family members, parties shall bear their own costs.
27. Orders accordingly

DATED AND SIGNED AT MOMBASA THIS 17TH DAY OF OCTOBER 2024. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Ms Katama, for the Appellants;

Mr Mwadzogo, for the Respondents; and



Arthur - Court Assistant.

