



**Surur v Mohamed & 2 others (Family Appeal 118 of 2019)
[2023] KEHC 904 (KLR) (Family) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 904 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
FAMILY APPEAL 118 OF 2019
AO MUCHELULE, J
FEBRUARY 16, 2023**

BETWEEN

NOOR KHAMIS SURUR APPELLANT

AND

MOHAMED KASSIM 1ST RESPONDENT

ASHA MOHAMED 2ND RESPONDENT

KEMSA NOOR 3RD RESPONDENT

*(Being an appeal from the entire Judgment and Decree of the Honourable
Senior Resident Kadhi, the Hon. A.I. Hussein delivered on 16th
September 2019 in Nairobi Kadhi's Court, Civil Case No. 213 of 2017)*

JUDGMENT

1. This is a first appeal. The parties are entitled to having the whole of the evidence before the learned Senior Resident Kadhi being subjected to fresh and extensive evaluation and consideration and for this court to draw its own conclusions on the same, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses who testified before the trial court (*Selle & Another v Associated Motor Boat Co. Ltd & others* [1968]EA 123). This court has the power to affirm or reverse the findings of law and fact by the trial court. Any material errors of law or fact should be examined to see whether they adversely influenced the decision subject of the appellant's appeal.
2. The appellant's case before the trial court was that the deceased Absa Ibrahim Musa alias Absa Khamis Surur had died in 1991 leaving the subject property known as Mombasa Subdivision No. 389, Plot 1 Section XV, Majengo, Mombasa. He said that he had a claim to the property, being a beneficiary of the estate of the deceased. His benefit arose from the fact that he was the deceased's blood brother. He



claimed that respondent's Dr. Asha Mohammed, Mohammed Kassim and Kemsu Noor (all being the administrators of the estate of the deceased) had carelessly and recklessly administered the estate, used it for personal gain and disposed of some of it to his detriment and to the detriment of other beneficiaries; and that they had abused their position of trust to disadvantage him. He sought a declaration that he was entitled to benefit from the estate property; he wanted the respondents to transfer, pay and/or refund to him his share of the estate; and to pay him the costs of the suit.

3. The respondents filed a defence to deny that the appellant was the deceased's biological brother. They denied that there was any property left by the deceased that was capable of administration. They denied that they had intermeddled with or mismanaged the deceased's property. Their case was that the property in question belonged to the late Ibrahim Musa Burkheit and the deceased Absa Khamis Surur, and that they had during their lifetime freely and voluntarily transferred it to the 1st respondent. They asked that the suit be dismissed with costs.
4. The trial court received evidence from witnesses called from either side, and, upon its consideration, came to the conclusion that the appellant was not the blood brother of the deceased, and therefore was not entitled to benefit from her estate. Secondly, that the deceased had before her death willed the property to the 1st respondent. The appellant was aggrieved by this finding and filed this appeal whose grounds were as follows:-

- “ 1) That the learned Kadhi erred in law and fact in holding that the appellant is a stranger and not a beneficiary of the deceased, the late Absa Ibrahim Musa also known as Absa Khamis Surur.
- 2) That the learned Kadhi erred in law and fact in holding that the appellant is neither a brother nor a rightful beneficiary of the estate of the deceased.
- 3) That the learned Kadhi erred in law and fact in failing to appreciate that the 1st respondent unlawfully transferred to herself the deceased property in contravention of the Law of Succession Act and Probate and Administration Rules.
- 4) That the learned Kadhi erred in law and in fact in disregarding vital legal and factual issues while making his judgment.
- 5) That the learned Kadhi erred in law in failing to consider the appellant's testimony.
- 6) That the learned Kadhi erred in law and in fact in failing to consider and apply the law appropriately.
- 7) That the learned Kadhi erred in law in finding for the respondents. This finding occasioned grave injustice to the appellant.
- 8) That the learned Kadhi erred in law in failing to appreciate that in view of the nature of the case, it was unjust to decline to consider that the appellant who was and is the only lawful beneficiary of the deceased, Absa Ibrahim Musa also known as Absa Khamis Surur.
- 9) That the learned Kadhi misunderstood and misapplied the law.
- 10) That the judgment of the learned Kadhi was against the weight of evidence adduced and was biased in rejecting the appellant's case.



- 11) That the learned Kadhi failed to appreciate sufficiently or at all the evidence on record.
- 12) That the learned Kadhi erred in law and in fact in failing to consider the appellant's evidence on record when arriving at his judgment."

It was sought that the judgment and decree dated 16th September 2019 be set aside, and that this court does make any other or further orders.

5. This court had the benefit of sitting with Hon. Mohamed A. Kutwaa (Senior Principal Kadhi, Machakos) and Hon. Mohamed Randu Garama (Senior Resident Magistrate, Nairobi). I am grateful to them for their insights on Sharia Law.
6. It was up to the appellant to prove to the trial court that he was related to the deceased as claimed. The claim was that he was the deceased's blood brother. Now that he was not either the deceased's spouse or child, it was the stated relationship that was going to get him to benefit from her estate. The trial court quoted Chapter 4 verse 7, Chapter 4 verse 8 and Chapter 4 verse 176 of the *Holy Quran* and observed that there were basically two grounds which establish a right to inheritance under Sharia law. They are consanguinity and marriage. The appellant needed to found his claim on any of the grounds.
7. The appellant was the only witness on his side. When he was cross-examined, he stated that:-

"The suit property belonged to my late sister Absa Khamis. My mother is Jermice Ismail and she was wife to Khamis Sunur (my father). Mother of Absa is called Statania, we have different fathers and that I am a biological brother and not a step brother, she is my sister.....I am not aware the property at Mombasa was given out during the lifetime of her husband."
8. The respondents called Kemsu Yusuf Noor, Juma Rehan Said, Afeeb Hamud Mohamed, Asha Mohamed (1st respondent), Halima Febit Ali and Maina Alento Agolad. Their evidence was that the appellant is an African whereas the deceased was daughter of an Indian called Mohamed. Her mother was Stabus Mohamed. She was married to Ibrahim Absa after the death of her first husband. She had no siblings.
9. The trial court received the evidence, and accepted the version given by the respondents. It returned the verdict that the appellant was not related to the deceased, and therefore could not claim benefit from her estate. My view of the recorded word is that the findings were based on the accurate consideration of the evidence. In any case, the trial court had the feel of the witnesses and their testimonies.
10. Once the trial court found that the appellant was not the blood brother, or at all, of the deceased, that was basically the end of his case. He had no legitimate claim to the estate of the deceased.
11. In conclusion, I find no merit in the appeal. I dismiss the same with costs.

DATED AND DELIVERED ELECTRONICALLY AT NAIROBI 16TH FEBRUARY 2023

A.O. MUCHELULE

JUDGE

