



REPUBLIC OF KENYA



**Abdalla v Bwanamkuu (Civil Appeal E006 of 2022)
[2023] KEHC 21297 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21297 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CIVIL APPEAL E006 OF 2022**

SM GITHINJI, J

JULY 6, 2023

BETWEEN

SAID ALI ABDALLA APPELLANT

AND

ZAHARIA ALI BWANAMKUU RESPONDENT

(Being an appeal from the judgement of the Kadhi's court at Lamu, Hon. Swaleh M. Ali (PK) delivered on the 30th May 2022 in Lamu Kadhi's court Succession Case No. E005 of 2022.)

JUDGMENT

CORAM: Hon. Justice S. M. Githinji

Appellant in Person

Respondent in Person

- 1 This appeal is brought by the appellant against the judgment of Hon. Swaleh M. Ali (PK) delivered on 30th May 2022 where he held that;
 1. The estate of the deceased comprised of the following properties;
 - a. Only a ground floor from the flat house made of block and bricks comprised of ground floor and first floor.
 - b. One pili pili bed
 - c. One shoka
 - d. One jembe
 2. That the heirs of the deceased Ali Said Abdalla are;



- a. Zaharia Alki Bwanamkuu Id/no xxxx (Widow)
- b. Said Ali Said Id/No xxxx (Son)

2 Dissatisfied with the judgment, the appellant lodged the instant appeal on the following grounds;

1. That the learned Kadhi erred in law and fact in finding that the one storey building situated at Matondoni area formed part of the estate of the deceased.
2. That the learned Kadhi erred in law and fact by disregarding the fact that the one storey building had been inherited by the appellant and his brother one Omar Mohamed Famau from their mother Rukia Omar Abdalla (deceased) and as such it could not form part of the estate of the deceased in the proceedings herein.
3. That the learned Kadhi erred in law and in fact by being blind to the fact that the one storey building inherited by the appellant and his brother had been entirely sold to the appellant by his brother thereafter and such it wholly belongs to the appellant and does not constitute the estate of the deceased herein.
4. That the learned Kadhi erred in law by completely ignoring the response/ defence raised by the appellant in the suit which was duly merited.
5. That the learned Kadhi erred in law by imposing himself as a witness in a suit which he was presiding upon. The learned Kadhi blatantly stated/testified in court that the deceased had approached him as regards the one storey house herein.
6. That the learned Kadhi erred in law by being biased in the entire proceedings as he out rightly through the proceedings favoured the respondent herein.

Evidence at Trial

- 7 Pw1 Zaharia Ali Bwanamkuu the widow of Ali Said Ali stated that the deceased had informed her that the house was his and did not belong to the respondent's mother.
- 8 Pw2 Mohamed Musa told the court that the deceased was his father and was entitled to a share of the estate.
- 9 Pw3 Abdalla Said a brother to the deceased told the court that the deceased told him that the house belonged to him.
- 10 Pw 4 Zena Abdalla the appellant's sister told the court that the house did not belong to one Rukia Omar as alleged by the appellant but it belonged to the deceased.
- 11 Dw1 Said Ali the deceased's son told the court that the house belonged to his mother and not the deceased and does not form part of the estate of the deceased.
- 12 Dw2 Said Abdall Famau did not give evidence of any probative value.



Analysis and Determination

13 I have perused the record of the trial court, the grounds of appeal and submissions by the parties as well as the authorities relied upon. The sole issue for determination is whether the flat house forms part of the estate of the deceased.

14 Section 107 of the *Evidence Act* provides that:

- 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

15 Section 108 of the *Evidence Act* states that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. In this instance, the burden of proof lay with the appellant to prove his claims. In my view, no evidence was tendered by the appellant to demonstrate that the property in contest was inherited from his mother, beyond mere assertions. In my view, the appellant has failed to establish his claim on a balance of probabilities. It appears to me that the allegations by the appellant are that the extent of or the father’s entire estate was unknown, which is a red herring intended to deflect the distribution of the estate.

16 In the circumstances, for want of evidence by the appellant, I find no reason to depart from the findings made by the trial court as to what constitutes the estate of the deceased. Consequently, the appeal lacks merit and is dismissed with costs to the respondent.

JUDGMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT GARSEN THIS 6TH DAY OF JULY, 2023.

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S.M. GITHINJI

JUDGE

Parties be notified.

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S.M. GITHINJI

JUDGE

6/7/2023

