REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CIVIL APPEAL NO 1 OF 2017

KHALIFA ABDALLA KHAMIS...APPELLANT

VERSUS

MOHAMED ABDALLA KHAMIS....................................RESPONDENT

(Being an Appeal from the Judgement of Honourable Mr. M. H. M. Shali Principal Kadhi delivered on 19th December, 2016 in Kadhi Lamu Law Courts in Succession cause No. 1 of 2016)

Coram: Justice R. Nyakundi

KHATIBA FOR THE APPELLANT

YUSUF ABOUKABAR FOR THE RESPONDENT

JUDGEMENT

This is a first appeal from the Judgement of the Principal Kadhi (Hon Mshali) pronounced and delivered on 19.12.2016 in which he discussed the portioners case substantially whereas on the other hand he a allowed the respondent’s case and made the following declarations:

a) That two deceased estates which have not been distributed between the parties herein are the;

(i) Five Milili Swahili beds

(ii) The cows

(iii) Some of the Shambas

(iv) The worst alleged to be a Wakf for a Mosque

(vi) Each party to bear its cost

Being aggrieved with the decision of the appellant lodged an appeal based on the following grounds:

1. That the Learned Principal Kadhi erred in Law and fact by admitting hearsay evidence

2. That the Learned Principal Kadhi erred in law and fact by finding that Hiba is allowed in Islamic Law regarding property inheritance.

3. That the Learned Principal Kadhi erred in law and fact in his finding that the property of the deceased was lawfully distributed and inherited while no evidence was tendered to support his finding.

4. That the Learned Principal Kadhi erred in law and fact in law in misevaluation of evidence and arriving at a wrong

conclusion.

Submissions on appeal

Learned Counsel Mr. Khatib argued and submitted that during the trial before the Principal Kadhi, hearsay evidence was admitted to proof existence and or an existence of a fact which was in consistent with Section 65 of the Evidence Act. Learned Counsel reiterated that in determining the issues in dispute Learned trial Kadhi erred in making a finding that ***Hiba*** is allowed in Islamic Law. Learned Counsel contended that there was no evidence of distribution of **plot No. Lamu/Pate/409** as stated by the Learned Kadhi in his Judgment.

Learned Counsel further submitted that the Learned trial Kadhi identified part of the estate but ordered that status quo be maintained without taking a step further to distribute the estate to the heirs. In a nutshell learned Counsel prayed for the Judgment to be set aside.

The Respondents Submissions

It was learned Counsels Mr. Aboubakari on behalf of the respondent submitted that the entire appeal is without merit and should be dismissed with costs. He referred the court to the provisions of Section 6 of the Kadhis Court Act. On the mode of recording and admitting evidence of witness to the claim. Counsel further submitted that the provisions of the Holy Quran i.e Chapter 2 Section 107, 108 and 109 of the evidence Act to advance the argument that the principal Kadhi in his Judgment never made findings by incorporating hearsay evidence.

Having considered the record, submissions, on appeal and the impugned judgment it's not the duty of the court to determine the appeal factoring in the advisory opinion by the Chief Kadhi.

Determination

On the first appeal its trite that this court being the first applicant court is under a duty to re-evaluate the evidence produced before the trial court, examine it by way of an appraisal so as to reach my own conclusions. In doing so I bear in mind that the trial court had the advantage of seeing and hearing witnesses, and therefore when it comes to issues on demeanor and truthfulness of a witness the court can only interfere with the findings if the record sourced that it acted on wrong principles of law and fact. It is an all-encompassing jurisdiction as laid down in **Services and another v lubia and another (1982 – 1988) KAR 727**

Before the trial court was a petition by Khalifa Abdalla Khamis against Mohamed Abdalla Khamis, both of common descent as children of the deceased persons Abdalla Khamis (father and Zubeda Khalifa Khamisi (mother) now deceased. The petition shows that both deceased persons died intestate leaving behind five movable and immovable properties therein mentioned as:

Two plots at Tendakasi

Plot at Kitanguyumbe

Plot at Kitanga Makaya

Plot at Kibeka

Cattle

Jewelry in a box

Money

Gold

Coconut trees

Water, Tanks

Big wall Watches

That all these properties to the estate are being held by one Mohamed Abdalla Khamisi, who has refused to having them distributed to the rightful heirs. In order to discharge the burden of proof and standard of proof in cases of this nature. The petitioner was under an obligation to tender evidence on the death of the deceased persons and the relevant free properties left behind for the benefit of the heirs to inherit under Islamic Law or as the case may be under the Succession Act. The standard of proof is on a balance of probabilities. It is also trite as stated **distributors Ltd and another C. A Number 65 of 200 (2005), E. A 65**. that a trial court has to decided the case before it on the evidence and the law. The issues are those which flow from the

pleadings as pleaded by the petitioner petitioner/plaintiff and cross pleaded by the respondent in his defense.

In **Unga Maize Millers Ltd v James Munene Kamau CA No. 16 of 2001 (2005 E. A** The court stated that:

> **"it's for the trial court to establish whether the plaintiff or petitioner had proved his or her case on a balance of probabilities as the onus of proof only shifts upon a prima facie case issuing made against the defendant or respondent for that matter".**

At the main hearing, the case in support of the petitioners' allegations the pleadings came from his own testimony and that of PW2 Abdalla Rahman Mohammed. As regards the issues it emerged that the deceased parents to both the petitioner and the respondent died intestate. There is therefore clear evidence of free properties which survived the two estates as referred to in the petitioner's evidence.

Flowing from the evidence it appears that no distribution of the estates had taken place as contemplated under Islamic Law. It was the respondent argument that some of the properties being claimed by the petitioners had been distributed to the grandchildren and as a consequence they are not available for distribution. A case in point was the Shamba at Pate Ndeya mui, the Shamba at Bamkuru near the way to Siyu divided to the children of Abdallah Khamisi before his death. The Land behind the Pwani Mosque which he arranged everyone was given a portion.

A careful consideration of the evidence of record reveals that the petitioner had established a prima facie case on the following aspects.

First, he is an heir to the estate of the deceased person. Second, the deceased persons refer behind an estate comprising both movable and immovable properties capable of being distributed to the children and other cognizable defendants. Third, the estate in one way or another has been intermeddled with by the respondent. Fourth, except on one or two issues of convergence the substantial part if not all of the Estate remains undistributed to the

rightful beneficiaries. Fifth, as stated by the Learned Kadhi in his judgment some of the aspects of the evidence by the petitioner may as well fall under the exclusion clause on hearsay evidence, however, notwithstanding that observations the evidence led is such that it satisfactorily proved on a balance of probabilities an existence of an estate intestate which largely remains undistributed.

I am not able to find any major contradictions or inconsistencies by the petitioner by the petitioner that is sufficient to collapse his case as conclusively decided by the learned trial Kadhi in his judgment. The gist of the appellants' case as I see it is on all of these scope of the estate which has existed since the death of the parents of the petitioner and respondent which required the beneficiaries to invoke the provisions of Islamic Law to have it distributed accordingly. In this case, one of the contested issues was on Hiba, simply defined in ordinary language as a gift, involving transfer of property from one living person to another without any form of considerations. It's a gratuitous and inter-vivos in nature. The courts have given guidance on this fundamental principles of a gift, regarded as the renunciation of the property right by the owner in favor of a donee. Under Islamic Law, a person is said to transfer his property through gift, and that transfer is called Hiba. The essentials of a Hiba are in consonant with Section 3I of the Law of Succession that:

> **(i) the donor must qualify to transfer his actual or constructed property in his or her possession to the donee**
>
> **(ii) The subject matter of the Hiba must be positively identified and ascertained.**
>
> **(iii) The formalities of the Hiba must be met.**
>
> **(iv) The person making a Hiba must be of maturity age and the owner of the property which is the subject matter of the Hiba.**
>
> **(v) It must also be proved that he transferred the property out of his free will and not under duress, coercion or mistake to the donee.**
>
> **(vi) It must also emphatically be stated that every form of property or right which has some legal value may be a subject of a Hiba.**

In the case of Rose Midland Bank Executor and Trustee Ltd (1948) 2 ALL ER CH 78 the court held tat the gifts made by the Testator ought to be specific in nature and positively identifiable (see also **Laures v Bennett (1785) Cox 167 29 ER 111)**

Similarly, **in Nawashi Ali Khan V Ali Raza Khan A. R (1984) it was held that gift of usufructs is valid in Muslim law and that the gift of corpus is subject to any such limitations imposed due to usufructs being gifted to someone else. It further held that gift of life interest is valid and it does not automatically enlarge into gift of corpus"**

It is a cardinal rule in our jurisprudence that the right to dispose of property by will or gift is exacting in its requirement as observed by **Nyamweya A.J Re: Estate of the Late Gedion Manthu Nzioka (deceased) (2015) EKLR** where she stated as follows.

> **''In Law, gifts are of two types (gift inter-vivos and gifts made in contemplation of death (gifts Mortis Causa. For gifts inter-vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing, or by delivery, by a way of a declaration of a trust by the donor, or by way of resulting trusts or the presumption of gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of a trust in writing. Gift's inter-vivos must be complete for the same to be valid.''**

In the instant case, and in view of the cases referred to above the yardstick of a valid Hiba for the deceased to have disposed of part of the estate was never established on a balance of probabilities. That classification of property therefore remains with the ambit of free estate intestate to be distributed to the beneficiaries. Secondly, in this particular case, there was audience of a Waqf in respect of a shop donated to Pwani Mosque.

> **Waqf literally means that the shop which formed part of the Estate of the deceased that had been confined, detained or restrained from the benefit of a third party.**

The definition is propounded in various judicial decisions. Thus in **Haji Salleh Bin Haji Ismael & another v Haji Abdullahi Bin Haji, Mohammed Saleh & Others (1935) 1MLJ 26 Whitley J stated that ''The ownership of the thing immobilized is transferred to God, which means that such object ceases, for man, to be subject to the right of the private property, and that it henceforth belongs neither to the founder nor to the beneficiary"**

The import of the courts statement in the Haji Saleh case is the corpus of irrevocability and perpetuity. **These two concepts adequately clarify the frontiers of the regime of a Waqf. Turning to perpetuity, its associated with the binding nature which automatically follows such a declaration. Secondly it cannot be constrained by time and temporariness. Thirdly the subject matter of the Waqf remains so forever in perpetuity.**

In the present case while there was an assertion in evidence on existence of a waqf the merits of it diminished for lack of characteristics which manifest a valid waqf to prevent the heirs from effective and productive utilization of it. Further another non-responsive effect of the evidences tendered in court is the absence of a Waqf deed which sets out the terms and conditions of the Waqf property and subsequent appointed executor or mtawalii. Following the above reasoning, I can safely conclude that the subject matter so expressed to have been donated to Pwani Mosque was never a waqf property dedicated for such purposes or intended by the donor.

Accordingly, the property is still under the administration of intestate estate and subject to distribution to the beneficiaries under Islamic Law. I note in this appeal that right from inception of the petition, the central issue revolves around inheritance and who holds the claim to the deceased's estate.

The question as to who is the rightful heir or descendants to claim a share of the estate is clearly a matter defined in Shariah Law; for those who profess Islamic Faith. The judicial power donated to the principal Kadhi was to determine the heirs and reconfirm the issue through evidence from both the petitioner and the respondent since they share a common heritage.

Applying such principles at hand, I am fortified indeed with the provisions of Section 29 of the Law of Succession Act it follows that the scheme and mode of distribution does not distinctively defer from the pre dominant clauses expressed under Sharia Law. What was the status of the properties listed by the petitioner ought to have been ascertained by the trial court? Incase of proprietorship, transfers done prior to the deceased death, gifts inter-vivos or Mortis Causa according to the Law and will of the deceased.

The question before me, is whether the appeal satisfies the criteria in ***Mbogo and Anor. V. Shah (1968)***

***EA 93, ''(supra)* a court of appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice**

That level of inquiry is positively correlated and empirically plausible from the record on matters to do with free property survived by the deceased and the respective beneficiaries. The trial court jurisdiction together with the legitimate expectation of the petitioner and respondent was to identify and ascertain the intestate property and have it distributed amongst the beneficiaries. At the hearing the record confirms existence of sufficient material which signaled to the court to exercise discretion under Section 66 (5) of the Kadhis Court Act to effectively render a decision on the distribution of the estate to the beneficiaries. However, on evaluation and scrutiny of the record his final declaration shows a judicial officer shying away in making a determination on the issue of inheritance. There was prima facie evidence admissible with a causal link between the property and the proposed beneficiaries. The standard of proof was discharged by the petitioner on a balance of probabilities. By assessing the merits of the petition I see a conflict of interest between the two brothers who engaged at the plenary involving non-disclosure on substantially identical facts. In light of certain information given to the court as the adjudicator of facts he was in a position to order by directing the parties to produce and make available documents relating to the Hiba and Waqf. Unfortunately, the trial was commenced and concluded in a stretch which left many issues unresolved.

Bearing in mind all the circumstances of this appeal, the appellant has demonstrated that the learned trial Kadhi misapprehended the facts and the law to arrive at an erroneous decision. The arguments in the matter was inextricably connected with the facts of and law relevant to the petition to which facts in issue remained inconclusively determined.

Having applied the Law to the facts, its apparent that the appellants appeal has merit, for it to be allowed in its entirety. Accordingly, the file is remitted back to the trial court at Lamu to adjudicate the Estates afresh and proceed with the distribution in consonant with Islamic Law. I make no orders as to costs.

It is so ordered.

DATED, DELIVERED AND SIGNED AT GARSEN ON 3RD OF MAY, 2021.

HON R. NYAKUNDI

JUDGE

NB

In the view of the Public Order No.2 of 2021 and subsequent circular dated 28th March ,2021 by her Ladyship, The Acting Chief Justice on the declaration of measures restricting court operations due to the third wave of Covid -19 pandemic this Judgement has been delivered online to the last known email address thereby waiving order 21(1) of the Civil Procedure Rules.

(khatibaadv@gmail.com)(yusufaboubakar@yahoo.com)