



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL APPEAL NO.17 OF 2019

MOAPPELLANT

VERSUS

HAK.....RESPONDENT

(Being an Appeal from the original Succession Suit No.4 of 2019 of Kadhi's Court at Marsabit)

J U D G M E N T

Appeal heard in the presence of Ali Dida Wako Senior Resident Kadhi Moyale Galgalo Adan Senior Resident Kadhi Garbatulla as assessors

The late **GAD** died on 7.10.2017. The respondent is the deceased's daughter. She petitioned the Marsabit Kadhi's Court for the distribution of the deceased's estate. The trial Court distributed the estate in its judgement delivered on 14.5.2019.

Being dissatisfied by the Kadhi's decision the appellant preferred this appeal on the following grounds:

- 1. That the honourable Kadhi erred in Law and in fact by misinterpreting the evidence of the appellant and her witness and thus finding GGO to be an adopted son of the deceased.**
- 2. That the honourable Kadhi erred in Law and in fact in finding that GGO was adopted only for the purpose of inheritance.**
- 3. That the honourable Kadhi erred in Law and in fact in making a finding that GGO was an adopted son of the deceased on the basis of hearsay evidence of all the witnesses of the petitioner.**
- 4. That the honourable Kadhi erred in Law and in fact in finding that AGM is a widow of deceased against the overwhelming evidence of A being married to MG and bearing him five children against Sharia law.**
- 5. That the honourable Kadhi erred in Law and in fact by admitting YJM as a beneficiary of the Estate in the face of overwhelming evidence that she is a Christian and married to Christian even at the time of making of the review of the judgment of 14th May 2019 and failing to find that her sudden change of faith being an afterthought choreographed for the purposes of inheriting the estate of the deceased.**

Mr. Behailu, learned Counsel, appeared for the appellant. Counsel submitted that the appeal raises three issues namely the deceased's lawful beneficiaries, whether one A who was the deceased's first wife can inherit and whether one of the deceased's children, YJ, who changed her faith twice to become a Christian can inherit. Counsel further submitted that according to the deceased's tradition only sons inherit. The deceased adopted one G while he was very young. The deceased was either a traditionalist or a Muslim and cannot be both. If he was a traditionalist at the time of his death, then his estate cannot be distributed according to Islamic law. G Was adopted only to inherit and cannot be considered as a beneficiary under Islamic law. By the time the deceased died, he had other sons from his second wife. Further, there is no evidence that G was adopted in accordance with the law.

It is also contended that **AM** is not a beneficiary. She was married to the deceased but left him. She got other five children with another man by the name MG. A had two children with the deceased. The Kadhi erred by considering A as the first wife and provided for her. Attempts to make A return to the deceased were not fruitful. A was therefore divorced.

Counsel for the appellant further contend that Y is one of the deceased's children. She got married to a Christian and have children. She

later re-converted to become a Muslim so as to inherit. The Kadhi erred by making her as a beneficiary. Being a Christian she cannot inherit a Muslim. Counsel further maintain that the deceased's estate was given as plot number xxx at Dakabaricha. That plot was transferred to the appellant by the deceased and no longer exist. What is in existence is plot number 1725 in the appellant's names.

Mr. Nyenyire appeared for the respondent. Counsel submitted that the Kadhi correctly decided the matter based on the facts before the Court and in accordance with Islamic law. The Kadhi correctly determined who are the deceased's beneficiaries. A still remained as the deceased's wife since she was not divorced. G was adopted by the deceased and there was no need for documentary evidence. On Y, Counsel contend that as per the Kadhi's decision once other beneficiaries agree, there is no harm for her to get her share.

This is a first appeal. The Court has to evaluate the evidence afresh and draw its own conclusion while taking into account that the deceased was a Muslim and his estate has to be inherited under Islamic law. Before the trial Court the respondent, HAK testified that her mother (A) was not one of the beneficiary. The deceased's only estate is plot number xxxx at Dakabaricha. Her sister is a Christian. Its her evidence that they are two daughters from her mother and the deceased. The deceased adopted G who is their first cousin as he deceased wanted a son in line with his tradition. G lived with the deceased and took care of him.

On her part, the appellant **MO** testified that they agreed to share the land but the respondent insisted on taking legal action. For the last 15 years before his death, she lived with the deceased and did not see A as a co-wife. The deceased left plot No.XXXX at Dakabaricha but she can't tell the size of the plot. She can't tell if A was divorced. The appellant wanted the beneficiaries to wait for two years before the estate could be distributed as he had just died recently. She had four children with the deceased. The deceased had two other daughters with the first wife (appellant and Y). G is not the deceased's child.

HASSAN MASH KONTE was the respondent's first witness. It is his evidence that the deceased was his neighbor. The deceased has two daughters with the first wife. He stayed for about seven years before marrying the second wife. He had three sons and one daughter with the second wife. According to the deceased's tradition, it's the sons who inherit and that is why he inherited G. G is a son of the deceased's brother. It was G who took the deceased to Nairobi for treatment. He never heard that the deceased divorced his first wife.

PW2 as per the record of the trial Court is SC and the deceased's relative. According to their tradition it's the sons who inherit. Before marrying the second wife the deceased had two daughters. The deceased adopted his brother's son, G. G was educated by the deceased and he took care of the deceased when he was sick. He was present when the deceased adopted G. He never heard that the deceased divorced his first wife.

PW3 testified that she was the deceased's first wife. She was never divorced. They only had misunderstanding and she left him and went back to her parents.

The appellant summoned two witnesses. **WECHÉ WOLDE HIDU (RW1)** testified that he comes from the deceased's Burji community. The deceased separated from his first wife and married the appellant. A got married to another man and got five children with that man. The deceased's brother gave him G. G was named after the deceased. He did not witness the deceased officially divorcing A. **R.W2 OSHE ANDO** is the deceased's neighbor he testified that the deceased's first wife was A who had two daughters namely Y and H. A left the deceased for another man. The deceased complained to the elders who made three attempts to arbitrate the two but A refused to return. A went with one MK and got five children.

The first issue is whether G is entitled to inherit the deceased. G must be an adult by now. He was not made a party to the proceedings. The evidence does confirm that G is not the deceased's biological child. The deceased took G from his brother while G was a child. He brought up G and educated him. Counsel for the appellant contend that there is no proof that G was adopted by the deceased. Evidence from both sides does confirm that G is the deceased's brother's son. The deceased took G because he had no sons from his first marriage.

The trial Court stated as follows on the issue of G.

On the adopted nephew by the name G, it is clear that he is not the son of the deceased but all the witness from both sides testified that the said G who is a nephew to the deceased was adopted by the deceased since was young as his son and in turn he took care of the deceased when he grew old and sick just like his own father and since now has reached the item of the distribution of the estate then this honourable court has decided to consider him for a share even if not equal to others as provided by Cap 4 section 8 of Holy Quran as the said G was close relative to deceased as a nephew and adopted by deceased.

Adoption under Islamic is referred to as Kafala. When a Muslim child is adopted the identity of the biological parents is not forgotten. Some of the Islamic adoptions rules are:

- i. The adopted child retains the names of his/her biological parents and does not change his name.**
- ii. The adopted child inherits from his biological parents.**
- iii. The family members where the child is adopted are not considered as blood relatives. The adopted child can even get married to someone from the adopting family.**

The Qur'an at 33:4-5 states as follows:

...Nor has He made your adopted sons your (biological) sons. Such is (only) your (manner of) speech by your mouths. But Allah tells (you) the Truth, and he shows the (right) Way. Call them by the (names of) their fathers; that is juster in the

sight of Allah. But if you know not their father's (names, call them) your brothers in faith, or your trustees. But there is no blame on you if you make a mistake therein. (What counts is) the intention of your hearts. And Allah is Oft-Returning, Most Merciful. (Qur'an 33.3-5)

It is evident that G is not the deceased's beneficiary under Islamic law. If the deceased wished to give part of his estate to G, he could have done so by way of a will. The deceased was entitled to give up to 1/3 of his estate to other people who are not his beneficiaries. The Burji tradition that daughters do not inherit cannot apply as the succession cause was determined under Islamic law. The deceased was a Muslim and died a Muslim. His personal law is Islamic law and not traditional law. Since G was adopted by the deceased, he is not entitled to inherit him in the absence of a will. The trial Court did not cite any verse from the Koran which makes G to be a beneficiary.

The second issue relates to A. The appellant contend that she left the deceased and got five children with another man. The entire evidence on record does establish that As had two daughters with the deceased namely H (respondent) and Y. A left the deceased and all efforts to have her return to her husband did not yield any positive results.

The trial Court held as follows on this issue:-

Concerning the first wife by the name A all the witness from both side testified that she was in fact around to the deceased but she left the deceased and went with another man but no one said that she was officially divorced. According to the Islamic sharia a married woman even if she left her husband and went with another man provided she has not been officially divorced she will still remain a wife with that marriage contract of her official husband. Therefore, the honorable court has recognized the first wife as a widow to the deceased.

The evidence from both the appellant and respondent does confirm that the deceased did not formally divorce A. What is considered to be the position in Islam is that As was committing adultery with MK but was still the deceased's wife. There is no formal divorce and therefore the marriage between the deceased and A still subsisted. I do agree with the finding of the trial Court that A was still the deceased's wife and is entitled to inherit him.

Lastly, Y J M, one of the daughters of A got married to a Christian. She was considered as the deceased's beneficiary. The appellant contends that a Christian cannot inherit a Muslim. Y reconverted to Islam for purposes of benefiting from the estate. From the initial judgement of the trial court of 14.05.2019, the trial Court excluded Y from the list of beneficiaries. The record shows that an application dated 3rd June, 2019 was filed seeking a review of the judgement delivered on 14.5.2019. The applicant, Y, sought to be considered as a beneficiary of the estate of her father. It is stated in the application that the applicant converted to Islam on 1st June, 2019 and had confessed before two Sheikhs.

The trial Court heard the application by way of oral evidence. Bashir Abdullahi, a Madrasa teacher and Mohamed Koldha Hirbo a business man as well as a Mosque Imam, testified. They informed the Court that Y had converted back to Islam. It was further stated that even Y's husband was willing to become a Muslim. In its ruling delivered on 12.7.2019, the trial Court reviewed its judgement and adjusted the shares of each beneficiary.

The appellant contend that Y re-converted to Islam for purposes of getting her share of the inheritance. The trial Court in its ruling gave a narration on how a non-Muslim became a Muslim but was executed on the suspicion that his conversion was for purposes of avoiding the execution. The prophet heard about it and was upset as no one knew the insight of the victim. Y was born a Muslim. She got married to a Christian. The estate was distributed and she was left out. She applied before the estate was distributed to get her share of the estate on the basis that she had re-converted to Islam. It would be unfair for the Court to simply conclude that Y's reversion to Islam was solely based on the need to get her share of the estate. That would be reading too much in one's mind. She voluntarily reverted to Islam and since the estate had not been distributed, she is entitled to her share as held by the trial Court. Should she go back to Christianity after getting her share only God the Almighty knows. As for now, all what we can conclude is that YJM is a Muslim and is entitled to benefit from the estate.

Counsel for the appellant also submitted that there is no estate for distribution. Plot number xxxx, Dakabaricha was transferred by the deceased to the petitioner during his lifetime. What is in existence now is plot number 1725 which is in the appellant's name. This contention is not supported by the appellant's evidence before the Kadhi's Court. The appellant testified that they had agreed to share the land. During cross examination she testified that the deceased left behind plot number xxxx at Dakabaricha but she does not know the size. All what the appellant wanted was a grace period of two (2) years before the estate could be shared. That evidence confirms that the deceased's estate comprises plot No.xxxx at Dakabaricha. Counsel for the appellant wrote a letter dated 21.8.2019 addressed to the District Surveyor, Marsabit. The title of the letter is "**Dispute Marsabit/Mountain/xxxx**"

The above letter does not make any reference to plot number xxxx. In her evidence, the appellant did not alledge that she is the proprietor of plot number xxxx, Dakabaricha. In her answer to the petition, paragraph 9 thereof reads as follows:-

9. The respondent wish to state that GAD (deceased) had only one estate plot number xxxx located at Dakabaricha location Marsabit County.

From the evidence on record, it is established that plot number xxxx Dakabaricha belonged to the deceased and is the only property which forms his estate. No official search was produced to prove the contention that the land was transferred to the petitioner. There is an application dated 2.9.2019 by the respondent indicating that plot number xxxx was sub-divided and plot number 1393 was created and this was done before the court orders were issued. I do find that the deceased's estate comprise of plot No.xxxx, Dakabaricha and do order that in case the plot was transferred to the appellant, the same be transferred back to the deceased before it is shared out to the beneficiaries.

The upshot is that the appeal partly succeeds. G, the adopted son shall not form part of the deceased's beneficiaries. A and Y are the deceased's beneficiaries. G was to get the share equivalent to that of a daughter computed at 9.7%. The two widows each got 6.35% while

the sons got 18.4%. I find that the removal of G does not alter the computation. The estate can be valued and the shares converted into money equivalent or it can be shared out according to the shares computed by the trial court. Parties shall meet their own respective costs.

Dated, Signed and Delivered at Marsabit this 19th day of February, 2020

S. CHITEMBWE

JUDGE