



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MARSABIT**

**CIVIL APPEAL NO.10 OF 2018**

**MOHAMED KABUNGE KOFIA.....1<sup>ST</sup> APPELLANT**

**AKK.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**HADIJA KABUNGE OSMAN.....RESPONDENT**

***(From the original Succession Cause No.6 of 2018 of the Kadhi's Court at Marsabit of the Principal Kadhi M.A. MAHMOUD)***

**JUDGMENT**

The late Kabunge Kofia Mbaya died on the 9.7.2011. The respondent is the deceased's daughter. She filed a suit before the Kadhi's court seeking among other things the distribution of the deceased's estate. The trial Court heard the dispute and shared out the estate. The appellants are also the deceased's children. Being dissatisfied with the judgment of the trial court the appellants preferred this appeal on the following grounds:-

- 1. The learned Kadhi erred and misdirected himself in Law when he failed to divide the estate of Kofia Kabunge (deceased) to the beneficiaries according to Islamic law.***
- 2. The learned Kadhi erred and misdirected himself in Law when he allowed the matter to proceed for full hearing even having been informed that the 2<sup>nd</sup> respondent was not of sound mind.***
- 3. The learned Kadhi erred and misdirected himself in law and in fact in ordering that the 2<sup>nd</sup> respondent and AK are not entitled to shares of Kofiya Kabunge their deceased father.***
- 4. The learned Kadhi erred and misdirected himself in law by adopting and allowing a sale agreement dated 25<sup>th</sup> March 2015 where 2<sup>nd</sup> respondent is a witness and his identity number do not correspond with the one in the agreement. During trial two witnesses in the agreement testified that they were not involved in the that sale.***
- 5. The learned Kadhi erred and misdirected himself in law and in fact when he failed to investigate the root of the petition since the 1<sup>st</sup> appellant was given the land by the late Kabunge Kofia to hold it on trust for the other beneficiaries.***
- 6. The learned Kadhi erred and misdirected himself in law and in fact in being biased against the appellants throughout and largely failed to appreciate the appellants adduced witness evidence and by making the decree which makes it impracticable for the respondents to cope with.***
- 7. That the decision is against the weight of the evidence adduced by the parties.***

Mr. Behailu appeared for the appellants. Counsel relied on the grounds of appeal. Counsel submit that the estate comprise of a plot where the deceased's children are residing. Some portions of the land have been sold. The deceased was married to two wives and the dispute is between the children of the two wives. It is submitted that the appellants are not satisfied in the manner in which the Kadhi divided the estate. The Kadhi held that Ali and A sold part of the land yet a sale agreement dated 25.3.2015 gave the name of the seller as that of Ali only. A was only a witness. Ali himself testified that he sold part of the land and used the money to build a house. The measurements of the plot sold by Ali also differs. It is further submitted that the plot that was sold by Ali belongs to A(2<sup>nd</sup> respondent). The land cannot cater for all the children. The respondent was paid Ksh.50,000 after part of the land was sold. The 2<sup>nd</sup> respondent is a person of unsound mind and it was improper for the Kadhi to proceed and conclude that he sold the land together with Ali. The sale agreement was used by the Kadhi to remove

the 2<sup>nd</sup> respondent from the list of beneficiaries.

It is further submitted that the trial court ought to have observed that the 2<sup>nd</sup> respondent is a person of unsound mind and required to be represented under the Civil Procedure Rule. The evidence established that Ali sold what belongs to A and used the proceeds to construct his own house. He is now handing over the house to the respondent. Ali is already settled on a portion of the land. The 1<sup>st</sup> appellant was given the land by the deceased to hold in trust. This issue was raised in the hearing but there was no determination on it. There was a request that the land be registered in the name of the 1<sup>st</sup> appellant. It is also submitted that the trial court demonstrated some form of bias against the appellants. The judgment as delivered is impossible to implement. A determination should have been made on the measurement for each beneficiary. The Kadhi made the determination in percentage form. The decision is against the weight of the evidence. The portion being claimed by the respondent does not exist.

The respondent opposed the appeal. She submitted that before distributing the estate the learned Kadhi visited the land. She is seeking her share of her father's estate. The 1<sup>st</sup> appellant sold part of the land in 1993 while the deceased was alive Ali also sold part of the land. After the delivery of the judgement the Kadhi visited the land so as to do the division but before that process was completed the appeal was filed. She is against the insurers of the title deed in the name of the appellant. The appellant sold their shares because she sued them Ali decided to give her the house. She admits that she was given Ksh.50,000 in 2016 after the 1<sup>st</sup> appellant had sold some land. She also contends that A is not of unsound mind but is only suffering from side effects of drugs.

This is a first appeal and the court has to evaluate the evidence afresh and make its own conclusion. Apart from the litigants nine other witnesses testified. The respondent who was the claimant testified that she is the deceased's daughter. There was an allotment letter that was to be issued in the name of the 1<sup>st</sup> respondent but she went to complain to the area chief who gave her a letter and the allotment letter was stopped. It is her evidence that the appellant together with her brother from the same mother, Ali, sold about four (4) plots. She wanted her share of the estate. Her mother was the 2<sup>nd</sup> wife.

The 2<sup>nd</sup> respondent testified that he is the deceased's eldest son. It is his evidence that their mother was not divorced by their father. The allotment letter ought to have come in his name since he is the eldest. It is true that some of the deceased's children did not get their shares since the plot is small. There is no more space for others to be accommodated. Ali sold a plot which he had given him. The buyer has built on the land. He did not sell any plot. The money received from the sale of the plot by Ali was divided among the beneficiaries. The deceased had indicated that the title deed be in the name of the 1<sup>st</sup> appellant. He also informed the court that it is not Ali who built the house and he is the one who built it. He also built another house which composed of two rooms. There is no space for Ali to give to the respondent.

The 1<sup>st</sup> appellant **Mohamed Kabunge Kofia** testified that his step brother Ali asked him for a plot. He allocated him a plot as he had promised to build a rental house for his sisters. Ali sold the plot. It is his evidence that he sold a plot to Jamila for Ksh.800,000 and gave the respondent Ksh.50,000. Another beneficiary, Rahima, was given Ksh.100,000. According to him the problem is caused by the fact that Ali sold a big space and there is nothing remaining. He has four rooms for rental on the plot.

Ali testified as a witness for the respondent. He is the deceased's son. He stated that together with the 2<sup>nd</sup> appellant they sold the plot to one Hussein Bunge. He used the money to build a house. When the respondent complained he told her that he will leave the house to her. The matter was settled and the dispute arose when it came out that the title deed would come out in the names of the 1<sup>st</sup> appellant. The appellant threatened to move them out of the property. He is willing to give out the house he built to the respondent who is his sister. He also testified that the 2<sup>nd</sup> appellant also sold one plot a long time ago to one Jamila. Jamila also bought a plot from the 1<sup>st</sup> appellant. Their late brother by the name Osinya also sold another plot. There are four people who bought portions of the land namely Bunge, Jamila, Game and Salat.

**Mohamed Jillo Abdulkadir** was called by the appellants as their first witness. He told the court that in 2009 there was demarcation of the land. The deceased told them that the land be registered in the names of the 1<sup>st</sup> appellant, his first wife and his other son Ibrahim. At one time Ali went to him and told him that he wanted to get a share of the plot. Ali got the plot and sold it. The first appellant also sold a plot. **Hawo Bariso** was called as 2<sup>nd</sup> witness for the appellants. She testified that she bought a plot from the deceased measuring about 100 x 50ft and there was a sale agreement to that effect. **Jamila Mohamed Diwa** was another witness. On 18.10.1993 she bought a plot from the deceased. She also bought another plot recently on 30.1.2016 from the 1<sup>st</sup> appellant for Ksh.800,000. Both agreements were witnessed by the appellants' mother. **Sake Kesho Kidane** was the fourth witness. He testified that he bought a plot from the deceased and the sale agreement was witnessed by the deceased, his wife and children including the 1<sup>st</sup> appellant. The size of the plot was about 100x50ft.

**Hussein Bunge Adan** testified for the respondent. He bought a plot from Ali and A, the 2<sup>nd</sup> appellant. The plot is measuring about 100 x 50ft and the purchase price was Ksh.700,000. A was to get Ksh.100,000 he was also to build another house for Ali comprising of two rooms. While the construction was on A's daughter requested him to put an extra room for her. They agreed that the sale agreement indicate that Ali was the seller and A was a witness. He built a room for the 2<sup>nd</sup> appellant and then another room for his daughter. According to him the 2<sup>nd</sup> appellant seems to have an issue with the space on which Ali's house was built. The wife of the 2<sup>nd</sup> respondent whose name was not given also testified for the appellants. She told the court that part of the area sold to Hussein Bunge was her house. Ali told her that he wanted her husband to leave him part of the land. She informed Ali that the 2<sup>nd</sup> appellant is not of sound mind and therefore the plot should not be sold. She later realized that the plot had been sold. Ali took advantage of the 2<sup>nd</sup> appellant and sold the plot. He also used another space to build his house.

**Mohamed Kale Sole** was the 7<sup>th</sup> witness for the appellants. He told the court that Ali went to him and asked for a plot to build. Together with the chief they gave the plot to Ali measuring about 20 by 50ft. The 2<sup>nd</sup> appellant later went to him complaining that Ali wanted to sell the plot. **Kalu Soma Guleid** was the 8<sup>th</sup> witness for the appellants. He is the area chief for Nagayo location. He knows the deceased family very well. He told the court that the 1<sup>st</sup> appellant sold a plot and part of the money was shared out. Ali also sold part of the land. **Fatuma Nane Shege** was the 9<sup>th</sup> witness for the appellants. She is the area chief for Nyayo road location. Ali went to her and told her that he wanted

to get a small space on the plot so that he could build a house. Ali and the 1<sup>st</sup> appellant agreed and a committee went to the ground where they measured a plot of 40 x 50ft. Ali then sold the plot to Bunge. The 1<sup>st</sup> appellant also sold part of the land.

The appeal raises several issues. There is the issue relating to the mental status of the second appellant. The second ground of appeal is that the matter proceeded to full hearing yet the 2<sup>nd</sup> appellant is not of sound mind. Although order 32 of the Civil Procedure Act is titled “**suits by or Against minors and persons of unsound mind**”. The entire provision makes reference to suits involving minors and there is no mention of persons of unsound mind. The general presumption is that a person of unsound mind requires a next friend to institute a suit. Under order 32 (3), where the minor is the defendant, the court if satisfied of the fact of his minority, is required to appoint a person to be the minor’s guardian ad litem. The same can be extended to a person of unsound mind.

In the current case, the wife to the 2<sup>nd</sup> appellant informed the trial court that he is of unsound mind. The trial court in its judgement stated as follows:

***The RW6 who was the separated wife of the 2<sup>nd</sup> Respondent complained that the 2<sup>nd</sup> Respondent is not sound minded and for that matter he was taken for granted on those sale whereby she pray that the Hon. Court should consider the children of the 2<sup>nd</sup> respondent for space to live. This Hon. Court noted while proceeding with hearing, where he kept on contradicting himself sometimes argues with the sale sometimes complaining over it.***

The record of the trial Court shows that the 2<sup>nd</sup> appellant took oath and gave his evidence. This was on 18.5.2018. when Hussein Bunge Adan testified on 14.6.2018, he was cross examined by the 2<sup>nd</sup> appellant. The 2<sup>nd</sup> appellant also made short submissions on that date. On 25.5.2018 the 2<sup>nd</sup> appellant also took oath and testified. According to the respondent, the 2<sup>nd</sup> appellant is not a person of unsound mind. No medical documents were produced to prove that the 2<sup>nd</sup> appellant is a person of unsound mind. The evidence shows that he was married and had children. According to Hussein Bunge, the 2<sup>nd</sup> appellant’s daughter requested for her room and he built an extra room for her.

The evidence on record clearly proves that he second appellant is sober and cannot be held to be a person of unsound mind. He was challenging the sale agreement involving Ali and Hussein Bunge because he was just a witness and was not the seller. This is what the agreement says. I don’t find that he was not aware of the dispute. In any case, this is a succession matter involving the distribution of an estate. He is the deceased’s son and he properly explained himself before the Court. He is the deceased’s eldest son and had expected that the title deed for the land would have come in his name. I do find that the ground of appeal that the 2<sup>nd</sup> appellant is of unsound mind has not been proved as there is no tangible evidence to that effect.

The other issue relates to the manner in which the trial court distributed the estate. This issue covers the rest of the grounds of appeal. According to the evidence on record the deceased had two wives. The affidavit of the respondent in support of her succession cause at paragraph 4 state that the deceased was survived by the following people.

- 1. Zainabu Kabunge - widow**
- 2. Mohamed Kabunge - son**
- 3. AK - son**
- 4. Ali Kabunge - son**
- 5. Juma Kabunge - son**
- 6. Ibrahim Kabunge - son**
- 7. Halima kabunge - daughter**
- 8. Hadija Kabunge - daughter**
- 9. Rahma Kabunge - daughter**
- 10. Asha Kabunge - daughter**

The learned Kadhi visited the suit land and took measurements of the entire plot. The plot size is 130x130feet. A large portion has already been sold. The evidence shows that part of the land was sold by the deceased. The appellants and their step brother, Ali, also sold part of the land. The appellants concede that the land cannot cater for each beneficiary. The 2<sup>nd</sup> appellant has a house on the land. The trial court gave that house to his children. At the same time, Ali agreed to give his house to his sister, the respondent herein. There is no mention of the other beneficiaries.

Mr. Behailu, Counsel for the appellants submit that the judgement of the trial court is impossible to implement. It is clear to me that the entire land had been built. The Court cannot force the purchasers to demolish their houses and move out of the land. The appellants participated in the sale of the land and took the sale proceeds. Although the 2<sup>nd</sup> appellant strongly maintains that he did not sell land to Hussein Bunge and that he was simply a witness, it is clear to me that he was aware of the sale transaction and even participated by appending his signature as a witness. His brother Ali approached the first appellant for a plot and that is in line with the evidence of

Mohamed Nane Sege. Ali is also the deceased's son. According to Hussein Bunge, the 2<sup>nd</sup> appellant and Ali sold the plot to him. Hussein Bunge built a room for the 2<sup>nd</sup> appellant and added an extra room for his daughter. The 2<sup>nd</sup> appellant fully participated in the sale transactions.

With regard to the first appellant, Jamila Mohamed Diwa testified that she bought a plot from him on 30.1.2016 for Ksh.800,000. The 1<sup>st</sup> appellant also witnessed the sale of the land to Jamila in 1993 by the deceased. The 1<sup>st</sup> appellant also witnessed the sale of land by the deceased to Sake Kesho Kidane. The 1<sup>st</sup> appellant testified that he has a house on the land as well as rental houses. The first appellant contends that the problem was caused by Ali who sold a big plot. The sale agreement for Hussein Bunge Adan gives the measurement of the sold plot as 75 x 57 feet. The beneficiaries should ensure that the plot size for Hussein Bunge is limited to the measurements as per the sale agreement.

In view of the fact that no extra land can be created within the suit land for the other beneficiaries, I do find that the trial Court did its best in the circumstances of this case to satisfy the respondent's claim. The 2<sup>nd</sup> appellant contends that the house given to the respondent belongs to him. It is clear from the record that the 2<sup>nd</sup> appellant is not the one who was in control of that house. Ali sold a plot to Hussein Bunge and built the house. There is no problem if Ali gives the house to his sister so as to resolve the dispute. When the other beneficiaries come calling for their shares, it will be up to those with houses on the land to cater for them and pay off their a respective shares.

The appellant also submit that the removal of the 2<sup>nd</sup> appellant and Ali form the list of beneficiaries is erroneous. I do find that indeed the two are the deceased's beneficiaries. The house that was given to the 2<sup>nd</sup> appellant's children forms part of his share. Ali is not complaining as he sold a plot to Hussein Bunge. Although he shared the sale proceeds, he is willing to give the house to his sister. The 2<sup>nd</sup> appellant still has a footing on the land. Hussein Bunge built a room for him. There is no more land to give to the 2<sup>nd</sup> appellant. His brother the 1<sup>st</sup> appellant has a residential house and rental houses on the land.

Mr. Behailu raised the issue of the title deed coming out in the name of the 1<sup>st</sup> appellant. It is further contended that the deceased had indicated that the title deed should come out in the name of the 1<sup>st</sup> appellant. That does not give the 1<sup>st</sup> appellant any advantage. There is no dispute that the land belongs to the deceased. According to Ali and the respondent, the appellants threatened to evict them from the land once the title deed came out in the name of the 1<sup>st</sup> appellant. My finding is that this cannot be an issue. Even if the title deed was to come out in the 1<sup>st</sup> appellant's name, that does not make him the owner of the land. However in view of the dispute herein, I do order that the title deed should be issued in the names of the two appellants, Ali and the respondent Hadija Kabunge Kofia jointly. Thereafter, the four people to demarcate the land and transfer the sold portions to the respective purchasers.

From the record of the trial court, I do find that the allegation that the Kadhi was biased has not been proved. The appellants fully participated in the hearing. The appellants' main contention seem to be the house that Ali surrendered to the respondent. The appellants are from the first wife while the respondent and Ali are from the 2<sup>nd</sup> wife of the deceased. The appellants called several witnesses and were allowed to ventilate their case by the trial court. I do find that the trial Court was not biased. I am entirely in agreement with the findings of the trial Court.

As a way forward, I do order that the committee involved in issuance of title deeds should issue the title deed for the suit land, Plot No.2052, Nyayo road, Marsabit town in the names of:

1. MOHAMMED KABUNGE KOFIYA
2. AKK
3. HADIJA KABUNE OSMAN
4. ALI KABUNGE KOFIA

I do further order that the measurements of the plots bought by the purchasers be limited to those indicated in the respective sale agreements. If it is established a purchaser's plot is bigger than the measurements, then the beneficiaries should reclaim the extra plot. If the extended plot by the purchaser is already developed, then the beneficiaries should call upon the purchaser to pay for the extended portion of the land. Parties are at liberty to go back to the Kadhi for the enforcement of the Kadhi's decision.

In the end, I do find that the appeal lacks merit and is hereby dismissed. Parties shall bear their own costs.

**Dated, Signed and Delivered at Marsabit this 13<sup>th</sup> day of February, 2019**

**S. CHITEMBWE**

**JUDGE**