**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**FAMILY DIVISION**

**CIVIL APPEAL 27 Of 2017 (Formerly 82 Of 2009)**

**MOHAMED ATHMAN KOMBO.....APPELLANT**

**VERSUS**

**MAUA MOHAMED.....RESPONDENT**

**JUDGEMENT**

***(An Appeal from the Judgment of Hon. Sheikh Twalib B. Mohamed, Kadhi delivered on 30.3.09 in Mombasa Kadhi Succession Cause No. 202 of 2007)***

1. The Appeal herein arises from the Judgment and Decree of Hon. Sheikh Twalib B. Mohamed, Kadhi delivered on 30.3.09 in Mombasa Kadhi Succession Cause No. 202 of 2007. The record indicates that the matter in the Kadhi's Court filed by the Respondent related to the estate of Athuman Kombo (the deceased) who died on 27.9.06. The Respondent stated that the Deceased left 2 commercial houses without land and pension and NSSF dues. She sought the determination of the estate and heirs of the deceased and the distribution in accordance with Islamic Sharia. The deceased was survived by 2 widows, namely the Respondent and the mother of the Appellant. He was also survived by the Appellant, 6 other sons and 5 daughters.

2. In his reply to the Petition, the Appellant averred that one of the houses was dilapidated and that with the assistance of his mother he has been reconstructing the same. He further avered that the Respondent had taken some properties of the estate and has been collecting rent from the commercial property for her exclusive use. He prayed that the Respondent be ordered to account for the rent due to the estate.

3. In his judgment of 30.3.09, the Hon. Kadhi made a determination that the house with 3 shops be included in the deceased's estate comprising of Plots Nos. 2085/VI/MN and 2213/VI/MN. The repair and renovation expenses be considered during the distribution. The estate to be distributed in accordance with Islamic shariah as follows:

Widows 1/8 equally

Sons 2/21 each

Daughters 1/21 each

4. The Appellant was dissatisfied with the decision of the Hon. Kadhi and preferred the Appeal herein. The grounds of Appeal are that the Hon. Kadhi erred in law and fact in that he:

a) Failed to take into consideration the evidence tendered by the Appellant and his witnesses.

b) ordered the distribution of the house on Plot No. 2213/VI/MN yet the same did not form part of the estate of the deceased.

c) Arrived at the wrong conclusion in his evaluation of the evidence.

5. The Appellant prayed that the Appeal be allowed and the judgment and decree of the Hon. Kadhi be set aside and an order be made dismissing the petition in the lower Court with costs.

6. Parties filed written submissions as directed by the Court. In line with Section Section 65(1)(c) of the Civil Procedure Act, the submissions were highlighted before the Court in the presence of the Hon. Chief Kadhi as assessor. The said provision provides as follows:

> ***"(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—***
>
> ***(c) from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors."***

7. I have given due consideration to the record of appeal, as well as the submissions by the parties' respective counsel. This being a first appeal, the Court is under a duty to reconsider and reevaluate the evidence and draw its own conclusion. However given that it has neither seen nor heard the witnesses, the Court must make due allowance in this respect. These principles were set out in Selle and another –vs- Associated Motor Boat Company Ltd.& Others (1968) EA 123 by Sir Clement De Lestang, V. P. as follows:

> ***An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should made due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif –v- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).***

8. Under Ground 1 and 3 of the appeal, it was submitted for the Appellant that it was his testimony that the house on Plot No. 2085/VI/MN (Plot 2085) belonged to his maternal grandfather was corroborated by his mother's testimony. The repairs of the house were done by the Appellant. For the Respondent, it was submitted that no evidence was adduced during trial to support the claim by the Appellant. The receipts produced for the alleged repairs of the house do not in any manner show that the house belonged to the Appellant's grandfather. It is further contended that the Appellant and his mother in their testimony stated that the deceased left 2 houses. They thus acknowledged that the 2 houses belonged to the deceased. To the Respondent therefore, the Appellant failed to prove on a balance of probability that house No. 2085 does belong to him and does not form part of the estate of the Deceased.

9. The record shows that the Appellant stated in his testimony that the house on Plot 2085 including the mangroves were given by his maternal grandfather Mwidau Mwinyi. He went on to state:

> ***Our father died on 27/9/2006. He left two (2) houses which he said it was for us (10) children.***

For her part, the Appellant's mother Mwatime Mwidau Mwijuma stated:

> ***The 1st house it was my father who started it as we had no money. It was when we continued with it later.***

There is on record drawings for drainage work for this plot. The name of owner is indicated as Athuman Kombo, the deceased. The Appellant did not state when his maternal grandfather gave this house nor has he stated to whom he gave the same. If he meant that his grandfather gave the house to the deceased then it cannot be said that the same belongs to his grandfather. In any event the Appellant himself states that the deceased left 2 houses. Further, his mother stated that this house was "started" by her father as they had no money. She then says that they continued with it later. The Court can only assume that what was commenced by the Appellant's grandfather was construction of the house. It would then appear that after commencement, his parents' fortunes changed and they were able to complete the same later. To my mind, this assistance cannot mean that the house was given to the deceased by his father in law. The drawings also clearly show that the deceased was the owner of the house. I therefore find nothing in the record before me that persuades me that the house on Plot 2085 did not belong to the deceased.

10. Under ground 2, it was submitted that Plot No 2213/VI/MN (Plot 2213) is in the name of the Appellant and his siblings and did not form part of the estate of the deceased and was therefore not available for distribution. It was further submitted that the house on Plot 2213 was matrimonial property and upon the demise of the deceased, the same wholly vested in the Appellant's mother who vested it in her children. For the Respondent, it was submitted that the Appellant's claim that this house was jointly owned by the deceased and his mother was not in issue at the trial Court and is being raised for the first time on appeal. The Court should therefore not consider the same. Further, the testimony of the Appellant and his mother that the deceased had prior to his death bequeathed the house to them shows that the house belonged to the deceased and was not jointly owned by him and the Appellant's mother. It is further contended that is such a bequest had been made as alleged, it is void as it offends Islamic law as ruled by the Hon. Kadhi. The Respondent further argued that the Appellant's mother not being a party to the suit in the Kadhi's Court did not seek to be enjoined to make her claim. Her claim that the property was jointly owned is therefore an afterthought.

11. I have looked at the record and I note that the issue of house on Plot 2213 being matrimonial property was not an issue raised before the trial Court. The issue may not therefore be oduced in the Appellants submissions herein. In this regard I am duly guided by the decision in Olive Mwihaki Mugenda & another v Okiya Omtata Okoiti & 4 others [2016] eKLR where the Court of Appeal observed:

> ***The issue of locus standi of the 2nd appellant was not an issue raised before the trial court; it is also not an issue raised in any ground of appeal and there is no cross appeal on the locus of the 2nd appellant in this matter, it cannot therefore be validly introduced through submissions, no matter how eloquent.***

12. To buttress his submission that Plot 2213 was matrimonial property which vested in his mother upon the demise of the deceased, the Appellant cited the decision in Aliya w/o Jaganath Rama Charan Nagia alias Mahmoud Issa v Hussein Issa Nagia & 2 others [2017] eKLR. This decision is however distinguishable. In that case unlike in the present case, it was not disputed that the subject property was jointly registered to the deceased and the appellant.

13. The Hon. Kadhi found that the estate of the deceased was comprised of the 2 houses. He then proceeded to distribute the estate to the 2 widows and their children in accordance with Islamic law. Under Islamic Sharia a Muslim may not make a bequest in his will in favour of a legal heir. This is because Allah legislated fixed shares for legal heirs. Allah's Prophet (SAWS) said:

> ***"Allah has appointed for everyone who has a right what is due to him, and no bequest must be made to an heir. (Abu Dawud). Similar hadith is narrated by Abu Umamah (RA) and reported by Ibn Majah, Ahmad and others".***

14. The Holy Qur'an in Nisa 4:11 stipulates the appointed share of every heir as follows:

> ***"Allah instructs you concerning your children [i.e., their portions of inheritance]: for the male, what is equal to the share of two females"***

Nisa 4:12 provides:

> ***"…And for them [i.e., the wives] is one fourth if you leave no child. But if you leave a child, then for them is an eighth of what you leave after any bequest you [may have] made or debt."***

15. Hon. Al Mudhar A. S. Hussein, Chief Kadhi is of the opinion that the Appeal should be allowed. He stated in part:

> ***- From the foregoing, I of the opinion that, the case was not properly instituted and not properly heard by the trial Kadhi.***
>
> ***- I would therefore opine if the case could be reheard by different kadhi and the appeal be allowed.***

16. With respect, I disagree with the Hon. Chief Kadhi for the reasons outlined above.

17. Having reconsidered and reevaluated the evidence herein, I draw the conclusion that the Appeal herein lacks merit and the same is dismissed. Each party shall bear own costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 8th day of March 2019**

**M. THANDE**

**JUDGE**

**In the presence of: -**

**…… for the Appellant**

**…… for the Respondent**

**…….…… Court Assistant**