REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL 38 "A" OF 2016

FADHIYA SALIM FARAJ.....APPELLANT

VERSUS

FAIZ MOHAMOUD ABDALLA.....RESPONDENT

JUDGEMENT

(An Appeal from the Judgment of Hon. Sheikh Abdulhalim H. Athman, Principal Kadhi

delivered on 17.11.16 in Mombasa Kadhi Succession Case No. 206 of 2015)

1. The Appeal herein arises from the Judgment and Decree of Hon. Abdulhalim H. Athman, Principal Kadhi delivered on 17.11.16 in Mombasa Kadhi Succession Case No. 206 of 2015. The succession cause instituted by Fadhiya Salim Faraj, the Appellant against Faiz Mohamoud Abdalla, the Respondent relates to the estate of Warda Said Saleh (the deceased) who died on 29.9.15 in Mombasa. The Appellant stated in her petition dated 6.11.15 that the deceased was childless and was only survived by herself, a sister.

2. The deceased left the following properties:

i) Swahili house on Plot No. 836/39 Section I MN, Kongowea comprised of 4 rooms 2 stores, 1 bathroom and 1 toilet.

ii) Swahili house at Kongowea Video Café on Plot No. 10/I/MN comprising of 6 rooms, 1 toilet and 1 bathroom.

iii) House on Plot No. 10 Kongowea.

iv) House on Plot No. 15/3/R/I/MN, Kongowea kwa Karama comprised of 9 rooms 2 toilets and 1 bathroom.

Respondent and the mother of the Appellant. He was also survived by the Appellant, 6 other sons and 5 daughters.

3. The deceased also left a liability of Kshs. 1,000,000/=.

4. The Appellant claimed that the deceased left a written will in which she charged the Appellant to discharge all her liabilities and managed her properties as she was childless. She further alleged that the Respondent purporting to be married to the deceased was trying to collect rent from the properties of the deceased. The Appellant prayed for an order restrain the Respondent from collecting rent or interfering with the deceased's properties and from harassing the Appellant.

5. In his response to the Petition, the Respondent averred that the deceased was survived by himself as the widower and her brother Swaleh Said Swaleh. He further claimed that house on Plot No. 10/I/MN (wrongly described as No. 15/3/R/I/MN) was the matrimonial home of the deceased and himself and he is therefore entitled to half share thereof under the Matrimonial Property Act. The estate of the deceased includes her share in her father's estate comprising of 2 houses in Bondeni and 1 in Majengo, Mombasa. The liability of the estate is not Kshs. 1,000,000/= as alleged by the Appellant but Kshs. 330,000/= owed to Musa Juma and Kshs. 75,000/= owed to Simon Gakunga Ndungi. The Respondent denies that the purported will is that of the deceased and even if it were, the same cannot be valid as it excluded her rightful heirs contrary to Islamic law. It is also ambiguous and does not bequeath the estate to anyone.

6. In a counterclaim, the Respondent sought a declaration that the Appellant, her brother Faraj Salim Faraj and her uncle Surur Salim Yaqut

have no claim in the house on Plot No. 10/I/MN, Kongowea. He also sought an order that they hand over vacant possession of the same or in the alternative eviction orders against them.

7. In his judgment of 17.11.16, the Hon. Principal Kadhi made a determination that:

i) The deceased signed the will. It was however against Islamic law.

ii) The deceased was married to the Respondent.

iii) The following are the heirs of the deceased and their entitlement:

Charity as per the will 30%

Fadhiya Salim Faraj uterine sister 11.66%

Faiz Mohamoud Abdalla widower 35%

Swaleh Said Saleh full brother 11.66%

Faraj Salim Faraj uterine brother 11.66%

8. In her Memorandum of Appeal dated 24.11.16 the Appellant complained that the Hon. Principal Kadhi erred in law and fact in that he:

1. Formulated his own issues and answered them.

2. Distributed the estate of the deceased contrary to her wishes.

3. Disregarded the contents of the will after appreciating the validity thereof.

4. Found that the Respondent was married to the deceased contrary to the evidence adduced.

9. The Appellant prayed that the judgment of the Hon. Principal Kadhi be set aside and that the Court do order that the estate of the deceased be distributed in accordance with her written will.

10. The Respondent was also dissatisfied with the decision of the Principal Kadhi and filed a Cross-Appeal dated 1.12.16. His grounds are that the Hon. Principal Kadhi erred in law and fact in that he:

1. Admitted the evidence of the document examiner without considering whether he had an office, necessary equipment to lawfully exercise his expertise.

2. Admitted the will as authentic yet it was signed by the Appellant who was executor and her son contrary to law on attestation of wills.

3. Found that the Appellant and Faraj Salim Faraj the half-sister and half-brother of the deceased on the mother’s side were heirs of the deceased contrary to Islamic law.

4. Held that 30% of the estate should be given to charity based on an invalid will.

5. Failed to order the Appellant to account for the rental income she was collecting.

11. The Respondent prayed that the Court do set aside the part of judgment of the Hon. Principal Kadhi that found:

a) That the will was authentic and find that the will was invalid.

b) That Appellant and Faraj Salim Faraj are heirs of the deceased.

c) That 30% of the estate be given to charity.

12. The Respondent further prayed that the Appellant be ordered to render accounts of all rent collected from the estate and surrender the same to the Respondent.

13. Following directions of the Court, parties filed their respective written submissions. At the hearing, counsel for the Appellant failed to attend Court and only the Respondent’s counsel highlighted his submissions. This was done before Court in the presence of the Hon. Chief Kadhi in compliance with Section 65(1)(c) of the Civil Procedure Act which 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."

14. 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 making due allowance that it has neither seen nor heard the witnesses see Selle and another –vs- Associated Motor Boat Company Ltd.& Others (1968) EA 123.

Ground 1 of the Appeal

15. The Appellant's complaint is that the Hon. Principal Kadhi formulated his own issues and answered them. The Appellant in her petition sought an order restraining the Respondent from collecting rent or interfering with the deceased's properties and from harassing the Appellant. She claimed that the deceased who was childless had in her written will charged the Appellant to discharge her liabilities and manage her properties. The Appellant further alleged that the Respondent purported to be married to the deceased and was trying to collect rent from the properties of the deceased. In his counterclaim, the Respondent sought a declaration that the Appellant, her brother and her uncle have no claim in the house on Plot No. 10/I/MN, Kongowea. He also sought an order for vacant possession or eviction orders against them. The issues formulated by the Hon. Principal Kadhi were validity of the will, what constituted the estate and liabilities of the deceased and the legal heirs of the deceased. From the petition and counterclaim, it is clear that the validity of the will, the heirs of the deceased, the assets and liabilities were all questions that required determination by the Principal Kadhi. In the premises, I cannot fault the issues formulated by the Hon. Principal Kadhi.

Ground 2 and 3 of the Appeal and Grounds 1, 2, and 4 of the Cross-Appeal

16. Due to their conceptual similarities, these grounds will be considered together. The Appellant complains that the Hon. Principal Kadhi distributed the estate of the deceased contrary to her wishes and disregarded the contents of the will after appreciating the validity thereof. The Respondent on the other hand claims that the Hon. Principal Kadhi erred in admitting the evidence of the document examiner without ascertaining his credentials. He also found that the will was authentic yet it was signed by the Appellant who was executor and her son contrary to the law on attestation of wills. The Hon. Principal Kadhi further erred in holding that 30% of the estate should be given to charity based on an invalid will.

17. The record shows that Emmanuel Kenga stated that he retired as a police officer on 3.4.15. He has been a document examiner for 26 years and was trained at the CID headquarters. Though retired he continues to examine documents. He however stated that he does not have a licence or certificate but that the CID are aware of his work. In his judgment, the Hon. Principal Kadhi stated:

Mr. Abubakar for the Respondent submitted the examiner's report be dismissed as he is retired and not registered to conduct document examination. I beg to differ, under Islamic law of evidence, expert evidence is admissible. The important issue is whether the person is an expert in his field.

18. I have looked at the report. It is headed "Emmanuel Karisa Kenga, Forensic Documents Examiner". It has a postal address and a mobile telephone number but no physical address. When asked, Emmanuel Kenga stated that his office is in Narok House, Kimathi Street but this is not stated in his report. A report or indeed a formal letter from an expert or a professional with no physical address gives the impression of a fly by night operative. Before expert evidence is admitted by a Court or tribunal, it is necessary to establish the credentials of the expert. Section 48 (1) of Evidence Act provides as follows:

When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger or other impressions.

19. Other than stating that he was trained at CID headquarters and has 26 years' experience, Emmanuel Kenga did not produce any credentials to support his claim. I do therefore find that the Hon. Principal Kadhi erred in by admitting and relying on the opinion of Emmanuel Kenga who is not licenced to carry out the work of document examiner and further without establishing that he is specially skilled in questions as to identity or genuineness of handwriting as required by law.

20. Did the Hon. Principal Kadhi err in admitting the will as authentic yet it was attested by the Appellant who was executor and her son? The law relating to attestation of wills is contained in Section 13 of the Law of Succession Act which provides:

13. Effect of gift to attesting witness

(1) A will shall not be considered as insufficiently attested by reason of any benefit thereby given, either by way of bequest or by way of appointment to any person attesting it, or to his or her spouse.

(2) A bequest to an attesting witness (including any direction as to payment of costs or charges) or a bequest to his or her spouse shall be void, unless the will is also attested by at least two additional competent and independent witnesses,in which case the bequest shall be valid.

21. The law is clear that a will shall not be considered insufficiently attested simply because a bequest has been made to an attesting witness.

What the law says is that such bequest shall be void unless the will is also attested by at least 2 additional independent witnesses. In the present case, the fact that the Appellant and her son were attesting witnesses does not in and of itself invalidate the will. It is only the bequest to the Appellant that is void for want of at least 2 additional witnesses. The limitation of a bequest to an attesting witness under Section 13 of the Act applies to a spouse of a beneficiary but not a son. A son of a beneficiary under a will would be a competent and independent attesting witness.

22. The Appellant states that the Hon. Principal Kadhi erred in that he disregarded the contents of the will after appreciating the validity thereof. He also distributed the estate of the deceased contrary to her wishes. In his judgment, the Hon. Principal Kadhi stated:

> ***I find the will document was signed by the deceased and is therefore authentic…***

23. The finding of the Hon. Principal Kadhi concerning the will is that the same was signed by the deceased and was therefore authentic or genuine. This does not in any way mean that the Hon. Principal Kadhi appreciated the validity of the will. As a matter of fact he goes on to state:

> ***The will although authentic must be subjected to Islamic law on inheritance and wills. Islamic law provides specific shares to specific heirs. Heirs and shares so specified cannot be amended by human agency through any instrument.***

24. I do not therefore agree with the Appellant that the Hon. Principal Kadhi found that the will was valid. He found the will not valid for purporting to amend what Islamic law provides for specific heirs. The Hon. Principal Kadhi could therefore not distribute the estate of the deceased in accordance with her will which according to him was contrary to Islamic law. It would then follow that if the will was invalid, then every bequest therein is invalid including the bequest to charity.

25. The Court notes that in the will, the Appellant was named as the person in charge of all the deceased's properties. The deceased purportedly stated in the will that the Appellant is to sell 1 of the deceased's 5 houses and pay herself the sum of Kshs. 580,000/= which the Appellant lent to the deceased at the time of purchasing Musa Juma's house. The deceased also bequeathed all that she owned to the Appellant. The deceased further stated that her 2 brothers Faraj and Swaleh were to get nothing from her estate. She also stated that her husband, the Respondent pronounced divorce upon her 3 times and did not live with her in harmony and that upon her demise he should be evicted from her house.

26. The fact that the Appellant is the single beneficiary of the deceased's will raises suspicion. Further she seemed to have played a central role in the making of the will, given that she and her son were the attesting witnesses. It also strikes me as strange that the deceased would live with the Respondent who she referred to as her husband but want him evicted upon her demise. It is also interesting that the deceased, who was living with the Respondent and his daughter Jamila made no mention of her being evicted together with her father. It would appear to me that the will if at all made by the deceased was made in suspicious circumstances. In this regard I am inclined to follow Musyoka, J. who in In re Estate of Lucy Wangui Muraguri [2015] eKLR stated:

> ***The position is that where a person who plays the central role in the making of the will, that is other than the testate herself, takes a substantial benefit under the will; that would be regarded as a suspicious circumstance. It ought to raise suspicion as to whether the testator, who is purported to have signed the will under those circumstances knew and approved the contents of the document that she signed.***

27. Further, I note from her testimony, the Appellant initially stated that she was a full sister of the deceased and that she was the only one who survived the deceased. It is only upon cross examination that she admitted that they are maternal sisters but have different fathers. She also admitted that the deceased had a full brother Swaleh Said Swaleh. The foregoing factors lead me to the conclusion that the deceased who is purported to have signed the will under those suspicious circumstances may not have known or approved the contents of the document that she signed if at all she did sign the same.

Ground 4 of the Appeal

28. The Appellant states that the Hon. Principal Kadhi erred by finding that the Respondent was married to the deceased contrary to the evidence adduced. In her testimony, the Appellant stated that the deceased, the Respondent and his daughter Jamila were living in the Kongowea house. She said the deceased said in her will that the Respondent should leave the house. Suror Yakut Salim an uncle of the deceased said that the deceased was not married to the Respondent. He was not invited to the wedding. He however stated that he saw the Respondent at the burial of the deceased. On his part, the Respondent stated that he married the deceased in 2007 and lived with her in her Kongowea house. Their marriage was solemnized by Sheikh Shaban Abd Musa. The original marriage notification was in the deceased's custody. They were unable to process marriage certificate as the deceased was unwell. Swaleh Said Swaleh a brother to the deceased also stated that he gave oral consent to the deceased to marry the Respondent. He stated that he has never seen the marriage certificate between the Respondent and the deceased. The Respondent did not produce any document to support his claim of marriage to the deceased nor did he call any of the witnesses to the marriage to testify in Court.

29. In his judgment, the Hon. Principal Kadhi stated:

> ***On the first question, there is overwhelming evidence the respondent was married to the deceased herein. A marriage under Islamic law becomes valid upon the consent of wife and husband, wife's waliy, at least two male witnesses and agreement on the dowry. Marriage certificate is important to prove the same but absence or lack does not make invalid a valid marriage solemnised under Islamic law.***

30. This finding of the Hon. Principal Kadhi that there is overwhelming evidence the Respondent was married to the deceased is rather curious. There was no evidence of the consent of the deceased and the Respondent to marry. There was also no evidence of at least 2 male

witnesses nor of any agreement on the dowry. The evidence on record is that the Respondent in spite of stating that he married the deceased in 2007 had no marriage certificate. They allegedly had not processed the same as the deceased was unwell. Was the deceased unwell from 2007 to 2015 the year of her demise? If he was married to the deceased and they lived together as husband and wife, how is it that he did not have the marriage notification which he said was in the deceased's custody? Why did he not call Sheikh Shaban Abd Musa who solemnized the marriage or other witnesses to the marriage who he said were still alive, to corroborate his testimony? As for Swaleh Said Swaleh a brother to the deceased, he was away in Saudi Arabia. He stated that he gave his oral consent to the alleged marriage when his mother called him. This evidence is nowhere near overwhelming. On the contrary it is evidence that would lead a reasonable person to draw the conclusion that there was no marriage at all between the Respondent and the deceased. In the circumstances, I find that the Hon. Kadhi erred in finding that the Respondent and the deceased were married.

Ground 3 of the Cross-Appeal

31. The Respondent stated that the Hon. Kadhi erred in finding that the Appellant and Faraj Salim Faraj the half-sister and half-brother of the deceased on the mother's side were heirs of the deceased contrary to Islamic law. In his opinion, Hon. Al Mudhar A. S. Hussein the Hon. Chief Kadhi stated:

> ***-the Quran states that clearly in Chapter (4) verse (12) says "and if a Man or woman leaved neither ascendants nor descendants but has a brother or a sister, then for each one of them is sixths (1/6) but if they are more than two, they share a third, after any bequest which was made or debts, as long as there is no detriment (caused) (this is) an ordinance from Allah, and bothers/sister where no descendants nor ascendant as heirs, if is one gets 1/6 if they are more than one they share (1/3) equally among them regardless of gender.***

Duly guided by the foregoing opinion of the Hon. Chief Kadhi, my finding is that the Appellant and Faraj Salim Faraj are heirs of the deceased.

32. The Hon. Chief Kadhi was further of the opinion that:

> ***- The Hon. Kadhi also erred in awarding the charity only 30% instead of 33.3% which is one third (1/3) maximum allowed in charity by way of Will, whereas the deceased had no children and no parents.***
>
> ***- The (1/3)=33.3% maximum in gifts through the Will has basis from the prophetic sayings while the 30% has no basis from Sharia, therefore the 33.3% should have been awarded.***

33. With tremendous respect to the Hon. Chief Kadhi, I disagree. This Court has for the reasons stated above found that the will of the deceased is invalid. It follows therefore that all the bequests made therein including that to charity is also invalid.

34. The Hon. Chief Kadhi gave 2 modes of distributions. The first is with the Respondent as an heir which for the reasons stated earlier is not relevant. The second is without the Respondent as an heir as follows:

> ***a) Charity 33.33%***
>
> ***b) Fathiya Salim (maternal sister) 16.66%***
>
> ***c) Faraj Salim (maternal brother) 16.66%***
>
> ***d) Swaleh Said Swaleh (full brother) 33.33%***

35. Ground 5 of the Cross-Appeal

The Respondent faults the Hon. Kadhi for failing to order the Appellant to account for the rental income she was collecting. This Court has found that based on the evidence, or lack thereof, the Respondent was not married to the deceased. In the circumstances, he has no interest in the estate that would warrant an order of production of accounts at his instance. In the circumstances, I find no fault in the Hon. Kadhi failing to order the Appellant to account to the Respondent for the rental income she has been collecting.

36. Having considered all the material before me, I have come to the conclusion that the Appeal and Cross Appeal partially succeed. The judgment of the Hon. Principal Kadhi of 17.11.16 is hereby set aside and I substitute therefor the following orders:

> i) The purported will of the deceased and the contents thereof are invalid.
>
> ii) Swaleh Said Swaleh the full brother of the deceased, Fathiya Salim Faraj, the maternal sister and Faraj Salim Faraj her maternal brother are lawful heirs of the deceased and their share in her estate in accordance with Islamic law as follows:
>
> Swaleh Said Swaleh the full brother 2/3
>
> Fathiya Salim Faraj, the maternal sister 1/6
>
> Faraj Salim Faraj her maternal brother 1/6

iii) Given that none of the parties has fully succeeded, each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 17th day of May 2019

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M. THANDE

JUDGE

In the presence of: -

.....for the Appellant

.....for the Respondent

.....Court Assistant