



REPUBLIC OF KENYA



KENYA LAW
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**Mwanjama v Mwangungu & 2 others (Civil Appeal 20 of 2017)
[2019] KEHC 12493 (KLR) (12 July 2019) (Judgment)**

Neutral citation: [2019] KEHC 12493 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 20 OF 2017**

**M THANDE, J
JULY 12, 2019**

BETWEEN

SAIDI RAMDHANI MWANJAMA APPELLANT

AND

ALI HAMISI MWAGANGUVU 1ST RESPONDENT

SAUMU HASSANI 2ND RESPONDENT

JUMAA ALI MWANJAMA 3RD RESPONDENT

JUDGMENT

1. The Appeal herein arose from the Ruling of Hon. Said Hamisi Bedzenga, Principal Kadhi delivered on 3.5.17 (and not 3.5.16 as indicated in the record of appeal) in Kwale Kadhi Court Succession Cause No. 99 of 2012. (I must state that the record in this Appeal is very confusing). The succession cause was instituted by the Appellant Saidi Ramdhani Mwanjama by a petition dated 17.4.12 in respect of the estates of Ramdhani Mwanjama and Mwanamina Ramdhani (the deceased). The Appellant sought a determination of the heirs of the deceased, distribution of the estate in accordance with Islamic law and a vesting order of the estate to the heirs. According to the petition, the deceased were survived by 12 persons indicated in paragraph 4 of the petition. The relationship is however not indicated in the petition. The deceased also left a property known as Kwale/Ukunda/1171 (the property).
2. In his judgment of 7.8.12, the Hon. Kadhi found that the legal heirs of the deceased are the Appellant, Mwanakombo Ramadhan Mwanjama, Binti Ali Ramadhan and Fatuma Ramadhan Mwakuhadzwa. The Hon. Kadhi then vested the property in the Appellant, Binti Ali Ramadhan and Fatuma Ramadhan.
3. By an application dated 4.4.13 Ali Hamisi Mwangungu, Saumu Hassani and Jumaa Ali Mwanjama, the Respondents herein sought to be enjoined in the petition. They also sought a review of the Judgment of the Hon. Kadhi. They claimed they were heirs and beneficiaries of the property which



- is family land and whose original owner was Mwadjuga Kuajwa and the suit was filed without their involvement. The Respondents filed another application dated 27.5.13 seeking injunctive orders against the Appellant as well as surrender to Court of the title to the property. In his ruling of 31.5.13, the Hon. Kadhi granted the Application dated 27.5.13 (the order gives the date as 29.5.13) as prayed.
4. After the said ruling and order, the record contains grounds of opposition dated 1.7.13 filed on 2.7.13 behalf of the Appellant in respect of an application dated 25.4.13. (The record does not contain an application dated 25.4.13). From the content however it would appear the grounds of opposition are in respect of the application dated 4.4.13. Also filed on 2.7.13 is grounds of opposition dated 1.7.13 on behalf of the appellant, in respect of an application dated 31.5.13. (Again there is no such application on the record). The content however indicates that the grounds of opposition could be in respect of the application dated 27.5.13. It is to be noted also that the second deceased person Mwanamina Ramdhani, has been indicated as a petitioner in her own succession proceedings in both grounds of opposition! The record further contains a notice of preliminary objection and grounds of opposition both dated 10.3.17 in respect of the Application dated 27.5.13 challenging the jurisdiction of the Kadhi's Court to deal with the succession matter further on grounds that it is functus officio having pronounced its judgment on 7.6.12 (the correct date is 7.8.12).
 5. In the ruling of 3.5.17, the Hon. Kadhi found that the property originally belonged to Ramadhan Mwakuadzwa. The Hon. Kadhi then directed that the property be subdivided and distributed to the 2 sons and 5 daughters of the said Ramadhan Mwakuadzwa with each son getting 2/9 share while each daughter was to get 1/9 share. Given that the children of Ramadhan Mwakuadzwa were all deceased, the Hon. Kadhi directed that their shares devolve upon their respective surviving heirs.
 6. It is this ruling that has brought the Appellant to this Court. The summarized grounds of appeal are that the Hon. Kadhi erred in law and fact in that he:
 - a. Found and held that the Respondents were beneficiaries of the estate of the deceased and entitled thereto.
 - b. Disregarded the evidence on record of the relationship between the 2nd deceased person's relationship to the 1st deceased person and the Appellant.
 - c. Found that the 2nd deceased person was a daughter of Ramadhan Mwakuadzwa.
 - d. Found that the property was family property yet the same had already devolved.
 - e. Found and held that the property be distributed among the heirs of Ramadhan Mwakuadzwa including the Respondents.
 7. The Appellant prayed that the appeal be allowed and that the ruling of the Hon. Kadhi of 3.5.17 be set aside and be substituted with an order dismissing the Respondents application dated 4.4.13.
 8. Section 65(1)(c) of the *Civil Procedure Act* provides:
 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."
 9. Pursuant to the above provision, the Appeal was heard by the Court in the presence of the Hon. Chief Kadhi as assessor. In his petition dated 17.4.12, the Appellant had indicated that the same was in respect of the estates of Ramadhan Mwanjama and Mwanamina Ramadhan. At this point I



need to state that the practice of filing 1 succession petition in respect of the estates of 2 or more deceased person is deplorable and unacceptable. It just causes confusion to the parties and to the Court as in the present case. Parties are well advised to file separate succession petitions in respect of each estate notwithstanding that deceased persons may hold the property forming their estates jointly or in common.

10. The Appellant stated that the heirs of the deceased are:

- a. Said Ramadhani Mwanjama
- b. Binti Ali Ramadhani
- c. Zuhura
- d. Fatuma Ramadhani Mwakuhadzwa
- e. Mesaidi Mrengo
- f. Mwanakombo Ramadhani
- g. Asha Ramadhani
- h. Mesaidi Ramadhani
- i. Maku Mwabasi
- j. Mejumaa Ramadhani
- k. Zuhura Jumaa
- l. Jambia Ramadhani

11. These heirs were those listed in the letter of the Chief of Diani location dated 16.4.12 as heirs of Ramadhan Mwanjama, the 1st deceased person. According to the said letter, Ramadhan Mwanjama was the father of the 2nd deceased person as well as of the Appellant. The Appellant did not in his petition indicate the relationship of the heirs to the deceased. Looking at the Chief's letter, I note that the heirs listed in the petition include 4 widows, 2 sons and 6 daughters of the 1st deceased person. There was no Chief's letter in respect of the 2nd deceased person. The record contains an official search dated 11.4.12 which indicates that the property was in 1984 registered in the names of the 2 deceased persons, Ramadhan Mwanjama and Mwanamina Ramadhan as proprietors in common in equal undivided shares. In his judgment of 7.8.12, the Hon. Kadhi stated:

The deceased is Ramadhani Mwanjama.

He left a parcel of land No. Kwale/Ukunda/1171.

The legal heirs are:

1. Said Ramadhan Mwanjama - son
2. Mwanakombo Ramadhan Mwanjama - daughter
3. Binti Ali Ramadhan - daughter
4. Fatuma Ramdahan Mwakuhadzwa



The Hon. Kadhi went on to say:

For the purpose of registration the estate land No. Kwale/Ukunda/1171 be issued to.

1. Said Ramadhan Mwanjama
 2. Binti Ali Ramadhan
 3. Fatuma Ramdahan
12. I have carefully looked at the judgment. Except for Mwanakombo Ramadhan Mwanjama who the Hon. Kadhi indicated was deceased, it is not stated what became of all the other heirs of the 1st deceased person and their shares. There is no mention of the 4 widows, 1 son and 3 daughters and their respective shares. Under Islamic Sharia, the appointed share of every heir is stipulated in the Holy Qur'an in Nisa 4:11:
- “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.”
13. My finding therefore is that the Hon. Kadhi erred by failing to comply with the dictates of Islamic Sharia in that he did not provide for the 4 widows, 1 son and 3 daughters of the deceased who were listed in the petition filed by the Appellant. Further the Hon. Kadhi erred in stating that the deceased was Ramadhani Mwanjama yet the petition was very clear that it was also in respect of the estate of Mwanamina Ramadhani, the 2nd deceased person. Nothing in the judgment was said about the 2nd deceased person. The Hon. Kadhi made no mention of the 2nd deceased person or of her ½ share portion of the property.
14. Hon. Sheikh Al Muhdhar A. S. Hussein, the Chief Kadhi as assessor assisted the Court with his opinion in the matter. He was of the view that the Appeal should be allowed. The Hon. Chief Kadhi's stated in part:
- My take is that, the Hon. Kadhi in Kwale KCC No. 99 of 2012 has erred by entertaining the issue of ownership of a disputed parcel of land between the parties which is out of his jurisdiction.
 - The Kadhi's Court jurisdiction is very clear in Article 170(5) of *the Constitution* of Kenya and Kadhi's (sic) Act Chapter !!, Section 5 of it.
 - The Kadhi in his finding that the disputed land belongs to who and does not belong to who, is out of his jurisdiction and the same should have been filed at Environment and Land Court.
15. I do agree with the Hon. Chief Kadhi that the Kadhi's Court lacks the jurisdiction to determine ownership of land which is the preserve of the Environment and Land Court.
16. Having taken into account all the material placed before me, my finding is that the judgment of the Hon. Kadhi of 7.8.12 as well as the subsequent proceedings and consequential rulings and orders



cannot stand. The estates of the 2 deceased persons were not administered in accordance with Islamic Sharia. In view of this finding, it is not necessary to delve into the submissions filed by the parties. The order that commends itself to me is to allow the Appeal and set aside not only the ruling of 3.5.17 but also the judgment of 7.8.12. I further direct that Kadhi Succession Cause No. 99 of 2012 be and is hereby remitted to the Kadhi's Court to be heard afresh by any other Kadhi other than Hon. Said Hamisi Bedzenga.

17. There shall be no order as to costs.

DATED, SIGNED AND DELIVERED IN MOMBASA THIS 12TH DAY OF JULY 2019

M. THANDE

JUDGE

In the presence of: -

.....for the Appellant

..... for the Respondent

.....Court Assistant

