



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL APPEAL NO. 2 OF 2015

STEPHEN BORU ELISHA.....APPELLANT

VERSUS

HABIBA MOHAMED SAID.....1ST RESPONDENT

HAGE IBRAHIM KOME.....2ND RESPONDENT

PUBLIC TRUSTEE.....3RD RESPONDENT

JUDGMENT

The late Abraham Kome Boru died on 24th April, 2012. His widow Habiba Mohamed Said, the respondent herein, filed succession cause number 13 of 2015 before the Marsabit Kadhi's court and was issued with a certificate of confirmed grant on 21st April 2015. According to that certificate, the deceased's estate is to be inherited by his wife and daughter Hage Abraham Kome. The appellant filed this appeal contending that he is the deceased's son. The grounds of appeal as per the amended memorandum of appeal dated 11th March, 2019 are THAT:-

- 1. The honourable Kadhi erred in law and in fact in holding that the petitioners were the only rightful heirs of the deceased owing to misleading information issued by the petitioners.***
- 2. The honourable Kadhi erred in law and in fact in assuming jurisdiction of this suit as the deceased's son and other family members are professed Christian faith and cannot be under the jurisdiction of Kadhi's court.***
- 3. The honourable Kadhi erred in law and in fact when he accepted to hear the petitioner and her witness while having in mind the deceased was married to the appellant's mother.***
- 4. The honourable Kadhi erred in law when he failed to find that the appellant herein was entitled to a share of the estate of Abraham Kome Boru Kome (deceased)***

Miss Momanyi appeared for the appellant. Counsel submit that the Kadhi's Court had no jurisdiction to handle the matter. The deceased was a Christian. The appellant was the deceased's son. His parents divorced soon after he was born. He was raised up by his maternal parents. He came to know about the succession cause after the Kadhi had made his decision. The Kadhi found that there were only two beneficiaries. During cross examination the 1st respondent testified that he had heard of the appellant. The appellant is entitled to inherit. The appellant's identification documents prove that he is the deceased's son.

The 1st respondent opposed the appeal. She is the deceased's widow. She contends that the appellant is the deceased's son. It is her submission that the appellant never visited his father while he was alive. She only met the appellant after her husband's death. The appellant's academic certificates have different names. The appellant's identity card has not been annexed. The 1st respondent denied that they lived with the appellant for fifteen years. The appellant alleges that he was born in 1995 and is an adult who never visited his alleged father.

It is the 1st respondent's contention that the deceased was a teacher. She is equally a teacher having served in that capacity for 17 years. She contributed towards the purchase and development of the estate. The deceased left a Will and indicated his next of kin. The appellant is not mentioned anywhere as the deceased's next of kin. There is no evidence that the deceased was paying school fees and maintenance for the appellant. In his academic certificates the appellant is known as Stephen Boru Elisha but changed his birth certificate in 2015 for his name to be Stephen Abraham. According to the respondents the deceased was a Muslim. He converted to Islam before he got married to the 1st

respondent. The two got a daughter together (2nd respondent).

The main issue being raised by the appellant is that he was condemned unheard. He was not made aware of the succession cause before the Kadhi's court. There is also the issue that the deceased was a Christian.

The record of the trial court show that three witnesses testified. The 1st respondent was the petitioner. She testified that she got married to the deceased under Islamic law on 22nd April, 2000. She produced the notes of the Kadhi who solemnized the marriage. The deceased was a Christian but converted to Islam. The trial court put some questions on the 1st respondent and this was her reply.

Plaintiff: Your honour, the deceased had married a wife according to the information I am getting now but that was before he became a Muslim. But the deceased did not tell me about it. But his relative are saying they even got a son with the said wife who has been long married to another person.

The deceased has got 5 brothers and a sister but all of them are Christians.

The parents of the deceased have passed away long time ago.

Your honour, there are letters from the County commissioner and Public Trustee concerning this estate and a birth certificate of the said daughter of which I would like to produce.

Declared dowry 4 cattle.

PW2 (indicated as PW1 in the record of the trial Court) is **ABDULLAHI MOHAMED**. It is his evidence that he attended the deceased's wedding with the 1st respondent. The deceased was a Christian but converted to Islam. The dowry was four cattle valued at Ksh.25,000 each.

PW3 GALICHA DUDA testified that the deceased was his neighbor. After his marriage to the 1st respondent they built their house near his. The deceased went for a teaching course and became a secondary school teacher. PW3 testified that he heard that the deceased had a son with another wife. The deceased converted to Islam to enable him marry the 1st respondent.

The matter before the trial court went undefended. The trial Court cannot be faulted as it proceeded on the position that the two respondents were the only beneficiaries. The appellant could have applied before the Kadhi for him to be included as a party and have the judgment set aside. He equally had the right to appeal.

Regarding the issue of the deceased's religion, there is no doubt that the deceased was initially a Christian. The marriage between the deceased was solemnized on 22.4.2000 by a Kadhi. The deceased's name is taken in Arabic as Ibrahim while the Kiswahili version indicate it as Abraham. The dowry of four (4) cattle is stated. Sheikh Omar Hassan is the one who presided over the marriage. The trial court was told that the deceased was a Muslim. It is only fair that the deceased's estate be determined by the Kadhi. Although the deceased was baptized in 1963, it is evidence that as of 2000 when he got married to the 1st respondent, he had become a Muslim.

The 1st respondent contends that she made contribution towards the purchase of some of the properties. That issue was not canvassed before the trial court as the matter proceeded ex-parte. The assumption was that the two respondents, being a mother and her daughter, were not disputing the distribution of the estate and that the entire estate was to be inherited by the two. The issue of contribution will become relevant once the dispute is fully heard and each one tells the court his/her side of the story.

The appellant and his witness told the court that they heard that the deceased had a son. The appellant is alleging that he is the deceased's son. That contention can only be tested and proved or unproved through a full hearing. I do find that the interest of justice will be served if the appellant is accorded the opportunity of telling the court his case.

Although the appellant maintains that the Kadhi had no jurisdiction to determine the dispute, I do find that the deceased converted to Islam. His inheritance has to be governed by the Islamic shariah. The respondents knew that the deceased was a Muslim and opted to file the succession cause before the Kadhi's court. The determining factor in deciding the place of suing is not the inheritors but the deceased's personal law. It is the deceased's estate which is the subject of inheritance. Since the deceased died a Muslim, his estates has to be dealt with through the Kadhi's Court. I do find that the Kadhi has jurisdiction to determine the dispute. Whether the appellant who is a Christian can inherit the estate of a Muslim will be determined by the Kadhi.

In the end, I do find that the appeal is merited and partly succeed. The appellant should be accorded an opportunity to present his case before the Kadhi. The other relatives of the deceased were not his dependants. The 1st respondent will be able to testify on how she contributed towards the purchase of the estate. The respondents are equally free to apply before the Kadhi for the release of a portion of the employment benefits if the same will assist the deceased's daughter with her education.

The upshot is that the appeal partly success. This matter is remitted back to the Kadhi's court for full hearing and determination. The appellant to be allowed to participate in the case. Parties shall meet their respective costs of the appeal.

Dated, signed and delivered at Marsabit this 23rd July 2019

S. CHITEMBWE

JUDGE