



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 103 OF 2018

ABDI ROBA HUKA.....APPELLANT

VERSUS

NURA ROBA HUKARESPONDENT

(Being an appeal against the judgment and decree of the Hon. Presiding Kadhi Mustafa G. Shindu in Kadhi's Court at Meru Kadhi's Court case No. 4 of 2018)

J U D G M E N T

1. The appellant was the defendant in the trial Court whilst the respondent was the plaintiff. By a plaint dated 5th April, 2018, the respondent alleged that his father, the late **Roba Huka Adano**, left behind 450 cows out of which he claimed 50 cows as his share (*Andura*) of inheritance. The plaintiff prayed for the said cows as his inheritance.
2. The appellant opposed the claim vide his defence dated 19th April 2018. He denied the respondent's claim and stated that there were only 183 cows out of which, only 2 belonged to the respondent.
3. As the first appellate court, this court is enjoined to re-appraise and re-evaluate the evidence afresh and come to its own independent findings and conclusions. See *Selle & another vs Associated Motor Board Company Ltd [1968] EA 123*.
4. **PW1 Nura Roba Huka**, the respondent testified that when his father died, he left behind 450 cows. That he had gifted him 50 cows before he died. However, the appellant as the 1st born had under the Borana custom taken over as the overseer of the deceased's family. That as per that custom, after the demise of the father the property is not apportioned among the rightful heirs but rather wholly owned and utilized by the elder brother, which was the case at hand. That he has been denied access to the property. He prayed that his paternal gift be removed from the herd when sharing the inheritance.
5. **PW2 Golompo Huka Adano**, a brother to the deceased and an uncle to the parties, told the court that the appellant had evicted the respondent from the deceased's home, barred him from the livestock and threatened to kill him.
6. **DW1 Abdi Roba Huka**, the appellant testified that there were 183 cows left. Most of them had been wiped out by drought. That 13 cows had been given to two children of the deceased from his second marriage. That his gift was 88 cattle, his sister's share was 11 cattle to be shared with their mother. That the cattle their father left for their inheritance was only five in number out of which the respondent was only entitled to 2 cows.
7. **PW2 Gedhi Godana Shedo** testified that she is the stepmother to both the appellant and the respondent. That since the death of the deceased, she had received 13 cows for the two children the deceased had with her.
8. The trial court instructed the Assistant chief of Biliqi Area to conduct a head count of the cows. A report dated 12th May, 2018 was filed in court which showed that the actual number of cattle was 183 while there were 20 shoats.
9. In its determination, the trial court relied on the provisions of the Quran (4:11-12) in regard to inheritance and the position of Islam on paternal gift during administration of the inheritance. The court found that there was no evidence that the deceased had given any gift to any of the beneficiaries. The court therefore proceeded to distribute the estate in accordance with shariah. The court also made a finding that the Borana custom that prohibited distribution of the deceased's estate to the beneficiaries but left it to the eldest son to be a source of friction and disputes.
10. The appellant was dissatisfied with the trial court's determination and filed this appeal. In his Memorandum of Appeal, he enumerated five grounds as follows: -

“a) That the Hon. Kadhi erred in law and in fact in giving judgment in favour of the respondent when he did not prove his case on a balance of probabilities.

b) That the Hon. Kadhi erred in law by disallowing the Area chief to give evidence.

c) That the Hon. Kadhi erred in law and in fact in failing to consider the submissions of the appellant and the weight of evidence on record submitted by the appellant.

d) That the Honourable Kadhi erred in law and in fact in failing to take the composition of the herd and in that he cannot distribute what belonged to the living people.

e) The Honourable kadhi erred in law and in fact in misdirecting himself on Islamic inheritance”.

11. The parties filed their written submissions which Learned Counsel ably hi-lighted. In their submissions both written and oral, Learned Counsel collapsed the said grounds to just one, *that the trial court erred in distributing cows that were not available for distribution as the 183 cows belonged to the appellant.* The court has considered the submissions carefully.

12. From the evidence on record, the deceased died leaving behind one widow and six children, 4 sons and two daughters. The first wife had two sons (the appellant (elder) and the respondent) and two daughters. The second wife **DW2**, had been divorced but had two sons.

13. The trial court ordered for a head count and the parties together with the Assistant Chief and all those involved confirmed that there were 183 cows and 20 shoats. This fact was not be contested.

14. The appellant’s contention that all the remaining cows were his had no foundation. There was no evidence that all the cows that the deceased left behind had died. All that was presented to the trial court was that, during the 2011 drought, a large number of the cows died. There was no evidence to show that after their death, the appellant acquired a new herd. The remaining cows of the deceased must have given birth and repopulated to 183 existing at the time of trial.

15. The appellant having failed to call any evidence to prove that he acquired any other cows other than those left by the deceased, his claim that the 183 cows were not subject o inheritance was but wishful thinking.

16. The appellant complained that the trial court erred in failing to call the area chief. To this court’s mind, trial court was not bound to call any witness for any of the parties. If anyone needed any particular witness to testify, it was upon such party to apply for summons. The appellant did not apply for any summons. Accordingly, the criticism levelled against the trial court for allegedly failing to permit the area chief testify has no basis at all.

17. The trial court rightly held that the Borana custom whereby the elder son of a deceased takes over the properties of a deceased and use it as he wishes is not only problematic, it is discriminatory and unconstitutional. It breaches **Article 27 of the Constitution**. The trial court was right in departing from it and applying the Islamic law on inheritance.

18. Accordingly, I find that the appeal has no merit and the same is hereby dismissed with costs.

It is so decreed.

DATED and DELIVERED at Meru this 19th day of September, 2019.

A. MABEYA

JUDGE