



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MARSABIT**

**CIVIL APPEAL NO. 11 OF 2018**

**HAFIFA SHARIFF.....APPELLANT**

**VERSUS**

**NAIMO SHARIFF.....1<sup>ST</sup> RESPONDENT**

**NURIA SHARIFF.....2<sup>ND</sup> RESPONDENT**

**MAKIDA SHARIFF.....3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Ruling in Civil Suit No.33 of 2017*

*of Senior Resident Kadhi Hon. A.D. WAKO at Moyale*

*delivered on 12.10.2018)*

**JUDGMENT**

The appellant filed succession cause number 33 of 2017 before the Moyale Kadhi's court. Her main prayers were that:-

- 1. The honourable court to equitably share the deceased's remaining piece of land to the rightful heirs according to Islamic sharia of inheritance***
- 2. Such further consequential orders this honourable court may lawfully make.***

The trial Court issued a ruling on 12<sup>th</sup> October, 2018 and distributed the deceased's estate in accordance with Islamic law. Being dissatisfied with that ruling the appellant preferred this appeal. The two grounds of appeal are:-

- 1. That the learned Magistrate erred in law and wrongly exercised his discretion in the circumstances.***
- 2. That the learned magistrate erred in law and fact by reallocating the portion of the deceased's property that had already been allocated as per a will and endorsed previously by a Kadhi's Court.***

Mr. Owade appeared for the appellant. The respondents were served but did not appear during the hearing of the appeal. This is unfortunate as the nature of the appeal involves their mother's estate and they are beneficiaries.

Mr. Owade filed written submission in support of the appeal. It is submitted that the deceased died on 5<sup>th</sup> July, 1999 in Moyale. She left a valid Will that was adopted by the Kadhi's court. Before succession number 33 of 2017 was filed, there was succession number 31 of 2013 that was finalized and distributed the estate. The will bequeathed the appellant two shops built by the appellant as well as a residential house also built by the appellant. Upon conclusion of the initial succession cause, the respondents demolished the appellant's two shops and residential house without the appellant's knowledge and consent. The demolitions triggered the filing of succession cause number 33 of 2017. The dispute was also heard by religious elders and minutes for that meeting were prepared and produced before the Kadhi's Court.

It is further submitted that the area occupied by the appellant's initial structures is considered as a prime area. The ruling of the Kadhi redistributed the deceased's estate afresh and went on to award the respondents the appellant's shop and residential house. The learned Kadhi did not consider the findings of the Community leaders. The deceased's property had already been distributed as per the Will. The

appellant had built a toilet behind her residence.

This is a first appeal and the Court has to re-evaluate the evidence afresh before drawing its own conclusion.

The appellant's evidence before the Kadhi's Court is that their late mother left a plot along Biashara street. The plot has nine (9) commercial rooms along the road and eight (8) residential rooms. The appellant has two rooms. The rooms were renovated but the number of rooms remain the same. Her prayer was that she wanted to get her share and the house she built plus her two rooms.

**NURIA SHERIFF** is the 2<sup>nd</sup> respondent. She informed the court that the appellant is her sister. Their mother gave the appellant two rooms. The rest were told to build their rooms on the plot since there is enough space.

**MAKINDA SHARIFF** is the 3<sup>rd</sup> respondent. She testified that their late mother left eight (8) commercial semi permanent rooms and residential rooms. She later developed the plot with the help of a developer. There are now 15 commercial rooms.

**ABDULRAHMAN SHARIFF** is the appellant's brother. He informed the Court that there are 15 commercial rooms.

The trial Court visited the premises on 27<sup>th</sup> August, 2018. The Kadhi noted that apart from two beneficiaries out of the deceased's six children, the rest had three rooms each. In his ruling the Kadhi noted that succession cause number 31 of 2013 did not distribute the entire estate. The earlier distribution left out a piece of land that was not developed. The decision of the Kadhi reads as follows:-

***The upshot of all the above the court hereby make the following orders: -***

***1. That the Applicant shall have in her name two (2) commercial rooms, the elder son of the deceased Mr. Abdirahim also shall have two (2) commercial rooms while the beneficiaries of the late son (Mohamed Shariff) of the deceased be given one (1) commercial room and bakery shop and the rest of the beneficiaries of the deceased (Makinda, Nimo, Nuria) shall have in their names one (1) commercial room each.***

***2. That the proceeds of the remaining seven (7) commercial rooms be shared in the following mode in accordance of Islamic law of succession.***

***(i) That the two (2) male children of the deceased shall get 25% each.***

***(ii) That the four (4) female children of the deceased shall get 12.5% each***

***3. Finally the children of the deceased are at liberty to build residential room for themselves behind their respective commercial rooms.***

The dispute herein is abit mixed up. The initial structures were demolished and permanent structures were erected. The Kadhi gave the appellant two commercial rooms. This was the position before the demolition. The only issue is whether the two rooms are located where the original two rooms were or not. The Court could not and should not order the respondents to restore the appellant's semi permanent rooms. What is on the ground seems to be a far much better structure than what was there before.

The appellant's case before the Kadhi as per the Petition was to have the remaining piece of land be distributed. The community leaders drew a sketch plan of what was on the ground. It shows that the appellant's shop and residence was bordering the main road. There is no proper sketch showing what is the current position. Are the commercial rooms located on the space previously occupied by the appellant's residence and shops? What does the appellant want in form of her share. It appears that there is enough space where she can put up another residence. The Kadhi gave the heirs the right to construct residential houses at the back.

The Kadhi gave the appellant two commercial rooms out of the fifteen rooms. The initial judgement in cause number 31 of 2013 gave the appellant 11.2metres from her Southern corner shop to the northern side along the right hand of the road. This finding is in accordance with the Will. The appellant is now contending that the Will was not followed in the Kadhi's ruling which is the subject of the appeal.

Since the appellant knew where her shops were located and since all the parties acknowledge and confirm that the appellant had two shops and a residential house during their mother's lifetime, I do find that the appellant should be given shops which are located on the same area as her original two shop were. The residence is on the main road and seems to have been replaced by commercial shops. I can't make a final determination on the matter as the extent of the remaining portion is not known. The Kadhi simply allocated the appellant two shops without indicating their allocation or whether the two shops cover the 11.2metres that was given to the appellant by the earlier Kadhi in Succession cause number 31 of 2013. The petitioner should also understand that her original shops and residence were semi permanent structures and what she is getting are permanent structures. The appellant should not claim more shops in the name of seeking to occupy her original space.

In order to avoid several applications and suits, I do hereby allow the appeal and set aside the Kadhi's ruling of 12<sup>th</sup> October, 2018 and proceed to give the following orders:

1. The Moyale Kadhi to visit the suit premises and identify the portion where the appellant's shops were initially located.

2. The Kadhi to take measurement of the premises and allocate the appellant 11.2metres equivalent of the shops in line with the earlier judgement in succession cause number 31/2013. However, this is subject to the number of shops covered in the 11.2 metre area.

3. The Kadhi to hear the matter afresh and take fresh evidence from the parties who should indicate how they wish the deceased's estate to be distributed including the appellant.
4. Upon visiting the premises and hearing the parties, the Kadhi to deliver his judgement on the dispute.
5. Any party dissatisfied with the Kadhi's decision shall be at liberty to appeal.
6. Since the appeal was not defended, parties shall meet their own respective costs.

**DATED, SIGNED and DELIVERED at MARSABIT this 18<sup>th</sup> day of September, 2019**

**S. CHITEMBWE**

**JUDGE**