



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL APPEAL NO.1 OF 2015

G B J.....1ST APPELLANT

G B J.....2ND APPELLANT

VERSUS

B B J.....1ST RESPONDENT

Y B J.....2ND RESPONDENT

JUDGEMENT

The late **B J** used to reside in Moyale. He died on 21.7.2007. The respondents filed a suit before the Moyale Kadhi (case No.46 of 2012) seeking to be recognized as the lawful heirs of their deceased father. The Kadhi delivered his judgement on 29.11.2012 and agreed with the respondents. This led to the filing of this appeal. The appeal was formerly filed before the Meru High Court as appeal No.259 of 2013. The file was transferred to the Marsabit High Court in 2015. The grounds of appeal as per the memorandum of Appeal dated 6th June, 2013 are:-

- 1. That the learned Kadhi erred in law and in fact in failing to hold that the 1st plaintiff did not have the requisite mental capacity to file the suit in the lower court.***
- 2. The learned Kadhi erred in law and in fact in failing to find that the respondents were not heirs to the estate of the deceased despite clear evidence from the appellants.***
- 3. The learned Kadhi erred in law and in fact in unfairly disregarding the evidence of the appellants while at the same time heavily relying on the evidence of the Respondents.***
- 4. The findings of the learned Kadhi are against the weight of evidence on record.***
- 5. The learned Kadhi erred in law and in fact in misinterpreting the relevant and applicable law thereby arriving at the wrong conclusion.***

Mr. Muriithi appeared for the appellants. Counsel submit that the proceedings before the Kadhi's court were initiated by way of a plaint. This brought the proceedings under the provisions of order 32 of the Civil Procedure Rules. Therefore the 2nd respondent could not have initiated a suit without a next friend as he was said to be mentally challenged. This made the entire proceeding defective and a nullity. The verifying affidavit was executed by both respondents yet one of them was mentally unstable.

It is further submitted that the evidence on record shows that the appellants were brought up by the deceased and even adopted his name. The deceased left a will and bequeathed his assets to the appellants. The respondents only emerged after the deceased's death. The appellants were therefore the proper beneficiaries of the deceased's estate.

Counsel further submit that a Kadhi's court can only adjudicate on the issue of distribution of a deceased's estate under the Islamic law if the proceedings are initiated as a succession cause. The trial court handled issues of probate in a suit commenced by plaint as a civil dispute. The plaint and verifying affidavits were not dated. The trial court also departed from the deceased's will without offering any justification contrary to the deceased's wishes.

Mr. Ondari appeared for the respondent. Counsel submit that the plaint did indicate that the 2nd respondent is of unsound mind. The issue was in the open. The 2nd respondent testified and was not cross-examined. No preliminary objection was raised. The appellants testified

and participated in the proceedings. The appellants produced birth certificates that were procured in 2012. This was after the deceased's death in 2007. The appellants gave contradictory evidence alleging that they did not know the respondents yet at the same time acknowledged knowing them. Counsel maintain that the applicable law before the Kadhi's courts is Islamic law. The trial court properly exercised its jurisdiction.

This is a first appeal. This court is duly bound to re-evaluate the evidence afresh and make its own conclusion. The 1st respondent testified that she is the daughter of the late **B J**. The appellants are occupying the deceased's house and also holding the estate yet they are not the deceased's children. When she was about two years old their late mother passed on and she was brought up by her aunt in Nairobi while her brother, the second respondent who has mental problems, was brought up by other relatives. Her late father got married to another woman, G, but they did not have children. The deceased left plot No.[particulars withheld] in Moyale which is developed with two rooms. He also left 3 plots in Manyatta. She filed the suit so that she could inherit her father's estate. She denied that her father left any will.

The second respondent also testified. He agreed with what his sister had informed the Court. It is his evidence that the appellants are their cousins, children of their late uncle, W J.

ABDI RADO testified for the respondents. He was a former chief as well as councilor of manyatta in Moyale. His evidence is that the deceased was the respondent's father and an uncle to the appellants. The appellants father passed on while they were young and they were brought up by the deceased. It is his evidence that the respondents are the deceased's biological children.

M J is the deceased's sister. Her evidence is that the respondent are the biological children of the deceased. The appellants are the ones occupying the estate. She gave a plot to the 2nd appellant but he sold it. The deceased and the appellant's father were her brothers. She is the only survivor in her family. The deceased took care of the appellants.

I W was the first witness for the appellants. His evidence is that the deceased took care of the appellants. The deceased stated that the appellants should not chase away his wife G. The respondents appeared after the deceased's death.

The 1ST appellant testified that he knew the deceased as his father and his mother is **G**. They used to treat the 2nd respondent well but his aunt took him away. The appellants want to sell the estate. The deceased used to sell stones. After his death, they continued to sell stones. The second appellant sold a plot to clear the deceased's debt. The plot was sold for Ksh.90,000. The deceased was sick for eleven (11) years. It is his evidence that he 2nd respondent is their aunt's son. The elders directed them to stay with the 2nd respondent who is mentally sick. The deceased left plot 238 and three other plots. The elders gave one plot to the 1st appellant and another one to the 2nd appellant. The elders ruled that the remaining plot to belong to the 2nd respondent. He has sold his plot and cleared a debt of Ksh.70,000.

The second appellant did not testify. **KANCHORA DADO** is the another witness for the appellants. His evidence is that the appellants are the deceased's children. The area chief gave a plot to the deceased who built a two roomed house. The deceased told the appellants to take care of their mother and they should stay in the property. He was one of the elders who heard the dispute. The elders did not consider the first respondent for any share of the property.

HALIMA GEDO also testified for the appellants. Her evidence is that the appellants were under the custody of the deceased after the death of their late father. The deceased was sick for about eleven years. The appellants took care of the deceased. The deceased gave the plot to the appellants.

ADAN NUR was the manyatta area chief. His evidence is that the appellants are the deceased's adopted sons. The 2nd respondent is the deceased's son. The dispute was taken to him but he handed it over to the elders.

The main issue for determination is what constituted the deceased's estate and who are the deceased beneficiaries.

The trial court held that the deceased's estate comprised of plot No.238 which has two rooms and three other plots. One plot was sold by the appellants. There is no dispute in that finding. The entire evidence from both sides does confirm that indeed the deceased owned those properties. I do agree with the findings of the trial court on what constituted the estate.

The second Issue is who are the deceased's beneficiaries. The judgment of the trial court did not deem the appellants as the deceased's beneficiaries. It is the evidence from both sides that the respondents are the deceased's biological children while the appellants were brought up by the deceased. Under the provisions of the Law of Succession Act, Cap 160 laws of Kenya, the appellants would have been considered as the deceased's dependants. Under Islamic sharia, the appellants cannot be considered as the deceased's dependants or inheritors. They are not the deceased's children. In the event that there is no will, the appellants are not entitled to inherit the estate. They are only entitled to inherit the estate of their own biological father and not that of their uncle. The mere fact that they were brought up by their deceased uncle does not qualify them to be inheritors. That is why the learned Kadhi did not consider them as the deceased's heirs.

Counsel for the appellant contends that the suit was a nullity as it was instituted without a next friend for the 2nd appellant. The record shows that all the parties participated in the proceedings. Even though the suit was initiated by way of a plaint, the prayers were that the respondents wanted to be recognized as the rightful heirs of the deceased in accordance with the Islamic law of inheritance. The respondent also pleaded for the appellant to vacate plot No.[particulars withheld], in Manyatta, Moyale and to return the sold undeveloped plot. That is purely a matter falling within the jurisdiction of the Kadhi's court and it was one involving a deceased's estate.

Order 32 rule 15 states as follows:

The provisions contained in rule 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind, and to persons who though not so adjudged and found by the court on inquiry, by reason of unsoundness of mind or mental

infirmary, to be incapable of protecting their interests when suing or being sued.

The provisions of order 32 mainly involve suits by minors. They are applicable to people with unsound mind. The 2nd respondent was held to be having mental problems. The 2nd respondent took oath and testified. He told the court that the appellants are his cousins. Their father is W J who is deceased. I do find that the 2nd defendant was capable of protecting his interest and did not require a next friend. Further, there is the claim by the 1st respondent who has no mental issues. Can the suit be deemed as a nullity yet there is a party who is of sound mind. I do not think so. This issue is an afterthought. The parties proceeded on very well before the Kadhi's Court and the 2nd respondent testified. The degree of his mental infirmity was not ascertained. He was fit to testify and I do hold that the suit was properly prosecuted.

Whether the suit was initiated by way of a plaint or by way of succession proceedings cannot be an issue at this appeal stage. The bottom line is that the respondents wanted to be recognized as the lawful inheritors of the deceased. That was the core of the dispute. There is no law that for a Kadhi to determine an issue of inheritance, then the claim must be instituted by way of a plaint. Section 8(1) of the Kadhi's court Act provides that the Chief Justice may make rules of the court providing for the procedure and practice to be followed in Kadhis Courts.. No rules have been made under Section 8(1). Therefore section 8(2) of the Kadhi's Court Acts apply and the Civil Procedure Act is applicable to Kadhis Courts.

The appellants contend that they were brought up by the deceased and they even adopted his name. That could be true but the Islamic law is to the effect that one cannot inherit his uncle if the deceased's biological children are still alive. The deceased was survived by a widow and two children who are the respondents. These are the lawful inheritors under the Islamic sharia.

The learned Kadhi held that the deceased bequeathed of his estate to the appellants. The finding is grounded on the contention that the deceased stated that the appellants should not chase away the widow and they should stay on the property. There is a written document which is on the letter head of the provincial administration dated 9.7.2007. The documents has a reference number. The same reference number is indicated in the chief's letter dated 15.9.2007. The deceased died on 21.7.2007. It is this document which the learned Kadhi deemed to be a will. I do not wish to find otherwise. It is the appellants who produced the document. According to the Kadhi the deceased could only bequeath ? of his estate to non- inheritors. That is how the appellants benefited from the estate. I will leave that finding by the Kadhi undisturbed. I do agree with that finding.

The evidence from both sides did prove that the appellants are not the deceased's children. They were brought up by the deceased. Even if they took care of the deceased, they should also remember that the deceased also brought them up. Taking care of a sick person does not make someone to be a lawful beneficiary. They were just paying back what the deceased had done to them. The learned Kadhi held that the appellants were simply appreciating what the deceased had done to them. The appellants own evidence confirms that they are not the deceased's children.

In the end, I do find that the finding of the learned Kadhi is within the law. The appeal herein lacks merit and is hereby dismissed with costs. A grant to be issued to the respondents who should ensure that the deceased's widow get her share. The estate to be valued and the appellants ? share to be ascertained. The appellants share to include the plot they sold as ordered by the Kadhi. The .share of the widow to be ascertained and settled as well. This matter is referred back to the Moyale Kadhi's court for purposes of valuation of the estate and distribution as per the Kadhi's decision. Parties shall bare their own respective costs of the appeal.

Dated, Signed and Delivered at Marsabit this 14th day of May, 2018

S. CHITEMBWE

JUDGE