



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL APPEAL NO. 4 OF 2016

FATUMA ANAB MOHAMED HAJI 1ST APPELLANT
ZAINAB MOHAMED HAJI 2ND APPELLANT
ALI MOHAMED HAJI 3RD APPELLANT
ABDIKADIR MOHAMED HAJI 4TH APPELLANT
ABDIRIZAK HASSAN MOHAME 5TH APPELLANT
DEKA ABDULLAHI DABAR 6TH APPELLANT

VERSUS

ASHA ABDULLAHI 1ST RESPONDENT
NUR ABDULLAHI 2RD RESPONDENT
KHADIJA MOHAMED ALI 3RD RESPONDENT
MOHAMED ABDULLAHI 4TH RESPONDENT

(Being an appeal from the ruling of Honourable M Hassan – Kadhi Garissa, delivered on 21/10/2016 at Garissa Kadhi’s Court Succession Cause No. 28 of 2015)

JUDGEMENT

A. BACKGROUND

1. This appeal arises from a ruling delivered by the Kadhi’s Court in Garissa on 21/10/2016 wherein the Kadhi’s Court dismissed the Notice of Motion dated 15/6/2016 filed by Fatuma and other Appellants herein and concluded that the beneficiaries of the estate of the late Fatuma Dabar Mohamed (deceased) should appoint an agent to collect the rent proceeds of the estate so that each of the heirs will get their rightful shares and that valuation of the estate be done by the Directorate of Town Management and Urban Services Garissa and that the matter be mentioned on 27/10/2016.

B. APPEAL

2. Consequent, upon the above ruling, the six (6) Appellants herein through counsel Ali & Co. Advocates filed the present appeal on the following grounds:-

(1) The learned Kadhi erred in law and fact by disregarding the affidavit/declaration sworn on 15/2/1990 before the District Magistrate, Garissa by Fatuma Dabar Mohamed (deceased) gifting the appellants rooms at Plot No. 165 (Sankul Road – Garissa) that it did not meet basic ingredients of a Hiba/gift or a will under Sharia contrary to evidence on record.

(2) That the learned Kadhi misapplied and/or misconstrued the condition of Hiba in Islam and despite confirming the 1st Appellant to have been in the suit property in possession for over twenty five years and there being a document confirming the Hiba and thereby arrived at a wrong decision.

(3) That the learned Kadhi erred in law and fact by failing to appreciate that *Qabdh* in Sharia can be either *Qabdh Haqiqi/Quabdh Hissi* (physical possession) or *Qabdh Hukmi* (constructive possession) and that there is no evidence on record that the court satisfied itself that each of the other appellants

with the exception of Fatuma Anab and Abdirizak Hassan had satisfied the condition of *Qabdh*.

(4) That the visit by the Honourable Kadhi's Court to the suit property Plot No. 165 amounts to unfair hearing contrary to Article 50 of the Constitution of Kenya as it was done in the absence of all the appellants and without notification of those who were absent as there is nothing on court record to confirm they were accorded the right to a fair hearing.

(5) That the learned Kadhi erred in law and misinterpreted the affidavit/declaration sworn on 15/2/1990 as being a will despite the issues not being pleaded thereby arriving at a wrong decision.

(6) That in the alternative the learned Kadhi erred in law and fact by failing to hold that once a property has been gifted away in Sharia and evidence by *Ijab* and *Qabul* then such property ceases to be property of the donor immediately.

(7) That the Kadhi's judgement is manifestly a miscarriage of justice.

3. In the petition of appeal the Appellants asked for orders that the appeal be allowed, and in the alternative the case be remitted to the Chief Kadhi, or any other Kadhi other than the trial Kadhi for a fresh hearing and final determination. The Appellants also asked for costs of the appeal.

C. SUBMISSIONS OF THE PARTIES

4. At the hearing of the appeal Mr. Kassim appeared for the Appellants. Mr. Farouk appeared for 1st, 2nd and 4th Respondents while Mr. Onono appeared for the 3rd Respondent. Before the appeal was heard, counsels for the parties agreed to file and serve written submissions. The Appellants counsel Ali & Co. Advocates filed their written submissions and their authorities on 3rd April, 2018, the 1st, 2nd and 4th Appellant's counsel filed the submissions on 11th April, 2018, and the 3rd Respondent's counsel filed written submissions on 11th April, 2018. Counsel for the Appellants relied on writings on Islamic Law as well as case authorities none of which was from Kenya. Counsel for the 1st, 2nd and 4th Respondents also relied on publications on Islamic Law which also referred to a number of court cases but not from Kenya.

5. In his submissions Mr. Kassim for the Appellants submitted that the appeal arose from the ruling of the Kadhi and the main concern of the Appellants related to three issues:

(1) Whether some beneficiaries were in possession of rooms.

(2) Whether the affidavit contained in page 17 of the record was a genuine document which would be relied upon by the Kadhi's Court.

(3) Whether the learned Kadhi was correct in relying on the evidence of Osman Shurie.

6. Starting with the third issue, counsel submitted that two witnesses testified, that is, Asha Abdullahi at page 66 of the record and Osman Shurie at page 68. Counsel submitted that in the ruling, the Honourable Kadhi stated that the deceased never wrote a Will, while Shurie did not talk about an affidavit but talked of an intended will which was not written. Counsel felt that the trial Kadhi mixed up issues as the issue was not about making a Will but it was about making the affidavit.

7. With regard to the issue of whether the affidavit was genuine, counsel submitted that the same was sworn before the magistrate at Garissa and was specific on the distribution of assets to the beneficiaries. According to counsel, the Kadhi was wrong in saying that it was invalid because it was not disclosed to other parties while the same had in fact satisfied the three conditions of making a declaration under Islamic Law. Counsel also said that the said affidavit was accepted by the beneficiaries who are still collecting rent.

8. With regard to possession, counsel submitted that the beneficiaries were already in possession as they continued to collect rent and that the 1st Appellant had actually lived in the premises for more than twenty years.

9. Counsel submitted further that though the learned Kadhi said that the affidavit was known only to the 1st Respondent, Khadija Mohamed Ali testified at page 72 of the record of appeal about the existence of the affidavit and thus the learned Kadhi made a mistake.

10. Counsel said also that it was not true as stated by Mr. Farouk for 1st, 2nd and 4th Respondents that the affidavit was a forgery as the same was sworn evidence and nobody so far had reported such alleged forgery to the police.

11. Counsel faulted the visit by the learned Kadhi to the scene without involving the 1st Appellant who resided there as well as the others. Counsel closed by stating that the affidavit transferred the property and this court should so find or alternatively the court may transfer the matter to another Kadhi for hearing.

12. Mr. Farouk for 1st, 2nd and 4th Respondent opposed the appeal. He stated that the 1st, 2nd, 3rd and 4th Appellants were children of 3rd Respondent while the 5th Appellant was a son of a sister of the 3rd Respondent.

13. Counsel submitted that the Kadhi was right in his findings on the affidavit and that it was curious that at page 57 of the record, Zainab Santul was given two rooms while at page 60 of same document made in February 1992, the same Zainab was given only one room and no explanation was given about that difference.

14. Counsel further submitted that Abdullahi Dabar was given a room but was not aware of it until his death which meant that the document made in February 1990 was not disclosed to anybody except the 1st Appellant Fatuma. In addition, at the time of making the declaration in the affidavit, the deceased had two living children who were not aware of the document which was disclosed twenty five years later when for the first time Nur Abdullahi applied to review the Kadhi's decision granting the whole estate to the 3rd Respondent Khadija who did not disclose its existence to the family of the deceased.

15. According to counsel, when Khadija realized that the Kadhi's decision was challenged she then came up with a document and also talked about the involvement of two Sheikhs that is Sheikh Mohamed and Sheikh Osman who was a Kadhi, and also disclosed the document which was not authentic.

16. Counsel argued that under Islamic Law, for a gift between living persons to be valid, the declaration had firstly to be made by the donor. Secondly, there had to be acceptance of the gift by the donee. Thirdly, the donee had to take possession. According to counsel, in the present case there was no valid declaration, acceptance or taking possession, as when the court visited the scene, only the 1st Appellant was in possession of the two rooms.

17. Counsel submitted lastly, that there was nothing irregular about the site visit by the Kadhi's Court as Mr. Peter Kibet Advocate was present as agent for the beneficiaries who were not present then. Counsel emphasized that there was no evidence of delivery and taking possession as the donor continued collecting rent. According to counsel, the 3rd Respondent could not be a neutral arbiter as she had made an application singly to inherit the whole estate.

18. Mr. Onono for the 3rd Respondent stated that no one would deny that the deceased gave birth to three children and that only the 3rd Respondent was alive. Secondly, no one would deny that the only brother of the 3rd Respondent died and left behind children. Thirdly, it could not be denied that the only sister of the 3rd Respondent also died leaving behind children.

19. According to counsel, the property of the deceased was to be inherited by all the three children of the deceased and in their absence, their children.

20. According to counsel, the affidavit relied upon fell short of expectations under Islamic Law. According to counsel however, a declaration was made and for a long time no one knew its existence except the 1st Appellant, who took possession, developed and still lived in the property, and that the only son of the deceased who was alive when the affidavit was said to be sworn, had no idea about it which was unusual.

21. Counsel wondered whether the affidavit could be split into two to benefit Fatuma and disentitle the other beneficiaries. He stated that the affidavit did not satisfy the three important ingredients under Islamic Law. Counsel concluded by stating that it was better to live with the findings of the Kadhi.

22. Counsel then proposed that the share of his client the 3rd Respondent remain intact and Fatuma enjoy her gift because she had been in possession. The grandchildren of the deceased also take their share. Counsel felt that such would enhance fair justice as Fatuma had been living in the premises for more than twenty years.

23. Counsel suggested also that the 3rd Respondent who was accused of not disclosing information was an old lady and the apparent mother of everybody (beneficiaries) and had undertaken to distribute the estate.

D. CONSIDERATIONS AND EVALUATION

24. This is a first appeal, as a first appellate court I am required to re-examine all that is in record afresh and come to my own independent conclusions and inferences. See the case of **Selle v Associated Boats Co. Limited [1968] EA 123**.

25. The matter is a succession matter of inheritance where there is no Will. It involves Muslims whose succession is governed by Islamic Law, and the Kadhi's Court has power to deal with such inheritance irrespective of the value of the estate under the Kadhi's Court Act (Cap. 11 of the Laws of Kenya), as well as the Constitution of Kenya 2010.

26. This Court has appellate jurisdiction from decisions or orders made in the Kadhi's Court under section 50 (2) of the Law Succession Act (Cap. 160) which states as follows:-

“50 (2) An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi's Court in respect of the estate of a deceased Muslim and, with prior leave thereof in respect of any point of Muslim Law, to the Court of Appeal.”

27. The proceedings in the Kadhi's Court commenced by way of a Succession Cause filed as a petition in May, 2015 by Khadija Mohamed Ali as the Petitioner. Khadija Mohamed Ali is a daughter of the deceased (Fatuma Dabar Mohamed) and did not disclose that she had a brother and a sister who had by then died and left several children. She applied for a transfer of all documents from the deceased to her name as the only beneficiary.

28. On the 27th July 2015, the learned Kadhi made the following orders:-

(1) That the Land Registrar – Garissa County to transfer the estate of the late Fatuma Dabar (deceased) to Khadija Mohamed Ali.

29. Thereafter, Nur Abdullahi Santul a son of the late Abdullahi Santul who is a son of Fatuma Dabar, filed an objection to the orders of the Kadhi and requested review of those orders. He listed ten other beneficiaries to the estate. On the 3rd of November, 2015 the Kadhi made the following orders:-

(1) This matter is certified urgent and service is dispensed with in the first instance.

(2) There be a stay of this court order of 27th July, 2015.

(3) That this court order of 27th July, 2015 is hereby reviewed.

(4) That the estate of the late Fatuma Dabar (deceased) to be distributed as follows:-

(a) Khadija Mohamed Ali will be legible for half of the estate.

(b) The remaining half will be shared among the daughters and sons of the late Abdullahi Santul; with each son getting a share of a daughter.

30. Thereafter, another application came up for hearing before the Kadhi on 30th November, 2015 which was filed by Nur Abdullahi Santul and the court ordered as follows:-

(1) This matter is certified as urgent and its service is dispensed with in the first instance.

(2) That there be a stay of execution of the court's order of 27th July 2015 pertaining to the estate of late Fatuma Dabar (deceased).

(3) The applicant's prayer for review of the orders of 27th July 2015 is hereby allowed.

(4) That there be an interpartes hearing on 2nd December 2015.

(5) This order to be served upon Land Registrar, Garissa County Government and Land Registrar Nairobi for compliance.

31. On 2nd December 2015, the Kadhi's Court convened with Khadija Mohamed Ali, Asha Abdullahi and Nur Abdullahi as the beneficiaries present in court. Khadija Mohamed Ali tendered her evidence, Asha Abdullahi also tendered her evidence. Nur Abdullahi stated that he was grateful in the way the court has handled the matter and asked that the estate of the deceased be distributed to the rightful heirs in accordance with Islamic Law. On the 9th December, 2015 Sheikh Mohamed Omar also tendered evidence. None of these four witnesses were cross-examined. It was on this occasion that Khadija produced an affidavit sworn by the late Fatuma Dabar that Zainab Mohamed be given two rooms, Abdullahi Dabar be given one room, Abdi Mohamed be given one room, Ali Mohamed be given one room and Zainab Mohamed be given one room. The ruling was reserved and on 17th December 2015 the learned Kadhi delivered a ruling stating as follows:

“In accordance with the Islamic Law, the heirs/beneficiaries are –

(1) Khadija Mohamed daughter of the deceased will be eligible for half of the estate.

(2) The remaining half will be inherited by the following sons and daughters of Abdullahi Santul;

(a) Mohamed Abdullahi.

(b) Nur Abdullahi.

(c) Abdi Abdullahi.

(d) Yakub Abdullahi.

(e) Maolid Abdullahi.

(f) Farhia Abdullahi.

(g) Uba Abdullahi.

(h) Asha Abdullahi.

(i) Nasra Abdullahi.

(j) Nimo Abdullahi.

Each son will be eligible for twice the share of daughter.”

(3) The estate to be valued by the Land Valuer Garissa.

(4) The heirs to take a mention date after the valuation of the estate.

(5) The heirs have the right of appeal.”

32. After this determination, on 16th June 2016 a Notice of Motion was filed by Mohamed Lethome Advocates for Fatuma Musa Abdurahman, Zainab Mohamed Haji, Ali Mohamed Haji, Abdulkadir Mohamed Haji, Abdirizak Hassan Mohamed, Dekka Abdullahi Dabar against Kadhija Mohamed Ali, Asha Abdullahi and Nur Abdullahi.

33. The application was filed with a certificate of urgency which names Fatuma Anab Mohamed Haji who was not in the application as the 1st Applicant.

34. The orders sought in the application were as follows:-

(1) That this application be certified as urgent and heard on priority basis.

(2) That the Honourable Court be pleased to review the orders of court issued on 7th December, 2015.

(3) That the Respondent be restrained from including the nine (9) rooms constructed on Plot No. 165 along Sankul Road within Garissa Township in the distribution of the estate of Fatuma Dabar.

(4) That this Honourable Court be pleased to confirm the applicants their entitlement to the nine respective rooms.

(5) Costs of this application be provided for.

35. The grounds of the application were that the effect of the order of the Kadhi was to deprive seven people of the gift made for the beneficial interest by the late Fatuma Dabar which was specific and distinguishable. Fatuma Anab Mohamed Haji also filed a supporting affidavit sworn on 15th June 2016 in support of the application.

36. Following the filing of this application, the Kadhi's Court on 16th June, 2016 convened and put the hearing of the same for 29th of June 2016. In the course of hearing the application the court visited Plot No. 165 in Garissa. At the hearing, Mr. Peter Kibet was present for the applicants and Asha Abdullahi, Nur Abdullahi and Mohamed Abdullahi were present.

37. Mr. Kibet made submissions in support the application. Asha, Nur and Mohamed Abdullahi made submissions in response. At 3.30 pm, the court visited Plot No. 165 with the same coram and the Kadhi noted that the 1st Applicant Fatuma Anab occupied two rooms. Abdirizak Hassan claimed that he occupied the room for Zainab Mohamed Santul but this could not be verified. The court then fixed the matter for ruling which was delivered on 1st October, 2016, which ruling and is the subject of the appeal herein.

38. I will start by saying that the matter before the Kadhi was in relation to succession or inheritance proceedings. The functions of a succession or inheritance court is to ascertain the assets of the estate, the beneficiaries or interested parties in the estate, and distribute the assets less any liabilities according to the law, in this particular case Islamic Law. This matter appears to have had a number of turns and twists and in the process it became complicated.

39. That said, in this appeal there is one technical issue which I will deal with first. The technical issue is whether the visit by the Kadhi's Court to the suit property Plot No. 165 amounted to unfair hearing contrary to Article 50 of the Constitution of Kenya as it was done in the absence of the appellants and without notification of those who were absent. Article 50 of the Constitution provides for fair hearing of any dispute that can be resolved by the application of law. The relevant provisions provide as follows:-

“50 (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate another independent and impartial tribunal.”

40. Sub-Article (2) of the Article relates to accused persons and there is no accused person in this matter.

41. The learned Kadhi visited the plot in question, which in my view the court had a right to do. The beneficiaries who were not present in court were not given prior notice. They were however represented by Counsel Mr. Kibet who did not object or require their attendance. At the premises, the court found two people who explained the situation of occupation of the rooms. Mr. Kibet also did not object to this. In my view therefore, it cannot be said that what the Kadhi did amounted to unfair hearing.

42. The major contest in this appeal is about the declaration in an affidavit said to have been sworn by the deceased Fatuma Dabar Mohamed on the 15th February 1990 before the District Magistrate, Garissa gifting to the Appellants rooms at Plot No. 165 Sankul Road – Garissa. That affidavit was not initially produced by Khadija Mohamed Ali when she applied to be granted the whole estate as the sole beneficiary. She later produced this document which also referred to others who are the Appellants herein. There is an argument that it is a forgery. It is also said that it does not meet the requirement of a valid declaration of a gift under Islamic Law.

43. With regard to the allegation of a forgery, I do not see any substance in that argument. It was brought too late in the day and there is no tangible ground for stating that it was a forgery. What the Kadhi who testified in court Sheikh Mohamed Omar stated was that when the deceased was about to die, a beneficiary called him and others to go and witness the making of a Will by the deceased, who refused to make a Will. There is no evidence that the deceased was asked about whether she had previously made a donation or not. In my view, the fact that the surviving male child did not know about the gift in 1990, does not mean that the deceased could not have made that gift. No argument has been put herein that under Islamic Law, the male child or any other beneficiaries have to be aware of a gift when it is made.

44. I have been informed and it is not contested by any of the parties or their counsels that there are three conditions under Islamic Law for making a gift before death on property. The first condition is that the gift should be made by the owner of the property. The second condition is that the gift should be accepted by the donee of the property. The third condition is that the donee of that property should take possession of it.

45. From all the evidence that is on record, in my view the deceased made the gift and it is in writing in Kiswahili language which was translated into English. It is very clear what is stated therein. The evidence is however that only one person Fatuma Anab Mohamed Haji was aware of the gift or donation and kept that for herself. There appears to be no requirement under Islamic Law that the gift be witnessed or signed by a witness. My finding is that the gift was made by the deceased. I thus, to that extent, do not agree with the finding of the Honourable Kadhi in the ruling.

46. It is only Fatuma Anab Mohamed Haji who was aware of that gift. She kept it secret. There is no evidence that she did not accept the gift. Infact the evidence on record is that she moved on site and occupied her two rooms which were said to have been gifted to her. In my view therefore, she accepted the donation that was given to her. The other donees of the gift were not aware of the gift and in my view could not accept what they were not aware of. Therefore, the gift with regard to Fatuma Anab Mohamed Haji, was accepted but was not accepted by the rest of the donees.

47. With regard to taking possession, also the said Fatuma Anab Mohamed took possession of what she understood to be the premises that were given to her. She has lived there for more than twenty years and none of the parties herein has disputed that. In my view therefore, she is the only one who took possession of the gift. The other donees did not take possession of the gift whether physical or constructive possession as they were not aware of the gift. On this point of taking possession I agree with Kadhi on his finding that Fatuma Anab Mohamed Haji took possession but I do not agree that Abdirizak Hassan Mohamed took possession.

48. I have been asked to refer the matter to another Kadhi for fresh hearing. I do not see the point of doing that as in my view; this is a straight forward matter which the same Kadhi can handle under Islamic Law in the sense that the donation is effective only with regard to the portion of Fatuma Anab Mohamed Haji. The rest of the properties have to be distributed to the beneficiaries in accordance with Islamic Law of Inheritance.

E. DETERMINATION

49. I therefore allow the appeal to the extent that I find that the affidavit of declaration confers property to Fatuma Anab Mohamed Haji as she satisfies all the conditions of a gift under Islamic Law. The other properties will be dealt by the same Kadhi in accordance with Islamic Law, unless he is not available in which case another Kadhi in Garissa can distribute those assets under Islamic Law. Parties will each bear their respective costs of the appeal.

Dated, Signed and Delivered at Garissa this 7th June, 2018.

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George Dulu

JUDGE