



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

SUCCESSION APPEAL NO. 32 OF 2013

BETWEEN

SALMA KASSIM SAID APPELLANT

VERSUS

WAHIB SAAD ALI RESPONDENT

(An appeal from the Order of the Kadhi's Court at Kisumu (Sukyan H. Omar Senior Kadhi) dated 17th July, 2012 in Succession Cause Number 22 of 2011)

JUDGMENT

Introduction

1. **WAHIB SAAD ALI**, (hereinafter referred to as the respondent) on 19th September, 2011 filed a Petition in respect of **ZAGHLUL ALI MOHAMED** (hereinafter referred to as the deceased) against the appellant. He pleaded that the deceased owned one plot situated at Kisumu Manyatta Arab comprising of two semi-permanent house units. The petitioner sought the following orders against the appellant:-

- i. Just and fair distribution of the estate in accordance with Islamic Sharia Law of Inheritance and Succession*
- ii. An order barring the respondent from being manager of the said premises*
- iii. An order that the respondent pays the petitioner Kshs. 180,000/- shed been collecting as rent*
- iv. Any other relief that the court may deem fit to grant.*

The Trial

2. After the trial, the Court made the following orders:

1. That Plot No. 4 and the old house belong to the estate of Ali Mohamed Sheiban,
2. That the estate shall devolve to Said and Zaghulul Ali Mohamed Sheiban in equal halves
3. That the interest of the late Said (1/2) of the estate shall devolve to the widow, the respondent and her children
4. That the other ½ of the estate shall devolve to the heirs of the late Zaghulul (his widow and son, the petitioner)
5. That the 5 (five) room houses is an absolute property of the petitioner
6. That the respondent is barred from managing or interfering with the affairs of the 5 room house in any manner

3. The court further distributed the share in respect of Said and Zaghulul Ali Mohamed Sheiban to the widows and children as shown in the judgment. In particular, the appellant was awarded 9/72 of the estate of Said (her first husband) and 1/8 of the estate of Zaghulul (brother to her husband who inherited her after her husband died).

4. The Appellant being dissatisfied with the trial court's decision preferred this appeal and on 3.6.13 filed the Memorandum of Appeal dated 27.3.17 which he raised 8 grounds in which she disputes the mode of distribution ordered by the court.

ANALYSIS AND DETERMINATION

3. I have carefully perused the record before me, and considered the grounds of appeal and submissions on behalf of both parties.

4. The dispute between the parties revolves around houses build on a piece of land originally known as **PLOT NO. 4 ARAB MANYATTA KISUMU**. A transfer form dated 20th July, 1960 shows that the owner **ALI MOHAMED SHEBANI** transferred the property to **SAID ALI & BROTHERS**. The court record shows that **SAID ALI** was brother to **ZAGHLUL ALI MOHAMED SHEIBAN** and **ABDULHAB**. The three brothers were deceased by the time this petition was filed. As stated in the trial courts' judgment, it was demonstrated during the trial that a letter of allotment had been issued in respect of **PLOT NO. 4 ARAB MANYATTA KISUMU** and it had been allocated a new number being **UNS. RESIDENTIAL PLOT NO. 62-KISUMU (MANYATTA ARAB)**.

5. The letter of allotment for **UNS. RESIDENTIAL PLOT NO. 62-KISUMU (MANYATTA ARAB)** on record was issued on 21st April, 1998 in the joint names of **ALI SAID MOHAMED; SALAM KASIM** (the appellant) and **WAHIBSAADA** (the respondent).

6. The court record evidently demonstrates that at the time of filing this petition, there was no property either in the name of **ALI MOHAMED SHEBANI** or **ZAGHLUL ALI MOHAMED** (both deceased).

7. The fact that the houses in dispute stand on property that is registered in the names of the appellant, the respondent and another did not require the dispute arising therefrom to be treated as a succession dispute as happened in this case. Since the property in dispute did not belong to a deceased person, the petition was misplaced, the trial was a waste of time and resources both for the court and the parties, and the subsequent distribution is a nullity. There's no doubt that the parties herein have been litigating in vain.

DISPOSITION

8. In the end and for the reasons given on the assessment above, the appeal is allowed and the Order of the Kadhi's Court at Kisumu dated 17th July, 2012 is set aside in its entirety. Since the case involves relatives, each party shall pay its own costs.

DATED AND SIGNED IN KISUMU THIS 18th DAY OF October 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Mr Arua

Appellant - Mr Nyanga

Respondent - N/A