



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL APPEAL NO. 5 OF 2016

MAKO YASSIN.....APPELLANT

VERSUS

HRIBAYE NANE SHEGE.....1ST RESPONDENT

MOHAMED NANE SHERE.....2ND RESPONDENT

SHERE OSMAN NANE.....3RD RESPONDENT

(Being an Appeal against the Judgment of the Hon. M. A. Mahmood in the Kadhi's court at Marsabit in Civil Case No. 143 of 2015 delivered on 12th July 2016)

APPEAL HEARD IN THE PRESENCE OF:

ABDULHALIM H. ATHMAN - PRINCIPAL KADHI ISIOLO LAW COURTS

AND

ALI DIDA WAKO - SENIOR RESIDENT KADHI MOYALE LAW COURTS

JUDGMENT

The respondent filed a Succession cause before the Moyale Kadhi's Court in 2014 in respect of the estate of the late OSMAN NANE. The appellant who was the defendant in the suit is the deceased's widow. The respondents were seeking the distribution of the deceased's estate. The matter was later heard by the Kadhi in Marsabit. The Kadhi delivered his judgment on 12th July 2016 and indicated the shares for all the beneficiaries. The appellant was not satisfied with that decision and filed the current appeal. The grounds of appeal are: -

- 1) The Hon. Kadhi erred in law and in fact in giving judgment in favour of the respondents when their case was not proved on a balance of probabilities.**
- 2) The Hon. Kadhi erred in law and in fact in failing to find that the respondents were not beneficiaries to the estate of appellant's deceased husband in respect to Moyale Plot No. 456 and the deceased benefits and pension.**
- 3) The Hon. Kadhi erred in law and in fact by delivering an ambiguous judgment based on land valuations provided by the respondents, which judgment is unenforceable on the face of it.**
- 4) The Hon. Kadhi erred in law and in fact in failing that the appellant was a lay person who required direction for stay and right of appeal explained to her before committal to civil jail.**
- 5) The judgment of the Hon. Kadhi is against the weight of law and evidence as the respondents squandered the deceased estate by selling the shamba at Lami location.**

Mr. Halake appeared for the appellant. Counsel submit that the trial court lacked jurisdiction to hear the dispute. The Kadhi's court ought to have been guided by written laws and in this case the Law of Succession in determining the suit. The Kadhi omitted to apply the provisions of the Law of Succession Act which law applies uniformly to both Muslims and non-Muslims. The judgment failed to meet the threshold set

under order 21 rule 4 of the Civil Procedure Rules. The dispute involved division of matrimonial property between the appellant and her co-wife after the death of their husband. Mr. Halake also argued that the Kadhi combined two succession matters in one file. The deceased, OSMAN NANE, was entitled to inherit a share of his father's estate (NANE SHEGE). The two estates ought to have been handled separately as they involved two separate deceased's person. The Kadhi also left out a plot at Lami from the estate. There was no commercial valuation of the estate. The court ought to have ordered for the valuation of the property. The court tasked the parties to do their own valuation yet they have no expertise to do so. The judgement is so ambiguous that it is difficult to enforce. The matter should be handled afresh at the Moyale Kadhi's court. The trial court did not consider the welfare of the four children and the widow.

Mr. Kiogora appeared for the respondents. Counsel submit that the suit before the trial court was about the division of the deceased's property amongst his beneficiaries. The dispute involved inheritance of the property which falls within the succession law. The suit was about the distribution of the estate of the deceased OSMAN NANE amongst his beneficiaries. The Kadhi's court fulfilled its duty and distributed the estate. Mr. Kiogora submit that **the case of RMM VS BAM (2015) eKLR** relied upon by the appellant involved the division of the matrimonial property to persons prophesying the Muslim faith and cannot apply to this case as the Kadhi was dealing with a succession matter and not a matrimonial cause. Succession and inheritance is the same matter. There was a prayer in relation to custody of children but the Kadhi did not deal with it. Section 2 (3) of the Law of Succession Act provides that the Act shall not apply to the estate of persons who at the time of their death are Muslims. Section 2 (4) of the same Act state that part vii of the Act shall apply to Muslims provided that it is not inconsistent with Muslim law. The Kadhi had jurisdiction to determine the dispute. Counsel also submit that the judgment of the trial court complies with the requirement of order 21 rule 4 of Civil Procedure Rules. Mr. Kiogora submit that the appellant abandoned their grounds of appeal as contained in the memorandum of appeal contrary to order 42 rule 4 of the Civil Procedure Rules.

The record of the trial Court shows that the case was initially heard before the Moyale Kadhi. It started denovo before the Marsabit Kadhi. The 2nd plaintiff Mohamed Nane Shere told the Court that the late Osman Nane's estate comprised of plot number 456, a residential house, rental house and work benefits including pension. The plaintiff simply started testifying without being sworn. He also informed the Court that the appellant had raised a counter claim involving plot numbers 332 and 333 which are in the name of Nane Shege. The 2nd plaintiff and the late Osman Nane are brothers and are the children of the late Nane Osman Shege. According to the 2nd plaintiff, the late Osman Nane was survived by four sons and four daughters, his mother and the appellant who is the widow. According to the claimant, apart from plot numbers 332 and 333, the estate of Nane Osman Shege include a residential house, commercial house and two shambas.

DW1, ABDULKADIR HASSAN was the assistant chief of Lami sub location. He testified that the 3rd respondent sold a plot at Lami. He witnessed the sale agreement. The plot did not belong to the 3rd respondent but it belonged to his father. At that time the late Osman Nane was alive. He was not aware whether the plot had been given to the 3rd respondent by his father.

The record of the trial Court indicate that the defendant only informed the Court about the sale of the Lami plot. She brought in DW1 to testify on the sale. It appears that she did not testify herself. She was not called upon to give her proposed mode of distribution. However, she gave her own valuation of the estate of the late Osman Nane and Nane Shege which contain the same properties as those valued by the respondents.

The appeal raises the following issues:-

1. Whether the Kadhi erred by dealing with the estates of the late Osman Nane Shege and his pre-deceased father, Shege Osma jointly
2. What constituted the estate
3. Whether the Kadhi erred by allowing the parties to value the estate on their own.

On the first issue, I have been advised by the two Kadhi's who were assessors that the Islamic Law of inheritance allows the collapsing of two estates together. The property of a deceased person devolves to the heirs in specific shares soon after death. Where a heir dies before distribution is done, his shares is not extinguished. It devolves to his respective heirs. This principle whereby the shares of a deceased heir is transmitted to his respective heirs is referred to under the Islamic law of inheritance as **al munasakhat**. Under this principle, estates of two deceased persons can be dealt with jointly.

In the case before the Kadhi, the deceased was Osman Nane Shege. He was entitled to inherit part of the estate of his late father. The 2nd respondent is his brother while the 1st respondent is his mother. The two were entitled to inherit the estate of the late Nane Osman Shege. The 3rd respondent is the son of Osman Nane and a grandson to Nane Osman Shege. The record of the trial Court shows that parties agreed to have the two estates dealt together.

After hearing the parties, the Kadhi held that the late Osman Nane was entitled to 10.9% of his father's estate. This 10.9% became part of the estate of Osman Nane to be inherited by the appellant, her four children, the 1st and 3rd respondents as well as the 3rd respondent's. In essence therefore the Kadhi added the 10.9% share to the estate of Osman Nane. I do not think this can raise any problem. The beneficiaries of Nane Osman Shege are not complaining that their father's estate had not been distributed and the heirs of Osman Nane have to wait for its distribution. The appellant even went ahead and valued the two plot numbers 332 and 333 and two farms (shambas), which constituted the estate of Nane Shege. I do find that the trial Court did not misdirect itself or erred in law and fact by adding the 10.9% share of the estate of Nane Shege to the estate of Osman Nane.

According to the decision of the trial Court, the estate of Osman Name Shege comprised of:-

1. Plot number 456, Moyale

2. Residential house
3. Rental house
4. Work benefits including pension
5. 10.9% share from the estate of his father, Nane Osman Shege.

Mr. Halake contends that the deceased's pension ought not to have been included as part of the estate. Under Islamic law of inheritance, whatever belonged to the deceased or whatever the deceased was entitled to form part of his estate and is available for distribution to the heirs. I am advised by the two Kadhi's that Islamic Law of inheritance makes no difference on the type of property heritable by the heirs provided that it has monetary value and it is halal (lawful). The Pension would have been due to the deceased had he worked until his retirement. Upon retirement, the deceased could have dealt with his pension in the manner he wished. It cannot be concluded that the deceased would have used all his pension for the benefit of the appellant and her children only since the children were still in school. The death gratuity and pension formed part of the deceased estate under Islamic law. All the deceased's beneficiaries were entitled to inherit it.

The last issue involves the valuation of the estate. The respondents filed their own valuation. Plot number 456 was valued at Ksh.8.3million. This includes Ksh.4.5million value of the empty plot. This means the house and other items are worth Ksh.3.7million,. The two farms for the estate of Nane Osman were found to be 7 and 5 hectares respectively. Plot number 32 was valued at Ksh.8.5million while plot number 333 was valued at Ksh.5.74million.

The appellant also provided her own valuations. She valued plot number 456 at Ksh. 5 million, plot 332 at Ksh.19,800,000, plot 333 at Ksh.7,900,000. The two farms were found to be 15 acres each.

The case involved distribution of a deceased's estate. What was done was pure guesswork. The beneficiaries cannot say that they got the real value of their respective shares. It would have been prudent for the parties to jointly engage one valuer to conduct the valuation. Taking the average between the two valuations cannot be an accurate valuation of the deceased's estate. I do find that the trial Court erred by allowing the parties to value the property comprising the estate. Further, the 10.9% share from the estate of Nane Osman Shege ought to have been computed. Thereafter, the share of each beneficiary from the 10.9% share ought to have been separately ascertained. There is need also to know whether the pension was paid as a lumpsum or not. Any money that is being paid to the appellant in her capacity as the widow cannot form part of the estate. Death gratuity should be part of the estate. Subsequent monthly payments to the widow should not form part of the estate. That is a benefit due and payable to a widow.

An issue concerning a plot at Lami was raised by the appellant's counsel. There is a sale agreement dated 19th January, 2003 indicating that the deceased and the 3rd respondent sold the plot for Ksh.165,000. Since the plot was sold during the deceased's lifetime, there should be no issue regarding that plot. It cannot form part of the estate.

The upshot is that the appeal partly succeeds. The valuations submitted by the parties were not professional valuations. The appellant seems to be interested in plot number 456. The respondents are equally entitled to inherit that plot. The Kadhi should also distribute individual shares of each beneficiary including the appellant. The judgement simply grouped the shares among the deceased's mother and the two houses. The appellant had three sons and one daughter with the deceased. The 3rd respondent is the only son from the first wife. He has three sisters. The share of each beneficiary after removing that of the 1st respondent (16.7%)

and that of the appellant should be ascertained. The 16.7% share of the 1st plaintiff should also be divided into two. Her share from the 10.9% plus the share of her son's estate. The two shares should be separately valued and computed.

I do find that the deceased's estate was properly ascertained but was not professionally valued. I have further noted that the proceedings were not properly taken. Parties simply started testifying without being sworn or cross examined. The trial court took an active role in cross examining and re-examining the parties. I am alive to the fact that the parties were laymen and women. However, the trial court ought to have sworn the 2nd plaintiff, allow him to testify and thereafter have him cross examined by the defendant. The appellant was not sworn and allowed to testify. I do find that the hearing was not fairly conducted. The appellant was

not allowed to give her side of the story. Further, the appellant's share as the widow was not separately ascertained. Under Islamic law, the appellant was entitled to ? of the estate of Osman Nane. This share has to be deducted from the estate separately and the shares of the children to be computed after the deduction. The appellant did not testify. It is not recorded that she did not want to testify.

This matter is remitted back to the Kadhi's Court with the following guideline.

- (i) Professional valuation of the estate to be done.**
- (ii) Ascertainment of the 10.9% value of the estate of Nane Osman Shege after the valuation.**
- (iii) Computation of the share and value of each beneficiary's inheritance from both the 10.9% share of Nane Osman's estate and the shares from Osman Nane's estate.**
- (iv) Computation of the share of the appellant (widow) separately**
- (v) If it is possible for the appellant to retain plot number 456 and other beneficiaries be fully catered for by the other estate,**

including the 10.9% share, then the Kadhi should consider this mode of distribution.

(vi) Taking of further evidence from any party who would like to testify including recalling of witnesses for purposes of further cross examination if need be.

(vii) A grant to be issued after the estate is distributed.

This being a family dispute involving the distribution of an estate, parties shall meet their own costs.

Dated, Signed and Delivered at Marsabit this 1st day of November, 2018

S. CHITEMBWE

JUDGE