



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
FAMILY DIVISION
CIVIL APPEAL 10 OF 2014

ASITBHAI T. HUSSEIN..... APPELLANT

VERSUS

HASHAM TARMOHAMED HUSSEIN

HUSSEIN TARMOHAMED DOSANI.....RESPONDENTS

RULING

(An Appeal from the Judgement of Hon. Sheikh Twalib B. Mohamed, Kadhi, delivered on 11.12.08 in Mombasa KCC No. 1 of 2007)

1. The Appeal herein arose from the Judgement of Hon. Sheikh Twalib B. Mohamed, Kadhi delivered on 11.12.08 in Mombasa KCC No. 1 of 2009. In the said Judgement, the Hon Kadhi made a the following determination:

- a) the shares of the heirs of estate of Tarmohamed Hussein (deceased) are widow $1/8^{\text{th}}$, 3 sons $2/8^{\text{th}}$ each and 2 daughters $1/8^{\text{th}}$ each;
- b) the shares of the heirs of estate of Aminabai Suleiman, widow of Tarmohamed Hussein (deceased) are 3 sons $2/8^{\text{th}}$ each and 2 daughters $1/8^{\text{th}}$ each;
- c) That the transfer of the interest of Tarmohamed Hussein to his children Mohamed Mehboob and Asit Tarmohamed Hussein was wrong;
- d) That the Appellant do render accounts.
- e) That valuation of $1/3$ interest in Mombasa/Block XV/147 be done and the Appellant buy off the other heirs by giving them their respective shares.

2. The brief background of this case as can be gleaned from the record is that Tarmohamed Hussein (“the Deceased”) died and was survived by his widow Aminabai Suleiman (now deceased), his 3 sons Hasham Tarmohamed Hussein and Hussein Tarmohamed Dosani, (the Respondents) and Mohamed Mehboob Tarmohamed (deceased). He was also survived by 2 daughters, **Asitbhai Tarmohamed Hussein (the Appellant) and Fatma Tarmohamed. His estate comprised of $1/3$ share of Mombasa/Block XV/147.**

3. The Respondents filed suit against the Appellant in the Kadhi’s Court at Mombasa seeking distribution

of the Deceased's estate according to Islamic law, accounts of their father's estate as well as an order that all proceeds of the estate be held in a joint account for the benefit of all heirs of their deceased father. The Respondents claimed in the lower Court that the estate of the Deceased comprised 1/3 share in Mombasa/Block XV/147 ("the Property"). That when the Deceased died, their mother took over the Property and upon her demise, Mohamed Mehboob Tarmohamed and the Appellant took over and they refused to give the other heirs their share of the Property. The Appellant for her part claimed that the Property was her father's but was now hers as their mother transferred it to her.

4. The Hon. Kadhi in his Judgement found that the distribution of the estate of the Deceased by his widow was not in accordance with Islamic law. That as administrator of the Deceased's estate, she had no capacity to transfer the Property to 2 heirs to the exclusion of the others. The Hon. Kadhi found that under Islamic law, the widow was to get 1/8th of the Property while of the residue, the 3 sons are to get 2/8th share each while the 2 daughters are to get 1/8th share each. From the 1/8th share of the widow who is also now deceased the 3 sons are to get 2/8th share each while the 2 daughters are to get 1/8th share each. The Appellant was also ordered to account for the shares of all the heirs. The Hon Kadhi further ordered a valuation of 1/3 interest in Mombasa/Block XV/147 be done and the Appellant buy off the other heirs by giving them their respective shares

5. The Grounds of appeal in summary are that the learned Kadhi erred in law and fact in that he:

a) Failed to hold that he had no jurisdiction to determine the matter as the Property belonged to the Appellant and did not form part of the estate of the Deceased.

b) Held that the Respondents had a share in the Property which is duly registered in the Appellant's name.

6. The parties through their respective counsel filed written submissions which were highlighted before the Court and in the presence of the Honourable Chief Kadhi as assessor.

7. For the Appellant, it was submitted that the Property is registered in the Appellant's name having been transmitted to her and her late brother Mohamed Mehboob Tarmohamed by their late mother Aminabhai Tarmohamed Hussein as executrix and sole beneficiary of the estate of the Deceased under his will. As such the hon. Kadhi did not have jurisdiction to hear and determine the matter. The Appellant contends that the Respondent's remedy lies in filing a suit in the High Court to nullify the title. It was argued that the Property having been registered in the name of the Appellant is prima facie proof of ownership by the Appellant. The Property does not therefore form part of the estate of the Deceased; that the Constitution and Land Acts protect a registered proprietor's rights absolutely; that the Kadhi's judgement amounts to revoking a title which in essence is repealing the provisions of the Constitution and land acts.

8. It was further submitted for the Appellant that the Deceased wrote a will, which was confirmed by the High Court, in which he appointed his widow as sole executrix and dependant. The widow then transmitted the property to the Appellant and her brother. It was thus not for the Hon. Kadhi to disregard the title and grant of probate from the High Court. That the Respondents never challenged the will of the Deceased or validity of the title.

9. For the Respondents, it was submitted that both they and the Appellant were children of the Deceased and all they seek is a share in their father's estate. What they sought from the Kadhi's Court is not a cancellation of the title but a determination of their legal inheritance. They argue that their mother was to administer the estate of the Deceased but instead, she transferred the Property to the Appellant by way of transmission to the exclusion of the other heirs of the Deceased which is against Islamic law. It was argued that under Islamic law, a deceased person cannot disinherit his heirs nor can he bequeath more than 1/3 of his estate without the consent of his other heirs.

10. I have considered the Record of Appeal, as well as the submissions by counsel. It is the duty of this Court as a first appellate court to reconsider the evidence, reevaluate it and make its own conclusions. This duty was set out by the **Court of Appeal** in the case of *Kenya Ports Authority versus Kusthon (Kenya)*

Limited (2009) 2EA 212 wherein it was held *inter alia*, that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

11. The issues for determination are:

- a) Whether the Hon. Kadhi had jurisdiction to determine the matter;
- b) Whether the Respondents have a share in the Property which is duly registered in the Appellant's name.

12. The Appellant contends that the Kadhi did not have jurisdiction to hear and determine the matter before him as the Property belonged to the Appellant and not the Deceased, having been passed to her by their mother, the sole beneficiary of the estate of the Deceased. The jurisdiction of the Kadhi's court is set out in Article 170(5) of the Constitution which provides:

“The jurisdiction of a Kadhis' court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.”

13. I have looked at the Petition before the Kadhi in KCC No. 1 of 2007. The prayers sought therein were for distribution of the estate of the Deceased, rendering of accounts and the deposit of proceeds from the estate in a joint account for the benefit of all heirs. The question for determination clearly related to inheritance of the estate of the Deceased. Consequently, the question before the Hon. Kadhi for determination fell well within the jurisdiction of the Kadhi as set out in Article 170(5) of the Constitution.

14. I now turn to the other issue as to whether the Respondents have a share in the Property which is duly registered in the Appellant's name. The Respondents claim that the Property forms the estate of the Deceased and as heirs they are entitled to their rightful shares. The Appellant on the other hand is adamant that the Property is hers as her mother transferred the same to her. The Hon. Kadhi stated in his judgement:

“From this everment (sic) it'svery clear that the deceased widow didn't distribute the deceased's estate to his legal heirs in accordance to Islamic Law as required of her by the Laws of Allah... As far as Islamic Law of Succession is concerned, the widow had no capacity as an administrator to have allotted or transmitted and/or transferred the deceased property to just two (2) of the deceased heirs in exclusion of the others”

15. There was reference to a will in the submissions herein by which the deceased allegedly bequeathed his estate to his widow. There was also a mention of a grant of probate. The record in the Kadhi's Court however does not show that such will or grant of probate were produced.

16. The record is clear and it is not disputed that that the Property was transferred by the widow to the Appellant and one brother Mohamed Mehboob Tarmohamed and the Respondents herein while the other heirs got nothing. This was done in contravention of Islamic Law of Succession. The Holy Qur'an states in Nisa 4:11

“Allah instructs you concerning your children [i.e., their portions of inheritance]: for the male, what is equal to the share of two females”

Nisa 4:12 provides:

“...And for them [i.e., the wives] is one fourth if you leave no child. But if you leave a child, then for them is an eighth of what you leave after any bequest you [may have] made or debt.”

17. As stated earlier, the record has no evidence of a will. Consequently the deceased is deemed to have made no bequest. Accordingly, the estate of the Deceased ought to have been distributed in terms of the provisions of Nisa 4:11 and 12 of the Holy Qur’an. Further, the Hon Chief Kadhi who sat with me as assessor in this matter stated:

“Islamic law of succession does not allow any Will which gives person/s share who are already entitled of the same... In the written Will the husband gave all his wealth to his wife who is entitled to inheritance, therefore the Will would have (sic) rendered Null and Void...”

18. What I understand the Hon. Chief Kadhi to be saying is that under Islamic Law of Succession, the widow was already entitled to inherit from the estate of the Deceased (see Nisa 4:12). Any will purporting to make a bequest to her would therefore be null and void. It is therefore my finding that the transfer of the Property to the Appellant and Mohamed Mehboob Tarmohamed by the widow of the Deceased to the exclusion of other heirs of the Deceased Respondents was done unlawfully.

19. It was submitted for the Appellant that the Appellants rights over the Property are protected under the Registered Land Act and by the Constitution. Article 40 (1) of the Constitution protects the right to own property as follows:

“(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya”.

Article 40(6) however limits the right to own property thus:

“(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

The right to property under Article 40(1) of the Constitution cannot be invoked by a party who has acquired property unlawfully. In the instant case, the transfer of the Property to the Appellant and Mohamed Mehboob Tarmohamed by the widow of the Deceased as I have found, was done contrary to Islamic Law of Succession and is thus unlawful. Consequently, the Property forms part of the estate of the Deceased and Respondents and other heirs of the Deceased have a right to their share in the Property notwithstanding that the same is registered in the name of the Appellant and Mohamed Mehboob Tarmohamed.

20. In the premises and from the totality of my evaluation of the evidence and the law relevant in this matter, my finding is that the Appeal herein has no merit. The same is dismissed but with no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 3rd day of March 2017

M. THANDE

JUDGE

In the presence of: -

..... **for the Appellant**

..... **for the Respondents**

..... **Court Assistant**