



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
FAMILY DIVISION
CIVIL APPEAL 9 OF 2013

SALIM ABDALLA SALIM.....APPELLANT

VERSUS

OMAR ABDALLA SALIM.....RESPONDENT

JUDGEMENT

(An Appeal from the Judgement of Hon. Sheikh Abdulhalim Athman, Principal Kadhi, delivered on 14.2.13 in Mombasa KCC No. 61 of 2009)

1. The Appeal herein arose from the Judgement of Hon. Sheikh Abdulhalim Athman, Principal Kadhi delivered on 14.2.13 in Mombasa KCC No. 61 of 2009. In the said Judgement, the Hon Kadhi made the following determination:

- a) The Will of 1998 is invalid as it was revoked by the Will of 2000, but it proves the heirs and properties of the deceased.
- b) The estate shall be redistributed taking cognizance of the transactions and earlier agreements and distributions of the family.
- c) A valuation of the entire estate and inventory of who owns which property be filed.
- d) The legal heirs and shares of each are as outlined.

2. The brief background of this case as can be gleaned from the record is that Abdalla Salim Al-Maery (“the Deceased”) died in 2003 and was survived by his widow, 8 sons including Salim Abdalla Salim, the Appellant and Omar Abdalla Salim, the Respondent. He was also survived by 9 daughters. The Deceased had 2 Wills dated 30.3.98 and another dated 29.10.2000. A Grant of Probate was issued to Jamila Salmin, the widow of the Deceased in High Court Succession No. 246 of 2007.

3. The Respondent filed a succession petition against the Appellant in the Kadhi’s Court at Mombasa seeking determination of the heirs of the Deceased and their respective shares in his estate as well as distribution of the estate in accordance to Islamic Shariah. In the Petition, the Respondent averred that the estate comprised of a 2 flat house without land in Bondeni, Mombasa (“the Bondeni House”). He claimed that only the Respondent is benefitting from the estate. The Appellant denied the Respondent’s allegations. He stated that the estate of the Deceased had been duly distributed to all the heirs including the Respondent and the Bondeni House was the due inheritance of the Appellant. He stated that the estate of the Deceased also comprised of 7 houses in Hola, 1 house in Garsen and a 3 floor building in Makupa.

4. In his Judgement the Hon. Kadhi ordered the redistribution of the estate. Being aggrieved by the decision of the Hon. Kadhi, the Appellant preferred the Appeal herein. The grounds of appeal in summary are that the learned Kadhi erred in law and fact in that he:

- a) Made an order that the estate properties be redistributed.
- b) Failed to take into account that redistribution of the estate would affect persons who were not party to the suit.
- c) Found that both Wills of the deceased were not valid yet the parties had accepted distribution as per the Wills.
- d) Ordered the redistribution of the estate yet part of the estate had been bequeathed to non-direct heirs.

5. Parties filed their written submissions which were highlighted by their respective counsel before the Court and in the presence of the Hon. Chief Kadhi as assessor. For the Appellant, it was submitted that the Petitioner had indicated in his submissions in the Kadhi's Court that he had no problem with the distribution of the properties of the estate save for the Bondeni House. This being the case, the learned Kadhi erred in ordering the redistribution of the entire estate. It was further argued that the Court cannot award what was not pleaded. The case of *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR was cited to buttress this submission. For the Respondent, it was submitted that both Wills were valid and that the Respondent had the right to make an application for distribution of the estate of the Deceased under Islamic Sharia in the Kadhi's Court.

6. It was further submitted for the Appellant that 16 heirs of the Deceased were not parties to the matter before the Kadhi's Court and only the Appellant and Respondent participated. The order of the Hon. Kadhi affected all the other heirs who had already received their shares of the estate and some of the properties had devolved to non-direct heirs such as grandchildren. Citing the case of *The Town Council of Olkalau v Nganga General Hardware C.A. No. 269 of 1997*, it was argued that the order of redistribution cannot bind parties who were not party to the proceedings. For the Respondent, it was submitted that all beneficiaries were informed of the proceedings but chose not to appear.

7. Counsel for the Appellant submitted that the Hon. Kadhi erred in finding that the 2 Wills were not valid yet they had been accepted by the heirs who in fact distributed the estate in accordance with the said Wills. The only asset in contention is the Bondeni House and that, by the Respondent only. The Appellant contends that he is in possession of the Bondeni House which was given to him as his share of the estate and only the Respondent has a problem with it. The Respondent also received his share of the estate. The Appellant states that the Hon. Kadhi ought to have found that the Petition was unnecessary as the estate had been properly shared out. The Respondent on the other hand submits that the Hon. Kadhi arrived at a fair decision and no heir other than the Appellant has complained about the decision.

8. The Respondent further submits that the Hon. Kadhi found that under Islamic law, a Will is only valid if it bequeaths to all heirs. He therefore found the 2000 Will invalid. The Respondent urged the Court to find that the Hon. Kadhi properly evaluated the evidence before him, considered property distribution under Islamic law and arrived at a correct position.

9. 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”

The above duty also applies to the High Court in the exercise of its appellate jurisdiction.

10. I have looked at the record. I see not 2 but 3 Wills. The 1st Will is drawn by K. M. Karimbhai, Advocate and is dated 30.3.98. This Will deals with all the houses in Laza, Hola, the house in Garsen and the house on Abdel Nasser Road, Mombasa (Bondeni House). The 2nd Will is drawn by Sachdeva & Company Advocates and is dated 19.10.00. This Will deals with Plot No. 75 Section XVI, Jomo Kenyatta Avenue, Makupa and the stone house at Laza, Hola being TRCC/22/C/456. The 3rd Will is drawn by Sachdeva & Company Advocates and is dated 29.10.02. This Will is similar to the 2nd Will save that one beneficiary Swaleh Abdalla Salim who was not provided for previously is now provided for. It is this 3rd Will that was proved in High Court Succession Cause No. 246 of 2007.

11. In each of the Wills described above, the Deceased revoked all the former Wills and declared each Will to be his last Will and testament. This being the case, the only valid Will would be the 3rd Will dated 29.10.02, the Deceased having revoked all other Wills. In any event this is the Will that was proved in the High Court.

12. This Court notes that none of the parties submitted on the issue of the High Court Succession Cause No. 246 of 2007. High Court Succession Cause No. 246 of 2007 was instituted on 24.4.07. Grant of Probate of the Written Will dated 29.10.02 was issued Jamila Salmin, the named executor and widow of the Deceased on 16.8.07. The Grant was confirmed on 4.4.08. The Certificate of Confirmation of Grant issued on 25.4.08 indicated that the estate was to be distributed as per the Will of the Deceased. On the other hand, KCC No. 61 of 2009 was instituted on 11.3.2009 about 2 years later. The Respondent, rather than going to the Kadhi's Court after the Grant was confirmed ought to have applied for revocation of the Grant of Probate or appealed the decision of the High Court.

13. The Hon. Kadhi in his decision found the Wills of 1998 and 2000 invalid and ordered the redistribution of the estate of the Deceased. This decision effectively set aside the Grant and the Confirmation thereof issued by the High Court. This is not supported by law. The Kadhi's Court being a subordinate Court is not clothed with jurisdiction to overturn the decision of the High Court which is a superior Court. Consequently the decision of the Hon Kadhi is bad in law.

14. This Court is alive to the fact that the High Court dealt with the assets listed in the 2002 Will being Plot No. 75 Section XVI, Jomo Kenyatta Avenue, Makupa and stone house at Laza, Hola being TRCC/22/C/456. The estate comprised of other assets listed in the 1998 Will which was revoked by the 2000 Will. It would therefore appear that the Deceased died intestate in respect of these other properties.

15. It was submitted for the Appellant that the heirs of the Deceased had agreed to distribute the estate in accordance with the 1998 and 2000 Wills. It was only the Respondent who was unhappy with the Bondeni House going to the Appellant as his share. It was therefore argued that the Hon. Kadhi should have restricted himself to the contested asset being the Bondeni House. I have carefully looked at the Petition. The Respondent stated that the property left by the Deceased was “2 flat house at Bondeni without plot”. The Respondent submitted in the Kadhi's Court as follows:

“We submit that this house is part of the deceased Estate and since it has not been mentioned anywhere in the Will and has not been distributed, this court has power to distribute the same to the heirs.”

The Respondent did not seek redistribution of the entire estate. His complaint concerned the Bondeni House. Consequently I do agree with the Appellant that the Hon. Kadhi had no basis for considering the distribution of the rest of the estate, a matter that was not pleaded. In stating this I am guided by the cited decision of Simon Taveta v Mercy Mutitu Njeru [2014] eKLR in which the Court of Appeal noted:

“In the absence of a specific plea for future medical expenses and/or eventualities, it is our

considered view that the trial judge erred in considering a fact and matter that was not pleaded.”

16. On the submission that the redistribution order affected heirs who are not party to the proceedings therein, I do note that the matter before the Kadhi was between the Appellant and the Respondent only. The record shows that the Deceased was survived by his widow, 8 sons and 9 daughters. The redistribution order applies to the entire estate and in effect affects all the beneficiaries and not the Appellant and Respondent alone. This being the case, can a party not before the Court be bound by the orders made therein? The answer lies in the finding of **A.B. Shah** J. A. (as he was then) in the case of The Town Council of Olkalau v. Ng'ang'a General Hardware C.A. No. 269 of 1997 at page 10:

“There is a factor which was not considered by the learned Judge. His order affects several parties who were not before the Court nor were they given an opportunity of showing cause why they should not vacate the suit premises (property). The common law principle of audi alteram partem is of a fundamental importance. Parties not before the Court may not be bound by orders which may affect them.”

17. What then is the fate of the estate of the Deceased and the distribution thereof? The High Court Succession Cause No. 246 of 2007 dealt with Plot No. 75 Section XVI, Jomo Kenyatta Avenue, Makupa and stone house at Laza, Hola being TRCC/22/C/456, the assets of the estate contained in the 2002 Will. The Deceased died intestate in respect of all other assets. It would appear that the heirs of the Deceased are satisfied with the distribution of the estate assets save for the Bondeni House. I have found that the Kadhi's Court erred in purporting to overturn the decision of the High Court. This Court also cautions itself not to sit in appeal of its own decision. The Hon. Chief Kadhi who sat with me as assessor in this matter is of the opinion that the appeal be allowed on the following grounds:

“ 1. THAT the trial Kadhi failed to summon all the beneficiaries to appear before him to confirm on distribution of the estate of their late father.

2. THAT the trial Kadhi should have confirmed from the beneficiaries if they were happy with the two wills made by their late father or Not.

3. THAT the two Wills were not accurate on Number of beneficiaries, which the Hon Kadhi should have questioned about it, but he never did that.

4. THAT the two Wills never mentioned what the widow was entitled to and the trial Kadhi never questioned it.

I am therefore of the opinion that this case be returned to the Kadhi's Court for retrial and the trial Kadhi to take in consideration all the above grounds.”

18. I concur with the Hon. Chief Kadhi. In the interest of justice, the matter should be retried before the Kadhi's Court with the involvement of all beneficiaries of the estate of the Deceased.

19. In view of the foregoing, I allow the Appeal and set aside the judgement of the Hon. Kadhi delivered on 14.2.13. I direct that the matter be heard afresh with the involvement of all the heirs of the Deceased by a Kadhi other than Hon. Sheikh Abdulhalim Athman. For the avoidance of doubt the hearing shall be restricted to the Bondeni House which was the subject of KCC No. 61 of 2009. Each party to bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 14th day of July 2017

M. THANDE

JUDGE

In the presence of: -

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

.....**for the Respondent**

.....**Court Assistant**