

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL CASE 44 OF 2007

MOHAMED ABDALLA MBARAK & 2 OTHERSPLAINTIFFS

VERSUS

ABDULKADIR ABDALLA MBARAK & 4 OTHERS.....DEFENDANTS

R U L I N G

Mohamed Abdallah Mbarak, Mohamud Abdalla Mbarak, Abdulkalik Abdalla Mbarak and Thureya Abdalla Mbarak (the plaintiffs) filed this suit by way of Originating Summons against Abdulkadir Abdalla Mbark, Ali Abdalla Mbarak, Abdusalam Abdalla Mbarak, Hamid Abdalla Mbarak and Twalib Abdalla Mbarak (the defendants)

A consent order was recorded on 20-5-97 regarding the distribution of the deceased's property (i.e Abdalla Mbarak Bin Saad) except for the dispute involving the ownership of the four storey building situated along Kilifi- Malindi Road at Kibaoni Village. All the parties are siblings.

The issue is whether the four storey building under reference forms part of the deceased's estate and what are the respective shares of each heir/beneficiary, and if, then who is/are the lawful owner(s) of the said property.

PW1 Abdulkalik Abdalla Mbarak gave viva voce evidence – he is one of the sons of the deceased Abdalla Mbarak Saad. He stated that in 1994, they obtained orders regarding distribution of the estate under Islamic Law and they entered consent regarding the distribution except for the one named property. He insists that the building belonged to their late father and it had no title. He however gave the court a copy of the original plan dated 26-1-06 from the Town Council showing the building plan (ex.3) and that it belongs to their father. He also produced a miscellaneous receipt of approval dated 14-1-86 (ex.4). It was his evidence that they were all born in that building and it should be distributed according to Islamic Law and it be valued as currently it is in the hands of the defendants yet it should form part of their late father's estate.

I perused the court file and noticed a document dated 29-4-97 which is a transaction of a handwritten will by the late Abdallah Mbarak Saad declaring that his house in Kilifi (Kibaoni) being a four storey building is a property of his son, Abdulqadir Ali and Abdisaalam. Why is it that PW1 completely omits any mention of this will? Has this will been challenged?

To my mind, the plaintiff's witness is guilty of non disclosure on this document which forms part of the court record and I cannot therefore ignore it that has not been alluded to at all. I can only infer mala fides for that omission.

Subsequently, the plaintiffs have not proved their claim and I decline to grant the prayers sought herein.

The suit is subsequently dismissed with costs to the defendants.

Delivered and dated this **8th** day of **July 2009** at Malindi.

H. A. OMONDI

JUDGE

Plaintiffs present

Mr. Abdallah holding brief for Kilonzo for plaintiffs