



REPUBLIC OF KENYA



**In re Estate of Guyo Sode (Deceased) (Succession Cause 37 of 2019)
[2022] KEKC 169 (KLR) (28 November 2022) (Judgment)**

Neutral citation: [2022] KEKC 169 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT MOYALE
SUCCESSION CAUSE 37 OF 2019
AD WAKO, PK
NOVEMBER 28, 2022
IN THE MATTER OF THE ESTATE OF: -
GUYO SODE..... DECEASED.**

BETWEEN

ADAN GUYO SODE PETITIONER

AND

SHAME GUYO SODE RESPONDENT

JUDGMENT

1. The Petitioner instituted this suit on 1st August 2019 in his capacity as rightful heir/beneficiary of the estate of their Deceased father the late Guyo Sode seeking for the following orders: -
 - a) That the honorable court to distribute the deceased's property among his heirs in accordance with Islamic law of succession.
 - b) Costs of the suit.
 - C) Any other relief may court deem fit to grant.
2. The Petitioner stated that their deceased father passed away on 17th May,2008 who is a practicing Muslim.
3. The late Guyo Sode Burje had three sons and one adoptive son namely; -
 - a) Mohamed Guyo Sode (deceased)
 - b) Shame Guyo Sode
 - C) Adan Guyo Sode.



- d) Hussein Ibrahim(adopted).
4. The petitioner stated that their late father left behind two properties located in Moyale and whose references are as follows; -
- a) Plot No. 66 located on Market Road Moyale Township.
- b) Plot No. 802 located in manyatta location.
5. The petitioners avers that during the last day of the late Guyo Sode Burje, he informed his two remaining sons that he wanted plot No. 66 be belong to both sons and the rental income collected thereof, be shared amongst them on an alternating monthly basis.
6. The petitioner further stated that the deceased allocated two rooms within Plot No. 66 one to Hussein Ibrahim (adopted son) and the other whose monthly rent would be taken to mosque as sadaqa (offering), a practice that the late Guyo Sode Burje did even during his lifetime.
7. The petitioner also pleaded that the plot no. 802 is currently Occupied by the respondent.
8. The Petitioner avers that the respondent has recently taken to transferring the deceased properties into his name and identifying himself to be the sole beneficiary and heir to the deceased and subsequently disinheriting his brother.
9. . The petitioner stated that the they have lived without incident since the deceased death for 11 years up until now when the respondent is attempting to disinherit his sibling's contrary to sharia law.
10. The respondent filed replying affidavit to petition dated 2nd September 2019 that the respondent admits the contents of paragraph 3 of the petition.
11. . That in response to paragraph 4 of the petition the respondent avers that the late Guyo Sode Burje had three sons namely Mohamed Guyo Sode (deceased), Adan Guyo Sode (the petitioner) and shame Guyo Sode (the respondent) and further that their deceased father has never adopted Hussein Ibrahim or any other children whatsoever hence the said adopted son is a stranger to the estate is merely being fronted by the petitioner to advance his selfish interest.
12. That the alleged adopted son is known to respondent by virtue his grandmother having shortly involved with their father but he was never adopted as a son and the petitioner must provide strict legal proof.
13. .That the response to paragraph 5 their deceased father did own the said property Plot No. 66 in township but transferred ownership of the same to the respondent during his lifetime hence there is no property available for succession.
14. . That the Plot No. 802 the respondent alleged that the said plot belongs to him it has never been registered in their deceased father's name or owned by him hence it cannot form part of the deceased estate.
15. . That the respondent also avers that since their maternal grandmother Kanne Maree Dusite had a plot no. 187 in Manyatta the property was left by their mother(deceased) for the benefit of the petitioner and he was not to lay any claim on the same and the petitioner cannot claim an interest on his plot no.66 in township (attached and marked as "SGSI" is a letter from Moyale town administration showing ownership of plot no. 187)
16. . That the petitioner is in active use and possession of plot no. 187 hence he cannot claim beneficial interest on his behalf or on behalf of anyone.



17. .That the respondent denies the contents of paragraph 6,7 and 8 and shall put petitioner to strict legal proof.
18. . That their no will, oral or written whatsoever and the alleged allocation of the plot no. 66 by the deceased is a complete fabrication without an iota of evidence.
19. . That respondent the content of paragraph 9 of the petition admitted and content of paragraph 10 of the petition denied petitioner shall put strict legal proof.
20. .That in response to paragraph 11 and 12 of the petition the respondent stated that the deceased whose estate is alleged to be subject of succession transferred all his estate years before he passed away and there is no estate which shall be subjected to succession herein (attached and marked 'SGS2' is an extract of land record from the county government of records showing the change of land effected by their deceased father on land plot no. 66)
21. .That Respondent said he had two brothers that is the late Mohamed Guyo Sode and the petitioner who solely owns land parcel no. 187 which belongs to their maternal grandmother but was solely inherited by their biological mother and subsequently by the petitioner.
22. . That the respondent stated that the land record clearly shows that their deceased father had given the plot to their eldest brother Mohamed Guyo Sode and changed the ownership to him (the respondent) after the demised of their brother Mohamed.
23. .That the respondent pleaded that it is further evident from the record that changed of ownership took place on 2nd April 1998 during the lifetime of their father and that was effected by the deceased father in person.
24. .That the respondent therefore prays for the dismissal of the petition with cost as the same is ill founded, malicious and with merit.
25. .The petitioner further filed replying affidavit sworn on 16th Sep,2019 to the response of the respondent and refuted the pleading of the respondent.
26. On 22nd Nov.2021 after series of adjournment matter was called for inter parties hearing where the all parties and their respective witnesses testified on oath.

Arguments by the petitioner

27. . The petitioner paraded his respective witnesses before the court, the PW1 Mr. Adan Guyo sode told the court that he is one of two remaining sons of the deceased Guyo sode their deceased father left two parcels of land, being one residential house Plot No. 802 and Plot No. 66 rentals. The deceased allocated two rooms within Plot No. 66 one to Hussein Ibrahim (adopted son) and the other whose monthly rent would be taken to mosque as sadaqa (offering), a practice that the late Guyo Sode Burje did even during his lifetime.
28. PW1 also told the court that their deceased father directed the rental income collected from the remaining rooms be shared amongst them (the petitioner and the respondent) on an alternating monthly basis. This routine lasted for 11 year after the death of their father.
29. . The petitioner also told the court that the respondent began to illegally and without due process transferred the entire estate into his name.



30. PW4 Mr. Ibrahim Isack Abdi and PW5 Mr. Isack Ali who is tenant at plot 66 since 1999 their evidence collaborated with the petitioner that they used to pay rent to the late Guyo sode, after his demise the two sons of the deceased (petitioner and respondent) took the rent on an alternating monthly basis.
31. It is the petitioner's case that the respondent in his replying affidavit to the petition deposed that the deceased did own plot no. 66 in township but transferred ownership of the same to him. The respondent on cross examination informed the court that plot 66 initially belonged to his father and later changed to late Mohamed Guyo sode and later given to him by his father.
33. In regards to plot 187 the petitioner claimed he was given to him by his grandmother, he was raised by his grandmother.

Defence Arguments

34. .RW1 Mr. Shame Guyo Sode the respondent told the court that plot no. 66 initially belong to his father before given to late Mohamed Guyo sode, after the demised of their brother his late father changed the ownership to him.
35. The Respondent also told the court that plot 802 belongs to him from on set, he acquired the ownership through county council of Moyale with the help of his deceased father, he confirmed that the property is still in his name, he also stated that his brother (the petitioner) had a share from their mother's side plot 187.
36. Having given due consideration to both oral and written submission of the parties during the trial and perusing through the documents before the court from both sides, the question which therefore, falls for my consideration is:
 - a) Whether the Kadhi's court has jurisdiction to hear and determine the dispute.
 - b) What is the personal law of the deceased for purpose of succession?
 - c) What does estate (TARIKAH) mean in Islam?
 - d) Who are the legal heirs of the deceased?
 - e) Whether the three properties in question will form part of the deceased's estate?
37. . On the first issue the jurisdiction of Kadhi's Courts is donated by Article 170 of *the Constitution* and subsection 5 of the Kadhi's Act. The issue in dispute should involve Islamic law. The parties must profess the Islamic religion and submit to the jurisdiction of the Kadhi's Court.
38. With this regards it is evident that the suit before the court involved the property of deceased Muslim. The suit was seeking distribution of the deceased's estate. The issue of inheritance is part of Islamic law involving a deceased's personal status. It falls within the purview of Article 170 of *the constitution*. I do therefore find that the court has the jurisdiction to hear the dispute between the parties in relation to the distribution of the estate. All parties profess the Islamic religion and committed themselves to the jurisdiction of the Kadhi's Court.
39. .On the second issue for consideration is personal law of the deceased, no dispute was recorded, the deceased died as Muslim therefore his personal law is Islamic personal law, I do agree with the submission of learned counsel for the petitioner.

Section 2 (3) of law succession states; - subject to subsection (4) the provision of this act shall not apply to testamentary or intestate succession to the estate of any person who at the time



of his death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.

40. .On the third issue for consideration is estate (tarikah) of the deceased, the estate comprises of all property that the deceased has owned, whether his ownership of the substance or corpus of a thing, moveable and immoveable, realty or personally. In Islamic law of inheritance, it makes no difference the type of the property heritable by the heirs provided that it has monetary value and it is halal (lawful).
41. .On the fourth issue the legal heirs of the deceased, in Islam their hierarchy of three classes of heirs, the first class often referred to as the Quranic heirs or sharers and the remaining two classes are the residuary heirs.
42. . There are six heirs who will always inherit if they survive the deceased and these are; - husband/wife, son, daughter, father and the mother, in this matter the deceased Guyo sode was survived by 2 sons no dispute was recorded to this regard.
43. . The fifth issue of consideration is whether the three properties in question will form part of the estate.

Plot no. 66

44. The PW1 Mr. Adan Guyo sode told the court that their deceased father left two parcels of land, being one of it is Plot No. 66 (commercial plot). The petitioner and the respondent used to take rental income from the said plot on an alternating monthly basis.
45. .PW4 Mr. Ibrahim Isack Abdi and PW5 Mr. Isack Ali who is tenant at plot 66 since 1999 their evidence collaborated and echoed with the petitioner that they used to pay rent to the late Guyo sode, after his demise the two sons of the deceased (petitioner and respondent) took the rent on an alternating monthly basis, the question beg the answer is why the tenant used to pay the rent to the deceased and also after his demised the two surviving sons taking the proceeds of the plot no. 66 on an alternating monthly basis if the plot belong to the respondent as alleged?
46. . RW1 Mr. Shame Guyo Sode the respondent told the court that Plot No. 66 initially belong to his father before given to late Mohamed Guyo sode, after the demised of their brother his late father changed the ownership to him, it shows that his late father gifted him the said plot.
47. The concept of gift to children, the Islamic scholars agreed that it is prescribed in Islam to treat children fairly when it comes to gift-giving, they should not single out one or some of them and not give to others.
48. . It is the duty of father to bring up his children maintaining equality between them, it is not permissible for a father to show favoritism to one of his children.
49. . The principle of equality relies on the following hadith of prophet reported by Bukhaari (2586) fromAN NU-MAN ibn Bashir reported that his father took him to the prophet (P B U H) and said, ; messeger of God I gave this son of mine a slave as gift and I wish that you to bear witness to it, the prophet (P B U H) asked him ,Did you give each of your children a similar gift, no he said, the prophet (P B U H) said then seek for yourself some other witness because I do not witness injustice;
50. The evidence in this Hadeeth is clear that the prophet commanded justice, and a command implies that it is obligatory, the prophet explained that showing preference to one child or singling him out to the exclusion of the others is falsehood and injustice, in addition to his refusal to bear witness to it and commanding him to take back his gift indicates that differentiating between children is haram(unlawful)



51. . Therefore based on above evidences and authorities from the Hadith of the prophet (peace be upon Him) I find that the suit property Plot No. 66 will form part of the estate of the deceased thus subject to inheritance.

PLOT 802

52. Respondent told the court that Plot 802 belongs to him from on set, he acquired the ownership through county council of Moyale with the help of his deceased father, the letter from the town administrator dated 3rd sep 2019 Marked 'Sgs1' referred to in the annexed affidavit of respondent also confirmed that the said plot bears the name of the respondent, and another letter from the same source dated 9th sep 2019 marked 'Ags2' referred to in the annexed affidavit of petitioner do confirmed the said plot registered in the of respondent.

53. In any civil case the claimant must prove their case on a balance of probabilities, this means the claimant must prove that his facts tip the scale in his favor, the court agree with the pleading of the Respondent; the law places the burden of proving the existence of fact to the party who puts in a claim, the court attention was drawn to the Hadith of the prophet; -

((on the authority of Ibn Abass (may Allah be pleased with him) that the messenger of Allah (peace be upon him) said; were people to be given everything that they claimed, men would(unjustly) claim the wealth and lives of (other) people, but the onus of proof is upon the claimant.....) Narrated by Baihaqi.

54. The petitioner's witnesses that merely stating the plot 802 belongs to the Deceased without elaborating further how the land was acquired, in my view cannot surpass the compelling evidence that adduced before the court by the respondent, therefore the said Property Plot No. 802 will not form part of the estate.

Plot No. 817.

55. . No dispute was recorded; the fact is the said Plot No. 817 is not part of deceased the estate, therefore cannot be part of the proceeding for the court to decide on it.

56. .The rightful Islamic shares of inheritance of heirs of deceased in regards to Plot No. 66 will take following mode, the deceased was survived by two sons;

a) Each son of the deceased will get 50%

57. No order as to cost, it is so ordered.

DATED AND DELIVERED 28TH DAY OF NOV, 2022.

HON. A. D. WAKO

PRINCIPAL KADHI.

MOYALE LAW COURTS.

