



**REPUBLIC OF KENYA**

**IN THE KADHI'S COURT AT MERU**

**SUCCESSION CASE NO 02 OF 2019**

**(Formerly SUCCESSION Case No 44 of 2018 at Isiolo Kadhi's Court)**

**IN THE MATTER OF THE ESTATE OF THE LATE**

**ALI NGE'NTU *Alias* ALI M'INGETI..... DECEASED.**

**MUSA ALI M'INGETU..... PETITIONER**

**VERSUS**

**NURU HASSAN MOHAMED.....RESPONDENT**

**JUDGMENT**

**Background**

1. In this succession matter, the petitioner prays for letters of administration interstate at the Chief Magistrates Court at Meru in succession Case No. 136 of 2016. The same was granted on 10<sup>th</sup> November, 2016. He later applied for confirmation of the grant on 11<sup>th</sup> April 2018. He annexed a supporting affidavit which proposed the distribution of the estate property. It proposed the petitioner get 0.625 acres and each of his deceased siblings to get an equal 0.125 acres to be shared among their respective children. The respondent filed an objection to this distribution on 29<sup>th</sup> June 2018. However, before the summons for confirmation could be heard, he applied for and was granted transfer of the matter to the Kadhi's court. The matter was transferred to Isiolo Kadhi's court as there was no Kadhi's court at Meru then. It was brought back to Meru when by consent of parties, upon establishment of the Meru Kadhi's Court.

2. The late Ali Ngatu alias Ali M'Ingetu died on 17th February 1978 at Meru Hospital aged [65] years. He was survived by a two sons and two daughters who, all except one, the petitioner herein, are deceased.

**Issues**

3. The dispute relates to the parcel of land Known as Plot No. Ntima/ Ntakira / 1805 measuring 0.408 Ha, approximately one acre. It is registered in the name of the deceased herein. The petitioner contends only half of the property belongs to the estate and the other half belong to him while the respondent contends the entire parcel of land belongs to the estate.

**Submissions**

4. Mr. Mwitari for the petitioner submitted that the petitioner bought a parcel of land sometimes in 1963 which was consolidated with his father's parcel. It is his submission that the respondent did not demonstrate that the exhibits produced on the adjudication were not authentic. He argued the green card in respect of Ntima/Ntakira/ 1004 (allegedly the first registration prior to sub division to give rise to 1805) included the ½ acre which was consolidated into Ntima / Ntakira / 1805. He contends the respondent did not adduce evidence to controvert this fact.

5. Mr. Kimathi for the respondent submitted that the property is registered in the name of the deceased as an absolute owner and that the adjudication records do not show any land of the petitioner was added to the deceased's estate. He submitted the evidence of the witness is faulty as he was a baby when the alleged transaction took place and that the petitioner failed to demonstrate why he could not ask his father to transfer his alleged share in the property to him before his death.

**Analysis and Finding**

6. The petitioner relied on the green card and adjudication records. He had filed witness statements by Idris K. Nuru, John M'Mwitari, Maritha Karegi, Yusuf Kinoti and Asha Makena. Only Idris Nuru gave evidence in court under oath and was cross examined. Statements of

witness which was not tested or cross examined has no evidentiary value and was therefore not considered in the determination of this matter.

7. Idris Nur [PW1] is an older brother to the respondent. He was born in 1964. His evidence is that his father told him that the petitioner bought a portion of land in 1963 which was consolidated with his grandfather's parcel and registered as Plot No. 1004, which Plot was subdivided and gave rise to Plot 1805. He stated further that his father identified the portion belonging to the petitioner as the part where he currently resides in.

8. I have carefully read the copy of the green card. It indicates The first entry was on 7.4.1965 and title deed for Plot No. Ntima / Ntakira / 1004 measuring 0.684 was issued to Ali Ingetu on 12.10.1965. It was subdivided into Plot Nos. 1799, 1800, 1801,1802,1803,1804 and 1805. As initially registered, the plot No. 1004 was first allocated to the deceased as were apparently the sub divisions.

9. The copy of the district land adjudication settlement appears to be sketch notes from a folio of the scheme. The name of the deceased appears next to Plot No. 1004, Riungu Mwarania next to 1002, and M'Ikirima M' Marete next to 1003. The names Muruine and Kieara appear in some of these plots. There are no statements of reasons and / or explanations of the sketch and whether it is a valid and official decision of any transaction and transfer. The name of the petitioner appears nowhere in this document. It does not support his claim. It is my considered view that the sketch of the adjudication, is unclear, incomprehensible and insufficient to qualify as an explanation of entries in the green card.

10. The burden of proof lies with the petitioner to prove he bought a parcel of land which was consolidated with that belonging to his father. It is trite law both under Islamic and law of evidence, that the claimant must prove. The Qur'an at Q.27.64 provides

**" ...say produce your proof if you should be truthful".**

Ibn Abbas [R.A.] narrated that the prophet PBUH said: **'The onus of proof lies on the plaintiff and the oath is to be taken by the defendant.** Reported by Bukhari [4552], Muslim [1/1711], Al Baihaki [10/252].

11. Section 107 of the Evidence Act, Cap 80 Laws of Kenya provides

**'whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist'**

12. Islamic law emphasised the need to record transactions of monetary nature in writing in the longest verse in the entire Qur'an, Q.2.282. It provides in part

**'You who believe, when you contract a debt for a specified term, write it down, and let a scribe write [it] between you in justice, let no scribe refuse to write as Allah has taught him....'**

13. The evidence of PW1 is not primary or direct. It is a report of what he was told by his father. It is heresy. It is very weak to overturn the documentary evidence of the title and green card. This, in addition to lack of any written document to support the transaction between the petitioner and his father leads me to find and hold that the entire Plot No. Ntima / Ntakira / 1805 belongs to the estate. It is so declared.

#### **Legal heirs.**

14. The issue of legal heirs was not disputed. The computations of shares of heirs in the ruling of 25<sup>th</sup> March 2019 was based on erroneous fact that the deceased was survived by two sons and two daughters. In the main hearing it became clear that that was not the case. The legal heirs of the late Ali M'Ingetu are three sons and one daughter. The shares in that ruling are vacated and corrected as hereunder.

1. Musa Ali M'ingetu son
2. Yussuf Ali M'ingetu son deceased
3. Nuru Kinoti Ali son deceased
4. Hadija Kabiithi Ali daughter deceased

15. Under Islamic law the son is entitled to twice the share of the daughter under Q: 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.**

16. Further under Islamic law of inheritance, upon death of a heir before distribution of the estate, his or her share does not lapse but devolves to their respective heirs in a process known as *al munasakhat*. The grandchildren of deceased heirs are therefore entitled to their respective shares.

The share of each son =  $\frac{2}{7}$  28.57%

The share of each daughter =  $1/7$  14.28%

**17.** The 28.57% share of **YUSSUF ALI M'INGETU** devolve to his heirs as follows:

1. Musa Kinoti Ali son 11.428%
2. Fredrick Kigunda son 11.428%
3. Saumu Kathanga daughter 5.714%

**18.** The 28.57% share if **NURU KINOTI** alias NOORU KINOTI ALI devolve to her heirs as follows:

1. Zainab Mwari daughter 2.04%
2. Idris Nuru son 4.08%
3. Salim Nuru son 4.08%
4. Hassan Muriithi son 4.08%
5. Yasmin Kendi daughter 2.04%
6. Abdi Nuru son 4.08%
7. Mariam Hamisi daughter 2.04%
8. Marion Kinanu Kassim daughter 2.04%
9. Jacob Kinoti Nuru son 4.08% deceased [devolves to his heirs: Sofia Nuru [1.36% and Abdalla Mwenda 2.72%]

**19.** The 14.28% share of **ADIJA KABIITHI ALI** devolve to her heirs as follows:

1. Abdalla Babu Mohamed son 3.57%
2. Asha Makena daughter 1.785%
3. Amina Nkirote daughter 1.785%
4. Zainabu Nuru daughter 1.785%
5. Asmani Mohamed son 3.57%
6. Nuru Mohamed daughter 1.785%

**20.** The final list of heirs and their respective shares are as hereunder:

1. Musa Ali M'ingetu son 28.57%
2. Musa Kinoti Ali grandson 11.428%
3. Fredrick Kigunda grandson 11.428%
4. Saumu Kathanga granddaughter 5.714%
5. Zainab Mwari granddaughter 2.04%
6. Idris Nuru grandson 4.08%
7. Salim Nuru grandson 4.08%
8. Hassan Muriithi grandson 4.08%
9. Yasmin Kendi granddaughter 2.04%

- 10. Abdi Nuru grandson 4.08%
- 11. Mariam Hamisi granddaughter 2.04%
- 12. Marion Kinanu Kassim granddaughter 2.04%
- 13. Sofia Nuru great granddaughter 1.36%
- 14. Abdalla Mwenda great granddaughter 2.72%
- 15. Abdalla Babu Mohamed grandson 3.57%
- 16. Asha Makena granddaughter 1.785%
- 17. Amina Nkirote granddaughter 1.785%
- 18. Zainabu Nuru granddaughter 1.785%
- 19. Asmani Mohamed grandson 3.57%
- 20. Nuru Mohamed granddaughter 1.785 %

**Distribution.**

21. Mr. Kimathi for the respondent submitted, wrongly, that the deceased was survived by four sons and therefore the property be distributed equally among them. As pleaded by the parties, the deceased was survived by four children but three were sons while one was a daughter. Their shares under Islamic law are as outlined hereinabove.

22. In terms of acreage, the parcel of land being one acre, the share of each primary heir is as follows

The share of each son = 0.285 acre

The share of the daughter = 0.142 acre

23. The estate is vested in the heirs in the shares herein. Due to the large number of surviving heirs and the limited acreage of the parcel of land, it is only practical for it to be distributed according to families of the primary heirs as in paragraph 16 and 22 herein. We so order.

**Dated and signed on 29<sup>th</sup> Day of September, 2020.**

This judgment, by consent of parties, has been delivered through email to parties' advocate to mitigate the effects of Covid-19 and for effective use of technology.

**HON. ABDULHALIM H. ATHMAN**

**PRINCIPAL KADHI**

In the presence of

..... Court assistant

..... for petitioner

..... for respondent