



**REPUBLIC OF KENYA**

**SUCCESSION CASE NO. 29 OF 2017**

**IN THE MATTER OF THE ESTATE OF**

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

**MOHAMED GENO LIO ALIAS AHMED GENO LEO..... (DECEASED)**

**IBRAHIM MOHAMED LEO**

**MARIAM MOHAMED GENO ..... PETITIONERS/APPLICANTS**

**VERSUS**

**HUSSEIN MOHAMED LEO.... ..... 1<sup>ST</sup> RESPONDENT**

**SALAT MOHAMED.....2<sup>ND</sup> RESPONDENT**

**ISAAK HASSAN.....3<sup>RD</sup> RESPONDENT**

**WATO DARCHE.....4<sup>TH</sup> RESPONDENT**

**MOHAMED ISAACK.....5<sup>TH</sup> RESPONDENT**

**JUDGEMENT**

**1.** The Petitioners filed a PETITION Under sec,4, 45(1) (a) &d (2) and sec.47 of the of the succession and rules 47 and 73 of the probate and Administration rules cap 160 law of Kenya by a way of notice of motion dated 14<sup>th</sup> Nov,2017 for the following orders;

1. That the Respondents be ordered to vacate and/or be evicted from the deceased's plot at MANYATTA BURJI,HARBORA/GUBALTICHA/25, MADO ADI AND MANSILE.

2.That this honourable court be pleased to find and declare the Respondents as intermeddles in the estate of the Deceased.

3.That this honourable court be pleased to issue orders injunction restraining the Respondents from trespassing into any of the estate properties either in the Republic of Ethiopia or at Moyale and/or any other place within Republic of Kenya.

4. That this honourable court be pleased to fine and imprison the Respondents for deliberately intermeddling with the estate properties without the authority of the personal representative .

5. That the Respondents be restrained from harassing the Administrator and /or creating circumstances that might occasion a breach of peace that might endanger the lives and welfare of the administrators, and their immediate family members.

6. The orders be served upon the O.C.S Moyale police station for enforcement.

7. That the costs for the application be provided for.

**2.**The Petition /Application is based on the following grounds inter-alia;

a) The Petitioner/Applicant in the personal representative of the deceased estate.

b) That the 1<sup>st</sup> Respondent secretly and stealthily without authority of the personal representative sold the deceased estate to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and put them into the possession thereof thus disinheriting the petitioner/applicant.

c) That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents not in the list of the beneficiaries in the estate of the deceased and are outsiders bent into destabilizing the smooth administration of the estate.

d) The conduct of 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents amounts to intermeddling with the estate of the Deceased which is an offence under section 45 (2) (a) law of succession Act Cap 160.

e) That the contained act of the Respondents will put the estate of the Deceased into waste to the detriment of many other listed beneficiaries who have equal rights of share to asserts of the estate.

f) That the Honourable court has dully to protect the interest of the estate of the Deceased from callous and irresponsible acts of the Respondents for greater benefits of the list of the beneficiaries.

3. On 18<sup>th</sup> Dec 2017 the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> Respondents filed replying Affidavits , the 1<sup>st</sup> Respondent raised preliminary objection on the following grounds ;

a) That this court has no jurisdiction to hear and determine this matter particularly with regards to parcel of land in the Federal Democratic Republic of Ethiopia.

b) That the matter is *res judicata*.

4. He further stated that from the onset the Petition/Application is deceitful and malicious due to following reasons;

i) That he is unable to properly respond to the allegation in the summon as the parcels of land in question are not identifiable.

ii) That he have not at any time intermeddled with the estate of their Deceased father and all of his dealing have been to the benefit of all the beneficiaries particularly to the petitioner **IBRAHIM MOHAMED LEO** who on 4<sup>th</sup> July 2015 received kshs 450,000/= being the proceeds of sale of land to the 5<sup>th</sup> Respondent.

iii) That the said transaction was agreed upon by all beneficiaries and witnessed by the relevant authorities on 3<sup>rd</sup> May 2015 as **IBRAHIM MOHAMED LEO** was at the time not within moyale.

iv) That to the best of his knowledge the estate of their Deceased father is intact and no beneficiaries has been disinherited as most of them have put up structures in their respective portions hence the question of intermeddling and disinheritance was not raised.

v) That the parcels of land found in some areas mentioned by the petitioners do not form part of the estate of their late father hence proof of ownership is material in determination of this suit and without the said proof the court has no proper proof on which to render it's orders.

vi) That it is demonstrably clear that the petitioners have not established sufficient ground to warrant issuance of the orders sought hence the court should proceed and dismiss the summon with cost.

5. The 2<sup>nd</sup> Respondent's wife **Mrs HAWO ALIOW DAHIR** stated that in her sworn affidavit dated 30<sup>th</sup> Jan 2018 that her late husband is the owner of the registered plot No. 945 situated at Manyatta location Moyale sub county.

6. That, the said plot was bought from **HUSSEIN MOHAMED LEO**( the 1<sup>st</sup> Respondent) with the consent of his family members and an agreement was entered before the area chief and elders signed to that effect on 27<sup>th</sup> Oct 2011.

7. That ,in the year 2011, before the said parcel of land was registered the Moyale sub county office advertised a notice for 30 days for any person with complain on the said parcel of land to register his or her complaint but to date no one has done so.

8. That, the said plot No. 945 is the only inheritance her Deceased husband left for her and her five children after her late husband died on 16<sup>th</sup> Feb 2016.

9. The 3<sup>rd</sup> Respondent stressed that in his sworn affidavit dated 27<sup>th</sup> Nov 2017 the following;

a) That on 27<sup>th</sup> Oct 2011 he bought plot no.930 situated in Manyatta within moyale sub county from the 1<sup>st</sup> Respondent **HUSSEIN MOHAMED LEO** for Kenya shillings three hundred and twenty five thousands(kshs. 325,000/=) annexed hereto and marked " A" is copy of the agreement for sale.

b) That on 11<sup>th</sup> Feb ,2016 he applied to and paid the county Government of Marsabit for registration of the said plot no. 930 which at the time was not registered. hereto and collectively marked "B" are copies of the application for registration and receipt, later the county government confirmed that plot no. 930 belong to him vie letter dated 28<sup>th</sup> Oct 2016, hereto marked "C" is copy of the said

letter.

c) That he has been paying annual plot rent to the said authority for his plot no. 930 annually without fail since then, hereto marked "D" are copies of receipts. thus he verily believe that the same cannot form part of the estate of the late **MOHAMMED GENO LEO** (Deceased )

d) That indeed it is not only mischievous but also in bad faith for the applicant to include him in the proceedings as a party since he is being dragged into family wrangles .

**10.**The 4th Respondent **Mr. WATO GUBO DARCHE** in his replying Affidavit dated 27th Nov 2017 stated the following;

1) That on 3<sup>rd</sup> Aug, 2011 he bought a unregistered plot situated in Manyatta within Moyale sub county from the 1st respondent who was selling it on behalf of **IBRAHIM MOHAMED LEO** the 1<sup>st</sup> Petitioner/Applicant for Kenya shillings two hundred and fifteen thousand (Kshs. 215,000/=) hereto marked "A" is copy of the agreement for sale.

2) That despite not having registered his plot with the County Government of marsabit,his said plot is identifiable and borders the plots of his Co- Respondent thus cannot form part the Deceased estate

**11.**The 5<sup>th</sup> Respondent also stated in his replying Affidavit dated 27<sup>th</sup> Nov 2017 that;-

a) That on 3<sup>rd</sup> June, 2015 he bought plot No. 929 situated in Manyatta within Moyale sub county from the 1<sup>st</sup> respondent who has selling it on behalf of **IBRAHIM MOHAMED LEO** (the Petitioner) for Kenya shillings five hundred thousand (kshs.500,000/=) hereto marked as 'A' is a copy of the agreement for sale.

b) That on 22<sup>nd</sup> june,2015 he applied to and paid the county Government of Marsabit for registration of the said plot No. 929 which at the time was not registered.

c) That the 1<sup>st</sup> Petitioner sold to him the subject plot through his brother the 1<sup>st</sup> Respondent and the money was paid to the 1st petitioner through the Assistant chief Manyatta **Mr. MOHAMEDNUR BAKATA'S** account at Equity Bank, Moyale branch who on the same date remitted the said sum into the account of the 1<sup>st</sup> petitioner hereto marked "F" is a copy of the bank statement from the equity bank for **MOHAMEDNUR BAKAT IBRAHIM**.

d) That having bought the subject plot from1<sup>st</sup> Respondent and the same having been registered in my name by the county government of Moyale, thus the same cannot form part of the estate of the deceased.

**12.** On 3<sup>rd</sup> Dec 2018 preliminary objection hearing begin after so many series of adjournment to pave way for reconciliation through A. D. R which was not bear any fruit.

**13.** On the same date the court in its ruling struck out piece land at Federal Democratic Republic of Ethiopia from the proceedings citing lack of jurisdiction and finds on the second point of P .O. matter is properly before the court.

**14.** On 14<sup>th</sup> Jan 2019 the matter came up for the hearing the 1<sup>st</sup> Petitioner lamented that their late father left behind the following properties;

a) Land at Manyatta Burji next to Manyatta cemetery.

b) Plot at Harbora

c)Plot at Mado Adi.

d) Plot at Mansile.

e) Plot at Manyatta where their elder brother's children are residing.

**15.** The petitioner also stated that the 1<sup>st</sup> Respondent sold the properties consist of four (4) plots at Manyatta Burji of their late father without their consent and claimed the plot at Harbora.

**16.** The Petitioner finally pray that the parcel of land that was sold by the 1<sup>st</sup> Respondent be deem as null and void until the family agrees on issues.

**17.** The 1<sup>st</sup> Respondent stated that the said properties some belong to their Deceased father like the land at Mado Adi and that at Manyatta Burji but Harbora land was taken by the Government during life time of their late father where now the Moyale girls secondary situated.

**18.** The 1<sup>st</sup> respondent stated that the Mansile land do not form part of the estate since it belong to him, on the hand concerning the Manyatta Burji Plots he maintained that he only sold the portion that belong to him. after subdivision was made by their elder brother who is Deceased now and also he sold that portion of land with the consent of the 1st petitioner to **MOHAMED ISAAK** the (5<sup>th</sup> Respondent) and the

proceeds of sale was sent to him through area chief account as stated in their replying affidavit .

19. On 30<sup>th</sup> Jan 2019 the 1<sup>st</sup> and 5<sup>th</sup> Respondents summon their witness Mr. **MOHAMEDNUR BAKATA IBRAHIM** who also area assistant chief where he testified that on 3<sup>rd</sup> June 2015 1<sup>st</sup> Respondent sold the plot to the 5<sup>th</sup> respondent with kshs. 500,000 /= and the amount was sent to the 1<sup>st</sup> petitioner via his (chief) personal account at equity bank A/C No.1020196909414 was 450,000/= the remaining amount the 1<sup>st</sup> Petitioner phoned the 1<sup>st</sup> Respondent and instructed that 20,000/= be given to his sister Mariam while the rest be given to the children of his late brother.

20. RW4 Mr Abdow Aliow Nyuko a old man of 70 years of age also echoed the same sentiment that was testified by assistant chief.

21. Mr Abdikadir Mohamed Geno who is one the beneficiaries testified in court and stated that their late elder brother gave him, 1<sup>st</sup> Respondent, 1<sup>st</sup> petitioner and other brother Mr Abdikarim plot measuring 100by 100ft each from the estate but out seven(7) remaining plots at Manyatta next to cemetery was sold by the 1<sup>st</sup> Respondent four(4) of them.

22. I have given consideration to the submissions by the parties. . The first issue to consider whether the Court has a jurisdiction in matters before it?

23. The provision of Article 170(5) of the Constitution is thus relevant.

**The jurisdiction of a Kadhi's 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 parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's Court.**

24. A critical examination of the aforesaid provision reveals that jurisdiction of kadhi's court is determined by the existence of three factors namely; the subject matter, the party's faith , and the party's submission to the jurisdiction of the court. With above in mind, It's not disputed that parties confer jurisdiction in respect of subject matter which revolved around estate of deceased Muslim therefore I find the court has jurisdiction.

25.The second issue of consideration is what constitute the estate of the Deceased from the submissions of the parties the 1<sup>st</sup> petitioner listed four properties namely ; Plot at Manyatta next to cementary, land at Harbora, Mado Adi and Mansile no documentation was availed in court but no dispute was recorded in regards to lands at Manyatta and Mado Adi that will form part of Deceased's estate ,while the remaining properties was disputed the 1<sup>st</sup> Respondent maintained that during the life time of their Deceased father the land at harbora was taken by the Government and Moyale Girls secondary school was built on it.

26. He also claimed that the other property belong to him, and Mrs Bone Woche testified that her late husband sold to the 1<sup>st</sup> Respondent that piece of land in 1978 with kshs 800/=

27 In the rules of evidence under Islamic Shariah law the onus of proving a case vest upon the Petitioner who claims the right while the taking oath rest upon the Respondent who denies the rights.

28.The petitioner claims that his late father has estate at Harbora and Mansile no evidence was adduced before the court to that effect.

29.The 1<sup>st</sup> Respondents has presented the evidences to establish that he own the said estate by calling the witness to testify in his support.

30.Therefore I held and find that the Deceased's estate comprised of plots at Manyatta Burji which consist of close to 8 Plots estimated measurement of 100by 50 ft on average and that land at Madi Adi.

31.However having said that the 1<sup>st</sup> Respondent sold the part of the plot at the Manyatta Burji to the 2<sup>nd</sup>,3<sup>rd</sup>,and 4<sup>th</sup> Respondents without consent of the beneficiaries and also sold to the 5<sup>th</sup> Respondent on behalf the 1<sup>st</sup> petitioner according to the evidences was brought before the court by the assist chief Mr. **MOHAMEDNUR BAKATA.**

32. The 2<sup>nd</sup> to 5<sup>th</sup> Respondents have dully registered their respective Plots that was sold to them by 1<sup>st</sup> Respondent and remitting annual Plot rent to the COUNTY GOVERNMENT OF MARSABIT thus I find status quo be maintain.

33. Lastly I do order the remaining parcels of land at Manyatta Burji and that of Mado Adi be valued and valuation report be presented in this court for proper guidance and to render fair and also to met end justice to all beneficiaries in 2 months.

34. The 1<sup>st</sup> Petitioner and 1<sup>st</sup> Respondent granted leave to do the said valuation.

35.costs be in the cause.

Dated and delivered at MOYALE this 6<sup>th</sup> day of march 2019.

Hon. A. D. WAKO

SENIOR RESIDENT KADHI

MOYALE LAW COURTS.