



**REPUBLIC OF KENYA**

**IN THE KADHI COURT OF KENYA**

**AT KISUMU**

**SUCCESSION NO. 7 OF 2017**

**In the Matter of the Estate of Mwatumu Nyaranga Hassan (Deceased)**

**SAID SALMIN MAHBOOB..... 1<sup>ST</sup> PETITIONER**

**ADIJA CHEMESUNDE SALIM.....2<sup>ND</sup> PETITIONER**

**VS**

**AHMAD SAID OMAR .....1<sup>ST</sup> DEFENDANT**

**ABDALLAH SAID OMAR.....2<sup>ND</sup> DEFENDANT**

**AND**

**ABDULKARIM ABDALLAH.....INTERESTED PARTY**

**JUDGEMENT**

**INTRODUCTION**

1. This is a succession matter. The suit was instigated on 7<sup>th</sup> February, 2017 by SAID SALMIN MAHBOOB and ADIJA CHEMESUNDE SALIM. I will refer to them as SSM and ACS. It was brought against AHMAD SAID OMAR and ABDALLAH SAID OMAR. I will refer to them as ASO and ABSO. There is also an interested party by the name ABDULKARIM ABDALLAH KAMAU. Will refer to him as AAK.

2. The deceased person to which the suit is related is MWATUM NYARANGA HASSAN. She passed away on the 19<sup>th</sup> of August, 2010.

3. The petitioner prays for:

1. Status quo to remain
2. Each party to appoint an administrator to hold in trust the ownership of the joint title deed
3. Any other relief the court may deem fit to grant.

**PLEADINGS**

**PETITIONERS**

4. The petitioner claims the late MWATUM NYARANGA HASSAN was survived by her sister MIRAJ HASSAN. She was her only heir according to Islamic law. She later passed on and was survived by her two children IDRIS SHARIFF OMAR and MWANARAFI SHARIFF OMAR. They were three together with SAID OMAR however Said passed on before the deceased here in. At the Said Salmin Mahboob & another vs Ahmad Said Omar & 2 others [2017] Ksm moment the only surviving child of MIRAJ HASSAN is IDRIS OMAR. MWANARAFI perished on 8th December, 2015. The uncle of the parties.

5. The estate in enquiry as sued by the petitioners is plot no. A/90 Manyatta Gonda within Kisumu County. Proprietor of the title is the deceased jointly with SAID OMAR. As cited above Said Omar passed away long ago before the deceased in this succession matter. The title was not changed after his death. The stated plot has rental houses which are the gist of this matter. They are 14 rooms rented. The rooms were divided into two sections upon the death of MAWNARAFI. The petitioners were given eight rooms and the respondents were entitled to 6 rooms.

6. The petitioners claim that the respondents are not the beneficiaries as their dad passed on before the deceased herein. The deceased is the owner of the plot.

7. The proceeds from the estate was managed by one FRANCIS JUMA appointed by the deceased herself. He did it equitably without problem. Until the 1st respondent stormed the care takers home arrested him and took away the documents of the plot without the knowledge of the suitors. Attempts to solve it amicably have failed as the respondents are using their rank as an officer of the Kenya defense forces to terrorize and harass the applicants and the tenants.

#### **RESPONDENTS**

8. Summons to enter appearance were served and the 2<sup>nd</sup> respondent entered appearance on 23<sup>rd</sup> February, 2017. He also filed his defense on the same date and admitted part of the allegations and denied most of them. The respondent states that when the deceased passed away MIRAJ HASSAN was in a comma. She died three weeks later. The title A90/Manyatta was co-owned by late Said Omar who had 80% contribution. The deceased had adopted her because she had no child. That the title had the deceased's name due the fact that he did that as a son could do to a mother. MIRAJ was the biological mother to Said Omar. He left her a house, self-contained built by him. IDRIS is the surviving child of MIRAJ but with many grandchildren.

9. That after death of MWATUM in a meeting the respondents accepted help MWANARAFI but after her death things changed bringing in the petitioners without the knowledge of the respondents. Francis Juma was along serving tenant trusted by Mwatum but they did not recognize his appointment as the caretaker.

10. The respondents on realization of this went to the area chief who wasn't present hence sort the help of Kondele police officers to acquire the titles of the deceased property.

11. There was no approach to solve the issues and their effort to engage the family chairman failed hence leading to the occurrences that are subject to this suit.

12. That it is their right to remain with the titles as they belonged to their father owing to the circumstance that the deceased never had a child. They look forward for the court to decide the rightful heirs and their shares.

#### **INTERESTED PARTY**

Said Salmin Mahboob & another vs Ahmad Said Omar & 2 others [2017] Ksm

13. By a notice of motion dated 19<sup>th</sup> April, 2017 the **IP one** ABDULKARIM ABDALLAH applied to be enjoined in the suit as an interested party. He argued that he was a grandson to the deceased, was not involved in the filing of the matter touching on the inheritance, the parties were concealing facts on the deceased property which will occasion injustice and he will lose his share given to a stranger.

14. On his supporting affidavit sworn on 19th April, 2017, he contends that he is the son to HALIMA JUMA daughter of the deceased. The deceased left plot A/90 Manyatta and next to it is a developed plot without title which belonged to his grandmother and managed by FRANCIS JUMA. Two rooms from the above named plot were given to her mother as a will. That the plot next to the plot A/90 was given to him as the grandson and Francis was aware of it.

15. Suggestion of adoption of HALIMA his mother should be proved strictly. I stayed at the plot as a tenant since the death of the grandmother until the respondents took over the management of the plots. The court should give the mother the rooms as willed and his house as given to him by the grandmother.

#### **ISSUES**

16. The issues for determination in this matter are:

- a) What constitutes the estate of the late MWATUM NYARANGA HASSAN

b) The legal heirs and their respective shares

c) Distribution of the estate

**17. The estate of the deceased.** The petitioners and the respondents produced exhibits relating to the estate of the deceased they include;

**i) Copy of title deed no. Kisumu/ Manyatta 'A'/ 3677 for MWATUM NYARANGA HASSAN and HALIMA KHANANGA JUMA**

**ii) Copy title deed no. Kisumu/Manyatta 'A' 190 MWATUM NYARANGA HASSAN and SAID OMAR**

**iii) Copy of title deed no. Kisumu/ Manyatta 'A' 191 IDRISA SHARIFF OMAR**

18. Kisumu/Manyatta 'A' 190 MWATUM NYARANGA HASSAN and SAID OMAR.

Petitioners claim all the beneficiaries have been receiving their respective shares and rent from estate properties, that the interference bought about by the respondents and demand for the whole property is misplaced. They filed sale agreement showing that it was a property of the deceased. The document is dated 06.06.1965 with all transactions. It was not disputed neither was it discredited. A close scrutiny of the search dated 23. 04.2017 reveals that plot was jointly owned by the two named on it. They would share equally. It is my finding that the plot is co-owned by the two now deceased.

19. Kisumu/ Manyatta 'A'/ 3677 for MWATUM NYARANGA HASSAN and HALIMA KHANANGA JUMA this one also indicates that it was owned by the deceased jointly with Halima. No argument over this but the respondent asked the court Said Salmin Mahboob & another vs Ahmad Said Omar & 2 others [2017] Ksm to get all the late property and do distribute to the legal heirs. They acknowledged that Halima was given.

20. Kisumu/ Manyatta 'A' 191 IDRISA SHARIFF OMAR – this one was adduced to court on claims that it belonged to the late but no evident was adduced in court to prove the alteration. I am unable to make any finding as to include in the late estate. The owner now lives in Tanzania. It can't form part of the estate.

21. The IP testified in court and stated that there is a plot of the deceased without title gifted to him. There no any document of purchase nor was there any elaboration of the ownership linked to the property of the deceased only a testimony from the PW1 who said it was on a road reserve and was temporarily being used. Unless documents showing ownership of the said plot are filed the court is not in a position to make finding as to whom it belongs.

22. The only estates for distribution in the ownership of the deceased are A' 190 and A 3677.

## **HEIRS**

23. There is no dispute on the legal heirs of the deceased in this matter. However there is an argument by the IP that his mother is the real daughter of the deceased. The petitioners and the respondents are in agreement that MWATUM HASSAN had no child of her own but the family of the said come from her sister MIRAJ HASSAN who was married to Shariff Omar Abdallah. They all agree that the only legal heir to the deceased in her sister, who is entitled to the whole estate. This is true according to Quran

24. *They ask you for legal verdict. Say: Allah directs thus about Al-kalalah those who leave neither descendants nor ascendants as heirs if is a man that dies leaving a sister, but no child she shall have half of the inheritance. If such deceased was a woman who left no child her brother takes her inheritance. If they are two sisters they will take two thirds of the inheritance; if they are brothers and sisters, male will have twice the share of the female. Thus does Allah make clear to you his laws lest you go astray? And Allah is knower of everything - Q 4: 176.*

25. Then it follows that the legal heirs would be;

1. MIRAJ HASSAN Sister get whole share

From her the rest would now inherit as follows;

1. IDRISA OMAR son

2. SAID OMAR son (died before the deceased)

1996

### 3. MWANARAFI OMAR daughter

26. This means that when a person dies he is inherited first and he is not entitled to any share in this regard. Since the estate of the late is jointly owned by the Said Salmin Mahboob & another vs Ahmad Said Omar & 2 others [2017] Ksm son his share will be taken out first. The share will be distributed to his heirs while the remaining half would be inherited by Idris and Mwanarafa. In the ratio of 2:1

27. IDRIS denounced his share and in fact he is living in Tanzania in favor of the late sister. Which implies that after the death of MWANARAFI her dependents will share out her portion.

28. The IP claimed that the late willed to her mother 2 rooms from the estate 'A' 190 and that there is another house without documents which was willed to him but was awarded to a stranger Identified as SWALEH OSWAYO. He alleged that the will was oral and that the caretaker Francis would come and testify. The caretaker was indeed in court and on his cross examination he accepted that the grandmother loved the IP so much and declared that the estate should be used to educate him. Which was done. Among the conditions of Wasiyyah is that the thing which constitutes Wasiyyah i.e the property bequeathed can be possessed by the person whom the bequest is made after the death of the person who makes the bequest. Therefore the, Wasiyyah will not be effective if a person make a bequest with something which cannot be existent after his death. The deceased said the estate to help the IP but it is not specific that he takes the estate. It is to be understood that the bequest is not definite it was for certain period of time and special need of schooling, therefore he has nothing to claim from the estate of the deceased. The court could not ascertain the ownership of the other estate he claimed hence no findings as to it. The allegation his mother not being adopted was specially answered by the PW1 who said that the daughter Halim was adopted from children home it was unanimously agreed that the late never had a child of her own he had no any document or evidence to show otherwise. I am therefore convinced that she was indeed adopted hence the IP has no locus to claim anything a part from a will which was time bound and has been dispensed.

29. The same be followed up for documentation and if found will be distributed the rightful heirs. It is my considered view in regard to the argument and the case before me that the heirs of the late MWATUM NYARANGA HASSAN WILL BE

- a. Idris Omar son
- b. Mwanarafa Omar daughter
- c. Said Omar will get his share as an owner but not as an inheritor

30. The share of Said Omar will be shared by his four children and one widow. One [1] widow, two [2] sons and two [2] daughters. The widow is entitled to one eighth [1/8] of the estate under Qur'an:4:12

***And for them [i.e. the wives] is one fourth if you leave no child. But if you leave a child then for them is an eighth of what you leave after any bequest you [may have] made or debt.***

31. Kisumu/ Manyatta 'A' 3677 for MWATUM NYARANGA HASSAN and HALIMA KHANANGA JUMA This title indicate the Plot is jointly owned by the deceased Said Salmin Mahboob & another vs Ahmad Said Omar & 2 others [2017] Ksm and the adopted daughter. This to me means it will belong to her. It is hereby awarded to her. There is no dispute it belongs to the estate. It is so declared.

32. The Court must applauds the deceased, this is because, she being a Muslim, was well aware that the Adopted child is not recognised an heir of the deceased under Islamic Sharia. To forestall the sorry situation the child would be in, the deceased made provision for her by way of will. Islam recognizes the testamentary freedom of Muslims. A Muslim may dispose of his estate by will to non-heirs but up to 1/3 thereof. In the case of Saifudean Mohamedali Noorbhai v Shehnaz Abdehusein Adamji [2011] eKLR the Court of Appeal opined:

***“The limit on a Muslim’s testamentary freedom, up to one-third of one’s estate, is seen in Islam as a means to ensuring balance between a Muslim’s freedoms in this regard and responsibility to his or her heirs. Deriving sanction from a Prophetic tradition, it reflects indications in the noble scripture that a Muslim may not “so dispose of his property by will as to leave his heirs destitute”. (Mulla, Ch, IX, Wills, p. 141).***

33. The court was urged to award the respondents compensation of the utility of their fathers property up to a tune of 5.5 M as they were not able to keep the maintenance ordained by the Quran as expressed about orphans in several verses quoted by the 2nd respondent. The estate was managed by the late who was supposed to give them their due. But in a meeting they decided to let the money help Mwanarafa. It does not find favour with me to award any compensation yet the deceased was in charge.

### ACCOUNTABILITY OF THE COLLECTIONS

34. Clearly the court ordered for the proceeds from the estate be deposited in court. 2nd respondent was tasked with managing the estate properties, by collecting rent and depositing in court. The 2nd respondent deposited in court

once 18,500/= on 17.7.17. there have been change of hands in collection and IP took over the estate since then to date. No clear record of accountability is on record.

The IP is directed to avail all records and accounts of all expenditure to enable us distribute and account for all the collections and expenditures.

**DISTRIBUTION**

35. The estate has be distributed in following manner

1. Kisumu/Manyatta ‘A’ 190 MWATUM NYARANGA HASSAN and SAID OMAR has been shared equally by the family of late Said and the family of Mwanarafa it therefore follows that the petitioners and the respondents to agree on whom the title will be transferred. Meanwhile the rooms are equally shared among the respondent’s family and the petitioner’s family. Said family will take the right side while the petitioners take the left side. OR all heirs to give their proposal on final distribution Said Salmin Mahboob & another vs Ahmad Said Omar & 2 others [2017] Ksm of the estate. Meanwhile, net proceeds after payment of rates and utilities and other expenses be distributed to heirs in the shares indicated herein above. Equal share between the families.

2. Kisumu/ Manyatta ‘A’/ 3677 for MWATUM NYARANGA HASSAN and HALIMA KHANANGA JUMA hereby given to Halima Khananga Juma and will be transferred to her name or whoever she proposes. Orders accordingly

3. No distribution of plot number Kisumu/ Manyatta ‘A’ 191 IDRISA SHARIFF OMAR which is not the estate of the deceased.

36. I have considered the oral evidence, as well as the submission before the court. Having studied all the evidence and the rival submissions placed before me and having examined the list of authorities referred to and the relevant provisions of the Law of Succession Act, I am disposed to make the following orders:-

- i) That the restriction placed on the Plot no. Kisumu/Manyatta ‘A’ 190 MWATUM NYARANGA HASSAN and SAID OMAR is now lifted and the title to be transferred to the representatives of the two families.
- ii) The record of collections and expenses be availed in court after 14 days for proper accountability
- iii) That the interest PARTY has no entitlement whatsoever to the estate of the deceased
- iv) No order as to costs each party to bear its own costs.

It is so ordered.

**DATED, SIGNED and DELIVERED in KISUMU this 12<sup>th</sup> day of APRIL, 2018**

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**R. K. OTUNDO SRK**

**In the presence of: -**

Mrs. Rehema Akidah

1<sup>st</sup> petitioner..... Present in person

2<sup>nd</sup> petitioner ..... present in person

1<sup>st</sup> respondent..... Absent

2<sup>nd</sup> respondent..... Absent

Interested Party ..... Present in person