



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

In re Estate of Hashmatbibi Kherdin Imamudin (Deceased) (Succession Cause 159 of 2011) [2016] KEKC 14 (KLR) (18 August 2016) (Judgment)

Mohamed Hanif Kherdin v Mohamed Sheriff Khairdin [2016] eKLR

Neutral citation: [2016] KEKC 14 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT MOMBASA
SUCCESSION CAUSE 159 OF 2011
AH ATHMAN, PK
AUGUST 18, 2016**

BETWEEN

MOHAMED HANIF KHERDIN PETITIONER

AND

MOHAMED SHERIFF KHAIRDIN RESPONDENT

JUDGMENT

1. In this succession petition dated 12th August 2011, the petitioner prays for orders for
 1. Determination of the deceased's estate, heirs and shares
 2. the respondent be restrained from selling the deceased's properties
 3. Distribution of the estate to legal heirs according to Islamic law
 4. Costs and other relief the court may grant.
2. The petitioner claim the deceased left one Swahili house with land at Majengo on Plot No. 196/section 6/XVI and two shops and was survived by five children, all sons but the respondent intends to sale it excluding other heirs claiming the property is his.
3. The respondent denies the property belonged to the deceased at the time of her death. He states he is the registered owner of the property known as Mombasa/ BlockXVI/705. He states the court lacks jurisdiction to order revocation of title and that there is no property available for distribution to heirs of the deceased herein.



Facts

4. The parties are siblings. The property in Majengo Mombasa was originally a house without land belonging to their late father Kherdin Imamudin. It was the family house, all their children used to live there. The land where the property stands belonged to Awadh and Said Swaleh Sherman famously known as Swaleh Nguru. Upon their father's death the children consented to register the house to their mother, Hashmatbibi in 1988. The respondent claims he bought the property from his mother and thereafter title was issued to him in 2007 and therefore the property is his and is not available for distribution. The petitioner contends the property belonged to all of them and was registered in their mother's name as trustee and therefore it is available for distribution to all the heirs. He contests she ever sold or transferred the property to the respondent. The respondent attempted to sale the property. It precipitated this suit.
5. Kherdin Imamudin died in 1968. Hashmatbibi Kherdin Imamudin died on 7th November 2001 at Majengo Burnley of diabetes. She used to live in Malindi and only came to Mombasa during her last days for treatment.

Issues

1. Whether Kadhi's court has jurisdiction to revoke title in a succession matter
2. Whether or not the property is available for distribution
3. Heirs and their respective shares
4. Distribution

Jurisdiction

6. Jurisdiction of the Kadhis court is provided for by article 170 [5] [Constitution of Kenya](#) [2010]. It provides:

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

7. Inheritance of estates of deceased Muslims is governed by Islamic law and disputes thereof have to be arbitrated by the Kadhis courts.

Etyang J in [Chelanga v Juma](#) KLR (2002) Vol 2. held:

The law of succession Act does not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim. In view of those statutory provisions, the devolution of the estate of any such person has to be governed by Muslim law.

8. M. K. Ibrahim J [in the matter of the estate of Ali Shitialo Ibrahim](#) P & A 151 of 94 e KLR [E994] held:

Succession matters where all beneficiaries are Muslims and the deceased was a Muslim be heard by the Kadhi's court. It is a special court set up specifically to deal with such situation. [Ibrahim, J] as he then was.



9. Islamic law does not differentiate on the kind of properties to be inherited. Muhammad M. Khan, in Islamic law of inheritance, 13 observes:

Muslim law makes no distinction between various kinds of properties for purpose of succession. Under Islamic law whether the property is real or personal, ancestral or self acquired, corpus or usufruct, movable or immovable is immaterial, the rules of succession are the one and the same.

10. All types of properties are subject to inheritance under Islamic law and therefore the Kadhis court have jurisdiction to deal with any property of a deceased Muslim. The court therefore has jurisdiction to consider and determine issues of any property that belonged to the deceased. The hands of the court are not tied by the title being currently registered in another name. It is an issue related and incidental to the estate The court is properly seized of the matter and should consider the issues and make a determination of the dispute on the merits.
11. Does the court have powers to revoke a title? This is an important question of law that need to be addressed. The Court and the *Kadhis Court Act* have no explicit provision for the Kadhis court to revoke titles. The powers, in my view are implied in the jurisdiction donated by the Constitution to the Kadhis court to determine issues of inheritance. Cap 300 vests powers for revocation of titles to the High Court. Where one provision provides for certain powers expressly and another by implication, the powers donated expressly in my view have precedence, especially as in this case, being donated to a High Court. Accordingly we will be reluctant to exercise our implied powers were we to find the title improperly acquired and should therefore be revoked. We would however be able to recommend same for the High Court's necessary action.

Is the property available for distribution?

12. The property in Majengo dispute was originally Plot No. 196/section 6/XVI belonged to Awadh Saleh and Said Saleh Sherman. It was registered on 21st November 2006 as Mombasa/ BlockXVI/705 under the names of Mohamed Shariff Khairdin.
13. The Land Registrar - Mombasa through letter dated 2nd October 2012 confirmed the two numbers refer to the same property, that the original parcel was sub divided into sub plot Nos. 620 - 749/ Block XVI/ Mombasa Majengo. The respondent admitted the property is the same one originally owned by their late father. There is thus no dispute on the property in dispute.
14. On 6th June 1988 the heirs of Khairdin Imamudin Shadi wrote a consent to register the property their mother Hashmatbibi Khairdin Imamdin. The exact words in Kiswahili, used are:

"tumekubali kwa hiari kumuandikia nyumba iliyokuwa ya marehemu babaetu, katika Plot No. 196 sehemu ya XVI iliyoko Majengo Mombasa, Mamaetu Hashmatbibi Khairdin Imamdin.." emphasis mine.

15. The Kiswahili word 'kumuandikia' literally means 'to register in favour of' . It denotes transfer of property from one to another. Words must be given their meanings. They are very important especially in drafting of agreements. There is nothing in the agreement to indicate, contrary to the submission by the petitioner, that they transferred the house to their mother to hold in trust on their behalf. If they had intended her to be trustee, they should have put it in writing. It simply was not captured. The property was transferred to their mother Hashmatbibi Khairdin on 6th June 1988. She had liberty to do with it as she pleased during her lifetime.



16. The plot where the house stands was sold by Awadh & Said Saleh Sherman to Hashmatbibi through agreement dated 14th June 1988 in consideration of Kes 45,900.00. On June 21, 1988 Hashmatbibi Kheirdin transferred the property to Mohamed Sherif Khairdin in consideration of KES 150,000.00. The transfer was drawn by Mr. Olaba advocates. It is dated, stamped and attested. It was not transferred to the purchaser until 26th September 2006 through an even dated memorandum of understanding; about five [5] years after the death of the late Hashmatbibi Kheirdin. In the landlords letter dated 19th September 2012 they explained how and why the respondent was issued with the title of the property as follows:
1. That according to our records held in this office, a letter by the area chief Majengo confirmed that Mohamed Sherif Khairdin was the only heir to the deceased...
 2. a transfer was made by this office on 26.9.2006 by both the landlord and the tenant Mohamed Sharif Khairdin..
 3. That after complying with the requirements of this office and paying all costs, a title deed was issued to the above on 19.6.2007.
17. The area Chief Majengo, Mwichande K. Omar's letter dated 24.7.2006 addressed to the advocate for the landlords stated that according to his investigation, Mohamed Sherif Khairdin was the only rightful heir in respect of the deceased estate. The two documents clearly show transfer of the property to the respondent was based first on the chief's letter confirmation of the respondent as the only rightful heir of the deceased and upon his complying with their requirements. It did not accrue to him as a result of the transaction.
18. The land lords erred in seeking confirmation of heir from the office of the president. The area chief has no jurisdiction to determine rightful heirs under the law. It is the particular function of a court of law with competent jurisdiction. He overstepped his mandate.
19. It is interesting to note that after the heirs of Kheirdin transferred the property to their mother it only took fifteen [15] days for her to transfer it to Mohamed Sharif Khairdin. Why was she in so much a hurry to sale the property and to one of her children without informing her other children? we would never know. It raises strong suspicion on the transfer especially as all the other heirs were not aware of the transaction in the five years she lived before her death when the property had vested in her. Be that as it may, upon death of a Muslim only the court has the requisite jurisdiction to determine the heirs of deceased and whether or not that transaction should have been upheld.
20. This was a first title but the history of the land and the house in this matter is very clear. It is also a very special type of ownership peculiar to the coast region that is now recognised in law. The house without land, that with the Swaleh Nguru land was eventually subdivided and issued to the tenants.
21. In HCCA 74 of 2007 *Shaban v Mwajuma Ulaya* the court cited with approval *Salim & another v Mohamed* KLR EAC 1, which held:
- "This case arises partly because of a peculiar land tenure phenomenon known only in Mombasa as house without land, defies the existing definitions of land in our laws but because of its notoriety the court has been forced to give it some measure of judicial notice. it has thus been recognized in various decisions that one may legitimately own a house temporary or permanent constructed on land owned by another person. I think the current initiatives towards reform of our land laws must come to terms with such phenomenon".



22. The late Hashmatbibi was the tenant of the land where the house stood. It was house without land but the landlord had requirements to transfer the land to the tenants. In the instant case it had not been transferred by the time of her death. The landlord should have requested a court order determining the legal heirs and vesting of the property before giving their consent for issuance of title. The issuance of the title of Mombasa / Block XVI/705 to the respondent was therefore irregular, un procedural and illegal.
23. Is the property available for distribution? One the one hand I have found the late Hashmatbibi had right to do with the property as she wished by virtue of it having been transferred to her. mere suspicions on the transaction cannot invalidate it. This makes the property not available for distribution. On the other hand, I have found the transfer of the property to the respondent irregular, un procedural and illegal. I should have recommended for its revocation. It is, however, impossible to act on the two findings together. The result would be the same. the title would be revoked but the property would still not be available for distribution but remain the respondent's property. There would be a cycle of but no end to litigation. Court decisions must not be academic but are aimed at resolving disputes. In the circumstances I decline to recommend revocation of the title of the estate property herein.

Heirs

The legal heirs of Hashmatbibi Kheirdin Imamdin are:

1. Mohamed Sherif Kheirdin Imamdin son
 2. Mohamed Akbar Kheirdin son
 3. Mohamed Rafiq Kheirdin son
 4. Mohamed Hanif Kheirdin son
 5. Mohamed Bashir Kheirdin son
 6. Fatmabibi Kheirdin daughter deceased
- Five [5] sons and one [1] daughter.
24. The share of each son is twice the share of the daughter under Qur'an:4:11
The share of each son = $2/11$ 18.18%
The share of each daughter = $1/11$ 9.09%
25. The 9.09% share of Fatmabibi Kheirdin's devolve to her legal heirs: two sons and one daughter, each son $2/3$ and the daughter $1/3$.

Conclusion

26. The estate property was transferred to the deceased by her children who sold it to the respondent in consideration of Kes 150,000.00 It thus is not available for distribution to heirs. It had not been transferred to the respondent in her lifetime. It was done irregularly, un procedurally and illegally five years after her death. In the circumstances, I decline to recommend revocation of the title of the property herein.

Each party to bear its own costs.

Orders accordingly.



DATED AND DELIVERED AT MOMBASA ON 18TH AUGUST 2016.

ABDULHALIM H. ATHMAN

PRINCIPAL KADHI

In the presence of

Mr. Yusuf K. Abdulrahman, Court assistant.

Mr. Gichana for the petitioner

Mr. Gitonga for the respondent

