



**In re Estate of Salim Ndoro Wale (Deceased) (Succession Cause 31 of 2011) [2015] KEKC 38 (KLR) (30 April 2015) (Judgment)**

*Rehema Salim Ndoro v Rocky Mzee Juma [2015] eKLR*

Neutral citation: [2015] KEKC 38 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT MOMBASA  
SUCCESSION CAUSE 31 OF 2011  
AH ATHMAN, PK  
APRIL 30, 2015**

**BETWEEN**

**REHEMA SALIM NDORO ..... PETITIONER**

**AND**

**ROCKY MZEE JUMA ..... RESPONDENT**

**JUDGMENT**

1. The petitioner through her petition dated 23rd November 2010, filed on 9th February 2011 prays for:
  1. Determination of the deceased's estate, heirs and their respective shares
  2. Distribution of the estate among the heirs according to Islamic law
  3. Costs
  4. Any other relief the court may grant.
2. The petitioner claims the deceased was survived by two daughters [Rehema and Asha Salim] and a widow, Fatma Salim Ndoro [now deceased]; and left a Swahili house and a farm / plot at Bombolulu. She claims the respondent is benefiting from the estate alone without regards to the other heirs.
3. The respondent through his answer to petition dated 18th March 2011 states the deceased left a parcel of land which was government land - now Plots Nos. 1580, 1581, 1598, 1599, 1600, 1604 and a Swahili house at Bombolulu. He claims the parcel of land was crown land and therefore did not belong to the deceased although the deceased had, through a will given him the house; and the petitioner was allocated a portion of the land where she constructed her house. He further states he was allocated the parcels of land by the Ziwa la Ng'ombe squatters settlement scheme after their mother's consent. He denies he has benefiting from the estate alone.



4. The late Salim Nodoro Wale died on 6th October 1985. He was married to Fatuma Salim Nodoro. The petitioner claims she and Asha Salim Nodoro are the children of Salim Nodoro Wale and the respondent is their uterine sibling, a son of their mother from another marriage. The respondent admits the three of them are uterine siblings but claims none of them is a child of Salim Nodoro Wale; that he was only their step father.
5. Ms. Shariff represented the petitioner while the respondent was represented by Mr. Hamza.

### **Issues**

6. The issues for determination in this case are:
  1. Whether or not the parcels of land constitute the estate of the deceased in this matter.
  2. Whether or not the house on Plot no 1528/ Ziwa la Ng'ombe settlement scheme belongs to the estate of the late Fatuma Salim Nodoro.
  3. Legal heirs of the deceased in this matter and distribution of estate, if any.

### **Analysis and Findings**

#### **Estate**

#### **Land [plots] at Ziwa la Ng'ombe - Bombolulu**

7. The petitioner claim the land belonged to their deceased father who had bought but the land was later distributed by the government through the Ziwa la Ng'ombe settlement scheme into six [6] plots. Her evidence in chief she stated that the plots were in the name of her mother but were misspelt, the mother gave the allotment letters to the respondent to effect correction of names. Aisha [PW1], her sister gave evidence supporting her claims. Kahindi Wale [PW2] the deceased brother's evidence is that the late Salim Nodoro Wale bought the parcel of land in dispute.
8. On the other hand, the respondent produced allotment letters in his name dated 2nd January 2013 for Plot Nos. Ziwa la Ng'ombe settlement scheme / 1528, 1535, 1536, 1537. He also produced title deeds for Plot Nos. Ziwa la Ng'ombe settlement scheme / 1528, 1534, 1535, 1536, 1537. They were issued in his name on 8th August 2013. His evidence in chief however contradicts his written answer to the petition, which itself has the same contradiction. In his answer to petition he admits the land belonged to the deceased but in the same vein claimed the land was crown land and was allocated to him, his sisters and other settlers. The petitioner and her sister admitted having been allocated at least one plot each by the settlement scheme but availed no allotment letters save for a location plan for Plot No. 1596 probably issued to the petitioner.
9. Under Islamic law of evidence, the evidence in chief [what claimant or respondent states during trial] unless there is admission, is a clarification of the claim but not evidence. What his or her witnesses state under oath and other documentary proof constitutes evidence. In matters of land and immovable properties, documentary evidence is critical and very important. Parties are bound by their pleadings and where the evidence in chief contradicts the pleadings, the pleadings will prevail.
10. The petitioner had not identified the estate in her petition, she did in an application in the matter [1580, 1581, 1598, 1599, 1600, 1604] but the plot Nos. are not the same ones in dispute. However the respondent did properly identify them in his reply and it is clear the parties are talking about the same parcels of land.



11. The petitioner provided no document to prove her claim that the respondent fraudulently registered the plots in his name or that it had been registered in their mother's name; rather it is respondents own testimony and pleadings that lead me to believe the property in dispute belonged to the parties mother.
12. The parcel of land in dispute originally belonged to the late Salim Ndaro Wale, however it had not been demarcated then. Later the government demarcated and distributed the land through the Ziwa la Ng'ombe settlement scheme. The parcel was issued to Fatma Salim Ndaro, his widow. This is because the respondent stated he got consent of their mother to get the plots registered to him. This can only mean one thing, that she had proprietary interest on the land that was eventually issued to the respondent, whether or not it was registered in her name at the time.
13. The settlement scheme subdivided the parcel into eight [8] plots giving the respondent six [6] plots and the two sisters a plot each. Under Islamic law a property of the deceased whether registered or not constitutes his estate. Under common law the situation is different, properties belong to those who it is registered in their names. The parties being Muslims are bound by Islamic Shariah. During demarcation cognisance is made and land issued to those living on the land or their relatives. Consequently the six [6] plots issued to the respondent and the two [2] issued to the petitioner and her sister, Asha, constituted the estate of Fatuma Salim Ndaro, the first owner of the land upon demarcation.

#### **The House on Plot No. 1528 / Ziwa la Ng'ombe Settlement Scheme**

14. Charo Katana Mwaduna [DW2] positively identified the house in dispute and testified that he constructed it with funds from the respondent. The petitioner had claimed her dowry funded it, she gave no evidence to support her claim. The parties mother lived in the house, but this is not sufficient evidence of ownership. The evidence tilts in favour of the respondent. I find the house on plot No 1528 / Ziwa la Ng'ombe settlement scheme does not belong to the estate of Fatuma Salim, it is the property of the respondent.

#### **Heirs**

15. The matter relates to the estate of Fatuma Salim Ndoro and not Salim Ndoro. Her legal heirs are:

1. Rocky Mzee Juma son
2. Rehema Salim Ndaro daughter
3. Asha Salim Ndaro daughter

16. The son is entitled to twice the share of the daughter under *Qur'an: 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.

The share of the son =  $2/4$

The share of each daughter =  $1/4$

#### **Distribution**

17. The property should have been distributed according to the shares of the heirs according to Islamic law during the allocation of the plots by the settlement scheme. Clearly that was not done, hence the unfair distribution and that led to this dispute. According to evidence adduced in court, in relation to number of plots, they were eight, the son should have got [3.2] while each daughter should have got [1.6] plots.



The court has to work with the evidence before it, it would have been best to know the total acreage of the [8] plots, but court was not given full information in this regard. We are compelled to work with number of plots on the assumption plots in settlement schemes are normally of the same acreage.

18. The respondent should release and transfer [2.8] plots to his two sisters; He can transfer two plots and cause subdivision of one; as much as possible, plots where he has made no or little developments.
19. The respondent is given [60] days to identify and transfer the plots to his sisters; failure to which the respondents have leave to file necessary application with the High court for revocation and / or allocation of titles, as this court lacks jurisdiction to revoke titles in the names of persons still surviving.

Orders accordingly .

**DATED AND DELIVERED AT MOMBASA ON 30TH APRIL 2015**

**ABDULHALIM H. ATHMAN**

**PRINCIPAL KADHI**

**In the presence of:**

**Mr. Yusuf K. Abdulrahman, Court assistant**

**Ms. Shariff for petitioner**

**Mr. Hamza for respondent**

