



**In re Estate of Buni Ali Sindi (Deceased) (Civil Case
327 of 1998) [2015] KEKC 15 (KLR) (4 June 2015) (Judgment)**

Yaye Ali Sindi & another v Tima Omar Msuo [2015] eKLR

Neutral citation: [2015] KEKC 15 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT MOMBASA**

CIVIL CASE 327 OF 1998

AH ATHMAN, PK

JUNE 4, 2015

IN THE MATTER OF THE ESTATE OF BUNI ALI SINDI (DECEASED)

BETWEEN

YAYE ALI SINDI 1ST PLAINTIFF

NYABWANA ALI SINDI 2ND PLAINTIFF

AND

TIMA OMAR MSUO DEFENDANT

JUDGMENT

1. The plaintiffs through their plaint dated December 16, 1998 claim the deceased left [7] houses and was survived by a widow, father [now deceased] a son and a daughter, the father was survived by a son and [2] daughters. They pray for distribution of the estate among the heirs
2. The defendant through statement of defence dated January 12, 1999 deposed that the estate of Bunu Ali has devolved unto and been inherited by his rightful heirs and is not subject of any further inheritance. She stated further that the plaint does not disclose any cause of action and is an abuse of the court process.

Background

3. Bunu Ali Sindi died on January 30, 1998. He was survived by his father, one widow and two children, a boy and a girl. One and a half months [45 days] later on 16th March 1998 his father died and was survived by a son and two daughters, the plaintiff's herein. Bunu Ali Sindi had several houses in Mombasa, his sister, the 1st plaintiff lived in one of them and paid rent before and shortly after his death. After their father's death the 1st plaintiff stopped paying rent on the argument that, with the



death of her father, she had acquired interest in the estate. Bunu's widow and children lived in some of the estate properties, others were rented.

Issues

4. There is no dispute on what constitutes the estate of the deceased herein and his legal heirs. Parties have even agreed on value of the estate. The main dispute is whether the 1st plaintiff, a sister to the deceased was tenant and should have paid rent of the estate property under her occupation, or was a beneficiary and therefore exempted to pay rent. The other issue relates to the accounts of the proceeds of rent collected from the estate properties, the correct accounts for adoption and whether or not the rent collected is part of the estate.

Estate

The estate of the late Bunu Ali Sindi consist of the following

S/No.	Property	Value [kshs]
1	Plot No. MSA/BlockXVI/722 at Majengo	7,500,000.00
2	Plot No. MSA/Block XIII/298 at King'orani	6,000,000.00
3	Swahili house on Plot No. 754/II/MN at Tua Tugawe	950,000.00
4	Twin Swahili houses on Plot No. 871/II/MN at Barsheba	900,000.00 980,000.00
5	Two Swahili houses on Plot No. 129/I/MN at Mwandoni	1,500,000.00 1,100,000.00
6	Swahili house on Plot No. 661/III/MN at Mtopanga	1,500,000.00
20,430,000.00		

Heirs

5. There is no dispute on the legal heirs of Bunu Ali Sindi. The heirs and their respective shares are as follows:
 1. Ali Sindi father 16.66%
 2. Tima Omar Msuo widow 12.5%
 3. Ali Bunu Ali son 47.22%
 4. Kituli Bunu Ali daughter 23.61%
6. The share [16.66%] of the late Ali Sindi devolve to his heirs as follows:



1. Mohamed Ali Sindi brother 8.3%
2. Nyabwana Ali Sindi sister 4.185%
3. Yaye Ali Sindi sister 4.185%

The final list of heirs and their respective shares is as follows:

1. Tima Omar Msuo widow 12.5%
2. Ali Bunu Ali son 47.22%
3. Kituli Bunu Ali daughter 23.61%
4. Mohamed Ali Sindi brother 8.3%
5. Nyabwana Ali Sindi sister 4.185%
6. Yaye Ali Sindi sister 4.185%

The share of the widow and her two children is 83.33%

The share of the siblings is 16.67%

Was the 1st plaintiff a tenant or a beneficiary?

7. Upon death of a Muslim, his estate automatically and immediately devolves to his legal heirs in specific shares. The Qur'an has provided for the shares of each beneficiary. The duty of the court is to clarify and formalise the same and solve any disputes thereof. I have not seen any evidence that the estate of the late Bunu Ali Sindi had been inherited and distributed, and if it was done without considering the interests of the deceased's siblings in the share of their father, the same would have been invalid.

MM Khan, in '[*Islamic law of Inheritance*](#), states:

‘Under Islamic law on the death of an owner, his / her heirs at once become entitled to specific shares. Some of them or all may not actually divide the property and continue managing jointly. Such arrangement unlike Hindu law, does not create joint tenancy or joint family. They are only tenants in common owning well defined and specified shares. They can actually and physically separate and take possession of their specific shares, any time they like, without any technical or legal formality before actual separation and division. If any such heir dies his / her undivided but specific interest devolves on the heirs of the deceased and is not taken by the surviving co-heirs’ these heirs have exclusive rights of possession, use and enjoyment as well as alienation without consent or concurrence of the other heirs.

[*Islamic Law of Inheritance*](#) – MM Khan, p 30.

8. The share of the deceased father, in this case, does not devolve to his grandchildren, it devolves to his children. The principle of survivorship is not applicable in Islamic law. Accordingly the moment the deceased's father died, his share devolved to and vested in his children, the siblings of the deceased herein.

"Islam rejects the rule of survivorship as it has rejected the concept of jointness of property and interest. Under Islamic law the death of an heir who has not separated his or her share from those of others does allow the surviving co-heirs to get the deceased's share by survivorship but it goes to the heirs of the deceased co heir. "

MM Khan, [*Islamic law of Inheritance*](#), P 11



9. As such, the estate not having been distributed and other heirs also occupying some properties without paying rent, and the 1st plaintiff, entitled to 4.185% of the estate, she oughtn't pay rent unless the other heirs also did the same, save for the [45] days before the death of the father of the deceased herein. To do otherwise would be discriminatory. The prayer for deduction of rent from her share cannot stand. It is dismissed.

Accounts

10. The proceeds from estate properties in form of rent, constitutes part of the estate. This is trite law. MM Khan, further observes in his Islamic law of inheritance, "... Islamic law makes no distinction between various kinds of properties for the 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 same." MM Khan, *Islamic law of inheritance*, p 13.
11. The rent collected from the death of the deceased father on March 16, 1998, is part of the estate and should be available for distribution to heirs in the shares indicated hereinabove.
12. Mr Nyongesa submitted that the estate of the deceased arising from the rentals collected is KESS 2,423,554.00 [inclusive of KES 1,160,000.00 owed by the 2nd petitioner]. This means, according to the respondents, the actual amount available for distribution is KES 1,263,554.00
13. There are two statement of accounts filed by the respondent, one dated September 26, 2001 filed on September 27, 2001 for the period from August 1999 to August 2001 [A] and another dated February 18, 2014 for the period January 2002 to December 2013 [B]. According to the statements the total income collectible as at December 31, 2013 [inclusive of the amount collectible from Yae Ali Sindi] was KES 9,541,333.00 while the total expenditure for the period was KES 6,539894.40.
14. The plaintiff challenged these statements and had AS OMAR & Co to audit the estate proceeds for the Mtopanga, Mwandoni [2 houses], Tua Tugawe and Barsehba estate houses. He returned a revenue of KES 12,698,271.00 as at the end of 2014. The auditor was cross examined on his report. He relied on information given to him by a Mr Abdulrazak Kubwa, the one who used to collect rent of the properties. It however has not considered that actual rent collection fluctuates due to availability and payment of tenants. It has not been indicated where the 1st plaintiff resides and if her rent was captured in the report. It has no mention of the expenditure. His assessment qualifies, in my view, as expert evidence that gives a general and fair overview of the revenue of the estate properties under review.
15. The defendant's reports on the other hand are very general and although she is the one in custody of the necessary documents, none were used to support either the income or the expenditure. The revenue is indicated per month, it does not detail the income from each property and therefore impossible to establish income of each property for verification. Other expenditures are outright imaginary and fictitious, for how does one explain clothing of KES 45,000.00 per child every month, when normally clothing for children is mostly purchased twice a year during the Eid celebrations? Purchase of clothes four times a year may be reasonable but every month is neither reasonable nor realistic. On the whole, the auditor's report, while not giving actual revenue of the properties clearly showed discrepancy and unreliability in the defendant's statements of accounts. I have one of two choices, to have another audit of the accounts based on the support documents to be availed by the defendant or to use my discretion to adopt revenue and / or expenses somewhere between the two figures given by parties. I opt for the former. The defendants to avail all relevant documents for audit of the accounts of the estate. The parties will agree on an auditor to do the exercise. The costs of this audit shall be borne by the estate.



16. Hence forth and until final distribution of the estate, the estate proceeds be managed by an estate agent to be proposed by parties and endorsed by court, which proceeds shall be deposited either in court or in joint account of parties' advocates whichever is preferable.

Distribution

17. The issue of accounts is not finalised. There are accounts for 2015 pending. Proceeds of estate after payment of rates and utilities and repairs only should be distributed to heirs according to their respective shares.

The estate is valued at KES 20,430,000. In monetary terms:

1. The share of the widow = 2,553,750.00
 2. The share of the son = 9,647,046.00
 3. The share of the daughter = 4,823,523.00
 4. The share of the brother = 1,695,690.00
 5. The share of each sister = 854,999.50
18. In monetary terms, the Joint share of the widow and her two children is KES 17,024,319.00 while that of the siblings is KES 3,405,681.00
19. Mr. Nyongesa submitted parties have entered consent and which the court should uphold. I have seen filed a consent agreement dated June 11, 2013 between defendant, Ali Bunu, Nyabwana Ali Sindi and Mohamed Ali Sindi. The 1st plaintiff is not party to the consent. The Consent purports to distribute the estate. The terms of the consent offends provisions of Chapter 4 verse 11 and 12 on Islamic law of inheritance and excludes a key party to the suit. It also was not considered or endorsed by court. It is hereby expunged from the record.
20. The heirs are joint owners in specific but undivided shares in the estate properties. Some heirs already live in some of the properties. The court does not have this information. I hereby direct parties to furnish same. The properties should be distributed to heirs according to the weight / value of their share, as much as possible heirs retaining properties they live in provided it is reasonably close to their respective share[s] and they offset any money in excess of their share. The court hereby invites proposal on same.

DATED AND DELIVERED AT MOMBASA ON 4TH JUNE 2015

ABDULHALIM H. ATHMAN

PRINCIPAL KADHI

In the presence of

Mr. Yusuf K. Abdulrahman, Court Assistant

Mr. Mazrui for plaintiffs

Mr. Nyongesa for respondent

