

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION MILIMANI

FAMILY APPEAL NO. E077 of 2021

SHEHA ANWAR SAID AZUBEDI 1ST

APPELLANT

RYDER ANWAR SAID 2ND

APPELLANT

ZEINAB ANWAR SAID 3RD

APPELLANT

VERSUS

LEILA MOHAMED 1ST

RESPONDENT

ZUBEDA SAID 2ND

RESPONDENT

FEISAL SAID **3RD**
RESPONDENT

(Being Appeal against the decision contained in the Ruling and Order by Honourable Kadhi Omar Suqyan Dated 2nd Of August 2021 In Nairobi Kadhi Court Succession Cause No. 63 Of 2019 In the matter of the Estate of Said Abdalla Azubed (Deceased)

JUDGMENT

1. The Deceased, **Anwar Said**, died on 16th July, 2002, and was survived by his widow and the Appellants (his children). He left behind several properties, one of them being Nakuru/Municipality/Block 5/108, also known as the Flamingo property, which was generating monthly rental income. Upon his death, Said Abdalla Azubedi (his father) took out Letters of Administration on which basis he managed the said property from 2002 to 2019 when he too

died. The Appellants took over management of the said property in July 2020.

2. The Appellants claimed that, all along, Said Abdalla Azubedi (their grandfather) had not been paying them the rental income from the Flamingo Property. They estimated that the Property had generated about Kshs.51,000,000.00 to 53,000,000.00 from the time of their father's death to the time when they took over the management in July 2020. They sued the Respondents (the administrators of their grandfather's estate) seeking to be paid/refunded all the rental income that had accrued over the said period. The lower Court delivered a ruling on 2nd August, 2021, in which it dismissed their claim.
3. The Appellants were dissatisfied with the ruling and brought this appeal vide a Memorandum of Appeal dated 30th September, 2022, in which they listed the following Grounds of Appeal;

1) The Learned Kadhi erred in law and in fact in his ruling dated the 2nd of August 2021 by holding that the Appellants failed to establish the

monthly rental income from property No Nakuru/Municipality Block5/108;

2)The Learned Kadhi erred in fact in his ruling dated the 2nd of August, 2021, by holding that the Maintenance, Education, and food provided by Said Abdalla Azubed totaled and or equaled to the rental income collected from property title number Nakuru/Municipality Block5/108;

3)The Learned Kadhi erred in law in his ruling dated the 2nd of August, 2021 by holding that the rental income collected from the year 2002 to the year 2020 without the knowledge of the Appellants totaling to Kshs.53,000,000.00, which was a property of their deceased father should be deducted from the maintenance that was provided to them by Said Abdalla Azubed.

4. They asked the Court to allow the appeal and order the administrators of the estate of the Said Abdalla Azubed to

refund Kshs.53,000,000.00/= illegally collected by Said Abdalla Azubed.

5. The Appeal was canvassed by way of written submissions, where the parties filed their respective submissions and the same was considered at length. The Court sat with two Kadhi's as assessors.
6. The Appellants submitted that the lower Court was wrong in refusing to order the Respondents to refund the rent that had been collected from the Flamingo Property. They argued that the law against intermeddling under **Section 45** of the **Law of Succession Act** was applicable in this case and that the only remedy available was to order a refund of the said collected rent. They argued that the fact that the Respondents took care of them after the demise of their father was not an exception to the rules disallowing intermeddling, and therefore the Respondents must be held to account and refund the accrued rent.

Issues for Determination

7. Having considered the Grounds of Appeal and the submission of the parties, I find that the only issue for determination is whether the Respondents should be ordered to refund the rent collected from the property between 2002 and 2019.
8. The role of this Court as the first appellate Court is well-settled. It is trite law that the duty of the first appellate Court is to re-evaluate the evidence in the subordinate Court both on points of law and facts and come up with its findings and conclusions. As the Court is re-evaluating the evidence, it is required to bear in mind that it had neither seen nor heard the witnesses.
9. This principle was set out in **Okeno vs. Republic (1972) EA 32**, where the East Africa Court of Appeal stated as follows;

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court

must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

10. Based on this authority, this Court is being required to undertake a wholesome review of the Appellants' suit at the lower Court and come up with its conclusion. I shall first begin by outlining the evidence adduced by the Appellants in support of their claim.

11. The 1st Appellant, who is the Deceased's daughter, testified at the lower Court. She told the Court that the property's monthly rental income was around Kshs.250,000.00/= and that she had never received a penny from the property when Said Abdalla Azubed (her grandfather) was managing the property. She, however, told the Court that her grandfather used to take care of her school fees, medical care, and transport. In addition, she testified that he used to give her a monthly upkeep of Kshs.20,000.00 when she was in the university and that she used to receive Kshs.40,000/= per month for 2 years before he died.

12. The widow of the Deceased, who is also the mother of Appellants, also testified. She told the Court that after the death of the Deceased, her father-in-law (Said Abdalla Azubed) has been taking care of her. She testified that they used to live in the same house with her father-in-law. She also told the Court that her father-in-law had allowed her to receive rent from some shops belonging to him, which were generating Kshs.112,000.00/= per month. She also testified

that she did not know how much the property had been generating before and even now.

13. The 2nd Appellant, also a daughter of the Deceased, also testified. She testified that her grandfather used to take care of her and would give her about Kshs.50,000/= monthly. She also told the Court that she was educated by her grandfather, and that even though she got scholarship for her degree, her grandfather helped her too. She also told the Court that she could not tell how much the property was generating in 2002 and that her calculation of the accrued rent was based on the current rates. She also told the Court that, in arriving at the estimate, she did not consider other costs like maintenance of the property, rates, and rents.

14. This Court is being required to relook at this evidence and determine whether the Respondents should be ordered to refund the rent collected from the property between 2002 and 2019.

15. From the evidence, it was established that Said Abdalla Azubed managed the Flamingo property from 2002

to the time of his death in 2019, and that he used to collect the rent from the said property during the said period. However, the parties did not adduce evidence to help this Court determine the exact amount collected by Said Abdalla Azubed from the said property.

16. On the part of the Appellants, they estimated that their grandfather collected about Kshs.51,000,000.00/= during this period between 2002 and 2019. They arrived at this rough estimate by using the property's monthly income as at July 2020, which was around Kshs.250,000.00/=.

17. Before I pronounce myself on whether the Appellants proved their claim for the accrued rental income, I shall make several observations on their evidence on this issue. First, the widow of the Deceased testified that she did not know how much the property had been generating before. In addition, the 2nd Appellant told the Court that she could not tell how much the property was generating in 2002 and that their calculation of the accrued rent was based on the current rates.

18. Given that the Appellants could not tell with precision how much had been collected, they assumed that the monthly rental income has been constant at Kshs.250,000.00 since 2002 to 2019. However, I am not persuaded by this assumption that the rent for the property remained the same for 17 years. To the contrary, I presume that it is more likely that in 2002, the monthly rental income was less than Kshs.250,000.00/= and that it kept increasing gradually over the years until it reached to the current rates of Kshs.250,000.00/=.
19. In addition, the Appellants admitted that, in arriving at the said estimate, they did not consider other costs like maintenance of the property, rates, and rents, which may have been incurred by their grandfather during the time that he was in charge of managing and collecting the rent.
20. Nonetheless, the Court appreciates that the Appellants may not have been able to know the exact rental income because they were not the custodians of the receipt books. The Appellants have already established that their grandfather was responsible for the management of the

property as well as collecting the rent. Thus, I am inclined to find that their grandfather was the custodian of the documents relating to the rental income, and was thus the best placed to provide evidence of how much he was collecting monthly from the property.

21. In these circumstances, the Court invokes **Section 112 of the Evidence Act Cap 80 of the Laws of Kenya** which provides thus:

“In Civil proceedings when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

22. In my view, once the Appellants established that their grandfather was responsible for the management of the property as well as collecting the rent, the evidential burden shifted to the Respondents. The Respondents, being his legal representatives, are better placed, than anyone else, to show how much rental income had been collected during the said period. Thus, I find that it was upon the Respondents to adduce evidence of how much had been

collected from the property over the years. They equally did not adduce this evidence.

23. However, even though the Respondents did not adduce evidence of the exact rental income collected over the years, there was evidence on record to show how Said Abdalla Azubed utilized whatever income he collected from the property. Generally, the evidence reveals that he took care of the Appellants since the death of the Deceased by paying for their school fees, medical care, transport, and giving them monthly upkeep.

24. The 1st Appellant, who is a daughter of the Deceased, testified that her grandfather used to give her a monthly upkeep of Kshs.20,000.00/= when she was in the university and that she used to receive Kshs.40,000/= per month for 2 years before he died. The 2nd Appellant, who is also a daughter of the Deceased, testified that her grandfather used to take care of her and would give her about Kshs.50,000/= monthly for upkeep. She also told the court that she was educated by her grandfather, and that even

though she got scholarship for her degree, her grandfather helped her too.

25. In addition, the widow of the Deceased, who is also the mother of the Appellants, told the Court that his father-in-law used to take care of her. She told the court that after the death of the Deceased, her father-in-law (Said Abdalla Azubed) had been taking care of her. She testified that they used to live in the same house with her father-in-law. She also told the court that her father-in-law had allowed her to receive rent from some shops belonging to him, which were generating Kshs.112,000.00/= per month.

26. Clearly, based on the Appellants' own testimony, there is overwhelming evidence that their grandfather took care of their welfare and provided for them sufficiently since the death of their father (the Deceased). This is evident from the monthly upkeep allowances paid to them by their grandfather as well as the fact that he took them to school and supported them until they could stand on their own. The 2nd Appellant told the Court that her father died when she was only 9 years and that their grandfather had

supported her since then, throughout her education, and until she left university.

27. In addition, the testimony of the Deceased's widow leaves no doubt in the mind of this Court that Said Abdalla Azubed assumed full financial responsibilities for the family of his deceased son. She told the court that after the death of the Deceased, her father-in-law (Said Abdalla Azubed) has been taking care of her. She testified that they used to live in the same house with her father-in-law and that he allowed her to receive rent from some shops belonging to him, which were generating Kshs.112,000.00/= per month.

28. Based on the above factual analysis, I am not persuaded that the Appellants have substantiated their claim for a refund of Kshs.51,000,000.00/= or any part of the rental income collected by Said Abdalla Azubed between 2002 to 2019. In my view, it is more likely than not that the deceased Said Abdalla Azubed used/spent all the rental income collected from the Flamingo property towards the welfare and maintenance of the Appellants and their

mother. For these reasons, their claim against the Respondents fails, and so does the Appeal.

29. The Court sat with two Kadhis as assessors, and the Hon Kadhi's opinion aligns with the decision by this Court.

Disposition

30. The Appeal is dismissed with no order as to costs.

31. It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI through the Microsoft Teams Online Platform on this **27TH** day of **APRIL, 2026.**

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Ms. Wageman Advocate holding brief for Mr Ali Advocate for the
Respondent

No attendance for the Appellant

JUDGMENT