



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CIVIL APPEAL CASE NO. 30 OF 2013

NADIA SALIM.....APPELLANT

VERSUS

AIDARUS SALIM.....1ST RESPONDENT

NASSIM SALIM.....2ND RESPONDENT

JUDGMENT

The respondents herein **Aidarus Salim** and **Nasim Salim** filed a petition in the Lower Court against Nadia Salim claiming that being son and daughter respectively of the late Salim Mansoor, they be appointed as the administrators of the Estate of the late Salim Mansoor. They prayed that the court orders that the proceeds from the Plots No. 9 and No. 31 having 3 shops at the front and 4 rooms at the back go directly to a joint account of Aidarus Salim, Nasim Salim and Mansoor Salim. The parties further applied that the Honourable Kadhi's Court do issue an order directing the clerk to convert to nullity the illegal transfer of the plot and cause it to revert to the name of Salim Mansoor.

The application was supported by the affidavit of Aidarus Salim who stated that he is one of the administrators of the Estate of Salim Mansoor who passed on in December, 2008. His late father left plots which the respondent illegally transferred to herself from their late father without their consent and without regard to the due process of the law.

According to the respondents, the rent from the said plots was taken by Mariam Salim but for the last one year and two months, the rent has been taken by Nadia Salim.

I have not seen the replying affidavit in respect of the petition. When the matter came up for hearing on 24.4.2013 before the honorable Kadhi, both parties were present. The honourable Kadhi observed that they are mature muslims and of sound mind.

On this date, the petitioner alleged that their father passed on in December, 2008 at Nyanza General Hospital and left behind 5 daughters and 2 sons. Their mother also died in September, 2011 at Kapsabet Hospital. When their mother died, they agreed as a family that the account of Mariam Salim who stays in Kapsabet be used to save the rent for the house which at the time of coming to court was Kshs.140,000/= until December, 2012. However, as from January 2013, the money was no longer sent to Kapsabet as per their family agreement but was being sent to the appellant. The petitioners requested to be included in the inheritance of their father. They also requested a joint account to be opened for purposes of having the rent for the house and that all tenants to be evicted from the house.

The appellant agreed that they were 5 daughters and 2 sons and that the ownership of the house plot No.

9, Serem Trading Centre was changed by their late father, Salim Mansoor Shah on 10.5.2007.

After considering the matter, the learned Kadhi found beyond reasonable doubt that the transaction was done by the father to his daughters and their mother on 23.5.2007 during his lifetime and excluded his sons. According to the learned Kadhi, there were certain legal questions to be answered in accordance to Islamic law and not otherwise as the deceased was a muslim and that the question is whether the transaction was a sale or a Will by the deceased. According to the learned Kadhi, the property was just transferred from the original owner to the deceased daughters and his wife. The learned Kadhi ultimately cancelled the transaction done by the Nandi County Council and reverted the property back to all heirs and mother in accordance to Islamic law. The transaction done on 23.5.2007 was to be cancelled by the Nandi County Council.

The appellant appeals to the court on grounds that the honourable Kadhi erred in law and fact in ordering cancellation of transactions and or dealings undertaken by the deceased Mansoor Salim during his lifetime. That the honourable Kadhi erred in law and fact in holding that there were fundamental issues which were neglected by the deceased when he bequeathed the land to his wife and daughters.

That the honourable Kadhi erred in law and fact in holding that the deceased was legally required to include his sons in the transfer of the Plot he gave to his wife and daughters. That the honorable Kadhi erred in law and fact in holding that the land ought to revert to all the deceased's heirs and their mother. That the honourable Kadhi erred in law and fact in ordering the Nandi County Council to cancel transactions done by the deceased on the Plot in 23.5.2007. That the honourable Kadhi erred in law and fact in ordering that the appellant pays the costs of the suit. Moreover, that the honourable Kadhi erred in law and fact in failing to observe the rules of natural justice in the course conducting the hearing before him. That the hearing was a sham as no evidence was taken and no cross-examination was done contrary to the laid down tenets of a hearing. That the honourable Kadhi did not allow the appellant to tender evidence and call witnesses.

According to the appellant, the honourable Kadhi went personally to the Nandi County Council to gather evidence to be used in the matter. That the honourable Kadhi was biased in the manner in which he conducted the proceedings and or handled the appellant to whom he was extremely hostile. The proceedings were a nullity and they ought to be declared so. That the honourable Kadhi has gone ahead to order distribution of the deceased's estate without any valid proceedings before him.

The appellant submits that during his lifetime, the deceased Mansoor Salim bequeathed plot No. 9 at Serem Trading Centre to the appellant, the 2nd respondent, the appellant's mother amongst others. There was no problem during the lifetime of the deceased, Mansoor Salim and his widow. However, after the demise of Mansoor Salim and his widow, the respondents filed the application before the Kadhi's Court, Eldoret saying that the Plot ought to have been given to the daughters of the deceased alone and it ought to have been given to the appellant's brothers and sisters. The Petition No. 6 of 2013 filed on 13.3.2013 and dated 18.2.2013 was never set down for hearing and that the parties were never allowed to tender evidence. It is alleged that the Kadhi went to Kapsabet and obtained evidence which he used to write the judgment. Moreover, the appellant argues that at the time of the application, there was a succession case filed in Kisumu being Cause No. 243 of 2012. The appellant argues that the deceased had already transferred the property to his widow and daughters and therefore, was not part of the deceased estate.

The appellant submits that the Kadhi's Court lack jurisdiction to entertain the dispute as it revolves on land. The Kadhi's Court has no jurisdiction how the deceased was to deal with his property during his lifetime, the appellant submits. Moreover, that the land is situated in Nandi County and therefore, the Kadhi's Court, Eldoret has no jurisdiction.

On issue of natural justice, the appellant argues that the appellant was condemned unheard. They were never afforded a hearing. They were not allowed to tender evidence and have it subjected to cross-examination before the court delivered the judgment.

The respondent on his part submits that the Kadhi's Court have jurisdiction to entertain the dispute as all

parties prefers Islamic faith and thus the Kadhi's Court was the proper forum for the institution of the suit. The issue was that the deceased gave out his plot to some children discriminating others. According to the respondent, the matter was prematurely brought to court as it was succession in nature. Moreover, that the matter was properly in the Kadhi's Court as revolves on inheritance and precisely, a father discriminating the sons.

I have considered the matter and do find that the first issue for consideration is whether the petition was properly before court. This court finds that this matter is premised on a succession dispute and should have been brought to the lower court as a succession cause. Mansoor Salim died sometime in 2007. The property is alleged to have been transferred and yet there is no evidence of transfer in his lifetime. The only evidence of transfer is the adopted Minutes of the Nandi County Council which reads:

“MIN.4/3/7/12 – ADOPTION OF MINUTES OF VAQRIOUS COMMITTEES

(d)The Chairperson of Works, town Planning and Markets Committee, Cllr. Priscillar Birgen, presented Minutes dated 26th March, 2012 and 19th June, 2012 for adoption. On the Minutes dated 26th March, 2012, Cllr. Pius Singoei and Cllr. Joel Malel were indicated as absent but were present. Cllr. Stanley Leleito was indicated as being present but had sent an apology. The Minutes were then proposed by Cllr. Thomas Magotsi seconded by Cllr. James Ngososei for adoption with correction made as pointed out above.”

At the time of the meeting and deliberations, the said Mansoor Salim was dead and all transactions done were intermeddling in the property of deceased and therefore were intermeddling with the estate of the deceased contrary to Section 45 of the Law of Succession Act, Cap 3, Laws of Kenya. Though the learned Kadhi had the jurisdiction to entertain a dispute revolving on inheritance where the parties preferred the Islamic faith, the petition as brought was not a succession cause contemplated by law.

On the issue of rules of natural justice, I do find that the proceedings do not show the parties giving evidence on oath or being cross examined and re-examined. I do not see typed witness statements or evidence on oath. The absence of evidence that the parties were heard on oath is an indicator that the appellant was not afforded a fair hearing which is an inalienable constitutional right. Moreover, the proceedings depict violation of the appellants right to fair administrative justice.

Ultimately, the appeal is allowed and thus the proceedings in Eldoret Kadhis Court case no 6 of 2013 and the decision therein are declared a nullity. The parties are urged to file a proper succession cause to be determined by the Kadhi in the geographical jurisdiction of the plot in dispute if none has been filed. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 28TH DAY OF JUNE, 2017.

A. OMBWAYO

JUDGE