



REPUBLIC OF KENYA



KENYA LAW
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**AR & 2 others v ARG (Civil Appeal 78 of 2019)
[2022] KECA 52 (KLR) (4 February 2022) (Judgment)**

Neutral citation: [2022] KECA 52 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 78 OF 2019
RN NAMBUYE, F SICHALE & S OLE KANTAI, JJA
FEBRUARY 4, 2022**

BETWEEN

AR 1ST APPELLANT

AR 2ND APPELLANT

MR 3RD APPELLANT

AND

ARG RESPONDENT

*(Being an appeal from the ruling/order of the High Court of Kenya at Marsabit
(Chitembwe, J.) dated 29th March, 2019 in Succession Cause No. 77 of 2016)*

JUDGMENT

1. The late RN, a retired army officer and resident of Moyale died on 9th December, 2005. He had divorced his first wife with whom he had 4 children and he had 13 children with his 2nd wife, ARN (the respondent). Upon his death, 3 of his children AR, AR and MR (children of the divorced wife and the appellants herein) petitioned the Kadhis Court at Moyale for distribution of the only asset of the estate, a commercial building No. xxxx situate in Moyale Town. It comprised some shops and lodging premises.
2. In a judgment delivered by the Senior Resident Kadhi at Moyale on 30th November, 2017, the learned Kadhi applied Islamic Law and the National Laws and distributed the estate as set out in the said judgment.
3. It was found in the judgment that the total value of the estate available for distribution was Kshs 8 million and the widow (respondent) and the children got respective shares. There was no appeal against that judgment.



4. The appellants by a motion dated 21st February, 2018 requested the Kadhi to interpret the implementation of the judgment that had been delivered as stated, it was said that the judgment was not clear.
5. In a ruling delivered by the said Kadhi on 26th February, 2018, the Kadhi ordered that the judgment be implemented, the Kadhi finding that the parties were dragging the litigation before him unnecessarily. Again there was no appeal against that ruling.
6. There followed various applications including applications for injunctions which were dealt with one way or the other. One of those applications was an application at the High Court of Kenya at Marsabit being Civil Appeal No. 1 of 2018 being a notice of motion brought by the appellants against the respondent where it was prayed inter alia that there be a stay of execution of the orders in the matter at the Kadhi's court particularly in relation to the ruling dated 26th February, 2018; that the respondent be ordered to pay the appellant their share from the income from the property as ordered by the Kadhi's court with immediate effect; and that the court do order the respondent to pay to the appellant their share of the monthly income from the property of the deceased pending the hearing of the appeal.
7. In grounds in support of the motion, it was said that the appellants intended to appeal against that ruling; that the appellants had filed an application for interpretation of the judgment delivered by the Kadhi on 30th September, 2017 and that the Kadhi had ordered in the ruling, maintenance of status quo without considering the appellants interest; and finally that the appellants would suffer irreparable loss if the order for stay of execution was not granted.
8. The appeal was heard by Chitembwe, J. who in a judgment delivered on 24th September, 2018, the Judge found that the Kadhi had explained his judgment; that the appellants could not allege that they had been condemned unheard; that the decree that was extracted after the judgment indicated that the distribution was to be based on the valuation report; the respondent was ready to distribute the estate but the appellants had refused to take their share; the Judge found the estate had been fairly and properly distributed finding that beneficiaries should not compete to buy off each other simply because they were capable of doing so. The appeal was dismissed leading to this second appeal.
9. There are seven (7) grounds of appeal taken for the appellants by their lawyers Messrs Hassan N. Lakicha & Co Advocates. These range from an attack on the Judge who is said to have made a finding that occasioned grave injustice to the appellants; that in view of the nature of the case, it was unjust for the Judge to decline to consider the appellants valuation report after granting an order to the appellants to make their own valuation; that the Judge misunderstood and misapplied the law; that the Judge was biased against the appellants; and that the Judge erred in law and fact in accepting the valuation report of Ms Probity Valuers Limited which was grossly an undervalue of the property and developments on the suit property leading to unjust and unfair enrichment of the respondent and her children leading to economic loss to the appellants.
10. The appellants proposed that we allow the appeal and that the ruling of 29th March, 2019 be set aside and the appellants' valuation report be considered for the purposes of the distribution of the estate of the deceased.
11. This is, in those circumstances a second appeal from the decision of the High Court sitting on first appeal. Our mandate is donated by Section 72 *Civil Procedure Act* (Cap 21 Laws of Kenya) which states in essence that except where otherwise expressly provided in the Act or by any other law for the time being in force, an appeal shall lie to this Court from every decree passed on appeal by the High Court, on any of the following grounds, namely that, the decision being contrary to law or to some usage having the force of law; the decision having failed to determine some material issue of law or



usage having the force of law; a substantial error or defect in the procedure provided by the Act or by any other law for the time being in force, which may possibly have produced an error or defect in the decision of the case upon the merits.

12. Considering that very narrow mandate, what is the issue here for our consideration?
13. The factual complaint in this appeal is that the Judge failed to consider one valuation report offered by the appellants but considered a valuation report produced by the respondent. As we have seen there was no appeal taken in respect of the main findings made by the Kadhi when the matter was heard and determined by the subordinate court.
14. In the appeal before the Judge at the High Court in Marsabit, the record shows that on 4th February, 2019 after parties addressed the Judge, it was ordered:

“Court:

Mention on 18.2.2019, the valuation shall be on the developments on the suit land. The land was valued. The value of the land and the developments will be joined together.

S. Chitembwe – Judge

4.2.2019”

15. In the ruling delivered on 29th March, 2019, the Judge noted that there was a joint valuation report by Ms. Probity Valuers Limited which valued developments on the land at Kshs 1.4 million while a valuation report by Shelter (M) Valuers Limited gave a value of 4,130,000.00. The Judge found that the 2nd valuation report dated 8th March, 2019 gave a valuation which was more than 3 times, the value of the 1st valuation. He therefore concluded:

“in view of the fact that the valuation done by probity valuers was a joint valuation and taking cognizance of the fact that even the parties themselves used probity valuers jointly when the matter was in the trial court (Kadhi), I do order that the valuation by probity valuers shall be the one to be utilized in the process of distributing the deceased’s estate. I do further take notice that shelter valuers have equally given a value of the land which is 3 times that given in the valuation by Probity yet there were no instructions to revalue the land.”

16. The Judge referred the matter to the Kadhi in Moyale to distribute the remaining part of the estate mainly the developments on the land according to the Islamic Law taking the value of the developments at Ksh.1.4 million.
17. The order by the Judge had been that the parties file valuation reports on developments on the land only. The record shows that the appellants filed a valuation that included land and developments on the land which was not what the court had ordered. This in any event is a factual issue and considering our mandate in a second appeal to deal only with issues of law, we can see no issue of law raised in this appeal and the appeal is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

