



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPEAL NO. 79 OF 2017

BETWEEN

MOHAMED MADHUBUTI.....APPELLANT

AND

JELANI MOHAMED HABIB.....RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Mombasa (Thande, J)

dated 24th March, 2017

in

Civil Appeal No. 25 of 2015.)

JUDGMENT OF THE COURT

1. Sheikh Una Mohamed (Sheikh Una) and his brother, Abubakar Mohamed Habib (Abubakar) purchased **Parcel No. 1.R No. 36/VII/533** (*suit property*) as joint tenants on 26th November, 1965 vide a public auction and a vesting order to that effect was issued on 11th March, 1966 by the High Court. Apparently, they executed a document dated 23rd April, 1966 (*1966 document*) outlining tenure thereof in the following manner:

“We Sheikh Una Mohamed and Abubakar Mohamed both of P.O Box No. 13028 Nairobi, Kenya have purchased L.R No. 36 Plot No. 533 Original No. 67/1 as joint tenants and unless we dispose or deal with this property otherwise during (sic) lifetime of both of us, we understand that on the death of any one of us the other will be entitled to the legal ownership of the property however it is understood and agreed that if Sheikh Una Mohamed dies first and is survived by his wife then Abubakar Mohamed will give her or pay her the value of such share in this property as she would be entitled to under Mohamedan law applicable to us.”

2. As fate would have it, Sheikh Una died on 2nd October, 1975 and Abubakar took out letters of administration as the sole administrator over his estate vide High Court Succession Cause No. 379 of 1997; he listed the suit property as part of the his late brother’s estate which was subject to distribution. The deceased had no children thus the grant therein was confirmed on 30th October, 2001 setting out the mode of distribution of the said estate to the beneficiaries as herein under:

Amina Kombo (widow) - 25%

Jelani Mohamed Habib - 30%

Abubakar Mohamed Habib - 30%

Kamar Mohamed Habib - 15%

3. Abubakar also applied for the conversion of the registration regime of the suit property from the **Government Land Act (repealed)** to the

Registration of Titles Act (repealed). However, he passed on before the suit property was finally registered under the **Registration of Titles Act** in the year 2010. Under the new regime the brothers were registered as tenants in common holding equal shares in the suit property. In the High Court succession cause Abubakar was substituted by **Jelani Mohamed Habib** (the respondent) as the administrator of estate of Sheikh Una while **Mohamed Madhubuti** (the appellant) was appointed as one of the administrators of the estate of Abubakar.

4. It seems thereafter, the suit property was sold to a third party for a sum of Kshs.32,500,000. It is the distribution of the said proceeds to the estates of Sheik Una and Abubakar that is in issue in this matter. However, before the sale was concluded a dispute arose amongst persons who believed that they were entitled to Sheik Una's estate but had been left out as beneficiaries in the High Court succession cause. Upon learning of the dispute the purchaser was adamant that he would not go on with the sale unless all the beneficiaries of the said estate agreed on the transaction.

5. According to the appellant, the respondent together with his advocate took advantage of this state of affairs to coerce him to execute a deed of settlement and release dated 18th February, 2013. The effect of the said deed is that it included persons who were not entitled to the estate of Sheikh Una as beneficiaries thereunder.

6. It is on the basis of the foregoing that the appellant lodged a suit against the respondent in the Kadhi's Court being Civil Case No. 140 of 2013 seeking:

a) That the document dated 23.4.66 ("the 1966 document") between Sheikh Una Mohamed and Abubakar Mohamed in respect of the property is legal and binding as a testamentary instrument and cannot be altered by any third party without the express free and willing consent of the beneficiaries of the estate of Abubakar Mohamed Habib.

b) That the Deed of Settlement and Release dated 18.2.13 ("the Deed of Settlement") between Kamar Mohamed Habib, Jelani Mohamed Habib, Mohamed Abubakar and Mohamed Bunu Ali is illegal and void ab initio on account of coercion and want of free consent of the beneficiaries of the estate of Abubakar Mohamed Habib in respect of the residual ¾ of the estate after paying ¼ thereof to estate of Amina Kombo (deceased) as per the 1966 document.

c) That the estate of Sheikh Una Mohamed is not entitled to the sale proceeds of the property and that only the estate of Abubakar Mohamed ¾ and the estate of Amina Kombo ¼ are entitled as per the 1966 document.

d) That the Respondent as the administrator of the estate of Sheikh Una Mohamed be compelled to list all real properties of Sheikh Una Mohamed. Those given out during his lifetime and those not given out.

7. In response, the respondent averred that the appellant had voluntarily signed the deed of settlement and release; there was no concept of joint tenancy under Islamic law; and the authenticity of the 1966 document was in question since he had never seen or heard of it prior to the suit being filed.

8. It is instructive to note that before the suit at the Kadhi's Court was heard the appellant filed an application in the High Court succession cause seeking stay of the proceedings in the Kadhi's Court which was dismissed.

9. In his reasoned ruling dated 20th August, 2015 the Principal Kadhi held that the authenticity of the 1966 document could not be questioned since it had been considered in the High Court succession cause. Islamic law does not recognize the concept of joint tenancy and as such, the change of the suit property's registration to tenancy in common was proper and legal. The estates of Sheik Una and Abubakar were each entitled to a 50% share of the suit property. The deed of settlement and release reflected the correct position of the distribution of Sheikh Una's estate save that the computation of the beneficiaries' respective shares was in error. He went on to revise the respective share of each of the beneficiaries as follows:

Amina Kombo	Widow	25%
Abubakar Mohamed Habib	Brother (deceased)	18.75%
Habib Mohamed Habib	Brother (deceased)	18.75%
Mwanaisha Mohamed Habib	Sister (deceased)	9.375%
Tima Mohamed Habib	Sister (deceased)	9.375%
Kamar Mohamed Habib	Sister (deceased)	9.375%
Jelani Mohamed Habib	Sister (deceased)	9.375%

10. The appellant was not pleased with that outcome and he preferred an appeal in the High Court which was dismissed by **Thande, J.** in a ruling dated 24th March, 2017. Unrelenting, the appellant has filed this second appeal complaining that the learned Judge erred in law by:-

a) Misrepresenting that the vesting order issued on 11th March, 1966 never vested the suit property to Sheik Una and Abubakar as joint tenants.

b) Failing to consider the appellant's submissions on the right of survivorship under a joint tenancy.

c) Failing to hold that the right of survivorship as a principle inherent in land law takes precedent in property interest as compared to personal law.

11. At the hearing Mr. Ali and Mr. Muturi appeared for the appellant while Mr. Mwadzugo appeared for the respondent. The appeal was disposed of by written submissions as well as oral highlights.

12. In his opening remarks, Mr. Muturi stated that the appeal turned on the single issue of whether Sheik Una's estate was entitled to 50% of the sale proceeds of the suit property. He argued that it was common ground that the suit property was vested in Sheik Una and Abubakar as joint tenants. Consequently, he took issue with the learned Judge's finding that the vesting order did not confer a joint tenancy.

13. He went on to submit that the learned Judge misconstrued the import of the 1966 document which was clear on the distribution of the suit property to the estates of Sheik Una and Abubakar. We understood counsel to argue in the alternative that the 1966 document could not affect the joint tenancy since it was not registered against the suit property's title.

14. According to Mr. Muturi, the learned Judge did not consider the extensive submissions made by the appellant with regard to the right of survivorship. Making reference to this Court's decision in *Boniface Awour & Another vs. Victor Otieno Nyadimo & 2 others [2017] eKLR* counsel urged that the doctrine of survivorship entails that upon the demise of one joint owner the interest in the land passes to the other joint owner.

15. Furthermore, the learned Judge in similar case, *Aliya w/o Jaganath Rama Charan Nagia alias Mahmoud Issa vs. Hussein Issa Nagia & 2 others [2017] eKLR* wherein she sat on an appeal from the Kadhi's Court decision, the right of survivorship arose. Conversely, while upholding the right of survivorship she found that the property in issue therein was not available for distribution in the estate of the deceased joint owner.

16. In his view, the issuance of title under the *Registration of Titles Act (repealed)* to Sheik Una and Abubakar as tenants in common was in error and capable of rectification under *Section 60* of the repealed Act. He also stated that the suit property should not have been included as part of the estate of Sheik Una; the High Court should invoke its inherent powers conferred under *Regulation 73* of the *Probate and Administration Rules* and remove the suit property from the list of assets in the High Court succession cause.

17. In opposing the appeal, Mr. Mwadzugo submitted that our jurisdiction by dint of *Section 50(2)* of the *Law of Succession* is limited to points of Muslim law. In his opinion, the appeal herein does not raise any point of Muslim law to warrant us entertaining the same. Elaborating further, he argued that the appellant had raised specific issues in his pleadings for determination with the full knowledge of the scope of the Kadhi's court jurisdiction. The Kadhi's Court analyzed the right of survivorship in Islamic law in detail as requested by the appellant.

18. Moreover, the dispute as presented before the Kadhi's Court and the High Court was based on succession in Islamic law and not the application of land law as the appellant purports. Therefore, this Court could not consider any issue which was not canvassed by the parties at the trial court.

19. In conclusion, counsel asked us to put to an end the protracted family dispute by dismissing the appeal with costs.

20. We have considered the record, submissions by counsel and the law. Mr. Mwadzugo correctly submitted that our jurisdiction in this appeal is confined within the parameters set out under *Section 50(2)* of the *Law of Succession* which reads:

"An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi's Court in respect of the estate of a deceased Muslim and, with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal." [Emphasis added]

21. Accordingly, we take cognizance that the issue that emanated from the Kadhi's Court to the High Court was in respect of whether the suit property or rather the sale proceeds thereof should be distributed in accordance with the principle of joint tenancy as outlined in the 1966 document. The Kadhi's court considered this issue in light of its jurisdiction to hear matters relating to distribution of the estate of a deceased Muslim. In our view, the Kadhi's decision which was upheld by the High Court reflected the correct Islamic position as pertains the distribution of the estate of a deceased Muslim who did not have children.

22. As for whether the suit property was erroneously registered under the *Registration of Titles Act* as being held by Sheik Una and Abubakar as tenants in common; and whether the suit property should not have been included in the High Court succession, are issues which were not before the Kadhi's Court. More importantly, the learned Judge found and rightly so, that those issues could not be raised at the Kadhi's Court. Having said that we cannot delve into those issues in this appeal.

23. We also find that the appeal does not raise any point of Muslim law and as such, we have no jurisdiction to interrogate any other issues raised by the appellant. We take cognizance of the Supreme Court's sentiments in *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR*:

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law..."

24. In the end, we find that the appeal has no merit and is hereby dismissed. Bearing in mind that this is a family matter we make no orders as to costs.

Dated and delivered at Malindi this 27th day of September, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR