



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A)

CIVIL APPEAL NOS. 35 OF 2014 & 23 OF 2015 (CONSOLIDATED)

BETWEEN

THUWEIBA MAKU.....1ST APPELLANT

FATMA MAKU.....2ND APPELLANT

RUKIA MAKU.....3RD APPELLANT

AZIZ MAKU.....4TH APPELLANT

AND

AISHA JUMA.....1ST RESPONDENT

MALIK ABU SHEE.....2ND RESPONDENT

(Appeal from the judgment and decree of the High Court at Mombasa, (Ibrahim, J.) dated 16th August 2012

in

HCCA No. 109 of 2007)

JUDGMENT OF THE COURT

Before embarking on the hearing of this appeal, and with the consent of the parties, we made an order pursuant to **rule 103** of the **Court of Appeal Rules** consolidating **Civil Appeal No. 35 of 2014** with **Civil Appeal No 23 of 2015**. The order of consolidation was based on the fact that the two appeals were between the same parties, involved the same suit property and raised the same questions. Indeed, the only difference between the two records of appeal was but one, an order extending leave to file appeal out of time. File No 35 of 2014 was adopted as the main file.

The appeal arises from the judgment of **Ibrahim, J.** (as he then was) dated 16th August 2012 which was read on his behalf by **Okwengu, J.** (as she then was) on 20th September 2012. The effect of the judgment was to dismiss with costs an appeal by the four appellants against a decision of the Hon. **Twalib B.**

Mohamed, the *Kadhi* of Mombasa in a succession dispute. This is therefore the appellants' second appeal, which by dint of **section 72** of the *Civil Procedure Act* is restricted to matters of law only. (See ***MAINA V. MUGIRIA [1983] KLR 78***).

The background to the appeal, in short, is as follows. The four appellants, **Thuweiba Maka, Fatma Maka, Rukia Maka** and **Aziz Maka** together with the two respondents, **Aisha Juma** and **Malik Abu Shee** are all children of **Pamgu Binti Fadhil (Deceased)** to whose estate this appeal relates. After the death of the deceased on 7th January 2002 at Guraya, Mombasa, the two respondents filed in the *Kadhi's* Court, Mombasa, **Succession Cause No. 147 of 2005** seeking determination of the heirs of the deceased and their respective shares in her estate. According to the petition, the deceased's assets were only two houses at Mtongwe, Mombasa.

By their undated response, which is on record, the appellants averred that in addition to the two houses in Mtongwe, the deceased also owned **House No. S. 42** on **Plot No. 160 Section 16, Bibi wa Shafi**, Mombasa (the suit property), which was part of the estate. The suit property is variously referred to in the proceedings as **"the house at Guraya"** or **"the Guraya house"**. In the pertinent part of the response, the appellants pleaded as follows:

"We are surprised to hear from our step sister and brother (the respondents) who are claiming that the house at Guraya which we are currently staying in is theirs alone. This is absolutely contrary to our knowledge and belief because we understand that this house belongs to our late mother and it is for all of us."

Before the *Kadhi* the two respondents testified that the estate of the deceased comprised only the two houses at Mtongwe and that the suit property was their property, having purchased the same from their late grandmother, **Mashaka Binti Mbwana Salim**. They produced in evidence an affidavit sworn by the said grandmother on 25th April 1989 before the then *Kadhi* of Kwale and Mombasa Districts, confirming the sale of the suit property to them for Kshs 50,000.

On the other hand, the evidence adduced by the first and second appellants on behalf of the other appellants was that in addition to the two houses at Mtongwe, which were let out to tenants, the deceased also owned the suit property where the appellants had all along resided. While admitting that their grandmother originally owned the suit property, the appellants denied that she had sold the same to the respondents.

After considering the evidence, the *Kadhi*, by a judgment dated 18th July 2007 held among other things that the suit property belonged to the respondents and was not part of the estate of the deceased. Aggrieved by the judgment, the appellants filed **Civil Appeal No. 109 of 2007** in the High Court at Mombasa, where the only issue was whether the *Kadhi* had erred in holding that the suit property was not part of the estate of the deceased. Upon dismissal of their appeal, as already stated, by Ibrahim J., who sat with two *Kadhis* as assessors, the appellants lodged the current appeal.

Prosecuting the appeal, **Mr. Hayanga**, learned counsel for the appellants impugned the judgment of the High Court on three broad grounds. First counsel contended that the judgment was ambivalent, null and void because it variously purported to be in respect of an appeal from the judgment of **Chief Kadhi, Hammad M. Kassim** dated 6th April 2006 in **KCCC No 234 of 2005** and also from the judgment of **Hon Kadhi Twalib B. Mohamed** dated 18th July 2007 in **KCCC No. 147 of 2005**. In learned counsel's view, due to the lack of clarity on which judgment the High Court was dealing with, there was doubt and apprehension that a grave mistake and injustice had been occasioned to the appellants which rendered the judgment a nullity.

On the second ground of appeal, it was submitted that the *Kadhi* erred by holding that the appellants had not filed a counter-claim for declaration of the suit property as part of the estate of the deceased. It was contended that even without pleadings, the *Kadhi* was obliged to determine whether the suit property was part of the estate of the deceased because the issue was raised after fair notice; was addressed by the

parties; and was left to the court to decide. Counsel relied on **ODD JOBS V. MUBIA [1970] EA 476** and **DHANI RAMJI V. RAMBHAI & CO. (UGANDA) LTD [1970] EA 515** in support of that proposition. The High Court was faulted, as the first appellate court, for failing to re-evaluate the evidence, come to its own independent conclusions and correct the mistake made by the *Kadhi*. The failure of the High Court to re-evaluate the evidence, it was submitted, was a question of law, which entitled this court to intervene and was sufficient ground for overturning the decision of the High Court.

Under the last ground of appeal, counsel argued three distinct issues. The first was that the affidavit of ***Mashaka Binti Mbwana Salim*** was wrongfully admitted and relied upon by the *Kadhi*. It was submitted, on the authority of **JAMES ALLAN DAVIES & OTHERS V. HOLIDAY CENTRE LTD (IN LIQUIDATION) & OTHERS, CA NO 142 of 1992** and ***Order 19 rules 1 and 9*** of the ***Civil Procedure Rules*** that an affidavit cannot form part of the evidence at trial. The affidavit was also attacked as defective for failure to indicate who had drawn it and on the basis that the deponent, who was already dead could not be subjected to cross-examination. It was further submitted that the respondents did not produce any agreement for sale satisfying the requirements of ***section 3 (3)*** of the ***Law of Contract Act*** (which demands that contracts for disposition of an interest in land must be in writing and signed by all the parties thereto with their signatures duly attested by a witness who was present when the contract was signed) or any documents of title to prove their ownership of the suit property.

The second issue was that the *Kadhi* had erred by relying on verses of the Holy Koran rather than on the law of evidence and the ***Kadhis' Court Act***. In that regard it was submitted that the *Kadhi* was bound to follow the provisions of the Act and in particular to weigh the credibility of the witnesses and evidence rather than to rely on religious edicts.

Lastly, it was submitted that the *Kadhi* and the first appellate court had erred by ignoring the fact that the appellants were in possession of the suit property, which they had repaired and renovated. In the appellants' view, that fact was consistent with the suit property being part of the estate of the deceased, rather than the property of the respondents.

Opposing the appeal on behalf of the respondents, ***Mr. Hamza***, learned counsel submitted that it was the appellants who had created the confusion between the judgment of Chief *Kadhi*, Hammad M. Kassim dated 6th April 2006 in KCCC No 234 of 2005 and that of Hon *Kadhi* Twalib B. Mohamed dated 18th July 2007 in KCCC No. 147 of 2005 in their initial memorandum of appeal and therefore could not be heard to complain.

Learned counsel further submitted that by observing that the appellants did not file a counterclaim for declaration of the suit property as part of the estate of the deceased, the *Kadhi* had not fallen into any error. In any event, it was contended, under the Evidence Act, the onus was upon the appellants, who were claiming that the suit property was part of the estate of the deceased, to prove so by evidence and that they had failed to adduce any evidence linking the suit property to the deceased.

Finally, on the authority of **NYANGAU V. NYAKWARA, CA NO. 3 of 1984** and **THOMAS OPENDA V. PETER MARTIN AHN, CA NO. 42 of 1981**, it was contended that the respondents' other grounds of appeal had not been raised in the first appeal before the High Court and therefore this Court was precluded from considering them.

We have anxiously considered the grounds of appeal, the written and oral submissions by learned counsel, the authorities cited and the law. We agree with the respondents that the grounds of appeal in this Court must flow from the issues canvassed and decided by the first appellate court and that this Court will not entertain an appeal founded on issues which are raised for the first time before it, unless they are issues of jurisdiction or illegality. The rationale behind that approach was well explained by ***Lord Birkenhead, LC*** in **NORTH STAFFORDSHIRE RAILWAY CO V. EDGE (1920) AC 254** as follows:

"The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods...The efficiency and the authority of a Court of Appeal, are increased and strengthened by the opinions of the learned judges who have considered these matters

below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decision which may be of the highest importance without having received any assistance at all from the Judges in the courts below."

Nevertheless, in the present appeal we understand the appellants' contention to be that the first appellate court failed in its duty to re-evaluate the evidence and come to its own independent conclusion, and that had it done so, it could not, from the evidence on record, have reached the conclusion that the suit property was not part of the estate of the deceased. As this Court stated in **JULIA KABURIA V. MANENE KABEERE & ANOTHER, CA 340 of 2002:**

"The Court of Appeal will, however, not allow a new point to be raised for the first time on appeal unless the evidence establishes beyond doubt that the facts if fully investigated would have supported the plea of the party seeking to raise the new issue."

On the first ground of appeal, the confusion between the judgment of Chief *Kadhi*, Hammad M. Kassim dated 6th April 2006 in KCCC No 234 of 2005 and that of Hon *Kadhi* Twalib B. Mohamed dated 18th July 2007 in KCCC No. 147 of 2005 was introduced by the appellants' memorandum of appeal in the High Court dated 21st July, 2007. In that memorandum of appeal, the appellants indicated erroneously that they were appealing from the judgment of the Chief *Kadhi*, Hammad M. Kassim dated 6th April 2006 in KCCC No 234 of 2005. Although the amended memorandum of appeal dated 3rd August corrected that error and indicated that the appeal was against the judgment of Hon *Kadhi*, Twalib B. Mohamed dated 18th July 2007 in KCCC No. 147 of 2005, the initial error was carried forward in the heading of the High Court judgment, but not in the body.

The body of the High Court judgment leaves no doubt that that the subject matter of the appeal is the judgment of Hon *Kadhi* Twalib B. Mohamed dated 18th July 2007 in KCCC No. 147 of 2005. The central issue raised and addressed in the High Court judgment is whether the suit property was part of the estate of the deceased, the very issue addressed by Hon *Kadhi* Twalib B. Mohamed in his judgment dated 18th July 2007 in KCCC No. 147 of 2005. We are satisfied that there is no ambivalence or confusion in the judgment; that the appellants were occasioned no prejudice; and that this ground of appeal has absolutely no merit and must fail.

We find the second ground of appeal anything but perplexing. While it is true that the *Kadhi* had stated that the appellants had not filed a counter-claim for a declaration that the suit property was part of the estate of the deceased, he cannot by any account, be accused of having failed to determine the issue whether or not the suit property was part of the estate. The appellants raised the issue expressly in their defence and both sides addressed it in their evidence. The *Kadhi* identified the question whether the suit property was part of the estate of the deceased as one of the issues that he had to decide. And surely he did and held that it was not.

We are satisfied that the first appellate court duly and properly re evaluated the evidence and came to the correct conclusion that it did not have any basis for interfering with the conclusions of the *Kadhi*. For example, at page 3 of the judgment, the learned judge delivered himself thus:

"From the proceedings it is clear that the Kadhi made a determination of whether the Guraya House formed part of the Estate. The court referred to exhibit No. 2, which is an affidavit by Mashaka Binti Mbwana Salim, which was commissioned by former Hon Kadhi of Mombasa/Kwale stating that she sold the house in Guraya to Malik Abu Shee Malik and Esha Juma for Kshs 50,000/-. From the record the affidavit is dated 25th April 1989 and there is the thumbprint of the deponent before the Kadhi of Mombasa/Kwale District. The document fairly describes the parties, property and the interest of the sellers and states the consideration paid for the property. A copy of the I/D of the deponent also shows that it corresponds with the information in the affidavit. The death certificate of Mashaka Binti Mbwana Salim shows that she died on the 7.12.1993 which is after the said transaction."

All the issues raised by the appellant's in the last ground of appeal boil down to the question whether there was evidence on record upon which the *Kadhi* and the first appellate court could have concluded that the suit property was not part of the estate. It was the appellants who asserted, in their undated defence, that the suit property was part of the estate of the deceased. By dint of section 107 and 108 of the Evidence Act, the burden was on them to prove that the suit property was part of the estate of the deceased and not upon the respondents to prove that it was not. Those provisions state as follows:

“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

Beyond stating that they had lived in the house, the appellant's did not tender any concrete evidence to show that it was part of the estate. Indeed, they did concede that the house originally belonged to the grandmother who the respondents claim sold it to them. On that point the burden was never on the respondents. The *Kadhi* had the opportunity of seeing and hearing the parties and was not satisfied by the appellant's evidence. The first appellate court was also not satisfied that it had any basis for interfering with the *Kadhi*'s conclusion. We do not see any basis for holding otherwise.

Before we conclude, we would like to point out that there was also no basis for the claim that the *Kadhi* had decided the case on Koranic edicts rather than on evidence as required by the *Kadhis'* Court Act. All that the *Kadhi* did was to cite verses of the Koran, which contrary to the appellants' assertion, mirror principles of the law of evidence, such as the exhortation to witnesses to tell the truth and the principle that he who asserts must prove.

We are ultimately satisfied that this appeal has no merit. Accordingly the same is dismissed with costs to the respondents. It is so ordered.

Dated and delivered at Mombasa this 22nd day of April, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR