



REPUBLIC OF KENYA

IN THE KADHI'S COURT AT ISIOLO

SUCCESSION CASE NO 30 OF 2018

IN THE MATTER OF THE ESTATE OF HABIBA GALGALO GUYO ...[DECEASED]

ADAN GALGALO GUYOPETITIONER

VERSUS

MADINA GALGALO GUYO RESPONDENT

JUDGMENT

1. The petitioner prayed for distribution of the estate of the late Habiba Galgalo Guyo according to Islamic law. He claimed their deceased mother left a two hectare plot at Maisha Bora, One house with two rental rooms, 13 cows and [120] goats and was survived by two sons and three daughters.

2. The respondent filed a replying affidavit dated 17th September 2018. She contended that their deceased mother distributed her estate in her lifetime and there is nothing left for distribution. She does not dispute the heirs of the deceased as listed by petitioner.

Facts

3. The late Habiba Galgalo Guyo died on 27th January 2018 at Isiolo. She was survived by five children, two sons and three daughters. She had livestock and parcels of land in Isiolo. She allegedly distributed it in her lifetime. The petitioner contends it was not. He apparently sold part of the plot [40 x 50] at Maisha Bora, the to one Hassan Mohamed consideration of KES 250,000.00 . He is of the view he should get the first part of the plot [of which he sold a portion] being the eldest son. The respondents were not consulted of the sale and oppose to redistribution.

Issues

4. The issue for determination in this matter are whether or not there is estate available for distribution to heirs.

Analysis and Finding

5. There is no dispute on the heirs and that properties listed belonged to the late Habiba Galgalo Guyo. The dispute is on whether or not it was distributed by herself in her lifetime and whether that is legal under Islamic law.

6. The legal heirs of the late Habiba Galgalo Guyo and their respective shares are:

i. Zainab Galgalo Guyo daughter 1/7 14.28%

- ii. Adan Galgalo Guyo son 2/7 28.57%
- iii. Hussein Galgalo Guyo son 2/7 28.57%
- iv. Madina Galgalo Guyo daughter 1/7 14.28%
- v. Fatma Galgalo Guyo daughter 1/7 14.28%

7. The petitioner argued the properties were not distributed by the deceased, neither the livestock nor the plots. He contends the properties forms the estate of the deceased and are available for distribution to heir under Islamic law. He argued he made enquiries at the Lands department in Isiolo County and the Maisha Bora property is registered in the name of the deceased. He however stated it was registered in all their names for purpose of protection from being taken by others but that it was not demarcated to individual heirs and he deserves the first portion being the eldest son. He admitted their mother gave each one of the children an equal part of the Maisha Bora parcel of land.

8. The petitioner called two witnesses. Ali Abdi Suleiman [PW1] evidence is that the deceased gave the plot to all her children starting with the eldest: Zainab, Adan, Hussein, Madina and Fatuma Galgalo. Jaro Boru [PW2] evidence is that the deceased was survived by five children and left the Maisha Bora plot.

9. The respondent presented letters of allotment and miscellaneous income receipts and approved PDP plans for five plots to support her claim.

- i. Plot No. Maisha Bora /150; 0.12 Ha Zainab Galgalo
- ii. Plot No. Maisha Bora /151; 0.12 Ha Adan Galgalo
- iii. Plot No. Maisha Bora /152; 0.12 Ha Hussein Galgalo
- iv. Plot No. Maisha Bora /153; 0.12 Ha Madina Galgalo
- v. Plot No. Maisha Bora /154; 0.12 Ha Fatuma Galgalo

10. All the other children of the deceased support respondents claim that the properties were distributed by the deceased herself and are already registered in their respective names since 2007 and each heir has been paying land rates to the County Government of Isiolo. The respondent submitted their late mother distributed her other properties other than the Maisha Bora parcel of land in her lifetime as follows:

- i. Adan Galgalo Plot No 56 Kambi Bule, 25 goats & 3 cows
- ii. Hussein Galgalo Kambi Garba Plot, 25 goats & 3 cows
- iii. Zainab Galgalo 20 goats & 3 cows
- iv. Madina Galgalo 20 goats & 1 cow
- v. Fatma Galgalo Plot No. 55 Kambi Bule, 20 goats & 3 cows

11. She stated the goats were [170] but she reserved [50] for herself and [10] for neighbours and the balance [11] she distributed as above.

12. Zainab Galgalo [PW1] evidence is that the properties were distributed and she told the petitioner and the buyer to stop construction of the house on her plot but they refused to listen to her. Isaack Abdi Mohamed [PW3] evidence is that the deceased informed her that she distributed her properties to all her children. Maalim Adan Mohamed [PW4] a Duksi teacher's evidence is that the deceased had sent her at Kula Mawe to count her livestock. he confirmed the goats were [170] and that he was instructed to gave out [2] goats as zakat.

13. From the evidence it is patently clear the deceased distributed all her properties well before her death and only reserved [50] goats for herself for use during her last remaining days. The Plots at Maisha Bora have since 2007 been registered in each of the heir's name although demarcation [beacons] had not been set. Each heir is allocated a specific equal portion of the plot.

14. Distribution of properties in one's lifetime does not fall under Inheritance. It falls under gifts. Muslims are entitled to give gifts to their children provided they are fair to all the children. The prophet Muhammad [may peace and blessings be upon him] declined to endorse a gift to only one of a person's children.

15. Nu'man Ibn Bashir said, 'my father went to the prophet (pbuh) and informed him, "I have gifted to this my son a male slave", the prophet asked him **"have you gifted the same to all your children"** he said **"no"**, **the prophet told him, "return your gift", in another version of the hadith the prophet told him, Fear Allah and be fair to all your children", in another he said, "I shall not be a witness to an illegality."**^[1]

Where the father has children from different mothers and fears or has seen signs of disputes, animosity, and quarrel between the children over his property, it is recommended he distributes his properties to all his children and wives and parents through gifts. It is recommended that he sets aside a property for his income which shall not be part of the estate to support him in the remainder of his life.^[2]

16. Islam does allow and even encourage in some cases distribution of one's properties to his heirs . Scholars differ whether it is a must to distribute on the basis of the Qur'anic principle of the son getting twice the share of the daughter. The preponderant opinion is that it should be on this basis. Other have opined it is a gift and the principal of son getting twice the share of the daughter is not a requirement in gifts.

17. Abdulrazaq in his 'Al Musannaf', reported that Sa'd Ibn Ubada (R.A.) distributed his property to his children but after his death his wife gave birth to another child of his. Abubakar and Umar (R.A.) ruled that the child get his share from his property.^[3]

18. Imam Ahmad is reported to have said, "it is permissible to distribute ones wealth before one's death", he further said, "it is optional to do so, he may or may not do so as long as he is fair (according to law' he also said, "it is however better to not distribute wealth before ones death as he may get other children after the exercise."^[4]

19. Al Naqrawy, a Malikite scholar is categorical in his '*Al Fawakih al Dawany ala risalat Abu Zaid al Qairawany*' that "it is permissible to distribute ones wealth before ones death provided a son gets twice the share of a daughter"^[5]

20. In a detailed research titled: 'Distribution of inheritance prior to death' published in the contemporary jurisprudence research journal issue No. 85 of Feb – May 2010, Dr. Abdallah bin Fahd bin Ibrahim Al Hayyid, a lecturer in the Faculty of education, King Saud University found that "distribution of one's property to all heirs before ones death is valid if done on the basis of a son getting twice the share of a daughter"

21. In the Instant case, the deceased distributed all her properties to all her children. The sons got a share more than the daughters both in the livestock and parcels of land. Accordingly we find no fault at her distribution. It was within her legal right probably aimed at ensuring the daughters are not disinherited. In any case the parcels of land were registered in the individual names of heirs since 2007. In law, they are not properties of the estate. The distribution of the properties by the deceased are adopted.

22. The petitioner sold a [40 x 50] portion of Plot No. Maisha Bora /150 belonging to Zainab Galgalo to one Hassan Mohamed. The sale is null and void. He is hereby ordered to demolish the house on the plot within sixty [60] days from date of delivery of judgment failure to which the same shall be demolished at their won costs. O.C.S Isiolo to ensure petitioner and the buyer's compliance with the court order and provide security in case of demolition.

23. The Chief officer, Lands department, County government of Isiolo to effect transmission of the parcels of land as follows:

- i. Plot No. Maisha Bora /150; - Zainab Galgalo
- ii. Plot No. Maisha Bora /151; & Plot No. 56 /Kambi Bule - Adan Galgalo
- iii. Plot No. Maisha Bora /152; & Plot at Kambi Garba -Hussein Galgalo
- iv. Plot No. Maisha Bora /153; Madina Galgalo
- v. Plot No. Maisha Bora /154; & Plot No.55/ Kambi Bule -Fatuma Galgalo

Each party to bear its own costs.

Orders accordingly.

Dated, signed and delivered at ISIOLO on 19th December, 2018

HON. ABDULHALIM H.ATHMAN ,

PRINCIPAL KADHI

ISIOLO LAW COURTS

In the presence of

Mr. Denge Boru, court assistant

Petitioner

Respondent

[1] Bukhari 5/210, 211, 257 (2586,2587, 2650), Muslim, 11/68-71 (4161-4153)

[2] Distribution of inheritance prior to death, Dr. Abdallah bin Fahd Al Hayyid, Contemporary jurisprudence research journal vol. 85 pp 237-238

[3] Abdulrazaq 9/98-99 (16498), Al Muhalla', Ibn Hazm 9/142, Mjmu' ul Fatawa, Ibn Taimiyah, 31/276

[4] Al Mughni 8/271, Shirh al Kabir 17/73, Badaiul Fawaid, Ibn al Qayyim3/100,Al Furu', Ibn al Mufallah 7/414, Al qawanin al Fiqhia, Ibn Juzzy 384, Al Fiqhil Maliky al Muyassar , Al Zuhaily, 1/696

[5] Al Fawakih al Dawany ala risalat Abu Zaid al Qairawany, Al Naqrawy, 2/222



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