



**REPUBLIC OF KENYA**

**IN THE KADHI'S COURT AT ISIOLO**

**SUCCESSION CASE NO. 47 OF 2018**

**IN THE MATTER OF THE ESTATE OF NOOR ELMI.....DECEASED**

**1. KHADIJA NOOR ELMI**

**2. MOHAMED DHAHIR GELLE..... PETITIONERS**

**VERSUS**

**1. FATUMA NOOR ELMI**

**2. HALIMA NOOR ELMI                      RESPONDENTS**

**JUDGMENT**

**Pleadings**

1. In this succession matter, the petitioner prays for orders for distribution of the estate equally among the heirs and the 2nd defendant to be compelled to bring back their brother from Somalia. She claims the deceased left Plot No 7918/42 at Isiolo Town which was fully developed to inheritance of five children one of whom is now deceased. She claims the respondents leased the shop to the Co-operative Bank, Isiolo and benefit alone from the proceeds. She claims other three shops on the plot also fetch rent proceeds which are not shared to all heirs. She claims their deceased aunt left KES 800,000.00 that the respondents shared between themselves alone. She further claims the 2nd respondent had their brother Mohamed Dahir Gele taken out of the country to Somalia.

2. The respondents filed a statement of defence dated 24th January 2019. They admit the deceased left Plot No 7918/42 at Isiolo town but deny the allegations made by the petitioner. They state that the property had a dispute in Meru and their father died before it was concluded. After conclusion of the Case, the property was vested in the first respondent as administrator of the estate. They further state that the respondents have been caring for the petitioner's son through proceeds of one of the three shops while she has been living in Tanzania since 1987 and only recently relocated to Kenya. They state that they the Co-operative Bank Isiolo has been leased on debt and they have not received any benefits from the proceeds to date. They deny that they had their brother taken to Somalia against his will and that their aunt left any money for distribution.

**Background**

3. The late Noor Elmi Abdi died on 23rd August 1990 at Isiolo aged [65 years]. He left a parcel of land Plot No 7918 / 42. It is strategically located in the CBD. There was some development on it. He was survived by his sister Fatuma Gele and one son and four daughters: Mohamed, Fatuma, Khadija, Halima and Asha Noor Elmi. Asha died in 1997 and was not survived by any child. her Husband is also deceased. The respondents engaged Co-operative Bank to build and lease a building on part of the parcel of land. Three shops were constructed by the second respondent on part of the remaining part of the parcel of land. They are rented out to tenants.

## Issues

4. There is no dispute on the heirs of the late Noor Elmi. There is also no dispute the entire parcel of land Plot No. 7918 / 42 at Isiolo belong to the estate of the late Noor Elmi. There is no dispute the building leased to Co-operative bank belong to the estate. The dispute is on whether or not the three shops constructed by Halima Noor Elmi, the second respondent, is part of the estate and how should the estate be distributed to heirs.

## Estate

5. Fatuma Noor Elmi obtained certificate of Confirmation of grant from Meru High Court on 4th June 1993 in Succession Case No 207 of 1991. She had the property registered to herself under the registration of titles Act Cap 281 laws of Kenya grant Number LR 63230 for [68] years from 1.11.91 at annual rent of KES 3,000.00. It measures 0.0948 Ha. The first respondent entered a ten year build and lease agreement with Co-operative Bank ltd from 1st august, 2010. The terms of the agreement were that the bank will finance the construction of the building up to the roof slab level with an allowance for upward expansion on 48 feet (frontage) by 120 feet (depth) of the plot. The cost will be recovered from rental proceeds within a period of (10) years. The rent per month was 95,000.00 per month reviewed every two years at 10%. The building was constructed at a cost of KES 14,002,240.00. The agreement should end in August 2020, however total recovery of the building cost from the monthly rent will not be complete until end January 2021. The monthly rent will then be KES 152,958.45 per month. The debit balance of KES 82,612.00 will be cleared from this amount from the rent of January 2021.

6. Although the property is registered in the name of Fatma Noor Elmi, on her own admission and evidence of her sisters and witnesses, the property belonged to the late Noor Elmi. Under Islamic law of inheritance it is available for distribution to all heirs according to their respective heirs.

## The three (permanent) shops

7. The court made a site visit on the afternoon of 5th march 2019 in the presence of parties. It established that the building housing the bank stretches one half of the parcel of land from front to back. Three permanent shops are constructed on about one third of the remainder on the front side. A hotel made of temporary *mabati* structure covers the remaining two thirds with a small empty space at the back. A small corridor separates the bank from the three shops. A black smith has a temporary *mabati* structure beside the building of the bank along the corridor. Halima, the second respondent, claims the three shops are hers, developed after their father's death from her own funds and capital from tenants and is therefore not available for distribution. She admits it is developed on the estate land. She argues there is land available to the other heirs if they want to develop their own shops. The first respondent supports this claim. The petitioner contends it was constructed from the funds their aunt Fatuma Gele left. Mariam Mohamed Noor [DW1] evidence is that the second respondent told her their aunt left KES 800,000.00 and that she wanted to use it to construct the shops. Under cross examination, her testimony was shaken. She was not sure there was money left by the parties' aunt. She said she was told, she did not see the money. The evidence is hearsay and not reliable. It is not admissible. I find the three shops were exclusively financed by Halima Noor Elmi, the second respondent. Had the three shops taken the entire remaining parcel of land, I probably would have a different decision regarding the shops, for lack of consent of all heirs in their construction. However land is available for any of the other heirs to make development of their own on the remaining parcel of land. The hotel is a temporary structure that can be easily demolished and developed. Accordingly I find the three shops do not belong to the estate.

8. The rent for the hotel and black smith is part of the estate and is available for distribution to all heirs.

## Heirs.

9. The legal heirs of the late Noor Elmi are:

1. Fatuma Noor Elmi daughter
2. Mohamed Noor Elmi son
3. Khadija Noor Elmi daughter

4. Halima Noor Elmi daughter

10. The son is entitled to twice the share of the daughter under Q:4:11

**'Allah instructs you concerning your children [i.e. their portions of inheritance]: for the male, what is equal to the share of two females.**

The share of the son = 40%

The share of each daughter = 20%

#### **Distribution**

11. The rent for the bank is not yet available for distribution until January 2021. From then onwards it should be distributed to heirs in shares hereinbefore indicated.

12. The rent for the hotel and Blacksmith kiosk is available for distribution, it be distributed to heirs in their respective shares indicated hereinbefore.

13. The petitioner is entitled, in consultation with her siblings, to develop up to a third of the remaining part of the land consisting of the temporary hotel, or equivalent to that occupied by the three shops.

14. Alternatively, if the petitioner wishes to get her share of the estate in monetary terms, the entire estate [the entire parcel of land and developments thereon, excluding the three shops] be valued, and the respondents to pay her share in monetary terms.

Each party to bear its own costs.

**Dated, signed and delivered at ISIOLO on 27th March 2019**

**HON. ABDULHALIM H. ATHMAN**

**PRINCIPAL KADHI**

**ISIOLO LAW COURTS**

In the presence of

Mr. Guyo Adan, Court assistant

Petitioner

Respondents



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