



REPUBLIC OF KENYA

IN THE KADHI'S COURT

AT ISIOLO

SUCCESSION CAUSE NO. 42 OF 2019

IN THE MATTER OF THE ESTATE OF THE LATE SORA HALAKE KUNUNE.... DECEASED

MUSLIMA MORO GURACHA & ANOTHER

suing as next friend to HALAKE SORA HALAKEPETITIONER

VERSUS

ABDI HALAKE KUNUNE & ANOTHER RESPONDENTS

JUDGMENT

1. Through amended petition dated 10th December, 2019, the petitioner prayed for orders that:

- i. Determination of the original and current estate of the deceased
- ii. Determination of the rightful share of the minor in the estate
- iii. Distribution of estate according to Islamic law
- iv. An order to compensate the minor/ petitioner for the value of the estate squandered or misused by the respondents who had full custody and authority over the estate
- v. An order to compensate the petitioner of thirty heads of cattle belonging to the minor's mother.
- vi. An order to compensate the petitioner the benefits of government's vulnerable groups monthly support for the last 8 years.

2. The petitioner deposed that the deceased died on 26th January, 2003 and was survived by one widow and seven children. He deposed that he left over (300) heads of cattle, one plot (No. 77) in Tullu Roba, one plot in Kiwanjani both in Isiolo; two (2) unregistered plots in Korbesa location - Merti, and one plot in Merti township, a residential plot in Embakasi – Njenga in Nairobi and KES 2.4 million in Barclays bank. The petitioner further averred that the respondents who are paternal uncles of the minor, squandered the deceased's estate including an additional (30) cattle belonging to Kamila Moro Guracha, the petitioner's mother. He deposed further that the respondents have been receiving monthly government stipend for the support of the orphans but the respondents and the step mother locked him out of the said benefits.

3. The respondents through replying affidavit sworn by Abdi Halake Kunune, the 1st respondent dated 24th October, 2019 opposed the petition. He deposed that the deceased was their brother and left no estate for distribution. He averred that the estate of their father, Halake Kunune was not distributed and the deceased was only caretaker of the family livestock business.

4. Sora Halake Kunune was an uneducated but diligent entrepreneur. He started from a young age as herder, hawkler to one of the most successful businessmen of Korbessa village, Merti sub-county of Isiolo County. He was a second in a Muslim Borana family of six children of Halake Kunune who died in 1983 survived by Abdikadir, Sora, Abdi, Roba, Halima, Mariam and his wife; four sons, two daughters and one widow. Sora moved to Nairobi then Namanga then returned to Korbessa where he ran a retail, wholesale and livestock business. In 1993 he was married to Habiba Sora Halake. They had four children together: Barwako, Muslima, Zaituna, Lana and Hassan; four daughters and one son. He later married a second wife: Kamila Moro Guracha who he had two children with: Osama and Halake Sora Halake. Kamila, his second wife predeceased him on 20th December, 2002. He died about one month later at South B Hospital, Nairobi on 26th January, 2003 aged [39] years old. His son Osama died after him after a short illness.

5. Upon Sora's death and the end of bereavement period, the family sat to deliberate on the affairs of the family. The 1st respondent was appointed care taker.

6. Litigation in this matter has been protracted. Court referred parties to elders for mediation but the petitioner refused to participate in the talks. The parties filed four applications, three by the petitioner and one, a preliminary objection by the respondents. They took a lot of time before they were dispensed with. For almost four months the court operations were scaled down in mitigation to effects of the Covid-19 pandemic. Main trial only started in December 2020 and adjourned severally, sometimes for long periods due to parties' counsel diaries and witness preparing for exams. Respondents' counsel failed to appear about four times on days scheduled for hearing, leaving his clients to proceed without his help.

7. Upon reading the pleadings and depositions of the parties and upon hearing of arguments of parties and testimony of witnesses, the issues for determination in this case are:

i. How many cattle remained. Did they belong to the deceased or the Halake family"

ii. What constituted the estate of the late Sora Halake Kunune

iii. Legal heirs and their respective shares

iv. Distribution of the estate

Estate

8. Livestock

The petitioner contends the deceased left (300) heads of cattle of his own and (30) belonging to Moro Guracha, the deceased's father in law. They argued he was a businessman and the cattle belonged to him. The petitioner called eleven witnesses. The evidence of PW1,2,3,4,5,7 and 8 is that they lived in Korbessa and saw the deceased being in charge of the cattle in three bomas (*ules, fimbos or banas*). Under Borana custom, each boma would have (100) heads of cattle. PW 9 and 11 evidence is not credible. PW 9 has been living in Isiolo and not Korbessa and PW11 (the orphan) was (3) years old when his father died. Their evidence is hearsay and therefore inadmissible.

9. The respondents, on their part, argued that the deceased was caretaker of family business. They stated their father had left about (20) heads of cattle, that the deceased was charged to take care of on behalf of the family. The 2nd respondent contended he financed the deceased to start and manage a livestock business for the family to help in daily maintenance. He argued he gave KES 200,000.00 of his own and another KES 200,000.00 by his wife. They contended (124) cows were left at the time of the death of Sora Halake Kunune because prior to his death, he had instructed payment of four heads of cattle as zakat for the livestock. Many of the cattle died during the 2005 and 2017 drought and now the herd stand at (42) heads of cattle. They called four witnesses, who testified that the cows under the management of the deceased belonged to the Halake family. RW2 although living in Isiolo was

present in the family meeting after the death of the deceased herein.

10. Islamic law of evidence rests the burden of proof on the claimant. This is based on **Q.27.64** which provide:

" ...say produce your proof if you should be truthful".

11. It is further emphasized by a tradition reported by **Bukhari [4552], Muslim [1/1711], Al Baihaki [10/252] on the authority of Ibn Abbas** (may Allah's blessings be upon him) that the prophet Muhammad (may Allah's peace and blessings be upon him) said:

'The onus of proof lies on the plaintiff and the oath is to be taken by the defendant.

12. There is no evidence to support any of the late Halake Kunune's (20) cattle were still existing at the time the late Sora came to Korbasa. The late Halake died in 1983. Sora Halake his son, on the 2nd respondent's testimony left Korbasa for Nairobi and only returned 1992 to start and not to continue the business. In any case, even if the cattle were merged together, where there is no specific agreement and identification of cattle belonging to different persons, it is safe to assume, on the balance of probability, that existing cattle belonged to one person only.

13. The petitioner's witnesses saw the deceased managing and dealing in the cattle. To their knowledge they were his property. It is not contested by the respondents that the late Sora had actual custody of the cows. The 2nd respondent claim that he financed the business to the tune of KES 400,000.00 is not supported by evidence contrary to the provisions of **Q.2.282** which provide:

"You who believe, when you contract a debt for a specified term, write it down, and let a scribe write [it] between you in justice, let no scribe refuse to write as Allah has taught him and bring to witness two witnesses from among you ... and do not be [too] weary to write it, whether it is small or large, for its [specified] term. that is more just in the sight of Allah and stronger as evidence and more likely to prevent doubt between you..."

14. It is appreciated that ownership of cattle is not registered. Apart from specific marks of each clan and individual, the herders only can identify ownership of individual cattle. None of the herders were called to testify on ownership of the cattle. 2nd respondent's testimony on the cattle is contradictory. On the one hand he stated the deceased was caretaker but was to be paid in terms of cattle, on the other he insisted he was merely a caretaker in the family business and in the estate of their father. This will presume that part of the herd was his own and another belonging to the family; however, the cattle of each could not be differentiated. The cattle either entirely belonged to the Halake family or the late Sora Halake. The evidence remaining on this issue is the petitioner's witness's knowledge against those of the respondent's witnesses. Possession is recognised as one of the evidences of ownership under Islamic law. It is referred as *'milk al yadd'*. It is circumstantial evidence admissible under Islamic law in the absence of primary direct evidence. **Dr. Muhammad Al Zuhaily in his 'Wasail al ithbat fi al Shariah' (Modes of proof in Islamic law), Dar Al Bayan, [1982] at 1/501-513** stated:

'Ibn Taymiyyah, Ibn Qayim, among the Hanbali scholars; Badr e Din ibn al Ghars al Zay'ly, ibn Abidin, Al Tarabulsi among Hanafi scholars and ibn Al Qassim have opined the admissibility of circumstantial evidence in Islamic law... many verses of the Qur'an and authentic traditions support the application of circumstantial evidence (in determination of disputes).'

15. In tradition reported by **Ahmad, Abu Daud (2/278), Al Nasa'i (8/217), Ibn Maja (2/780) and Al Baihaqi (10/255)** on the authority of Abu Musa (may Allah's blessings be upon him), two persons, each claimed ownership of an animal in their possession but none had proof. The prophet (may Allah's peace and blessings be upon him) ruled it belonged to both of them in equal halves. Commenting on this ruling Al Zuhaily said, the prophet Muhammad (may Allah's peace and blessings be upon him) decision was based on their equal possession of the animal. If no other proof was available and the animal was in possession of one of them, the decision, it would be inferred, be would have been in his favour.

16. PW6 worked at the Isiolo livestock market. Their evidence is that the 1st respondent sold cattle, was charged rates for cattle belonging to orphans. PW7 evidence is that the 1st respondent had told him, the cattle belonged to the orphans.

17. On analysis of the evidence adduced in court, the absence of sufficient credible proof that the cattle left belonged to the Halake estate or family business, the possession of the cattle and dealings by the deceased for eleven years (1992 – 2003) and evidence of PW6 & 7 on 2nd respondent statement during sale of the cattle at Isiolo livestock market, I do find the cattle left by the late Sora Halake Kunune belonged to him and constitutes part of his estate.

18. The other question relating to the livestock is the number left and remaining. Petitioner's witnesses' figure of (300) heads of cattle is based on their estimate of the *bomas, fimbos, ules* or *banas* he had left. On the assumption, according to Borana custom, that each boma held about (100) head of cattle, they stated, the number of cattle left were (300). On the other hand, based on the deceased instruction for payment of four cattle as *Zakat* signified the cattle left were between 120 and 129 heads of cattle. The respondents contended they were (120) heads. The latter is more accurate based on deceased's own instruction and the fact that he was the person most knowledgeable about the size of his cattle.

19. It is not disputed the 1st respondent was the *de facto* administrator of the estate. It is not disputed he sold some cattle to cater for the welfare of the children. It is not disputed there was a drought in 2005 and 2017. The respondents successfully demonstrated to have educated the children of the deceased. Barwaqo completed nursing course, Muslima completed public health training and the respondents secured her employment with the County government of Isiolo, Lana and Zaituna are in secondary school and Hassan completed *tahfidh* (memorization of the Holy Qur'an) and is now in primary seven. The respondents through their sister Halima, took care of Osama, who had been abandoned by her maternal relatives, till his death. The respondents severally assisted Halake's, the child in issue in this case, education. There had been continued interference from the child's maternal relatives. Many cattle died due to drought. The respondents cannot be held accountable for natural calamities. It is noted the petitioners also received cattle and assistance from the respondent for the child's welfare. The claim of squandering the estate is not established. It is dismissed. The number of cattle remaining at the time of last hearing were (42) cattle. These form part of the estate.

20. On the claim of (30) heads of cattle belonging to Moro Guracha, his evidence is contradictory. He testified that '*it is our custom to give son-in-law cattle to help in his boma.*' He had testified that he had given him (30) cattle but under cross-examination state he had given two cows. The applicable law in this court is Islamic law and not Borana customary law. The term 'gave' implied he gifted him the cows, whether they were two or thirty. Gifts, under Islamic law, are not returnable. Further the witness becomes a claimant and under Islamic law of evidence, cannot be a witness in his own case. The claim fails.

Funds in Bank Account

21. The petitioner claimed the deceased left funds in Barclays (now absa) bank in Isiolo. On his application dated 6th March 2020 the court granted and issued an order to the bank compelling them to furnish details and bank statements prior to his death. The Bank complied, did an investigation of their records and replied vide letter dated 14th August 2020 '*we do not have this customer in our books.*' We find and hold the deceased never had any account with Barclays Bank as alleged.

Retail and Wholesale business

22. The business left by the decease belonged to his estate. It had been run by Habiba Sora Halake, his widow. Both parties agree it collapsed and no longer exists. The respondents are absolved of any blame on its collapse. The widow had not been made a party to the proceedings. She however was a witness. Part of the reason it collapsed could be inexperience in business and that she depended on it entirely to support the children.

Orphan Stipends

23. On the claim that respondents received stipends from government in support of orphans, no evidence was adduced to support the claim. In any case such funds did not belong to the deceased and do not form part of estate of deceased Muslims.

Plots

24. The respondents admit the defendant left two unregistered (2) plots, one for each of his family in Korbesa, Merti sub county. These were the deceased's residence with each of his two wives. Although unregistered, these properties are part of the estate based on respondent's admission.

25. The petitioners claimed the deceased left an unregistered plot in Merti township and a plot in Kiwanjani in Isiolo town. No evidence was produced to support this claim. The 2nd petitioner admitted it is registered in the 1st respondent's name. He failed to prove fraud on the part of respondents. This claim is therefore dismissed.

Plot No 77 Tullu Roba / Isiolo

26. The petitioner claimed this property belonged to the deceased but was later fraudulently subdivided and a portion sold to one Hassan Bidu. They produced a letter by the letter dated 20th November, 2020 by the Chief Officer, Lands and Physical Planning – County government of Isiolo. They also relied on a letter dated 1st March 2012 by the County Clerk, County Council of Isiolo to the Permanent secretary, Ministry of Local government. In that letter the clerk attached a list of allocation of 472 plots in Zone 149A Tullu Roba in Isiolo for approval and ratification. In the attached list, Plot No 77 is Sora Halake Kunune.

27. The respondents relied on a letter dated 1st December, 2020 signed by the same officer, one Ture Tepo for the Chief Officer, Lands, County government of Isiolo. In said letter, the officer stated the letter confirming sale of Plot 77B to Hasan Bidu is a forgery and should be disregarded. The officer was called and gave evidence as an expert witness. His evidence is that according to the official records of the Lands department, County government of Isiolo where he is in charge, Plot 77 is a ballot area at Tullu Roba, which means it had been inhabited by squatters and the County government issued the plots to inhabitants through ballots. According to minutes of 3rd November, 2011, Plot 77 Tullu Roba was issued to Habiba Sora Halake. He confirmed the letter on confirmation of sale was a request by the 2nd petitioner and the letter came from their office but was categorical the letter dated 16th March, 2012 and document attached thereto are not part of the official records at the Ardhi House, Isiolo.

28. The first letter by the Isiolo Land department, though not a forgery, only confirmed sale of a portion of Plot 77 Tullu Roba. It does not confirm ownership of the plot. The official lands record confirms the plot was issued to Habiba Sora Halake. There is no evidence it belonged to the deceased.

29. Further, the dispute on Plot 77 is clearly one of ownership of a property now registered in the name of Habiba Sora Halake. It does not fall under the jurisdiction of this court. Disputes on ownership have to be resolved before distribution at the appropriate forum. In the case of **Jibril Gollo Duba VS Asli Gollo Duba (2021) eKLR, E.M. Muriithi J**, held:

‘It is clear that a dispute regarding ownership in respect of a deceased person negates the concept of free property of a deceased property of a deceased person and the dispute should be determined by a court with jurisdiction to determine ownership disputes before distribution by a succession court and if necessary, the court may set apart the share or property in dispute to await the outcome of the resolution of the dispute.’

30. In the case of **Fatuma Mohamed Shariff vs Principal Magistrate Court, Kajiado & 2 others (2014) eKLR**, where the petitioner had prayed for orders to quash proceedings in a succession matter before the Kadhi's Court, Kajiado where the petitioner, her son had lodged a claim against her in respect of certain properties in her name which he claimed belonged to his father (now deceased). In the said case, **Mumbi Ngugi J**, stated:

‘it is also possible that the Kadhi's court was mistaken in concluding that it had jurisdiction to deal with issues under Article 40 and 162 especially given that Article 170 (5) gives the Kadhi jurisdiction where all parties submit to such jurisdiction, and that the magistrates court was mistaken in issuing an injunction in the matter. On the face of it and as the interested party tacitly concedes, as the property is registered in the petitioner's name, the proper forum for determining such claim as he may have would be the Environment and Land Court in which the constitution vests jurisdiction to hear and determine questions relating to title to land.’

31. The Plot No. 77 Tullu Roba is registered in the name of Habiba Sora Halake in the official records of the Isiolo Lands registry. Petitioners failed to prove claim of fraud in its registration and even if same had existed, this court lacks jurisdiction to make a determination on such issue. Accordingly, we cannot find the said property belongs to the estate of the deceased herein.

Pot at Njenga- Embakasi, Nairobi

32. The petitioner produced no documentary evidence to support claim the deceased left property in Nairobi. In contrast,

respondents produced documents including ownership certificate No. 058 dated 23rd November, 2011 for Plot No. 130 Njenga Jua Kali market- Nairobi, proving it belongs to one Zara Ahmed Farah Halake. It is declared not part of the estate of the deceased herein.

The legal heirs.

33. Their no dispute on the legal heirs of the late Sora Halake Kunune. They are:

- | | |
|-------------------------|-------------------|
| 1. Lokho Halakhe Kunune | Mother (deceased) |
| 2. Habiba Sora Halake | widow |
| 3. Barwaqo Sora Halake | daughter |
| 4. Muslima Sora Halake | daughter |
| 5. Zaituna Sora Halake | daughter |
| 6. Lana Sora Halake | daughter |
| 7. Hassan Sora Halake | son |
| 8. Halake Sora Halake | son |
| 9. Osama Sora Halake | son (deceased) |

34. The mother is entitled to one-sixth of the estate, the widow to one-eighth, each son to twice the share of the daughter under **Q.4.11 and 12.**

The share of the mother = 16.66%

The share of the widow = 12.5%

The share of each daughter = 7.09%

The share of each son = 14.16%

35. Osama's share devolves to his heirs: his full brother and paternal grandmother (deceased mother) as follows:

Halake (brother) = 83.33% = 11.8%

Grandmother = 16.67% = 2.36%

36. The share of the deceased mother (16.66 + 2.36 = 19.02%) devolved to her children: Abdikadir, Abdi, Halima and Mariam Halake Kunune, siblings of the deceased herein.

37. In terms of families, the shares are as follows:

Habiba Sora Halake and her children = 55.02%

Halake Sora Halake = 25.96%

Deceased siblings = 19.02%

Conclusion

38. The estate of the late Sora Halake Kunune comprises of two unregistered plots in Korbesa, Merti sub county, Isiolo and (42) heads of cattle. Halake Sora Kunune is entitled to 25.96% of the estate. In distribution of cattle, site visit is necessary as cows are of different ages, sizes, gender and condition. The Kadhi's court at Merti is the closest at site and would be most convenient for purpose of execution of the distribution order. By a copy of this judgment, execution be done at Merti Kadhi's court.

Each part to bear its own costs.

Orders accordingly,

DATED, SIGNED AND DELIVERED IN OPEN COURT AT ISIOLO ON 15TH NOVEMBER, 2021

HON. ABDULHALIM H. ATHMAN

SENIOR PRINCIPAL KADHI

In the presence of

Mr. Adano Roba, Court assistant

Mr. Jarso Wario for petitioner

Mr. Kiogora Mugambi for respondents



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