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Date Delivered:	05 May 2016
Case Class:	Civil
Court:	Kadhis Court at Mombasa
Case Action:	Judgment
Judge:	Abdulhalim H. Athman
Citation:	In re Estate of Ibrahim Bakari Mwaigachu (Deceased) (Succession Cause 208 of 2014) [2016] KEKC 24 (KLR) (5 May 2016) (Judgment)
Advocates:	M/S A. O. Hamza, M/S A. O. HAMZA
Case Summary:	-
Court Division:	Family
History Magistrates:	-
County:	Mombasa
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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**REPUBLIC OF KENYA**

**IN THE KADHI'S COURT**

**AT MOMBASA**

**SUCCESSION CASE NO. 208 OF 2014**

**IN THE MATTER OF THE ESTATE OF IBRAHIM BAKARI MWAIGACHU.....DECEASED**

**AISHA ADAM KHAMIS.....PETITIONER**

**VERSUS**

**1. AMIR IBRAHIM BAKARI**

**2. MAULID IBRAHIM BAKARI**

**3. RUKIA IBRAHIM BAKARI.....RESPONDENTS**

**JUDGMENT**

The petitioner through her petition dated 31st October 2014 amended on 16th February 2015 prays for:

1. Determination of the estate, heirs and the respective shares of the estate of the late Ibrahim Bakari Mwaigachu
2. Distribution of the estate to heirs according to Islamic law.
3. A declaration that the extension of [6] rooms with a store at the deceased Jua kali - Magongo , Mombasa house exclusively belong to the late Bakari Ibrahim
4. Any other relief the court deems fit to grant and costs.

She claims the deceased left two houses without land at Magongo Mombasa one at Bomu on Plot No 1858 and another at Jua Kali area. She deponed Bakari Ibrahim built an extension to the Jua Kali house which does not belong to the estate of Ibrahim Bakari but to the estate of his son Bakari Ibrahim. She further sates the deceased was survived by [5] sons and [2] daughters some of whom are now deceased, others left descendants others did not. She claims the respondents are not cooperative especially with her in the management of the estate properties towards just distribution of proceeds.

The respondents [1st & 3rd] filed a statement of defence on 2nd October 2015. They deny the Bomu house on Plot No. 1858 has ground rent arrears. they admit Bakari Ibrahim built the extension to the Jua Kali house but he did it for his father on agreement that he would recover his costs from rent proceeds in 2 and a half years, which he did and therefore the house belongs to the estate. They deny any agreement that there was agreement to sell the *matatu* to recover any costs of repair, that Bakari only assisted as a sibling in the repair of the *matatu*. They oppose the distribution of the estate.

I note that the all the respondents had signed the defence to the initial petition but only the 1st and 3rd respondents signed the reply to the amended petition.

The 2nd respondent filed a replying affidavit dated 26th October 2015. He admits the estate and heirs as listed in the petition. He stated the 1st & 3rd respondents are not co-operative in the distribution of proceeds of the estate. He proposes the estate be left intact and proceeds or rent be distributed to heirs according to their shares. He also prayed for the 1st & 2nd respondent be ordered to give accounts for of the estate since the death of Bakari Ibrahim on 21st July 2014.

The firm of A.O. Hamza represented the petitioner. The respondents appeared in person.

## **FACTS**

The late Ibrahim Bakari Mwaigachu died on 29th April 1987 at Mombasa of diabetes aged [50] years. The petitioner is a widow of Bakari Ibrahim one of the sons of the deceased herein who died on 21st July 2014. The respondents are children of the deceased, siblings to the petitioner's late husband.

## **ISSUES**

The issues for determination in this matter are:

1. What constitutes the estate, whether or not the extension of the Jua kali house is part of the estate of the deceased herein
2. Liabilities of the estate, if any.
3. The legal heirs of the deceased and their respective shares.
4. Distribution of the estate.

## **ESTATE**

There is no dispute the house at Magongo on Plot No. 1858 belongs to the estate of the late Ibrahim Bakari Mwaigachu. The dispute on whether or not the extension of [6] rooms and store at the Jua Kali house is part of the estate or belonged to his son Bakari Ibrahim [now deceased]. The petitioner contends the extension is not part of the estate, the respondents to the contrary.

The petitioner produced a letter dated 20.11.1986 to prove the extension belongs to Bakari Ibrahim her husband and not the deceased herein. The letter signed by the late Ibrahim Bakari Mwaigachu and witnessed and signed by Bakari, Amir and Maulid stated that *"Bakari Ibrahim is entitled to be paid a total of KES 60,000.00 for construction of the extension of the house and should be paid same through the rent of KES 2,000.00 per month commencing from January 1987 to 1989 till the amount is fully settled"*.

The text and spirit of the letter does not support the petitioner's contention. Clearly the extension did not belong to Bakari Ibrahim but to his father. He did finance its construction but for his father on the understanding he would be repaid his costs from the rent proceeds. PW2's evidence contradicts the document. His evidence in light of the document is hearsay and uncorroborated. It cannot stand.

Under cross examination the petitioner alluded Bakari Ibrahim was not fully paid his costs. Ibrahim Bakari died about four months after the writing of the letter. The amount was to be settled in two years and five months [30 months]. Bakari died in 2014, [27] years later. He was in charge of the family affairs. He was the head of the family after passing of the deceased herein. There is no evidence to show he complained lack of payment of his costs many years after his father's death. Apart from lack of evidence

of non settlement of the costs incurred by Bakari, on the balance of probability, there are no liability to the estate in this regard.

I find and hold that the entire house at Jua Kali area [the main house and the extension] is part of the estate of the deceased herein.

The respondent submitted in her evidence in chief that the deceased left a farm at Voi, that it belonged to the estate although it was registered in Bakari's name. The issue was not counterclaimed in her reply to the petition. Further the title on her own admission is registered in the name of Bakari Ibrahim. For these reasons I cannot find the parcel of land in Voi as part of the estate in this matter.

The estate of the late Ibrahim Bakari Mwaigachu consist of:

1. One house without land at Bomu Magongo on Plot No. 1858
2. One house without land at Jua kali - Magongo [ the main house plus the extension]

## **LIABILITIES**

The petitioner claim the deceased repaired the petitioner's Matatu and had not fully settled the costs of 12,000.00. Bidu Hamisi Nyamawi PW1 evidence is that the deceased had the matatu repaired and owed the mechanic [Baghdad] 36,000.00 and 12,000.00 [to Sammy cushion maker] for installing seats. He stated that he had to settle it himself after the 3rd respondent refused to settle the latte amount. Collins Otieno's PW2 evidence is that the 3rd respondent refused to clear debts of Bakari Ibrahim who had helped clear her debts. He stated the late Bakari informed him he will settle her debt and the car [matatu] will be his.

The receipt by plaintiff's witness indicate the amount was 22,000.00 and balance was 12,000.0 which was settled in two instalments 2015 after his death. This receipt is dated 9th December 2013. The receipt by the defendant also with a different stamp by Sammy cushion maker indicates the cost for the works was KES 10,000.00 and balance was only KES 2,000.00. This receipt is dated 4.1.2014. a date 11.12.2013 is cancelled. the respondent submitted the mechanic [Baghdad] had forgiven the late Bakari his debt. She submitted the late Bakari only offered to help her as his sister but the repairs were not a debt.

The PW2 is not a credible witness. His testimony regarding the *Jua Kali* house having clearly contradicted the written agreement of the deceased which was witnessed by, among others, Bakari himself. There is no proof of any agreement between Bakari and his sister Rukia Ibrahim on the repairs of her matatu. Although the two receipts give different figures, there is no doubt Sammy Cushions were owed money for repair and installation of seats. The respondents admits only 2,000.00. On the balance of probability I will adopt the higher figure of KES 12,000.00 as liability. This is not liability to the estate but to the 3rd respondent as it was costs incurred in the repair of her motor vehicle.

## **HEIRS**

The dispute regarding the heirs is whether Mwanajuma Idd, the widow, is entitled to inherit the deceased and whether Rukiya Ibrahim snr. is a legal heir of the deceased.

The petitioner contended the widow had been divorced. This is denied by all respondents. No evidence was provided by the petitioner. The widow is alive. she had been attending court. She should have been

listed to give her testimony. In any case, there is no doubt she had been married to the deceased and in the absence of evidence of divorce, I find and hold she is a legal widow and entitled to inherit the deceased herein.

Rukiya snr. and Hatib Ibrahim were listed by the petitioner as heirs. The respondent did not oppose the same in their pleadings but the 1st and 3rd respondents argue Rukia snr and Hatib Ibrahim's mother had not been legally married and therefore not entitled to inherit the deceased herein. Hatib is now deceased. Rukia snr was summoned to give evidence but failed to appear. The respondents should have specifically denied the two as legal heirs in their pleadings. It is trite law that parties are bound by their pleadings. Lack of evidence to the contrary leads me to find they are legal heirs of the deceased herein.

The legal heirs of the late Ibrahim Bakari are:

- |                              |          |          |
|------------------------------|----------|----------|
| 1. Mwanajuma Idd             | widow    |          |
| 2. Hatib Ibrahim Bakari      | son      | deceased |
| 3. Rukia Ibrahim Bakari snr. | daughter |          |
| 4. Amir Ibrahim Bakari       | son      |          |
| 5. Maulid Ibrahim Bakari     | son      |          |
| 6. Rukia Ibrahim Bakari jnr. | son      |          |
| 7. Rehema Ibrahim Bakari     | daughter | deceased |
| 8. Matano Ibrahim Bakari     | son      | deceased |
| 9. Bakari Ibrahim Bakari     | son      | deceased |

one [1] widow, six [6] sons and two [2] daughters.

The widow is entitled to one eighth of the estate and each son twice the share of the daughter under Qur'an:4:12 and 11 respectively.

The share of the widow = 12.5%

The share of each daughter = 6.25%

The share of each son = 12.5%

The heirs of the deceased beneficiaries have not been identified. They be indentified on a mention date to finalise shares of all beneficiaries.

## **DISTRIBUTION**

The estate be valued, both the proceeds of rental income and market value of the estate properties for directions on final distribution of the estate. The beneficiaries have leave to give proposals on

distribution. Cost of valuation be born from the rent proceeds.

Orders accordingly.

Dated and delivered at Mombasa on 5th May 2016.

**ABDULHALIM H. ATHMAN**

**PRINCIPAL KADHI**

In the presence of:

Mr. Yusuf K. Abdulrahman, court assistant

M/S A. O. HAMZA for petitioner

Respondents.



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