



Case Number:	Succession Case 50 of 2019
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Case Class:	Civil
Court:	Kadhis Court at Isiolo
Case Action:	Judgment
Judge:	Hon. Abdulhalim H. Athman - Principal Kadhi
Citation:	In re Estate of Maryan Hassan (Deceased) [2020] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Family
History Magistrates:	-
County:	Isiolo
Docket Number:	-
History Docket Number:	-
Case Outcome:	Agreements adopted by the court with minor adjustments for purpose of equity.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE KADHI'S COURT AT ISIOLO

SUCCESSION CASE NO. 50 OF 2019

IN THE MATTER OF THE ESTATE OF MARYAN HASSAN....DECEASED

1. HUSSEIN NOOR HAJI OSMAN

2. HASSAN HAJI OSMAN.....PETITIONERS

VERSUS

ABDIRAHMAN ISSACK.....RESPONDENT

JUDGMENT

1. In this succession matter, the petitioners claimed the deceased left two unregistered plots with permanent houses in Laisamis, Marsabit County and was survived by seven children. They pray for determination of estate and shares of each heir and distribution of estate to heirs according to Islamic law and the petitioners be appointed administrators of the estate.

The respondent through his reply (statement of defence) stated the property is registered in his name and does not belong to the estate of their deceased mother.

2. The late Maryan Hassan, died on 11th November, 2019 at Isiolo.

3. The issues for determination in this matter are:

1. What constitutes the estate of the deceased herein

2. The legal heirs, their respective shares

3. Distribution of the estate

4. The jurisdiction of this court in succession matters of estates of deceased Muslims is conferred by the Constitution of Kenya [2010] Article 170 [5], Section 5 of the Kadhi's court Act, Cap 11, and Sections 2 (3) and 48 [2] of the laws of succession Act, cap 160.

Background

5. The heirs of the late Maryan Hassan are two families, Haji Osman and Issack Adan. The late Maryan Hassan lived in Marsabit, she got unwell and was treated, passed away and was buried in Isiolo, where most of her children, except Abdirahman, Ado and Alima, lived. The three lived in Laisamis with or close with their mother. Upon her death, burial and the lapse of the bereavement period, the family including the parties herein with elders and relatives met to discuss the inheritance issues. They reached agreement on distribution of estate and proceeded to document it the following day. All the heirs except the respondent signed it. The respondent allegedly had also agreed to the terms of the agreement and was ready to sign but he apparently declined to sign at the last moment and returned to Laisamis. Mzee Abdi, an elder tried to arbitrate without success. The other heirs, as a result, decided to come to court.

Estate

6. The petitioners claim the deceased left two properties with permanent houses in Laisamis in Marsabit County, One with (8) rooms near the main Moyale Highway and another with a (2) rooms on the hills, constructed from family contributions during the burial of the respondent's wife in 2014.

7. The dispute is only on one of the two properties in Laisamis, the unsurveyed and unregistered plot with two rooms house on the hill at Laisamis is not disputed as part of the estate. It is hereby declared as part of the estate of the deceased herein.

8. The dispute is only on the plot with (8) rooms near the main Moyale Highway (Now Plot 196 Laisamis Town). The petitioners argued their mother acquired the unregistered plots in the 1980s. They contend the respondent admitted in the family meeting that the two properties belong to the estate. They produced chief's letter dated 27th January 2010 and called seven (apart from petitioners) witnesses to support their case.

9. Augustine A. Super, the Assistant Chief, Laisamis sub location through letter dated 27th January 2020 confirmed that the late Marian Hassan is the rightful owner of the two plots one measuring 50X75ft and another measuring 50X100 at barrier 1 village, Laisamis. Alima Saramo [PW1] evidence is that she lived in Laisamis with their mother together with the respondent and his full sibling Ado, that during burial of respondent's wife, relatives saw the conditions their mother and siblings were living in and decided to contribute to build her a better house, that the contributions about KES 800,000.00 were handed to her and she supervised the construction in stages and later from rent proceeds of the shops. Ado Issack [PW2] evidence is that the respondent, is their brother, the last born in the family and was a small boy when their mother acquired the plot in the 1980s, that he helped clear the bushes in acquiring the plot for their mother. It is his evidence that the respondent took advantage of their mother's illiteracy to register the plot in his own name. Abdullahi Maalim Issack [PW3] evidence is that he is a Imam and relative and presided the family meeting to advise on deceased's inheritance, that the respondent admitted the two properties belonged to the estate. He stated the respondent said '*save for the plots where we reside, she (the deceased) left no other properties*'. It is also his evidence he initiated the family contribution for the construction of a house for the deceased at the Laisamis plot. He testified that the family discussed and agreed to relinquish their interest on the estate in favour of the respondent and Ado, that the respondent would get the larger house near the barrier by the Highway and Ado will get the smaller one by the hill. They only differed how to develop the smaller house but eventually agreement was reached at the meeting but respondent failed to sign despite having not objected to the terms of the agreements. PW4 evidence is that he lived in Laisamis in the 1990s and saw the deceased living in the hut and he personally financially contributed towards the construction of a better house for her. It is his evidence the respondent admitted the properties belonged to the estate during the family meeting in Isiolo. PW5 evidence is that the deceased was his aunt and he lived in Laisamis and knew her for more than [33] years. It is his evidence that the properties in dispute belong to the deceased. He was also present at the respondent wife's burial when the decision to contribute for construction of a house was made, that he contributed in terms of work for the construction of the house in dispute. PW7's, a granddaughter of the deceased, evidence is that she lived with the deceased from childhood till 1999 when she was married and that the plots were acquired by the deceased.

10. On the other hand the respondent filed copies of miscellaneous receipts from the County Government of Marsabit for Land registration, plot rent rates, application for unregistered plot, chief's letter dated 14th December 2019 and called three witnesses to support his case.

11. The application for registration of the land [Plot No 196 Laisamis Town] was recommended on 6.9.2016 by Chief Officer of Lands, Marsabit County, about four years before death of the deceased herein. Chief's letter dated 14.12.2019 states in part 'all property and estate are registered under Abdulrahman Issack as the rightful legal heirs of the deceased.' Ibrahim Bashir's [DW1] evidence is that the property was allocated to the respondent. Hussein Adan Hassan [DW2] is a tenant at the property. His evidence is that the property belongs to the respondent since he was the one living with the deceased. Peter Mauki Muriuki's [DW3] evidence is that he was contracted by the respondent to construct the property on Plot 196 in 2012, the respondent paid him his fees. He did it in stages and did finishing for tenants of the property.

Analysis

12. It is important to emphasise that the applicable laws of evidence in this matter and all matters before Kadhis Courts is Islamic law of evidence under Section 6 of the Kadhi's Court Act (1967), Cap 11 Laws of Kenya. It provides:

"The laws and rules of evidence to be applied in a Kadhi's Court shall be those applicable under Muslim law."

13. The petitioners' evidence confirms the respondent listed the property in dispute before all family members as part of estate. The

evidence is conclusive and he never objected or denied it was such. It is trite Islamic principle of evidence that Muslims are bound by their agreements and contracts.' It is based on the Hadith reported by Imams Abu Daud (3594), Ibn Hibban (1199), Al Hakim (49/2) and Baihaqi (79/6). Another important rule of Islamic evidence (as well as common law) is that admission is a total, complete and strongest form of evidence. The respondent had every opportunity to deny the meeting, that the property belonged to him. There is no evidence of coercion to the agreement. He only failed to appear at the advocate's office the following day as agreed to sign the document. His agreement amounted to a categorical admission the property is part of the estate.

14. Both Chief's letter (authored by the same chief) confirm the property belonged to the estate. One letter states the properties are registered under the respondent's name as the legal heir of the deceased because he 'was the only child who remained with the deceased until her death.'

15. DW1 and DW2 evidence is weak. their knowledge of the property starts in the 2012 and 2014. The petitioner's evidence in this regard is stronger, they have a history of the property since 1980s. It is noteworthy that the respondent is the last born of the family. His elder brother vividly remember how the then unsurveyed plot was acquired by the deceased. PW1,PW2,PW4,PW5 and PW7 lived for many years before the construction of the house in the 1980s and 1990s, and are categorical the plot was acquired by the deceased.

16. The respondent however applied for and is registered as owner of the plot 196 since 6.9.2016, about three years before the death of the deceased. The permanent house had by then been constructed. All his siblings and relatives apparently were not aware of this. The deceased was not aware of it. Only the respondent was aware of this fact. Why did he not inform his siblings and relatives in the meeting discussing issues of the estate about it" Whatever the reasons, strictly under Islamic law of evidence, his failure to declare it at the meeting bound him to the terms of agreement. He relinquished interest, if any on the property, the moment he listed the property as part of the estate.

Registration of the property in respondent's name was in 2016. All evidence conclusively indicate the plot was acquired in the 1980s by the deceased. The respondent was at the time of survey living with the deceased. He was the most educated child living with her. He was a trusted son. The respondent ought to have consulted all his siblings in the registration process. The Lands department ought to have involved the other members of the family in the registration process. The registration of the property in the respondent's name is contrary to the original ownership as supported by overwhelming evidence adduced in court.

17. Who financed the house on Plot No. 196 Laisamis Town" The defendant evidence is contradicted by plaintiff's evidence . Six plaintiff's witnesses testified to have witnessed decisions for contributions to construct the house for the deceased during burial of respondent's wife at Laisamis. They personally contributed financially or in kind to construct it. PW1 supervised its construction for the deceased . DW3 evidence is that he constructed it for the respondent. The two sets of evidence contradict each other. The issue collapses based on the principle that "*the original position on non permanent issues are that they are nonexistent while permanent issues are existent*", the house sits on the estate property and therefore is declared as part of it.

18. Based on the strength of the evidence of the petitioners, respondent's agreement at the family meeting, I find and hold that Plot 196 Laisamis Town belong to the estate of the deceased herein.

19. The estate of the late Maryan Hassan therefore consist of:

- i. Unsurveyed plot 50X75ft with two room permanent house at Barrier 1 village, Laisamis Town
- ii. Plot No 196 Laisamis town

LEGAL HEIRS

20. There is no dispute on the legal heirs of the late Maryan Hassan. One son Noor, relocated to Ethiopia for many years and has not been heard from since 1979. it is not certain whether he is alive or not. The legal heir of the deceased herein are:

- a. Hassan Haji Osman son
- b. Hussein Noor Haji Osman son

- c. Ado Issack Adan son
- d. Abdirahman Issack Adan son
- e. Fatuma Haji Osman daughter
- f. Alima Saramo Fora daughter
- g. Amina Hassan daughter

21. Each son is entitled to twice the share of the daughter under Q:4:11 respectively.

'Allah instructs you concerning your children [i.e. their portions of inheritance]: for the male, what is equal to the share of two females.' Q:4:11

The share of each daughter = 9.09%

The share of each son = 18.1825%

22. In the event Noor is confirmed to be alive as at 11th November, 2019, he shall be entitled to a share in the estate.

Distribution

23. The legal heirs had agreed that the two properties in Laisamis be distributed to their two siblings: Abdirahman and Ado Issack Adan as follows:

- i. Plot No 196 Laisamis be issued to Abdirahman Issack Adan
- ii. Unsurveyed 50X75ft plot in Laisamis town by the hill be issued to Ado Issack Adan

provided that part or the entire rent proceeds of Plot 196 be collected by Alima Saramo Fora, one of the daughters of the deceased and heir, to be used to fund improvement of the property issued to Ado Issack Adan. No timeline was given. The other heirs had relinquished their interest and shares in the estate in favour of their two siblings.

24. The agreement is legal under principle of takharuj. Muslims are bound by their agreements. The same be and is hereby adopted with minor adjustments for purpose of equity.

25. The deceased was taking care of orphans now under the care the respondent. She had also orally willed that Ado being poor and needy be helped. For this reason, The respondent shall continue to receive only half of the rent of Plot 196 Laisamis while the other half shall be collected by Alima Saramo Fora for safekeeping and financing Ado's property for a period not exceeding five years.

26. Orders accordingly.

Dated and delivered at ISIOLO on 12th March, 2020

HON. ABDULHALIM H. ATHMAN

PRINCIPAL KADHI

In the presence of

Mr. Guyo Adan, Court assistant

Petitioner



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