

بسم الله الرحمن الرحيم

IN THE CADI APPEALS PANEL OF THE GAMBIA

HOLDEN AT BANJUL

APPEAL NO. 31/2005

BETWEEN:

AJI TIDE CEESAY.....APPELLANT

AND:

MODU NJIE.....RESPONDENT

JUDGMENT

Written and delivered by Omar A. Secka

The appeal was filed on 18/10/2005 against the decision of Cadi Court of Banjul dated 10/10/2005 which distributed the property which is situate and laying at Street 45 Stanley Banjul belonging to the late Pa Njie to the following legal heirs and beneficiaries; (a) a widow called **Meta Secka**, (b) a son called **Modu Njie** and (c) a daughter called **Sukay Njie**

The judgment was to the effect that the widow was entitled to 1/8 and the son and daughter would share the residue on the principle of to the male double the share of a female. It was equally contended before the lower court that the said widow (Meta Secka) and the daughter (Suky Njie) passed away before the distribution took place. That the son (Modou Njie) agreed to compensate her beneficiaries in cash.

The appellant being dissatisfied with the said judgment appealed to this panel upon the following sole grounds i.e. ***I am not satisfied with the type of distribution although I agreed that the male will have the two shares of the female but there is a mistake in the demarcating.***

At the hearing of the appeal on 28/11/2006, the appellant was represented by lawyer Genet Sallah, while the respondent was represented by lawyer Anthuman Gaye. The counsel to the appellant at the hearing amplified the above ground of appeal by submitting that the estate in question was distributed since 1969 through a Curator (a public trustee) in line with Sharia principles. That the Cadi of the lower court had no right to re-partition the estate when same has been partitioned about 45 years back. He argued that the re-partition done by the lower court is unlawful and un-constitutional and not done for the benefit of the appellant.

The counsel argued further that the (Constitution of the Gambia) provides that partition has to be accepted and acted upon. Where both sides are Muslims, they follow the Sharia way of partitioning. The Cadi was informed about this procedure, but he never considered it. That the

copy of that distribution is available in the office of curator and that he would follow it up before the next proceeding. The hearing was therefore adjourned.

On 30/1/2008 the court resumed sitting with same Genet Sallah appearing for the appellant. The counsel continued his submission by telling the court that he did actually follow up the curator, but was unable to trace the document because there were so many documents. He therefore asked for further adjournment and the appeal was accordingly adjourned to 12/3/2008 for continuation.

On 12/3/2008 one female lawyer Amie Joof held the brief of lawyer Genet Sallah. She informed the court that the document could not be traced in the office of the curator. Based on this, the panel decided to continue with the hearing without the document from the curator's office or in the alternative, the panel would request for it officially. The appellant therefore continued his argument through lawyer Sallah that the laws of the Gambia Volume 15 Cap. 14:02 provides that distribution should be based on Sharia law. He argued further that the lower court accorded hearing to the respondent only excluding the appellant. That the appellant could testify to the fact that she was not allowed to say anything at the hearing and, according to him that contravened the rule of fair hearing. The two parties to a case must be heard. For that reason the counsel urged the panel to set aside the court's decision and order for a retrial.

The panel thereafter asked the appellant to inform them of what happened in the lower court. The appellant answered thus: *"I was called there in the court, the Cadi asked me if I know Modou Njie I said yes, he asked me who is my mother I answered him, he asked me how many of us are? I informed him. he again asked me that Modou Njie is demanding his share from the compound, I told him the case is at the curator office, he said to me I don't asked you about the curator, I just I told him you can do what you want. For that being a while he called us for the second time, when I came to the court I found Modou Njie sitting in the Cadi's office I heard the Cadi saying that Modou Njie is the city born intact is our nephew, I heard Cadi said again that he has sent the evaluator to evaluate the compound."*

Whereupon the lawyer Genet Sallah told the court that, that is to say, the process was not complete, and any judgment in incomplete proceedings is equally an incomplete judgment.

At the close of the appellant's submission, the respondent represented by his counsel lawyer Koka Gaye holding brief for Anthuman Gaye submitted in response to ground 1 of the grounds of appeal that since the document pertaining to the land could not be traced from the curator's office, the appellant's counsel could not base his argument on that. That he conceded to the argument that this court, based on the provisions of the Constitution, has supervisory power but disagreed with the counsel that the lower court had no right to distribute the property when he could not produce evidence that the office of the curator had earlier on done the distribution of the estate in question before the court. He also argued that, contrary to the appellant's argument, the appellant was fully heard because she submitted before this panel that she was asked a lot of questions by the Cadi such as who is their mother and how many children has their mother. The argument of non hearing is therefore a non issue. She submitted further that the fact that the

decision of the lower court was based on D82,804 is a clear proof of the fact that all the parties to the proceedings were heard in conformity with the rules of fair hearing as applicable in Islamic law and not in conformity with the process of hearing in the High Court. He concluded his argument by submitting that the appellant's counsel was not faulting the distribution made by the lower court but hammering on the fact that the proceedings were incomplete. He therefore urged the court to affirm the decision of the lower court.

Genet Sallah made final reply to the submission of the respondent's counsel by submitting that there was no concluded hearing on the case and this is a foundation stone for any judgment. On the issue of hearing all the parties, the case file forwarded to this court by the lower court is very clear on this. The case file showed that the process was not completed before the lower court. About the dissimilarity between the procedure of Cadi Court and that of the High Court, he submitted that the procedure of Cadi Court is based on the Holy Quran. And what she said that he was not faulting the judgment of the Cadi Court, her arguments are quite explicit to the contrary.

Having carefully listened to the arguments of the appellant and the respondent, this panel finds it difficult to agree with the appellant's counsel that the property was distributed before by the office of the curator since no evidence to that effect could be produced by the appellant from the office of the curator. Furthermore, the panel also disagreed with the lawyer to the appellant that it was the office of public trustee (the office charged with the division of estate) that divided the property since there is no evidence to that effect also.

About the submission by the appellant that she was invited by the Cadi and when she went, she found the Cadi referring to the respondent as the son of his (the Cadi's) sister, that submission is unacceptable to the panel also since there is no evidence to prove that. On the incompleteness of the court process, the panel finds it difficult to agree with that submission because the appellant submitted orally before this court that the trial judge called them twice in respect of the case and thereafter arranged for the valuation of the property by a valuer with a view to distributing it to the beneficiaries. It was because of the completeness of the process that the court knew the family members and their relationship with one another.

The panel however agrees with the appellant on the issue of dissatisfaction with the division done by the court and also with the respondent on the fact that there is nothing to show that the division was done by public trustee.

Based on the forgoing analysis, the panel decides and orders as follows:

1. To affirm the division of the lower court on the distribution of the property of late Pa Njie among his beneficiaries i.e. wife to get 1/8 and the son and the daughter to share the residue to the male double the share of a female.
2. That the cash compensation by Modou Njie to his sister as ordered by the lower court is not in order since the property in question could be partitioned without any harm. as stated in Fawakihud Dawani : (any property that is divisible without any harm must be divided).page394

3. That the first distribution done by lower court is set aside and order to re-valuate the property including the developments done on the property through Mr. Wally Ndure is hereby made.
4. That a new distribution be made based on the new valuation.

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(Signed) Hon. Omar Secka Presiding

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(Signed) Alh. Essa Foday (Panelist)

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(Signed) Alh. Sering Muhammed Kah Panelist.