



In re Estate of Salim Mohamed Abdalla Balala (Deceased) (Succession Cause E086 of 2023) [2024] KEHC 12179 (KLR) (27 September 2024) (Ruling)

Neutral citation: [2024] KEHC 12179 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE E086 OF 2023**

G MUTAI, J

SEPTEMBER 27, 2024

**IN THE MATTER OF THE ESTATE OF SALIM MOHAMED ABDALLA BALALA
(DECEASED)**

BETWEEN

MOHAMED SALIM BALALA 1ST CITOR

TAUFIQ SALIM BALALA 2ND CITOR

AND

TIFLEY ABDALLA BAKHSHUWEIN 1ST CITEE

SALAH SALIM BALALA 2ND CITEE

SABAH SALIM BALALA 3RD CITEE

ABDALLA SALIM BALALA 4TH CITEE

FATMA SALIM BALALA 5TH CITEE

RULING

1. Salim Mohamed Abdalla Balala died on 1 September 2022. I shall hereafter refer to him as “the deceased”. The deceased died intestate and was survived by his wife, Tifley Abdalla Bakhshuwen, and children, Taufiq Salim Balala, Mohamed Salim Balala, Salah Salim Balala, Sabah Salim Balala, Abdalla Salim Balala and Fatma Salim Balala.
2. The family members could not agree on which of them should petition the court for letters of administration intestate. Thus, vide citations dated 15 November 2023, the 1st and 2nd Citors sought to have the Citees either accept or object to the issuance of the letters of administration intestate to the said Citors.



3. The 1st, 3rd, and 5th Citees separately entered appearance in person on 31 January 2024. Prior to entering appearing, the said Citees had individually agreed to have the grant issued to the 1st and 2nd Citors vide consents they each signed on 15 December 2023.
4. On the other hand, The 2nd and 4th Citors objected to the issuance of the grant to the 1st and 2nd Citors and filed a joint Affidavit of Protest sworn on 11 December 2023, in which they deposed that their father was a Muslim. They expressed the wish to have their father's estate administered under Islamic Sharia. They denied that they had refused to take out letters of administration and averred that attempts to have a consensus as to who would be the administrators and what assets formed the estate had not been reached. They accused the Citors of fueling discord within the family. The 2nd and 4th Citees deposed that a meeting held on 24th January 2023 at the residence of the 2nd Citee failed after the two Citors disrupted it.
5. The 1st Citor responded to the Affidavit of Protest vide the Replying Affidavit he swore on 6 February 2024.
6. Vide the said affidavit, Mohamed Salim Balala deposed that Part VII of the [Law of Succession Act](#), which governs the appointment of administrators, was applicable to the estates of deceased Muslims unless there was inconsistency with Muslim law. He contended that the application of Part VII of the [Law of Succession Act](#) to estates of deceased Muslims did not oust the application of the Islamic law, but rather that it complimented it "in the administration of the estate to avoid disorder".
7. The 1st Citee pointed out that the 1st, 3rd, and 5th Citors had consented to the appointment of the 1st and 2nd Citors as the administrators, and as such, it was not true that they had thwarted efforts to get consensus from the other beneficiaries by fueling discord within the family. He averred that the substantive law to be applied in the administration of the estate of his late father would be Islamic Sharia.
8. Mohamed Salim Balala challenged the standing of the 2nd and 4th Citee on the ground that they had not entered appearance either at the Principal Registry or in the Mombasa Registry. As such, their Affidavit of Protest was incompetent. He averred that the delay in the administration of the estate would lead to waste of the estate.
9. On 20 March 2024, the 1st and 2nd Cites petitioned for limited grant ad colligenda bona of the deceased's estate for the purpose of collecting and getting in and receiving the estate and doing such acts as may be necessary. Mohamed Salim Balala deposed in support of the petition that the deceased left behind a substantial estate that needed to be administered even as the Court considered the citation.
10. *Vide* what is described as an Entry of Appearance to Citation dated 22 April 2024, the 2nd and 4th Citees appointed the firm of Aziz & Associates to act for them. These 2 Citees were previously represented by the firm of Gitahi Gathu & Co Advocates and had filed an Affidavit of Protest. Since the Citees appointed a different firm of advocates to act for them, who did not refer the Affidavit of Protest whatsoever, this Court deems the said Affidavit of Protest moot.
11. The 2nd and 4th Citees stated in their Replying Affidavit to the citation that their father was a Muslim. They wished to have the Succession cause determined by the Kadhi Court in accordance with Islamic Sharia.
12. They aver that under section 48(2) of the [Law of Succession Act](#), the jurisdiction of the Kadhi Court is recognised. Article 169(1) (b) and 170 of [the Constitution](#) established the Kadhi Court. It granted it the jurisdiction to deal with questions of Muslim law relating to personal status, marriage, divorce



or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's Court.

13. They further deposed that proceedings before the Kadhi would be seamless, as opposed to what would happen if the grant was sought in this Court. It was averred that if the grant is sought at the High Court, letters of administration would first be obtained. Subsequently, separate proceedings would be filed at the Kadhi's Court to determine the estate and to establish each heir's share. After that, they would have to return to the High Court for confirmation. In their view, such a convoluted process would waste judicial time and resources. They averred that they had no objection to the Citors being co-administrators in the matter before the Kadhi's Court as they, too, are beneficiaries. The Citors were accused of conspiring to destroy amity and consensus at a meeting held on 24th January 2024 at the 2nd Citee's home and of refusing to cooperate to settle the matter amicably as required by Islamic law.
14. The Citors were also accused of intermeddling with the estate by purporting to distribute some of its income even before the grant was issued to them, in particular, by having an agent collect rent on their behalf and purporting to distribute the proceeds to the respective heirs.
15. The 2nd and 4th Citors thus prayed that I direct the parties to proceed to the Kadhi's Court so that "the Citors and we can be joint administrators in the Kadhi's Court".
16. The 1st Citor filed a Supplementary Affidavit in which he deposed that the Kadhi's Court in case No. E325 of 2023 gave orders authorizing the preservation of the estate, collection of rent by Albeity Accounting & Business Solution and interim distribution of the proceeds based on the needs of the heirs. He stated they had since provided a statement of account to the 2nd and 4th Citees' advocates.
17. He averred that this Court was the most appropriate forum to hear and determine the succession as a grant issued by the High Court was the most appropriate order for vesting some properties to the heirs. He deposed that the High Court would still be required by law to apply Islamic Sharia as the substantive law. The High Court could still seek the guidance of the Kadhi Court in respect of the shares of each heir.
18. Mr Mohamed Salim Balala accused the 2nd and 4th Citees of harassing the deceased's widow by demanding a statement of account for the period when the deceased was alive. He stated that the 2nd and 4th Citees had control of a company called BICO Ltd, which owns three go-downs at Shimanzi. The said go-downs were used or rented by them. However, they had not accounted for accruals nor paid dividends. He urged that the said failure showed that they were not reliable or trustworthy. On the other hand, he and the 2nd Citee exhibited good faith by arranging the settlement of cheques on a pro-rata basis and providing statements of account as a sign of good.
19. The citation was heard on 31 July 2024. Ms Ndegwa for the Citees and Mr Aziz for the 2nd and 4th Citees made oral submissions. I will set out their respect submissions below.
20. Ms. Ndegwa submitted that the 2nd and 4th Citees were improperly before the Court as they didn't enter appearance to the citation properly pursuant to Rule 21(5) of the [Probate & Administration Rules](#), 1980. She urged that this Court, contrary to what the 2nd and 4th Citors say, has jurisdiction to hear and determine the Petition regarding the deceased's estate. She referred me to sections 2 (4) of the [Law of Succession Act](#). The said section applies the provisions of part VII of the [Law of Succession Act](#) to the estates of deceased Muslims unless the provision of the said part is inconsistent with Muslim law.
21. She urged that this Court, rather than the Kadhi Court is the most appropriate forum, as the Court issues grants. The Kadhi Court, on the other hand, issues orders which may present challenges during the transmission of immovable properties to the heirs. Ms Ndegwa submitted that the Citors and three



other beneficiaries agreed and that only the 2nd and 4th Citors were presenting challenges. Counsel stated that the 2nd and 4th Citors had not accounted for the properties in their possession and, for that reason, couldn't be trusted with the administration of the estate.

22. Mr. Aziz opposed the citation. He submitted that the Citors had not conducted the affairs of the estate with candour. He urged that the Citors obtain orders secretly at the Kadhi's Court. Had they been aware of the application, they would have objected. Mr. Aziz urged that if they were given the grant, they would do as they wished, to the detriment of the other beneficiaries.
23. Counsel submitted that the 2nd and 4th Citees were from a different house and that they, too, should be involved in the administration of the estate of their father. He urged that the Kadhi Court has jurisdiction to hear and determine the matter and that the fact that some properties were in Nairobi was neither here nor there. He deplored the alleged fact that Citor had distributed the estate before the grant was issued.
24. It would appear to me that the issues for determination are whether this Court has jurisdiction to hear and determine the succession proceedings in respect of a deceased Muslim and, if so, what orders should be issued in respect of the citation filed herein.
25. A court whose jurisdiction to hear a matter is questioned must satisfy itself first that it has the requisite jurisdiction. As was aptly put by Nyarangi, JA in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR:-

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

26. To determine if I have jurisdiction, I must examine constitutional and statutory provisions and the court's decisions.
27. Article 170 (1) of *the Constitution* of Kenya, 2010 creates the Kadhi's Court. The jurisdiction of the said is stated in Article 170 (5) as being:-

“(5) The jurisdiction of a Kadhis' court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.”

28. The constitutional provision is given effect by section 5 of the *Kadhi's Court Act* which provides that:-

“A Kadhi's court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.”

29. It is evident from the said provision that the Kadhi's Courts:-
 1. Determines the questions of Muslim law in respect of, among other things, inheritance;
 2. In which all the parties profess the Muslim religion; and



3. The parties have submitted to the jurisdiction of the Kadhi's Courts.

These elements must all be present as the elements are conjunctive and not disjunctive.

30. The foregoing observation flows from the decision of the Court of Appeal in *Genevieve Bertrand vs Mohamed Athman Maawiya and Another* [2014] eKLR where it was held that:-

“23. In the case of the Kadhi's Court, it is a creature of *the Constitution* (section 66 of the retired *Constitution* and article 169 of the current Constitution). The jurisdiction of the Kadhi's Court is specifically defined under Article 170 (5) of *the Constitution* and section 5 of the *Kadhi's [Court] Act*, as “determination of questions of Muslim Law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's Court”. Thus the jurisdiction of the Kadhi's Court is determined by the existence of three factors. That is the subject matter of the claim or dispute, the party's Muslim faith, and the party's submission to the jurisdiction of the Kadhi's Court.”

31. In my view, the *Law of Succession Act* must be interpreted to breathe life into the progressive ethos of our Basic Law.

32. Section 2(3) and (4) of the *Law of Succession Act* provides that:-

“(3) Subject to subsection (4), the provision of this *Act* shall not apply to testamentary or intestate succession to the estate of any person who at the time of this death is a Muslim to the intent that in lieu of such provisions, the devolution of the estate of any such person shall be governed by Muslim law.

(4) Notwithstanding the provisions of subsection (3), the provisions of Part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim dying before, on or after the 1st January, 1991.

33. It is evident from section 47 of the *Act* that the High Court has wide powers to entertain any applications and determine any disputes under the Act and to pronounce such decrees and make such orders as may be expedient.

34. The wide powers of the High Court are not taken away by section 48(2) of the *Act*. In my view, the latter section creates a concurrent jurisdiction that allows parties to elect whether to file the petition for grant of representation either at the High Court or at the Kadhi's Court.

35. The right of a party to elect whether to file the petition in the High Court of Kadhi was restated by the Court of Appeal *Re the Estate of Ismail Osman Adam (Deceased), Noorbanu Abdul Razak v. AbdulKader Ismail Osman*, Mombasa Civil Appeal No. 285 of 2009 where Githinji JA held that:-

““There should not be any confusion between the jurisdiction of the High Court to entertain a dispute relating to testamentary or intestate succession to estates of Muslims and the substantive law applicable in the High Court in such disputes. Section 47 makes it clear that the High Court has jurisdiction to entertain any application and determine any dispute



under the LSA [Law of Succession Act]. However, by section 48(2) the jurisdiction of the High Court is not exclusive as Kadhi's Courts have also jurisdiction to entertain disputes relating to the estate of deceased Muslims. However, if the High Court assumes jurisdiction to the estate of a deceased Muslim, then by virtue of section 2(3) [of the Law of Succession Act], the law applicable in the High Court as to the devolution of the estate is the Muslim law and not the LSA. As an example, disputes relating to the validity of a will made by a Muslim and the ascertainment of heirs and shares of each will be determined in accordance with Muslim law. In *Saifudean Mohamedali Noorbhai v. Shehnaz Abdehussein Adamji*, Mombasa Civil Appeal No. 142 of 2005 (unreported) this Court said in part:

'Kenya Courts have held in past judgments that every litigant of whatever religious persuasion, has the option of going directly to the High Court, and a Muslim is not necessarily restricted to the jurisdiction of the Kadhi's Court'

However, by virtue of section 2(4) LSA, the law relating to the administration of the Estate of the deceased Muslim is the one stipulated in Part VII of the Act, that is, sections 44-95 in so far as those provisions are not inconsistent with Muslim law."

36. In my view, the Citors, having elected to file this cause before the High Court, are before a Court with jurisdiction. By filing this Citation in the High Court, the Citors have essentially declined to submit to the Kadhi's Court. That being the case, they can't be forced to have their dispute adjudicated by the Kadhi's Court. The High Court must, therefore, consider their Citation and determine it. When hearing and determining this matter I must, however, be governed by Muslim law in respect of inheritance since the deceased was a Muslim.
37. The objection to the jurisdiction of this Court is, therefore, without merit and must fail.
38. Having held that I have jurisdiction, I must next determine what orders ought to be issued.
39. The Citors and the 2nd and 4th Citees have accused each other of intermeddling with the estate of the deceased. The 2nd and 4th Citees averred that the Citor collected rent from the properties of the deceased without having first obtained a grant. From my perusal of documents, it is evident that the impugned action was pursuant to the orders of Hon Kadhi that allowed the said Act. In my circumstances, I am unable to fault the Citors.
40. What of the 2nd and 4th Citees? The Creditors allege that they control a company called BICO Ltd. and that they haven't accounted for dividends accruing from the said company. Although these allegations are serious, they have not been attested. In essence, they are mere allegations at this point. Nothing can turn on them.
41. What orders should be issued then? The vast estate of the deceased must be administered without further delay; otherwise, it will be wasted. Since the Citors come from one house, it will not be fair to leave the other house out, more so as no good reason has been given for their exclusion. In succession matters, just like with all other areas of law, justice must not only be done; it must be seen to be done. The Court must, therefore, strike a balance and exercise its undoubted jurisdiction under section 66 of the Law of Succession Act judiciously.
42. Thus, in this matter, I must give both houses an equal chance to administer the estate and complete the administration under the watchful eyes of the Court.
43. In the circumstances, I hereby directed the Citors, Mohamed Salim Balala and Taufiq Salim Balala and the 2nd and 4th Citees Salah Salim Balala and Abdalla Salim Balala to petition for letters of administration intestate in this Court within 30 days of the date hereof.



44. This being a family matter, parties shall bear their own costs.

45. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF SEPTEMBER 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Ms Ndegwa, for the Citors;

Mr Aziz, for the 2nd and 4th Citees; and

Arthur - Court Assistant.

