



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 2326 OF 2003

IN THE MATTER OF THE ESTATE OF HASSAN KIMANI BIN CHEGE (DECEASED)

HASSAN KIMANI SHABAN.....1ST APPLICANT

KHADIJA NJOKI SHABAN.....2ND APPLICANT

VERSUS

HASSAN SHABAN KIMANI.....1ST PROTESTOR

ZUHURA WAITHERA SHABAN.....2ND PROTESTOR

RULING

1. Mr Ojienda for the administrators, Mr Rombo for the 1st house, and Zuhura Waithera Shaban asked the court to determine the question:

“Which law, Sharia or the Law of Succession Act, will apply to the estate of the deceased?”

The parties filed written submissions on the question.

2. The background of this case is that, the deceased Hassan Kimani Bin Chege died intestate on 13th June 1958. He left his first wife Amina Mumbi Kimani with whom he has a son Shaban Hassan. Amina Mumbi Kimani died on 19th December 1999. The deceased's second wife was Wanjiro Hassan. Her children were six. They included Zainabu Njoki Kimani and Mariam Njoki Karanja.

3. Shaban Hassan petitioned for the grant of letters of administration intestate and obtained a grant. Zainabu Njoki Kimani and Mariam Njoki Karanja filed a separate cause seeking a grant. They cited Shaban Hassan. Subsequently, the two matters were consolidated. The earlier grant was revoked, and on 3rd February 2006 a joint grant was issued to the three. The three died before the grant had been confirmed.

4. The late Shaban Hassan left two widows: Mariam Wambui Shaban and Khadija Njoki Shaban. Mariam Wambui Shaban got 7 children and Khadija Njoki Shaban got six children.

5. The deceased's estate comprised Dagoretti/Riruta/295. Zuhura Waithera Shaban stated that Dagoretti/Riruta/17/B7 was also part of the deceased's property.

6. There is no dispute that the deceased was a Muslim, and so were all the members of his family.

7. When Shaban Hassan died he had left a Will in which he had denied the paternity of five of the children. He had not provided for them in the Will. A case regarding his succession was filed before the Kadhi in **Milimani Commercial Civil Case No. 160 of 2007**. In a judgment delivered on 5th June 2009, the Kadhi Court determined that the Will was null and void as it would always be the cause of enmity and hatred amongst the beneficiaries if the five were not provided for, and because it contradicted the general rules of the law of succession. The

decision has neither been reviewed nor successfully appealed against.

8. In **Milimani Succession Cause No. 377 of 2009 Estate of Shaban Hassan**, a joint grant was issued on 21st November 2019 to Hussein Kuria Shaban, Zuhura Waithera Shaban, Hassan Kimani Shaban and Khadija Njoki Shaban in order for them to represent the interests of their late father in the instant cause. On 21st November 2019 a further order was made to issue the same four with letters of administration intestate in respect of the deceased herein. They were then asked to apply for the confirmation of the grant. Hussein Kuria Shaban and Zuhura Waithera Shaban were from the first house of Shaban Hassan. Hassan Kimani Shaban and Khadija Njoki Shaban were from the second house.

9. Hassan Kimani Shaban and Khadija Njoki Shaban filed summons dated 17th January 2020 for the confirmation of the grant. Their distribution proposal was on the basis that the deceased was a Muslim and that under **section 2(3) and (4) of the Law of Succession Act (Cap. 160)** the provisions of the Act do not apply to the estate, and therefore that the estate was governed by Islamic law.

10. Hassan Shaban Kimani protested. He stated that he was the firstborn son of Shaban Hassan. His case was that the entire estate be shared equally between the two houses. He was from the first house. Zuhura Waithera Shaban was a daughter from the 1st house. Her case was that the estate should not be shared in accordance with Islamic law, because, if that is done, four children from the second house would not benefit as they were born out of wed lock. She named them. She further asked that rental income from the properties be first accounted for by the second house and be distributed between the two houses. Thereafter the properties be shared equally between the two houses.

11. Mr Ojienda submitted that, now that it was undisputed that the deceased died a Muslim his estate should be governed by Islamic law as provided by **section 2(3) and (4) of the Act**, and cited a number of decisions to support his client's case. Mr Rombo's submission was that the only fair way to deal with the estate, now that the deceased left two houses, was to share it in accordance with **section 40 of the Act**. This was because if Islamic law was resorted to, the four illegitimate children in the second house of Khadija Njoki Shaban would not inherit. That was the same position taken by Zuhura Waithera Hassan.

12. On the question that step children (or illegitimate children) cannot benefit under Islamic law, reliance was placed on **Chelanga –v- Juma [2002]IKLR 339** and **In the Matter of the Estate of Robert Napunyi Wangila (NRB HCSC No. 2203 of 1999)**.

13. Before dealing with the question regarding which law should apply to the estate of the deceased, it is material to point out that the Kadhi's decision that nullified the Will of Shaban Hassan and asked that the alleged illegitimate children of his second wife do benefit, was appealed against by Khadija Njoki Shaban. The appeal was filed on 1st August 2009, but it appears that it was abandoned. This is because the same Khadija Njoki Shaban (together with Hassan Kimani Shaban) are the ones who applied to have the grant confirmed; the grant that had been issued jointly to them and the first house of Shaban Hassan. But more important, now that there was a judgment of a competent court, it binds the parties and binds this court. The question of the Will does not arise, and also the question of illegitimate children not being provided for.

14. It is also material to point out that the estate in question is that of the deceased Hassan Kimani Bin Chege, and there is no dispute that he died intestate.

15. **Section 2(3) and (4) of the Act** provides as follows:-

“(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 his 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.”

16. The deceased died instate, and was at the time of his death a Muslim. Under **section 2(3) of the Act**, the law governing his estate shall be Muslim law. The Court of Appeal in **Ismail Osman Adam (Deceased) Noorbanu Abdul –v- Abdulkader Ismail Osman, Mombasa Civil Appeal No. 285 of 2009** stated that –

“However, if the High Court assumes jurisdiction relating 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 Law of Succession Act. 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 the Muslim law.....”

17. This determines the question posed by the parties. The estate of the deceased shall be distributed in accordance with muslim law.

18. The parties can now take a hearing date for the application dated 17th January 2020 for the confirmation of the grant issued herein.

DATED and SIGNED this day of MARCH 2022

A.O. MUCHELULE

JUDGE

DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 28TH DAY OF MARCH, 2022

A.O. MUCHELULE

JUDGE