



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Abdalla & 6 others v Ali & another (Succession Cause
666 of 2011) [2022] KEHC 3153 (KLR) (20 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 3153 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 666 OF 2011**

MW MUIGAI, J

JUNE 20, 2022

**IN THE MATTER OF THE ESTATE OF JUMAA ABDALLA
MUNYU ALIAS JUMAA ABDALLAH (DECEASED)**

BETWEEN

HALIMA JUMA ABDALLA 1ST APPLICANT
ABDALLAH JUMAA MUNYU 2ND APPLICANT
FATUMA JUMAH ABDALLAH 3RD APPLICANT
MARIAM JUMA 4TH APPLICANT
SWALEH JUMA 5TH APPLICANT
BAHATI JUMA ABDALLA 6TH APPLICANT
MWANAISHA JUMA ABDALLA 7TH APPLICANT

AND

AMINA ALI 1ST RESPONDENT
MOHAMED MATIKU KHAMISI 2ND RESPONDENT

RULING

BACKGROUND

1. The deceased herein, Jumaa Abdalla Munyu died on 27th March, 1993 in Muputi, Machakos County.
2. The 1st and 2nd Respondents herein, Mohammed Matiku Khamisi & Amina Ali nephew and niece to the deceased, petitioned for Probate of written Will in the estate of the deceased herein on 8/8/2011. According to the Respondents, the deceased herein died leaving a valid Will annexed to Petition for Probate dated 12th December, 1992.



3. In support to the Petition, Consent to Making of Grant dated 30th April 2012, the following beneficiaries signed consents before Commissioner of Oaths :-
 - a. Mariamu JumaaID.NO. 10580908
 - b. Halima JumaaID.NO.13424213
 - c. Mwanaisha JumaaID.NO.21192254
 - d. Ibrahim JumaaID.NO.0196687
 - e. Fatuma JumaaID.NO. 0535538
 - f. Bahati JumaaID.NO.7408038
 - g. Abdulla JumaaID NO. 0320303
4. The Petition with Will annexed was gazetted on 31st May 2012 and Grant of Probate with Written Will was issued to the Executors of the Will; Mohammed Matiku Khamisi & Amina Ali on 12th July 2012.
5. The suit was dismissed for want of prosecution on 28/6/2007 and reinstated on 7th October 2020 with a new grant to be issued.
6. The Grant of Probate in the estate of the deceased herein was issued on 11th September, 2020 to Mohammed Matiku Khamisi and Amina Ali.
7. Halima Juma Abdalla filed Protest to Confirmation of grant on 9/10/2020 and objected to the Grant of Probate issued on grounds, that signatures of beneficiaries' consents to grant of probate were forged, the Executors did not take steps to have the grant confirmed and subsequently the leasehold to Machakos Town Block 11/121 expired.
8. Halima Juma Abdalla with consents of siblings moved to the Kadhis Court on 6/7/2020 for letters of administration intestate and cited the Petitioner to propound the Will that was alleged to have been executed by the deceased.
9. Halima Juma Abdalla is opposed to the grant of Probate of the Last Will and Testament of Jumaa Abdalla Munyu as it is contrary to dictates of Islamic law of inheritance and Amina Ali & Arua Ali have equal shares to the legitimate heirs and sought the matter to be referred to Kadhi Court.
10. Amina Ali, executor by Replying Affidavit to the Protest sated that there was no fraud in obtaining the Grant of Probate, the deceased exercised his testamentary freedom under the law and Will and handed the Will to her as he also appointed her one of the executors of his estate.
11. By letter dated 18/12/2020 by advocates for 1 of the Executors, Mohammed Madika Khamis intimated that the said Executor renounced his appointment as Executor even before the filing of Petition for Grant of Probate and as such is not privy to any claim protest or intermeddling of deceased's estate.

Summons Dated 2/08/2021 filed On 12/8/2021

12. The 1st to 7th Applicants Summons is premised on Section 2(3), 2(4) of the *Law of Succession Act* and Rule 24 of the *Probate and Administration Rules*. The Applicants have sought the following orders:-
 1. That the Hon. Court be pleased to stay the confirmation of the grant issued herein on 11th September, 2020 pending the hearing and determination of this Application.



2. That this Hon. Court to issue an order requiring the Respondents to bring into this Court the Will purported to have been executed by the deceased herein for purposes of being examined in respect to the said Will in open Court.
 3. That this Hon. Court to have the Respondent to propound the said Will.
 4. That this Hon. Court to order that the said Will is invalid according to Islamic Law and that consequently the deceased herein died intestate.
 5. That the cost of this application be provided for.
13. The Summons is based on grounds that the deceased at the time of his death was a Muslim hence the said Will must be propounded to assess whether it conforms to the Islamic Law on Wills. The Applicants assert that unless the Hon. Court issues the orders sought, the estate is likely to suffer irreparably as the 1st Respondent is likely to apply for the grant fraudulently, unfairly, illegally and inconsistently with the law upon which it was issued.
14. The Summons is supported by the affidavit of the 1st Applicant sworn on 2nd August, 2021. She averred that she is a daughter of the deceased herein hence competent to swear the affidavit. According to the 1st Applicant, the deceased herein died intestate on 27th March, 1993 and survived by herself and the following children namely;
- a. Abdalla Jumaa Munyu-Son
 - b. Fatuma Jumaa Abdallah-Daughter
 - c. Mariam Juma-Daughter
 - d. Swaleh Juma-Son
 - e. Bahati Juma Abdalla-Daughter
 - f. Mwanaisha Juma Abdalla-Daughter
 - g. Ibrahim Jumaa Abdalla-Son(Deceased)
 - h. Fadhili Jumaa Abdalla-Son(Deceased)
15. She averred that upon perusal of the file, she came across a Will dated 27th March, 1993 and marked as “HJA8” purported to have been executed by the deceased herein and appointing the Respondents as executors. On the advice of their advocate, the Applicants believe that the Will is invalid for the following reasons;
- i. The testamentary freedom in Islam is not absolute,
 - ii. That by dint of the deceased having been a Muslim at the time of his death, his estate must be devolved according to Islamic law.
 - iii. That the said Will purports to deal with more than 1/3 of the deceased’s property contrary to Islamic Shariah.
 - iv. That the said Will purports to bequeath to Amina Ali and Arau Ali (nieces of the deceased) the same shares as the wife and children of the deceased herein contrary to Islamic Shariah as they are neither Dhaw-u’L-Fara’id, Asaba nor Dhaw-u’l Arham(legitimate heirs).



- v. That without prejudice to the foregoing, the wife and children of the deceased were neither informed nor did they consent to the said grant purported to have been requested vide the impugned Will herein.
16. According to the Applicants, on the advice of their advocate, the 2nd Respondent vide a letter dated 18th December, 2020 marked as “HJA9” indicated that he had voluntarily and orally renounced his executorship to the estate of the deceased prior to the petition for grants of administration. 2nd Respondent averred that by dint of paragraph 7 of the Ruling of this Court, the 2nd Respondent is still regarded as an executor of the impugned Will until his letter expressing his renunciation forms part of the record in this Court.

1st Respondent’s Replying Affidavit

17. In opposition to the Summons, vide her replying affidavit sworn on 18th October, 2021, the 1st Respondent averred that the deceased died testate and exercised his testamentary freedom as per Section 5 of the *Law of Succession Act*. According to the 1st Respondent, the deceased never hinged his testamentary freedom on any religion and none is to be imputed as he was of sound mind, of sound judgment and in good health hence the desire to read and interpret the Will in accordance with the Islamic law is akin to taking away the testamentary freedom of the deceased.
18. 1st Respondent averred that the Applicants should be challenging the validity of the Will and whether its form and substance complies with the law and not to interpret the Will as per a religion which the deceased never expressed in his Will hence the Application herein must fail and the confirmation of the Grant proceeds and distribution of the estate as per the Will executed on 12th December, 1992. According to the Respondents, the application is misplaced, bad in law, ill-founded and res judicata.

1st Applicant’s Supplementary Affidavit

19. In response to the 1st Respondents averments, the 1st Applicant averred that it is an uncontroverted fact that their father died a Muslim and was buried as so. According to the 1st Applicant, by dint of Section 2 of the *Law of Succession Act* the devolution of the estate must be devolved according to Islamic law. According to the 1st Applicant, Section 5 of the *Law of Succession Act* is not applicable and is inconsistent to Section 2(3) of the same *Act*. According to the 1st Applicant, the testamentary freedom is not absolute to a person who died a Muslim in Kenya after 1st January, 1991 but subject to Islamic Law. The 1st Applicant averred that whether the Will is invalid or not should be the first issue for determination.

Applicants Submissions

20. On behalf of the Applicants, the following issues were proposed for determination;

Whether the deceased died leaving a valid Will according to Islamic Law

21. Reliance was placed Section 2(3) of the *Law of Succession Act* that provides as follows:-

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. See *Etyang J. Chelanga v Juma* KLR (2002) Vol.2.



22. Subsection (4) provides:-

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.

23. Reliance was also placed on *Minhaj et Talibin*, a manual of Islamic Law according to the school of Shafii by Nawawi[1914]as translated by H.C Howard, it is stated at page 260261 that;

“testamentary disposition may not exceed a third of the estate; and those made in contravention of this precept of the law, may be reduced to the portion which may be disposed of, upon the application of the legitimate heir. If he declares his approval of the disposition, it is effective, whatever it amounts may be; but according to one jurist it is then considered as mere donation upon the part of the heir, and the legacy itself remains void for as much as exceeds the third.”

24. According to the Applicants, more than 1/3 of the properties owned by the deceased was devolved by the Will contrary to the Islamic Law. Reliance was placed on Musyoka J. in his treatise ‘Law of Succession’ in the case of *In Re Estate of IOI (deceased)* 2019 eKLR.

25. It is submitted that the Applicants who are children of the deceased herein did not consent to the shares devolved. According to the Applicants, the 1st Respondent and her sister Arua Ali who are not children of the deceased being given same share of the estate as the Applicant is contrary to Islamic Law. It is submitted that the impugned Will is invalid and contrary to the rules of Islamic Law hence the deceased died intestate.

What is the acceptable mode of distribution applicable to the estate herein

26. According to the Applicants, the Holy Quran in Surah Nisah 4:11 states that only children of the deceased, his parents and widow are ranked superior over the other classes of heirs to inherit the deceased’s estate hence the 1st Respondent and her sister who are not primary heirs of the deceased herein ought not to inherit.

27. In conclusion, the Applicants submitted that the deceased left an invalid Will hence;

- i. The deceased died intestate
- ii. The estate of the deceased should be distributed according to Islamic law and not as per the impugned Will
- iii. The administrator to be appointed should be from the children of the deceased and not the 1st Respondent who has no legitimate interest in the estate herein as she is not a primary heir according to Islamic Law.

Respondents Submissions

28. On behalf of the Respondents, it is submitted that the application is an attempt to delay the Confirmation of the Grant as no illegality on the form and substance of the Will has been raised to warrant propounding the aforesaid Will.

29. According to the Respondents, the application is res judicata in that the Court’s Ruling made it clear that ‘Even though the parties profess Muslim religion, there will be no prejudice since the law applicable



will be the Muslim law pursuant to guidelines provided for in Section 2(3) and 48(2) of the [Law of Succession](#) when the parties will be canvassing the issue of the confirmation and distribution of the estate of the deceased.

30. Reliance was placed on the case of [Saifudean Mohamedali Noordhai v Shenal Abdebusein Adanji](#) (2011) eKLR where the Court stated that:-

“Kenyan 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.”

31. The Respondents urged the court to decline the application and direct the parties to file their respective proposals for distribution. According to the Respondents, they rely on the contents of the Will of the deceased as the mode of distribution.

Determination

32. I have considered the Summons Application, pleadings and as well as the submissions and cases relied upon by parties.

The issues that emerge for determination are as follows;

1. Is the deceased’s estate testate or intestate?
2. What is the applicable law?
3. Which Court should hear and determine the matter?

Is the deceased’s estate testate or intestate?

33. The deceased left a Last Will & Testament marked AMA1 annexed to the Petition of Grant of Probate with consents to issuing a grant filed by Executors on 8/8/2011. Despite gazettement, the formal nationwide notice to interested parties to file Objection and/or contest issuance of grant the grant of Probate was issued in the absence of any objection at the time.
34. Since then, the beneficiaries have contested the Will of the deceased (only in terms of distribution and not validity of the Will), the signatures of consent to making a grant and the distribution as per the Will being contrary to Islamic dictates of inheritance. They have sought distribution of deceased’s estate as an intestate estate. The jury is still out there, the matter of the deceased’s estate is not heard and determined yet as the Applicants further contest the choice of forum, the High Court and choice of law ; the [Law of Succession Act](#).

What is the applicable law?

The Preamble of [LSA](#) provides;

An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons; and for purposes connected therewith and incidental thereto

35. The Summons is premised on Section 2(3) of the [Law of Succession Act](#) that provides:-

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.

36. Further under 2 (4) of the Act provides:-

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.

37. From the above excerpts the Law of Succession Act is applicable in both High Court and Magistrates Court and dint of Section 47 & 48 of the Act, on administration and distribution of deceased's testate and intestate estates. The Law of Succession also provides with regard to estates of deceased persons who are Muslims and/or profess Islam faith, then vide Section 2(3) & 4 of LSA, the LSA is not applicable. The appropriate law is Islamic Law.

Which Court should hear and determine the matter?

38 Although, the High Court's jurisdiction is both original and appellate and spelt out in Article 165 CoK 2010;

Article 170 (5) of CoK 2010 provides;

the determination of questions of Muslim Law relating to personal status, marriage, divorce or inheritance proceedings in which all parties profess the Muslim religion shall submit to the jurisdiction of the Kadhi Court.

39. The appropriate forum even if parties may approach either High Court or Kadhis Court, to hear and determine the testate and intestate estates' for parties who are Muslims is the Kadhi Court as the Court of 1st instance and if any appeal is filed thereafter it is to the High Court.

40. With regard to stay of proceedings sought the application may be granted on the following considerations;

Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000 thus;

...whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the *prima facie* merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”.

41. The instant Application herein is bad in law in seeking to stay proceedings in the High Court pending hearing and determination of the same matter in the Kadhis Court; it is contrary to the hierarchy of Courts, the issues is either the Court is clothed with requisite jurisdiction or not. If not as the Court of 1st instance, as in the instant case; the remedy is not to stay proceedings but to withdraw/dismiss/ transfer the matter in this Court and parties move to the Kadhi Court for hearing and determination of the matter.



Disposition

42. The Application dated 2/8/2021 filed on 12/8/2021 is partly granted with regard to the matter being heard by Kadhi Court and partly dismissed specifically with regard to stay of proceedings.
43. The matter in this Court is hereby transferred to Kadhi Court for hearing and determination.
44. Each party to bear its costs.

It is so ordered

DELIVERED, DATED AND SIGNED IN OPEN COURT AT MACHAKOS THIS 20th DAY OF JUNE, 2022 (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

