



**NAS v IMR & 2 others (Civil Appeal E045 of 2020)
[2022] KEHC 15768 (KLR) (Family) (28 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15768 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

CIVIL APPEAL E045 OF 2020

AO MUCHELULE, J

NOVEMBER 28, 2022

IN THE MATTER OF THE ESTATE OF AIM (DECEASED)

BETWEEN

NAS APPELLANT

AND

IMR 1ST RESPONDENT

AH 2ND RESPONDENT

KYA 3RD RESPONDENT

(Being an appeal from the Judgment of Hon. S.H. Omar (Deputy Chief Kadhi) in Nairobi Kadhi's Court Succession Cause No. 27 of 2019 delivered on 2nd October 2020)

JUDGMENT

1. The deceased AIM was the son of the 1st respondent IMR and the 2nd respondent KYA. He died during the Ethiopian Airlines Flight ET 302 crash in Bishofu in Ethiopia on 10th March 2019. He left three children. Hon. Sukyan Hassan Omar, Deputy Chief Kadhi in Nairobi Kadhi's Court Succession Cause No. 27 of 2019 on 16th July 2019 issued the 1st and 2nd respondents a grant of letters of administration which he confirmed on 13th October 2020, thereby distributing the estate of the deceased to them, the children and to the 3rd respondent AH whom he found to be the only widow of the deceased. The appellant NAS had cross-petitioned for the grant and had sought that the grant issued to the 1st and 2nd respondents be revoked as she was the one entitled to the grant. According to the 1st and 2nd respondents the deceased had married the appellant but that had divorced her by the time of his death. He had subsequent to the marriage married the 3rd respondent. The Deputy Chief Kadhi heard the dispute, the appellant saying that she had never been divorced and was therefore the



one entitled to the grant and that she was a beneficiary. The Kadhi found that she had been divorced and therefore not a beneficiary of the deceased's estate.

2. These are the findings that aggrieved the appellant who filed the present appeal. In the Memorandum of Appeal dated October 6, 2020 the following were the grounds:-

- “1) That the learned Kadhi erred in fact and in law finding that the Appellant had been divorced by the deceased;
- 2) That the learned Kadhi erred in fact and law finding that the 3rd Respondent was legally married to the deceased;
- 3) That the learned Kadhi erred in fact and in law in finding that the 1st and 2nd Respondents are the lawful administrators of the estate of the deceased;
- 4) That the learned Kadhi erred in fact and in law in finding that the Appellant is not a beneficiary to the estate of the deceased;
- 5) That the learned Kadhi erred in fact and in law in finding that the Appellant is not entitled to be administrator of the estate of the deceased; and
- 6) That the learned Kadhi erred in fact and in law in failing to revoke the Grant of Letters of Administration issued on 1 July 6, 2019.”

3. The appellant sought that the judgment, decree and consequential orders be set aside and the appeal be upheld. She was represented by Mr. Modi.

4. The 1st and 2nd respondents opposed the appeal, and were represented by Mr. Ali. The 3rd respondent was represented by M/s Wadeu. She opposed the appeal. During the hearing of this appeal, this court had the benefit of Hon. Mohamed Abdalla Kutwa (Kadhi, Machakos Law Courts) and Hon. Mohamed Garama Randu (Kadhi, Upper Hill Kadhi's Court) whom the Hon. Chief Kadhi had appointed to be assessors. I am quite grateful to them.

5. This is a first appeal. The parties are entitled to having the whole of the evidence tendered in the trial court being subjected to fresh and extensive scrutiny and to having this court draw own conclusions on the evidence, while keeping in mind that the trial court saw and heard the parties and their witnesses, an advantage that this court did not have (*Selle & another -v- Associated Motor Boat Co. Ltd & others* [1968]EA 123). This court has power to affirm or reverse the findings of the trial court. Any material errors of fact or law should be examined to see whether they adversely influenced the decision subject of the appellant's appeal.

6. The evidence showed that the deceased and the appellant got married on November 28, 2010 under Islamic Law. Their relationship was therefore governed by Islamic law, considering that the deceased died a muslim. Section 2(3) and (4) of the *Law of Succession Act* (Cap. 160) 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.”

7. The first issue for determination is whether the deceased had divorced the appellant by the time he died. It was common ground that by the time the deceased died the appellant had moved from the matrimonial home to another house. The deceased was living in Riyadh in Saudi Arabia where he was apparently working. There was disagreement between the two, although the appellant says she had his permission to move to a new home; that he had in fact come to Kenya and visited her for about a month. She could, however, not recall when the two had last communicated, prior to his death. The appellant insisted that the two were still married. On the other hand, there was the evidence of PW 4 Abdulla Ratib Abdulla who stated that he was the deceased’s friend. He testified that when the deceased last visited, he narrated to him the challenges he was having with the appellant who had left their home without authority and was living elsewhere. The deceased told PW 4 that he had divorced the appellant and had come to marry the 3rd respondent. He did not know the house the appellant had moved to and it took PW 4 to show him. He wanted to go and collect his clothes. The appellant knew he had come to marry and this made her quite unhappy. When they went to the house the appellant said he had sold his clothes, but upon plea she gave the clothes. Soon thereafter, the deceased married the 3rd respondent and left Kenya. The 2st respondent, PW 3 YAO, PW 1 MIMI and the 3rd respondent each testified that the deceased had declared to each that he had divorced the appellant. The trial court considered all this evidence and concluded that the deceased had indicated to all these people that he had divorced the appellant to her knowledge.

8. It is common ground that in Al-Fatawa Al-Almagriyah it is stated that:-

“A person asks a man; Have you divorced your wife? And he answers; “Yes”, she is divorced.”

It follows that in Sharia law, a man can validly divorce his wife by pronouncing “talak” to her, but he can validly divorce her through the phone or in the absence of witnesses or in her absence provided he categorically indicated that he has divorced her. The divorce takes effect immediately it is pronounced and when the information gets to the wife. The trial court accepted the evidence that the deceased had by the time of his death divorced the appellant. I have no reason to depart from the finding, after I have considered the recorded word. The decision in *Ghansi Bibi –v- Ghulam Dastagir* [1968] 1 MYS LJ 566 supports the finding.

9. Since the court found that the applicant was divorced, and in her own words she had completed the waiting period (Iddah), she was not a beneficiary to the estate of the deceased under Islamic law.

10. The next question is whether the 2nd respondent was married to the deceased. The respondent testified that she got married to the deceased after he declared to her that he had divorced the appellant. PW 1, PW 2, PW 3, PW 4, PW 5 and PW 6 all gave evidence of the marriage. A marriage certificate was produced to evidence the marriage. Ideally, the certificate was sufficient proof of the fact of marriage (*In the matter of N.N.S. –v- S.A.M.* [2002]eKLR). However, it was the appellant’s contention that the marriage was not valid because it was performed by a person not licensed, and that the certificate was not properly completed and/or executed. It was submitted for the respondents that –

“Islamic marriage is a sacrosanct contract and an act of Ibada. Islamic Sharia has to put limitation on capacity that only a gazetted Imam or registrar is the only one empowered to solemnize an Islamic marriage. It is not uncommon for registrar and even Kadhis for respect of some scholars though the said scholars not being assistant registrars for marriages or even Kadhis to accord them their respect and allow them to solemnise a marriage



11. Indeed, the *Marriage Act* appears to acknowledge the fluid situation in which the registrar of marriages may authorize people below the Kadhi to solemnize Islamic marriage. Section 49 of the Act provides as follows:-

- “(1) A marriage under this Part shall be officiated by a kadhi, sheikh or imam as may be authorised by the Registrar and celebrated in accordance with Islamic law.
- (2) A person authorised to officiate at a marriage under this Part shall record the details of a marriage under this part in the prescribed form and shall deliver the record to the Registrar for the registration of such a marriage.
- (3) Any provision of this Act which is inconsistent with Islamic law and practices shall not apply to persons who profess the Islamic faith.”

12. The appellant claimed that the 3rd respondent had no capacity to marry the deceased because she was still married. However, the respondent stated that she was herself divorced and was able to confirm this to the officials who then married her to the deceased. The lower court believed her. I accept what she had to say. Marriage is an act. The court found that she married the deceased. The certificate was only evidence of the occasion.

13. The last question is whether the court was right in its declaration of the beneficiaries, and in its exclusion of the appellant as a beneficiary. The appellant having been found to have been divorced by the deceased, she ceased to be beneficiary of the estate. That left the respondents as the beneficiaries. The grant to the 1st and 2nd respondents was with the consent of the 3rd respondent as the widow. It follows that both the grant and the certificate of confirmation were properly issued, and the bid to revoke the grant was not legally tenable.

14. In conclusion, the appeal has no merits and is dismissed with costs.

DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 28TH DAY OF NOVEMBER 2022.

A.O. MUCHELULE

JUDGE

