



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1550 OF 2019

IN THE MATTER OF THE ESTATE OF HASSAN SAID BARUD (DECEASED)

SADIYA A. SALAH.....PETITIONER/APPLICANT

VERSUS

KHADIJA ROBA GUYO.....RESPONDENT

RULING

1. The deceased Hassan Said Barud died intestate on 9th April 2019. He was a muslim. During his life, he married twice. He married the petitioner/applicant Sadiya A. Salah and got children Fatuma Samira Hassan Said, Sahra Amina Kassin Said, Mohamed Hassan Said, Abdi Hassan Said and Nasra Leila Hassan Said. They are all adults. He then married the respondent Khadija Roba Guyo who bore the minors Jamila Hassan Said and Said Hassan Said. There is no dispute that the petitioner was divorced by the time the deceased died. She filed this petition on 3rd December 2019 and caused a citation to issue to the respondent to accept or refuse letters of administration intestate. She presented the petition as “a widow” of the deceased. It is, however, clear that she is not a widow of the deceased, having been divorced before the deceased died.

2. Subsequent to the petition was the present chamber summons dated 30th September 2020 by the applicant, under **rules 49** and **73** of the **Probate and Administration Rules**, in respect of the only asset of the deceased. This is plot No. 72 located in Eastleigh Section II in Nairobi. It is a developed property that houses the residence of the respondent and her family, and also rented houses. The applicant sought that the respondent be restrained from collecting rent, intermeddling with, further construction or otherwise interfering with it pending the hearing and determination of the petition. The applicant further asked that the court does appoint her or an agent to collect monies generated from the premises pending the resolution of the petition. The respondent collects and applies the rent for her upkeep and that of her children. Then there are utilities to be paid. It does appear not disputed that some improvement has since been done to the premises. The petitioner considers this improvement to be illegal.

3. It would also appear not disputed that following the deceased’s death, the two houses were made to sit and discuss the estate. Over and above the premises, the deceased had left a motor vehicle KBQ 559B which they agreed to sell and the proceeds were shared in accordance with Sharia law. The parties agreed to commission the valuation of the premises after which they would sell it and share the proceeds in the same manner. It was while this was pending that the applicant filed the petition.

4. The respondent opposed the application on various grounds;-

a. that she was the only widow of the deceased and the applicant was the deceased’s divorced wife, therefore that the applicant had no capacity to bring the petition or the application;

b. that this court lacks the jurisdiction to hear and determine this petition and application; that since the parties were muslims the only court with jurisdiction was the Kadhis’ Court;

c. that the application was not merited as she was in residence collecting and using the rent in her capacity as the widow of the deceased, and that the proceeds were hardly enough to sustain her; and

d. that the children of the deceased by the applicant were adults and beneficiaries who had not authorized the applicant to file the

petition and application, because the applicant was not herself the deceased's beneficiary.

5. Under **section 170(5)** of the Constitution and **section 5** of the **Kadhis' Courts Act (Cap. 11)**, a Kadhi's court has powers to hear and determine a dispute relating to inheritance in which all parties profess the muslim religion and submit to the jurisdiction of the kadhi's court. **Section 5** of the **Act** goes on to say that

“.....nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceedings which comes before it.”

6. In the submissions by the respondent in support of her notice of preliminary objection, it was argued that since the applicant and respondent were muslims and the dispute related to inheriting the deceased, the court with the jurisdiction to hear and determine it was the Kadhi's court. Reference was made to the decisions in **R.B. & R.G.U –v- H.S.B & A.S.B. [2014]eKLR** and **Ashraf Abdu Kassim –v- Karar Omar & 3 Others [2014]eKLR**. The other submission was that the applicant being divorced, had no capacity to bring the petition as she could not inherit the estate of the deceased. Lastly, she had no authority from her children to bring either the petition or the application.

7. The applicant chose to file her petition before this court. The petition was filed under the **Law of Succession Act (Cap 160)**. Under **section 66(a)** of the **Act**, the deceased having died intestate, preference would be given to the respondent to petition and get a grant in relation to the deceased's estate. The applicant, a divorced wife of the deceased, would have no capacity to petition in respect of this estate. If her children with the deceased were adults, then they would be involved in the petition under **section 66(b)** of the **Act** because they are beneficiaries. There is no evidence they commissioned the applicant to file either the petition or the application.

8. The complaints in the notice of preliminary objection that the applicant lacked capacity to file the petition, and that she did not obtain authority from her children to bring either the petition or the application are consequently merited.

9. More important, now that the deceased was muslim and his family are muslims, and the family having shared part of the estate under muslim law, under **Article 170(5)** of the Constitution and **section 5** of the **Kadhis' Courts Act**, it is the Kadhi's court that has the original jurisdiction to hear and determine the dispute. The High Court would not be the forum to resolve the dispute.

10. I made reference to **section 66** of the **Law of Succession Act** as forbidding the applicant from approaching this court for a grant in respect of the estate of the deceased. More appropriately, however, under muslim law, a divorced woman has no right to inherit property from the former husband (**Ramadhan Mustafa –v- Zulfa Ngasia Juma [2019]eKLR**). The woman would not have capacity to petition for the grant in relation to the estate of her late husband that she had divorced.

11. In conclusion, the preliminary objection is sustained. The petition and the application are struck out with costs.

12. I am grateful to Mr Wainaina for the applicant and Mr. Owino for the respondent for their written submissions which I have considered.

DATED and DELIVERED at NAIROBI this 24TH FEBRUARY 2021.

A.O. MUCHELULE

JUDGE