



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 35 OF 2016

AISHA BREK.....APPELLANT

VERSUS

AISHA MOHAMED NZAWA

SAADA SAIDRESPONDENTS

(An appeal from the Judgment of Hon. Salim S. Mohamed, Kadhi I, delivered on 26th October, 2016 in Malindi Kadhi Succession Cause No. 19 of 2013)

JUDGMENT

1. The appeal herein arises from a petition that was filed by Aisha Mohamed Nzawa who was the mother to the deceased. The said petition was filed in the Kadhi's Court in Malindi. She sought to be appointed as the administrator of the deceased's estate, determination of heirs and assets of the deceased, distribution of his assets according to Islamic Sharia and for any other relief the court deemed fit to grant in the interest of justice. In the said petition, the beneficiaries to the deceased's estate were outlined as:-

- (i) Aisha Mohamed Nzawa – mother
- (ii) Aisha Brek – wife
- (iii) Saada Said – wife
- (iv) Abdul Said – son
- (v) Samia Said – daughter
- (vi) SS [name withheld] son
- (vii) MS [name withheld] daughter

2. After the hearing of the case, the Hon. Kadhi appointed the deceased's mother, Aisha Mohamed Nzawa, to be the administrator of the deceased's estate.

3. The Hon. Kadhi also found that all the persons named in the petition filed on 28th November, 2013 were legal heirs to the deceased's estate and proceeded to distribute the said estate according to Islamic law.

4. The appellant herein was dissatisfied with the Kadhi's decision and filed a memorandum of appeal on 2nd November, 2016 raising the following grounds of appeal:-

- (i) That the Learned Kadhi erred in fact and in law by holding that the estate of the deceased (Said Abdulrahman Said) would be administered by only Aisha Mohamed Nzawa and by leaving out the lawful widow (appellant) herein or any of his two adult children;
- (ii) That the Learned Kadhi erred in fact and in law by giving a share to a person who was not a legal wife to the deceased and her illegitimate children without considering in whole the evidence on record;

(iii) That the Learned Kadhi erred in fact and in law by finding and granting shares to illegitimate children as beneficiaries of the deceased.

(iv) That the Learned Kadhi erred in fact and in law by failing to appreciate the evidence adduced during trial and the evidence on record before delivering his judgment and introducing his own new evidence which never came from the parties like Zahra Mahmoud Ali by referring to as her as (a.k.a) Saada Said;

(v) That the Learned Kadhi erred in fact and in law and misdirected him in law and in fact in suppressing evidence adduced by the appellant;

(vi) That the Learned Kadhi erred in fact and in law by holding that the Forensic report by the Directorate of Criminal Investigations was not evidence enough to be relied upon in determining whether the 2nd respondent was a legal wife or not and that the Honourable Kadhi failed to appreciate the evidence adduced before court by the appellant;

(vii) That the Learned Kadhi erred in fact and in law by delivering a judgment in favour of the 2nd respondent, a party who did not file any pleadings nor even the final submissions to the suit; and

(viii) That the Learned Kadhi erred in fact and in law by finding that the deceased's estate comprised of Kshs. 93,752.00 at Gulf Bank and Swiss Francs 18,000.00 being three months salary of the deceased paid to the widow immediately after his death for funeral arrangements.

5. The appellant's Counsel filed his written submissions on 14th March, 2018. The 1st respondent filed his on 9th May, 2018. The 2nd respondent filed no submissions. Ms Bakari Advocate from the law firm of Aboubakar & Mwanakitina Advocates informed this court that she had no instructions to represent the 2nd respondent on appeal.

6. Mr. Siminyu, Learned Counsel for the appellant stated that they had all along been serving the law firm of Aboubakar & Mwanakitina Advocates with the documents for this appeal. This court on perusal of the court file confirmed that indeed that was the position and that on 8th August, 2019 the said law firm was served with a hearing notice for 4th September, 2019. The law firm of Aboubakar & Mwanakitina Advocates never filed a notice to cease from acting for the 2nd respondent.

7. Further, the law firm of Aboubakar & Mwanakitina Advocates had on 10th November, 2016 filed grounds of objection on behalf of the 2nd respondent to the application dated 2nd November, 2016. They were thereafter served with the Record of Appeal on 17th January, 2019. This court therefore deemed the said law firm to be still on record for the 2nd respondent although they filed no documents on her behalf.

8. Counsel for the appellant submitted that the Hon. Kadhi erred by appointing Aisha Mohamed Nzawa (1st respondent) who is the deceased's mother as the sole administrator of the deceased's estate to the exclusion of the appellant and the deceased's 2 grown up issues. It was contended that the deceased only left the appellant as the beneficiary of his estate.

9. With regard to the 2nd respondent, it was submitted that she is known as Zahra Muhmoud Ali who was born in Somalia as per the copy of her passport availed in court. In making reference to a marriage which was said to have been officiated in Coventry, in the United Kingdom, Mr. Siminyu pointed out that the person who was said to have been married was Sadaa Said Abdalla as per the copy of the marriage certificate which was filed in court. It was further submitted that the dependents of the deceased were declared by the court in Switzerland to be his descendants. These were the appellant, Karim Gathoni a child born out of wedlock, Samira Said and Abdulrahmaan Said. It was stated that the marriage certificate was subjected to forensic examination and the signature on it purporting to be the deceased's was not by his hand. It was further stated that the Hon. Kadhi confirmed that the said certificate was void but still went ahead to regard the 2nd respondent as a beneficiary to the deceased's estate. It was submitted that the appellant had adduced evidence that polygamy is not permitted in Switzerland.

10. Counsel for the appellant submitted that the 2nd respondent admitted in cross-examination that the deceased used to call her children bastards, which means illegitimate children. Mr. Siminyu pointed out that such children are never allowed to inherit under Islamic law.

11. He also submitted that in the year 2001, the deceased had a wife by the name Gertrude whom he divorced in the year 2004. His divorce was confirmed in the year 2006, yet the 2nd respondent claimed to have been married by the deceased in the year 2001.

12. It was indicated that the deceased married the appellant on 4th December, 2007. An entry on their marriage certificate showed that he was divorced at the time he contracted a marriage with her.

13. Counsel for the appellant posited that the 2nd respondent did not disclose if she was the one who was divorced by the deceased. He referred to the decision **In the matter of the Estate of Ishmael Juma Chelanga (deceased)**, 2002 (eKLR) where the High Court held that the deceased's illegitimate children could not inherit his estate.

14. It was indicated that the 2nd respondent did not produce any documents to establish that the deceased used to support her children by sending her money through Western Union and Telegram. Mr. Siminyu concluded his submissions by stating that the 2nd respondent was a fraudster who produced a passport which bore a different name from that reflected on the marriage certificate she was relying on. The passport showed she was born in Somalia yet in her evidence, she said she was born in Kenya. He prayed for the appeal to be allowed.

15. The 1st respondent's Counsel, Mr. D. Nyongesa, Learned Counsel supported the appointment of the 1st respondent as the administrator

of the deceased's estate. He refuted the claim that she was sickly as alleged by the appellant. He cited the provisions of the Law of Succession Act which allow Kadhis to appoint administrators in succession cases where the parties profess Muslim faith.

16. In regard to the 2nd respondent's marriage to the deceased, it was submitted that under Islamic law, a marriage certificate is not the only proof of marriage. It was submitted that in this case, the 1st respondent was the one who listed down the names of the deceased's wives. It was further submitted that the deceased at first married Gertrude also known as Asha Said, whom he divorced. He then married Asha Brek, the appellant. He relied on the evidence of the 1st respondent who had testified in the lower court that the 2nd respondent was a wife to the deceased.

17. Counsel for the 1st respondent submitted that the 2nd respondent produced documents to support her assertion that she was married to the deceased. This court was told that the fact that she filed no pleadings to support her claim should not be used against her. He submitted that the 2nd respondent was known by different names and she had produced documents as proof of the same. He added that the divorce referred to by Mr. Siminyu was the one for the deceased and Gertrude.

18. It was argued that although the deceased used to refer to the 2nd respondent's children as bastards, they were not illegitimate children.

19. Mr. D. Onyango asserted that the 1st respondent was best placed to know the persons who were her in laws than any other person. He prayed for the appeal to be dismissed.

20. In a rejoinder, Mr. Siminyu submitted that in the year 1996, the deceased became a Swiss national. As a Muslim, nothing stopped him from contracting another marriage under Islamic faith but in the year 2007 he did a civil marriage and declared in his marriage certificate that he was divorced. There was however nothing produced by the 2nd respondent before the Kadhi's Court to show she was a divorcee although she claimed to be the deceased's wife. It was submitted that she did not call witnesses in the Kadhi's Court to corroborate her claim.

EVIDENCE ADDUCED BEFORE THE KADHI'S COURT

21. The 1st respondent, Aisha Mohamed testified as PW1. She gave evidence to the effect that the deceased who was her son was at first married to a Swiss lady by the name Gertrude who begot two children-

- (i) Abdulrahman Said – 30 years;
- (ii) Samira Said – 23 years.

22. He later divorced her and married Aisha Brek, the appellant, who had no children. The 1st respondent's evidence was that the deceased had another wife by the name Saada Said, the 2nd respondent, who was married on 27th July, 2001 and that the marriage was blessed with 2 children-

- (i) SS (Name withheld), born on 23rd June, 2002; and
- (ii) MS, (Name withheld), born on 4th November, 2003.

23. In the Kadhi's Court, the 1st respondent had stated that the deceased's estate comprised –

- (i) A house in Malindi Central;
- (ii) A shamba at Malindi air strip area portion 309; and
- (iii) An account with Gulf bank.

24. The 1st respondent had testified that although the said account at Gulf Bank had Kshs. 93,752.85. The amount was withdrawn and only Kshs. 3,470.78 was left in the said account. She thought that the appellant is the one who withdrew the money. The 1st respondent had also testified that the deceased was to be paid gratuities of Swiss Francs 272,000/= at the exchange rate of 98 which was the equivalent of Kshs. 26,656,000/=.

25. The 1st respondent gave evidence that the house included in the deceased's estate belongs to Abdul and Samira. She sought to be recognized as the administrator of the deceased's estate.

26. In cross-examination, the 1st respondent stated that Samira and Abdul told her about the full gratuities of Kshs. 26,000,000/= having been taken by the appellant who refused to share with the other heirs. The 1st respondent said that she did not have evidence that the appellant took the money from the deceased's account at Gulf African Bank.

27. The 2nd respondent, Saada Said aka Zahra Ali testified that the deceased was her husband to whom she got married in the year 2001. She further said that they got married in London and the dowry was a gold chain and a praying mat. She stated that she lived in London and the deceased in Switzerland. She testified that their marriage was blessed with 2 issues namely, SSA [name withheld] born in the year 2003 and MSA [name withheld] who was born in the year 2002.

28. The 2nd respondent in her evidence stated that the deceased used to send her money for maintenance through the bank or Western Union. She said that when the deceased informed her when he married the appellant. She stated that the appellant knew her and her children but she did not allow the deceased to go to London and see her. She stated further that the appellant used to refer to her children as bastards and she was divorced in December 2012 by the deceased because of mistreating the 2nd respondent's children.

29. It was her evidence that the appellant was divorced in December, 2012 and she came to Mombasa. After a week she went to Switzerland in January, 2013. The 2nd respondent stated that the deceased died in Switzerland on 27th February, 2013 when he with his first wife Gertrude. The 2nd respondent was informed of his death by the deceased's brother, Salim.

30. She stated that the deceased told her that Chocha Villa was for Samira and Abdul. She prayed to be recognized as one of the heirs.

31. In cross-examination she stated that she knew that the Swiss Government paid the appellant Kshs. 34 Million although she alleged to have received 18 Million. She stated that she knew Karim was a child of the deceased born out of wedlock and that in Islam, children born out of wedlock do not inherit from their father.

32. PW3 was the appellant, Aisha Brek Abdallah. She denied having been divorced by the deceased. She denied having any knowledge of the 2nd respondent. She stated that she got married to the deceased on 4th December, 2007. She knew nothing about the alleged marriage of the deceased to the 2nd respondent on 27th July, 2007. The appellant stated that the deceased did not register the 2nd respondent and her children as his next of kin or dependents. The appellant testified that the deceased had registered Gertrude's children Karim Gathoni and Abdul. The other legal heirs were Samira and herself. She admitted that she was paid Swiss Francs 18,000 being the deceased's 3 months' salary. She said that according to Islamic law, Karim could not inherit but according to Swiss law he was one of the deceased's dependents.

33. The appellant stated that for the 7 years she was with the deceased, she never saw him going to London or sending money for maintenance to the 2nd respondent.

34. In cross-examination, she said that she never saw the 2nd respondent visiting Switzerland. The appellant stated that she was in London when she took a photo with Manar and Samir but they never visited them in Switzerland. She knew the two children as family members of Ahmed who was a friend to her husband. She admitted that the deceased's children Abdulrahman and Samira stated that there were 2 or more children in London. She testified that she was receiving death gratuity and pension of Swiss Francs 3000 per month for her lifetime as she did not opt to be paid a lump sum.

35. PW4 was No. 231671 Chief Inspector Alex Mwangera, a Document Examiner. He testified that he examined the signature which was purported to be that of the deceased on the marriage certificate which was said to be for a marriage between him and the 2nd respondent, as against the deceased's known signature. In his opinion, it was not by the hand of the deceased. The signature of the deceased on the marriage certificate for the marriage between him and the appellant was found to be by the deceased's hand.

ANALYSIS AND DETERMINATION

36. The duty of the first appellate court is to analyze and re-evaluate the evidence adduced before the lower court and come to an independent decision, while bearing in mind that it neither saw nor heard the witnesses testify. In the case of **Epantus Mwangi and Geoffrey Ngatia vs Duncan Mwangi Wambugu** [1982 – 88] 1 KAR 278, the court stated as follows:

“the principle is that a court on appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles.”

37. At the hearing of this appeal, this court sat with the Chief Kadhi, Hon. Almuhdhar A.S. Hussein. His opinion as to this appeal forms part of these proceedings. It is however not binding on this court.

38. The issues for determination are:-

(i) If the Hon. Kadhi erred by appointing the 1st respondent as the sole administrator of the deceased's estate;

(ii) If the Hon. Kadhi erred by giving a share of the deceased's estate to the 2nd respondent;

(iii) Whether the 2nd respondent's children are heirs to the deceased's estate;

(iv) If the Hon. Kadhi erred by holding that the forensic report by the Directorate of Criminal Investigation was not conclusive in determining that the 2nd respondent was not a legal wife of the deceased;

(v) If the Hon. Kadhi erred by delivering a Judgment in favour of the 2nd respondent who filed no pleadings or submissions; and

(vi) That the Hon. Kadhi erred in his finding of what comprised the deceased's estate; and

(vii) Whether the Hon. Kadhi introduced new evidence for the 2nd respondent and suppressed evidence adduced by the appellant.

If the Hon. Trial Kadhi erred by appointing the 1st respondent as the sole administrator of the deceased's estate.

39. The 1st respondent is the one who filed a succession petition to the Kadhi's Court on 28th November, 2013. She sought among other orders, to be appointed as the administrator of the deceased's estate. The appellant herein, filed a response to the petition on 18th December, 2013 in which she sought to have the petition by the 1st respondent dismissed with costs and in the alternative, for her to be appointed the administrator and for the rightful heirs/beneficiaries of the deceased to be determined. In her evidence before the Kadhi's Court, the appellant claimed that she was not in Kenya when the 1st respondent filed the succession petition and that they never discussed about it as a family.

40. The appellant however fell short of convincing the Trial Kadhi why she should be appointed the administrator of the deceased's estate and why the deceased's mother, the 1st respondent, should not. Going by the evidence adduced, this court holds a similar view as the Trial Kadhi that there was no proof that was brought forth to demonstrate that she was incapable of administering the deceased's estate. The 1st respondent applied for and obtained limited grant of letters of Administration ad litem from the High Court in Malindi in Probate and Administration Cause No. 35 of 2014. It gave her the authority on 24th September, 2014 to file the succession cause in the Kadhi's Court. The Trial Kadhi in the final analysis determined that the 1st respondent was the best suited to administer the deceased's estate and not the appellant. The Hon. Chief Kadhi in his opinion found no error in the appointment of the 1st respondent as the administrator of the deceased's estate. This court finds no sound reason to depart from the decision of the Trial Kadhi in that regard. If at all there will be need to replace her as an administrator in the future, the appellant shall be at liberty to move the relevant court for such an order.

If the Hon. Kadhi erred by giving a share of the deceased's estate to the 2nd respondent.

41. The 2nd respondent was recognized by the 1st respondent as a wife to the deceased. The 2nd respondent produced a marriage certificate serial No. CM/10/2001 to the effect that she was married to the deceased on 27th July, 2001 at Coventry in the United Kingdom. The Counsel for the appellant doubted the authenticity of the said marriage certificate. It was subjected to forensic document examination. It was established through a report dated 19th November, 2015 that the signature purported to be of the deceased on the marriage certificate in issue was not by his hand. This was after the same was compared to the signatures on his passport and the marriage certificate between him and the appellant. The findings of the document examiner leads to the conclusion that the 2nd respondent was not married to the deceased.

42. This court finds that the 2nd respondent was either a girlfriend or mistress to the deceased. In that regard, this court holds a different view from that of the Hon. Chief Kadhi and the Trial Kadhi. For all intents and purposes, the 2nd respondent is not an heir to the deceased's estate. This court therefore upholds the submissions by the appellant's Counsel that the 2nd respondent, Saada Said, is not a beneficiary of the deceased's estate.

Whether the 2nd respondent's children are heirs to the deceased's estate.

43. The 1st respondent recognized the children of the 2nd respondent as having been sired by her son, the deceased. When she filed the succession petition, the 1st respondent included SSA and MSA as the children of the deceased. Further to the foregoing, this court does not doubt the 2nd respondent's assertion that her children were sired by the deceased as this court believes that she was his girlfriend or mistress. It was the evidence of the 2nd respondent that when the deceased died, his brother Salim called and informed her about the death. It follows logically that the 2nd respondent was known to some of the deceased's family members. The appellant went to great lengths to deny having any knowledge that the 2nd respondent's children had been sired by her husband, the deceased. From her evidence, it became clear that she knew the children. She stated as follows in her evidence:-

"I know these children. The female is M [name withheld] and the male child is called S [name withheld]. I do not know who took the photos. They were taken in London. These photos were not taken in my house and I do not have such a sofa set. This is SAADA'S house in London."

44. On being cross-examined by Ms Mwanakitina, the appellant stated thus:-

"..... They were introduced to me, all what I knew they were family of Ahmed who is a friend to my husband never has M and S visited us in Swiss. All these photos were taken in LondonThe children Abdulrahman and Samira said there are two or more children in London....."

45. This court has perused the legal proceedings that took place in the District Law Court of Bulach in the Succession Registry Office Business file Nr. EN130029-C/U mf/nd in a ruling delivered on 19th April, 2013 in the matters of Abdulrahman Said concerning renunciation of succession. In his determination the substitute Judge Lic. Iur. R. Amsher in paragraph 111 noted as follows:-

"The deceased was originally a Kenyan Citizen and assumed Swiss Citizenship on 24th January, 1996. According to information of his children Abdulrahman and Samira Said, their father had 2 more children who are residing in London, but they do not know their addresses. Up to today the circle of legal successors could therefore not be determined conclusively. A costly and time consuming succession determination including calling successors in England and Kenya concerning other descendants of the deceased is not justified in the opinion of the court in the following matter (refer to clause iv)." (emphasis added).

46. The above extract from the court proceedings in Switzerland indicates that Abdulharman and Samira Said knew that their father, the deceased, had other children living in London. From the totality of the evidence adduced and the above observation made by the Judge in the court in Switzerland, this court concludes that SSA and MSA are the children that he sired with the 2nd respondent. It is therefore rather odd that the appellant denied any knowledge of the deceased's children borne by the 2nd appellant whereas the deceased's children borne by

Gertrude knew of the existence of the 2nd respondent's children. The evidence by the 2nd respondent was not clear on who between the deceased and the appellant used to refer to the 2nd respondent's children as bastards. The manner in which the proceedings were recorded before the Kadhi's Court were not clear on that aspect.

47. Mr. Siminyu submitted that since the said children were illegitimate, they were not heirs of the deceased's estate. He relied on the decision of **In the estate of Ishmael Chelanga** (supra) where the High Court held that children sired out of wedlock by a man who professes the Muslim faith cannot inherit their father's property.

48. Article 24(4) of the Constitution addresses limitation of rights and fundamental freedoms. The said provisions state as follows:-

“The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhi's courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.”

49. The children of the 2nd respondent were sired by the deceased. The two children bore the deceased's surname of Abdulrahman as per copies of their passports availed before the Kadhi's court. It is therefore not strange that they were known to the deceased's mother, the 1st respondent and Gertrude's children, sired by the deceased. This court however finds that they were illegitimate as they were born when there was no valid marriage between the deceased and the 2nd respondent. The two professed Muslim faith. This court therefore holds that for purposes of succession, SSA and MSA are not heirs to the deceased's estate. The Trial Kadhi therefore erred when he included them as heirs in the distribution of the deceased's estate.

50. As to the other issues raised by the appellant, the above finding has resolved them. The only outstanding issues are on whether the Hon. Kadhi erred when he made a finding on who the deceased's heirs are and what comprised his estate.

51. This court does not concur with the opinion of the Chief Kadhi, in his opinion which supported the finding of the Trial Kadhi on the identity of the persons who comprise the heirs to the deceased's estate. The Chief Kadhi suggested that Karim Gathoni should have been included as an heir to the deceased's estate. It was however not clear how Karim Gathoni was the deceased's son so as to be regarded as such under Islamic law. The 1st respondent did not include him in the list of proposed heirs. This court hereby identifies the heirs to the deceased's estate in accordance with Islamic law as:-

- (i) Aisha Mohamed Nzawa – (Mother)
- (ii) Aisha Brek – (widow)
- (iii) Abdulrahman Said – (Son)
- (iv) Samira Said – (Daughter)

52. Contrary to the submissions made by Mr. Siminyu that the Trial Kadhi brought in evidence which was not adduced such as by referring to the 2nd respondent Saada Said Abdalla by the name Zahra Ali Mahmoud, the 2nd respondent is the one who produced documents in which she identified herself by the two names. It was therefore not erroneous for the Trial Kadhi to refer to her as Saada Said Abdallah a.k.a (also known as) Zahra Ali Mahmoud.

53. The other issue of the accounts not having been availed by the petitioner as ordered by the Trial Kadhi on 10th November, 2015 is not a ground of appeal. The appellant should have raised it as a substantive ground of appeal. An issue which is not raised in the memorandum of appeal cannot be canvassed through submissions.

54. The 2nd respondent failed to file any documents in response to the succession petition. Failure to file any documents could not shut her out as a witness for the 1st respondent who had named her as an heir to the deceased's estate. On 15th March, 2016 Mr. Siminyu Advocate informed the Trial Kadhi that the 1st interested party could continue in the case as an heir and not the 2nd respondent. The Trial Kadhi should therefore have treated her as a prospective heir to the deceased's estate and a witness for the 1st respondent herein and not as a respondent in the succession petition.

55. Although the appellant in one of her grounds of appeal stated that the Trial Kadhi suppressed evidence, this court is at pains to decipher which evidence was not considered due to the generalization of the said ground of appeal.

56. It is the finding of this court that the Hon. Kadhi did not err by finding that Swiss Francs 18,000 being three months salary of the deceased which was paid to the appellant immediately after the deceased's death for funeral arrangements was part of the deceased's estate.

57. The position of the law is that any asset be it moveable or immovable that existed before the demise of the deceased or any money held to his credit or received after his death, save his pension and sacco shares and/or benefits comprise part of the deceased's estate and are for distribution to his heirs. The appellant admitted having received 18,000 Swiss Francs as the deceased's three months' salary after his death. This court holds that the said money forms part of the deceased's estate. The appellant shall therefore refund Swiss Francs 18,000 to the deceased's estate and claim the cost of a coffin, transportation of the deceased's body from Switzerland to the place where he was buried and funeral expenses on production of the relevant supporting documents to the administrator of the deceased's estate.

58. With regard to the issue of withdrawal of cash from the deceased's bank account using an ATM card, although there is a possibility that

the appellant knew the PIN number for the deceased's ATM card, this court cannot conclude that she was the one who withdrew the money that was in the deceased's account at Gulf Bank. It is this court's finding that the sum of Kshs. 93,752/= does not form part of the deceased's estate as there is no evidence on the identity of the person who withdrew the said cash in quick succession. In the said circumstances, it is not possible to order anyone to refund the said money.

59. In addition to the Swiss Francs 18,000 the Trial Kadhi was correct in holding that the immovable properties of the deceased are a house at Malindi Central and a portion of land at No. 309 in Malindi. The deceased's estate both movable and immovable shall be distributed to his heirs in accordance with Islamic law.

60. The appellant's appeal succeeds only to the extent addressed in this Judgment. Each party shall bear her own costs.

DELIVERED, DATED and SIGNED at MALINDI on this 28th day of February, 2020.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Oduor Siminyu for the Appellant

Mr. Mulwa holding brief for Mr. Duncan Nyongesa for the 1st Respondent

No appearance for the 2nd Respondent

Mr. Samuel Kabue - Court Assistant