



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS CIVIL APPLICATION NO. 23 OF 2020**

**IN THE MATTER OF THE ESTATE OF SAID ABDALLA AZUBEDI (DECEASED)**

SHEHA ANWAR SAID AZUBEDI.....1<sup>ST</sup> APPLICANT

RYDER ANWAR SAID.....2<sup>ND</sup> APPLICANT

ZEINAB ANWAR SAID.....3<sup>RD</sup> APPLICANT

**VERSUS**

LEILA MOHAMED.....1<sup>ST</sup> RESPONDENT

ZUBEDA SAID.....2<sup>ND</sup> RESPONDENT

FEISAL SAID.....3<sup>RD</sup> RESPONDENT

**RULING**

1. Before me is a Notice of Motion dated 10<sup>th</sup> February 2020 filed under Articles 159 and 170 of the Constitution of Kenya 2010, and Section 1A, 1B, 3A, 3B, 15, 18(1)(b), 18(1)(b)(i) and 63 (e) of the Civil Procedure Act (Cap. 21), and Order 51 Rule 1 of the Civil Procedure Rules 2010 seeking the following orders –

***1. That the application be certified as urgent and further in view of the urgency of the matter, this Honourable Court do in the first instance, dispense with the service of this application on the respondents and does make interim orders in terms of the prayers below.***

***2. That pending the hearing and determination (of) this application filed herein or until further orders of this court, that there be stay of proceedings in the Nairobi Kadhis Succession Cause No. 63 of 2019 in the matter of the Estate of Said Abdalla Azubedi (deceased).***

***3. That pending the hearing and determination of this application, an interlocutory injunction do issue to restrain the respondent in this action and each and or all of them jointly or severally and or any 3<sup>rd</sup> parties either by themselves or their servants and/or agents and/or employees and/or howsoever from interfering, administering and or meddling with the estate of SAID ABDALLA AZUBEDI (DECEASED).***

***4. That this court be pleased to transfer the suit known as NAIROBI KADHIS SUCCESSION CAUSE NO. 63 OF 2019 IN THE MATTER OF THE ESTATE OF SAID ABDALLA AZUBEDI (DECEASED) from the Kadhis Court at Nairobi to the High Court of Kenya at Nairobi for adjudication and determination.***

***5. That this court be pleased to order that the applicants be included as administrators and executors to the ESTATE OF SAID ABDALLA AZUBEDI (DECEASED).***

***6. That this Honourable Court makes such order as may be expedient and just to meet the ends of justice.***

***7. That the costs of this application be provided for.***

2. The application has grounds on the face of the Notice of Motion that the Kadhi's Court had no jurisdiction to adjudicate on the estate of SAID ABDALLA AZUBEDI (DECEASED) as, though the applicants profess the Muslim faith they did not agree that the issues in the

matter be determined before the Kadhi's Court, that some of the respondents had been tainted with fraud, illegality, deception and uttering false documents, that the Kadhi's court had unprocedurally and illegally issued the respondents with letters of administration despite glaring irregularities in the petition in NAIROBI KADHIS SUCCESSION CAUSE NO. 63 OF 2019 IN THE MATTER OF THE ESTATE OF SAID ABDALLA AZUBEDI (DECEASED), that the administrators in the Kadhi's court failed to disclose that SAID ABDALLA AZUBEDI (DECEASED) had a son ANWAR SAID ABDALLAH ALIAS ANWAR SAID (DECEASED) who died on 16<sup>th</sup> July 2007 and left 3 children two sons and a daughter LEILA SAID (DECEASED) whom he brought up as his own up to the day of his demise by providing a monthly stipend, that though the deceased herein had lived in and his assets were in Nakuru, the respondents secretly filed the petition for letters of administration in the Kadhi's court in Nairobi, that the main driver of the illegitimate administrative process was one FEISAL SAID who had further sought to fraudulently disinherit the 1<sup>st</sup> and 2<sup>nd</sup> applicants herein by listing the assets of ANWAR SAID ABDALLAH ALIAS ANWAR SAID (DECEASED) as assets of SAID ABDALLA AZUBEDI (DECEASED).

3. The application was filed with 3 supporting affidavits sworn by the three applicants which amplified the grounds of the application. The affidavits annexed a number of documents.

4. The application is opposed through a replying affidavit sworn on 21<sup>st</sup> February 2020 by Feisal Said the 3<sup>rd</sup> respondent, in which it was deponed that the three applicants were grandsons and granddaughter of the deceased, that Sheha Anwar and Ryder Anwar were sons of Anwar Said Abdalla (deceased) while Zeinab Anwar was a daughter of Leila Said (deceased), that their parents having predeceased SAID ABDALLA AZUBEDI – under Islamic law the applicants were not entitled to inherit from his estate, that the succession cause herein was correctly filed in the Kadhi's court which had jurisdiction as the deceased SAID ABDALLA AZUBEDI died a Muslim and Islamic law applied to the devolution of his estate as his personal law, and also that the present application was wrongly brought under the Civil Procedure Act while it should have been brought under the Law of Succession Act, and that the proper way to make changes on a grant of letters of administration was by way of an application for revocation of grant.

5. Parties counsel by consent agreed to file written submissions. However, though the applicant's counsel M/s RBZ Advocates LLP were given many chances to file their written submissions, they did not do so, though their counsel Mr. Odipo appeared in court on 16<sup>th</sup> September 2020 virtually and promised to file the submissions.

6. The respondents advocates filed their written submissions dated 18<sup>th</sup> May 2020, in which they argued that the applicants being grandchildren of the deceased, whose parents predeceased the deceased herein Said Abdalla Azubedi had no locus standi to bring the application since under Islamic law they were not beneficiaries of the estate herein as there were other genuine beneficiaries, that the personal law of the deceased was Islamic law, and that the fact that the deceased might have previously provided for the applicants did not make them beneficiaries of his estate.

7. Counsel for the respondents also maintained that the Kadhi's court had jurisdiction to hear and determine the succession matter herein and that the applicants had no merited grounds to apply for revocation of grant. Several authorities and Islamic law writings were relied upon.

8. Having considered the application, documents filed and the submissions written and oral, in my view the issues for my decision are whether this court has jurisdiction to hear the application and succession proceedings. Secondly, whether the applicants have a *locus standi* to bring this application. Thirdly, whether the court can grant any of the prayers sought. Fourthly, and lastly, what should be the order as to costs.

9. With regard to the first issue whether this court has jurisdiction to hear and determine this matter, the argument of the respondents is that the Kadhi's Court having jurisdiction to deal with the succession application and proceedings herein, and the matter having been adjudicated in the Kadhi's court in Nairobi Succession Cause No. 63 of 2019, this court has no jurisdiction to entertain this application.

10. It is not in dispute that the deceased Said Abdalla Azubedi was a Muslim. In this regard Article 169(1) of the Constitution establishes the Kadhi's Court as a subordinate court and Article 170(5) provides for the jurisdiction of that court. Article 170(5) of the Constitution provides as follows:

***“170(5) The jurisdiction of a Kadhi's court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's court.”***

11. It is clear from the above provisions of Article 170(5) of the Constitution that through the Kadhi's court has jurisdiction, submission to the jurisdiction of the Kadhi's court by Muslims is voluntary and has to be unanimous by all parties involved. Where however, all parties though Muslims do not agree, then the Kadhi's Court should not adjudicate on the matter, as in that case it will not have jurisdiction to adjudicate on the subject succession matter.

12. Further, Section 2(1) of the Law of Succession Act (Cap. 160) which commenced on 1<sup>st</sup> July 1981 before the Constitution was inaugurated in 2010 provides as follows –

***“2(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the Laws of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.”***

13. It follows thus that in all succession or inheritance matters, unless there is other written law to the contrary, same are to be determined under the Law of Succession Act, in which the jurisdiction is conferred upon the High Court under Section 47 as follows –

***“47. The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient.***

***Provided that the High Court may for the purpose of this section be represented by resident magistrates appointed by the Chief Justice.”***

14. From the above provisions of the law, it follows that this court can entertain any application purported to be filed under the Law of Succession Act, and in certain cases may be represented by the Resident Magistrate. In case of Muslims, the applicable law is Section 48(2) which provides as follows –

***“48(2) For the avoidance of doubt it is hereby declared that the Kadhi’s Courts shall continue to have and exercise jurisdiction in relation to the estate of a deceased Muslim for the determination of questions relating to inheritance in accordance with Muslim law and for any other question arising under this Act in relation to such estates.”***

15. As such, since this application was brought under Article 159 and 160 of the Constitution and is purported to relate to succession or inheritance matters of a deceased person’s estate, this court has jurisdiction to entertain the application and determine the same. It also has jurisdiction to transfer a case from the Kadhi’s court to the High Court. I will add that the Civil Procedure Act and Rules, unless specifically imported by the Law of Succession Act, are not applicable in succession matters. I find and hold that this court has jurisdiction to hear and determine the application.

16. With regard to whether the applicants have locus standi to bring this application, my considered view is that since they were grandchildren of the deceased, I have to fall back to the definition of interested parties or dependants in succession matters under the Law of Succession Act. In this regard, Section 29 of the Act, provides as follows –

***“29. For the purposes of this Part, “dependant” means –***

***(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;***

***(b) such of the deceased’s parents, grand children, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and***

***(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of his death.”***

17. As can be seen from the above provisions of the statute law, grand children who are maintained by the deceased are also in the category of dependants. They would thus have locus standi to bring the application. The only limiting factor to bringing such application is when a grant of representation has already been confirmed. In this regard section 30 of the Act provides as follows –

***“30. No application under this part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by Section 71.”***

18. In my view therefore, the applicants herein being grand children who claim to have been maintained by the deceased have *locus standi* to bring the application since there is no allegation that the grant has already been confirmed by the Kadhi’s court. The issue whether they were actually maintained by the deceased, and whether their parents pre-deceased the deceased, is a matter for proof through evidence. However, for the purposes of *locus standi*, I find that the applicants have *locus standi* to bring the application.

19. The next issue is whether the court can grant the prayers sought. It has to be noted that prayers 1, 2 and 3 have been spent as they relate to orders pending determination of the application. The substantive prayers for consideration by this court, are thus number 4 and 5 which state as follows –

***“4. That the court be pleased to transfer the suit known as NAIROBI KADHIS SUCCESSION CAUSE NO. 63 OF 2019 IN THE MATTER OF THE ESTATE OF SAID ABDALLA AZUBEDI (DECEASED) from the Kadhi’s Court at Nairobi to the High Court of Kenya at Nairobi for adjudication and determination.***

***5. That this court be pleased to order that the applicants be included as administrators and executors to the ESTATE OF SAID ABDALLA AZUBEDI (DECEASED).***

20. In my view, this court cannot grant the above prayers sought as the applicants have abandoned the prosecution of the application, and also failed to tender evidence to establish on the balance of probabilities that they were entitled to the grant of the orders sought. The applicants having the burden of proof of their allegations and prayers in accordance with Section 107 of the Evidence Act (Cap. 80), having failed to participate in the prosecution of their application to prove what they pleaded, what they pleaded remained allegations. In this I rely on the clear provisions of section 109 of the Evidence Act, which provides as follows –

***“109. The burden of proof of any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”***

21. The applicants having failed to support their allegations, the application is for dismissal as the applicants have not proved their claims on the balance of probabilities. Prayers 4 and 5 cannot thus be granted, and I have to dismiss the application.

22. With regard to the last issue of costs, as this is a family matter, I order that parties will bear their respective costs of the application.

23. The application is thus dismissed. Parties will bear their respective costs of the application.

**Dated and delivered this 26<sup>th</sup> day of October, 2020.**

**George Dulu**

**JUDGE**

***Delivered virtually due to COVID-19 pandemic and regulations issued by the Ministry of Health.***