



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
SUCCESSION CAUSE NO.279 OF 1978
IN THE MATTER OF THE ESTATE OF FMMH alias FBM (DECEASED)
IMA.....APPLICANT
VERSUS
AA.....RESPONDENT
JUDGMENT

1. The deceased FMMH alias FBM died intestate on 19th May 1975. She left two properties:-

- (a) LR No. [.....]Nairobi West that has 6 flats; and
- (b) Plot No. [.....] in Pumwani that has a semi-permanent house.

She was survived by the following children:

- (a) HA;
- (b) AA (the respondent);
- (c) IMA (the applicant);
- (d) MA;
- (e) RA; and
- (f) AA.

The deceased adopted and brought up ZA. The applicant asked the court to consider ZA as a beneficiary of the deceased's estate. The respondent was opposed to her, saying that she was not the biological child of the deceased.

2. A grant of letters of administration intestate was issued to the applicant. On 28th March 2017 the applicant filed the application dated 12th September 2016 seeking the confirmation of the grant. He proposed that the estate of the deceased be distributed and/or sold and the proceeds distributed in accordance with Islamic Law. The distribution, he stated, was as follows:-

- (a) MA (daughter) – 9.09%
- (b) RA (daughter) – 9.09%
- (c) ZA (daughter) 9.09%;

(d) HA (son) – 18.18%

(e) AA (son) 18.18%

(f) IMA (son) – 18.18%, and

(g) AA (son) 18.18%.

3. The respondent was opposed to the application on various grounds. On 13th June 2016 the court gave the applicant 60 days to file and serve the application for confirmation. The application was filed about 9 months later. The respondent took issue with this, by saying that the application was incompetent because it had been filed late and without leave. Secondly, the court had given the applicant 30 days to file and serve an affidavit of full and accurate account of the status of the estate of the deceased since the grant was issued on 5th October 1978. The estate accounts were filed the same time the application was filed. This was done without leave. Again, the respondent rightly took issue with this.

4. When the court made the orders above, it was concerned about the lengthy period it had taken before the estate of the deceased was distributed. In the meantime, there had been countless applications, both before this court and before the Kadhi's court. The court wanted the dispute among the parties resolved by the sharing of the estate of the deceased. Such resolution could only follow an application for the confirmation for the grant issued to the applicant. I bear in mind that the respondent is not substantially opposed to the manner the estate has been administered by the applicant. The accounts have not been challenged in any material way. In the wider interests of justice, I will consider the application for confirmation and the accounts to be properly on record.

5. The respondent was opposed to ZA being regarded as a beneficiary. Otherwise, he was not opposed to the property in the estate being sold and the proceeds being distributed in accordance with Islamic law. All parties herein are muslims.

6. On the issue whether or not ZA is a beneficiary, the applicant swore that this matter had been heard and determined by the Kadhi's court. He was supported by HA and AA. In **Kadhi's Court at Nairobi (Milimani Commercial Courts) Civil Case No. 140 of 2007** the respondent sued the applicant and HA over the distribution of the estate. He was, in the proceedings, opposed, to having ZA inherit any part of the estate. It was common ground that ZA had been brought into the home as an infant by the mother of the parties. The mother then brought her up until she got married and got a child. The Kadhi received evidence from the parties, and other children in the family, and concluded that ZA was a beneficiary who was going to inherit from the deceased, in the same way as the deceased's daughters. The respondent was aggrieved by the decision. He sought review. The application was dismissed. He filed an appeal but abandoned it. I determine that the issue whether or not ZA is a beneficiary of the estate of the deceased is *res judicata*. The Kadhi's court competently determined the issue (**John Florence Maritime Services Limited & Another -v- Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR**).

7. I do not agree that the issue before the Kadhi's court was on the maternity of ZA (whether or not she was mothered by the deceased). It was common ground that the deceased adopted her.

8. It is common ground that the estate be sold and the proceeds be shared in accordance with Islamic law as follows:-

(a) MA (daughter) – 9.09%

(b) RA (daughter) – 9.09%

(c) ZA (daughter) 9.09%;

(d) HA (son) – 18.18%

(e) AA (son) 18.18%

(f) IMA (son) – 18.18%, and

(g) AA (son) 18.18%.

This distribution is hereby confirmed by the court. The grant issued to the applicant is hereby confirmed in those terms.

9. I direct that within 14 days from today counsel do agree on a valuer failing which the court shall appoint one. The valuation shall be done within 30 days of the appointment. Once the valuation report is filed the property shall be advertised for sale, and, once sold, the proceeds shall be shared as above.

10. Any costs, including the advocates' fees, shall be agreed and/or taxed and borne by the estate.

DATED and DELIVERED at NAIROBI this 29TH day of APRIL 2019.

A.O. MUCHELULE

JUDGE