



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 28 OF 2014**

**SR.....APPLICANT**

**AND**

**RR.....RESPONDENT**

**JUDGEMENT**

1. Both the Applicant **SR** and the Respondent **RR** (NNK) claim to have been married to the deceased RH who died on 6<sup>th</sup> May 2012. Each claim to have cohabited him in Kariobangi Nairobi at the time of his death.

2. The Respondent had moved the Kadhi's court in Case No. 60 of 2013 seeking to have the deceased's properties transferred to her as the only widow of the deceased. She claimed that the Appellant had been divorced.

3. On the other hand, the Appellant who was the Respondent then claimed to have been the only legitimate wife, though she was aware that the deceased cohabited with the Respondent and they had sired 3 children. She disputed the paternity of the Respondent's first son. Her case was that there was no marriage between the deceased and the Respondent and any issues borne of the union between them were illegitimate and none of them other than herself and her children ought to inherit the deceased.

4. In his judgment the Hon. Kadhi found that both the Appellant and the Respondent were wives, secondly he found that the 1<sup>st</sup> child of the Respondent was born with the recognised minimum period allowed by the sharia from date of marriage; he recognised children of both parties as legitimate children of the deceased and proceeded to distribute the estate.

5. The Appellant being aggrieved by the entire judgment of the Honourable Kadhi, moved this court by way of an appeal. Her grievances may be summarised as follows:

- The Kadhi misdirected himself by applying common law principles.
- The Hon. Kadhi erred by ignoring crucial evidence.
- The Hon. Kadhi erred in recognising the Respondent as a widow and her children as legitimate children of the deceased contrary to the Sharia and
- The Hon. Kadhi failed to find that a property in Kwa Ndolo Scheme derived out of Plots No. xxxx and xxxx formed part of the estate.

She sought to have the judgment set aside and the case placed before another Kadhi for fresh hearing and determination.

6. It was submitted by counsel for the Appellant that no proof of marriage between the Respondent and the deceased was tendered, as the marriage certificate was disowned and signature on the same disputed. That any relationship between the deceased and the Respondent was an illegitimate union and their off-springs therefore illegitimate. Counsel faulted the Hon. Kadhi for having applied common law principles in holding and applying presumption of marriage which is not a recognised concept in Islamic Law. Further counsel submitted that the Respondent had failed in the absence of a valid marriage certificate, to call witnesses to prove that a marriage existed between them.

Ad relates to property No. xxxx and Plot No. xxxx it was urged that the Kadhi ignored evidence of ownership which was never controverted.

7. Counsel for the Respondent on his part urged that marriage under the Sharia being a civil contract did not require any ceremony nor any specific formality. That the deceased and the Respondent were married despite finding by Kadhi that there was absence of direct proof of marriage. Counsel urged the court to find that a marriage did exist based on long cohabitation of the two (30 years) which cohabitation was open and acknowledged by relatives and friends alike. As regards the first son of the Respondent counsel supported the Kadhi's findings.

Equally the issue of plot Nos. xxxx and xxxx counsel urged that no evidence in support of ownership was placed before the Kadhi and the finding cannot therefore be faulted

8. The issues for consideration are:

- i. Whether the respondent and the deceased were married under the Sharia.
- ii. Whether the offsprings of the union between the deceased and the respondent were legitimate.
- iii. Who should inherit the deceased?

9. **Article 170 of Constitution of Kenya 2010** establishes the Kadhi's courts and provides for its jurisdiction to include determination of question of Muslim Law relating to personal status, marriage, divorce or inheritance where all parties profess Islamic and submit to the jurisdiction of the said act.

The Kadhis Act Chapter 11 of the Laws of Kenya is a reflection of **Article 170 of the Constitution**.

10. The law applicable in matters before the Kadhi is the Sharia, principles of common law are not applicable in recognition that the same encompasses principles and doctrines that may not be compatible with Muslim Law. I find the following authorities cited by the Appellant's Counsel relevant in this respect;

**Raya Binti Salim Bin Khalfan El Busaidi vs Hamed Bin Suleman El Busaidi & Anor (1962) E.A.** where the court stated:

**“It would be wrong to apply principles of equity derived from Common law to suit Christian Society in England in order to import a presumption whereby to judge the intentions of a Muslim husband and wife living in Zanzibar whose social and cultural background is very different.”**

**Re Estate of CCBN (deceased) (2018) eKLR where the court laid emphasize on the application of Sharia in Matters of Muslim personal in line with Article 24 of the Constitution 2010.**

11. Clearly from the judgment of the Hon. Kadhi he appeared to have been influenced by decisions of other jurisdictions that allow application of the Sharia alongside statute or secular law which is not in tandem with the provision of Article 170 of the Constitution, which led him in applying principles of common law in arriving at his decision on the status of the relationship between the deceased and the respondent.

The status of the union between the two inform the question as to whether their children are legitimate or not. The two issues relate and must suffer the same fate.

12. As relates to Plot Nos xxxx and xxxx the Kadhi found no sufficient evidence to prove ownership had been places before him with a rider that if ownership was available same be shared by both household in accordance with the Sharia. I find no fault with the finding that proof of ownership was not adequate and the fact that if proof is found same be distributed in accordance with the Sharia.

13. For the above reasons the appeal succeeds, the judgment of the Kadhi is set aside in its entirety. The matter is hereby referred back for hearing of the matter afresh before a different Kadhi.

14. This being a succession dispute each party will meet its costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF DECEMBER, 2019.**

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**ALI-ARONI**

**JUDGE**