



**REPUBLIC OF KENYA**

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

**Succession 436 of 2004**

In re Estate of CCBH (Deceased)

**C K C**

**C C**

**minors suing through their mother and next friend.....APPLICANTS**

**VERSUS**

**ANC.....RESPONDENT**

**RULING**

1. CBH the deceased herein died on 2.8.04. The record shows that he was survived by 2 widows and 18 children. A grant of letters of administration was on 24.6.05 issued to AC, SC (S) and ANC the sons and widow of the deceased. The grant was confirmed 25.7.07 and the estate was to be distributed in accordance to Islamic Sharia as the deceased and his family are Muslims. Succession Cause No. 82 of 2012 was instituted in the Kadhi's Court for purposes of determining the shares of the heirs of the deceased.

2. On 18.12.12, Swauriqy died. He is survived by his children C K C and C C (the Applicants) and their mother J W N who is not a Muslim. In a ruling of 2.10.14, the Hon Kadhi made a determination that S's share in the estate of the deceased was 9.21%. By an Application dated 11.3.15, the Applicants through their mother and next friend seek a determination of what constitutes the said 9.21% share of the estate of the deceased. They further seek a temporary injunction against the administrators and beneficiaries their servants and agents or employees of the estate from distributing, alienating or dealing adversely with the said 9.21% share of the estate of the deceased pending the hearing and determination of this suit.

3. The grounds upon which the Application is premised are that the Applicants were not informed when the succession cause in the Kadhi's Court was filed; that they were adversely affected by the judgement of the Hon. Kadhi of 29.8.13; that following their application to set aside the said Judgement, the Hon. Kadhi in his Ruling of 2.10.14 stayed the distribution of Swauriqy's 9.21% share in the estate of the deceased pending a determination by the High Court as to who has right to this share. The Hon. Kadhi did not specify which properties in the estate constitute the 9.21% share and it is necessary for this Court to make that determination.

4. J W N, the Applicants' mother and next friend avers in her affidavit sworn on 11.3.15 that the Hon. Kadhi's Judgement adversely affected the Applicants' inheritance of the father's portion of the estate of the deceased. The Respondent asserts that Sharia Law which unjustly discriminates against women, children and non-Muslims from inheriting their fathers and husband's estate should be declared an

outright violation of Article 27 of the Constitution. The Court as custodian of the Constitution should uphold, respect and protect constitutional principles so that rights of Kenyans are assured; that unless this Court intervenes to protect the Applicants' right to their property then the provisions of the Constitution will be rendered nugatory. She further states that the best interests of the Applicants who are children should be considered ahead of anyone else's; that the fact that the Applicants can be evicted from the house in which they lived with their father when he was alive is unspeakable.

5. The Respondent in her Replying Affidavit sworn on 18.3.15 avers that the succession cause in the Kadhi's Court was filed by S and she only took over the matter when he died. S who was one of the Administrators of the estate of the deceased died before the final order on distribution was made. The Respondent further avers that the final distribution of the estate has not been done and therefore the properties due to the estate of S have not been determined. The Respondent's further averment is that the Applicants and their mother are not entitled to the estate of S as their mother was not legally married to S and the Applicants were born out of wedlock. She further states that there is no discrimination in Sharia law. Even the Constitution appreciated the special needs of Muslims by limiting the requirement on equality and Muslim law cannot be declared a nullity.

6. Parties filed their submissions which were highlighted by their respective counsel. The gist of the Applicants' case is that during the lifetime of the deceased they lived with both their parents in a part of the estate of the deceased. When the estate of the deceased came up for distribution, the Applicants were told they were not entitled to their father's share thereof as they were illegitimate having been born in a union not recognised under Islamic Sharia. This they say is discrimination and goes against their best interests as children. According to the Applicants, 2 issues fall for determination in the Application:

- i) Whether the Applicants are entitled to their father's 9.21% share in the estate of the deceased.
- ii) What constitutes the 9.21% of the estate of the deceased.

#### Whether Applicants are entitled to their father's 9.21% share in the estate of the deceased

7. To support their submissions under this head, the Applicants cited the UN Convention on the Rights of the Child (CRC), African Charter on the Rights and Welfare of the Child (ACRWC), the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (the Maputo Protocol) and the UN Convention on the Elimination of all forms of Discrimination against Women (CEDAW). It was argued for the Applicants that Kenya is bound to respect, protect and enforce the rights of children without discrimination of any kind. It was further submitted that children are neither the property of their parents nor are they helpless objects of charity. They are human beings with their own rights. The Constitution also protects the rights of children. The Applicants therefore have a right to inherit their father's estate which right must be protected by the Court.

8. It was further submitted that in denying them their right to inheritance, the Applicants are being punished and subjected to violence and discrimination. This negates the protection against punishment, violence and discrimination guaranteed by the Constitution and the aforesaid Conventions. To them, freedom from punishment is non-derogable. It was argued that the Applicants live in Mtwapa where child sex tourism thrives. If they are disinherited, their pursuit of education will cut short and they shall be forced into the streets and exposed to hard drugs, prostitution, child sex tourism and other vices. This can only be averted if the Applicants are allowed to inherit their father's share of the estate of the deceased.

9. The reason the Applicants are being disinherited is because of their mother's religion and status. The Applicants have been labelled "illegitimate children" who have no right to inherit their father's share in the estate of the deceased. This is discrimination on account of the Applicants' mother's religion and marital status and is a violation of Article 3 of the CRC and Article 3 of the ACRWC. It was contended that the birth of a child must be viewed independently of the relationship between the parents which relationship may not be sanctioned by law. This is as was stated by the Supreme Court of India in the case of Revanasiddappa & Another v Mallikarjun & Others. It was submitted that in Jane Anthony v V.M.

Siyath it was stated that children have no role in their birth and illegitimate children like other children are born to their parents. The Applicants further relied on the cases of Vidhyadhari & Others vs Sukhrana Bai & Ors and Rose Mueni Musauvs Brek Awadh Civil Appeal No. 267 of 2011 to persuade the Court to presume a marriage between the Applicants' parents and thereby confer legitimacy upon the Applicants. The Applicants are children of Swauriqy and by that reason are entitled to inherit their father's share in the estate of the deceased.

10. The Applicants assert that they have been denied their father's share of the estate of the deceased. This is a violation of their right to property which is also a violation of the right to life which is the source of all rights and the right to dignity. The Court was further urged to place the best interests of the Applicants as the primary consideration as required by the Constitution, CRC and the Children Act allow them to inherit their father's share of the estate.

11. For the Respondent, it was submitted that the question of the Applicants entitlement in S's share in the estate of the deceased was answered by the Hon. Kadhi in his Ruling of 2.10.14. The Hon. Kadhi rightly found that the Applicants are not entitled to inherit Swauriq. It was submitted that the ruling was based on the tenets of Islamic law and is not discriminatory as claimed by the Applicants. It was submitted that the Ruling is based on the special beliefs of Islam. Article 24(4) of the Constitution limits the provisions on equality to allow the application of Islamic law. The Respondent contends that the deceased was born a Muslim, lived a Muslim and died a Muslim. The applicable law relating to his estate therefore is Islamic Sharia as required by Section 2(3) of the Law of Succession Act. This was adopted in the case of Chelanga v Juma [2002] 1 KLR 339 at pages 353-354. Given that the Applicants are not entitled to Swauriqy's share in the estate of the deceased, there prayer for injunction in this Application must fail.

12. The Respondent further contends that as much as the Applicants have the various rights as set out in their written submissions, the same only apply when one is entitled thereto. In this case, the Applicants are not entitled to inherit from the deceased's estate. It cannot therefore be construed that they are being deprived of their rights. The Applicants are not being disinherited. They just do not qualify to inherit under the tenets of Islamic Sharia.

#### What constitutes the 9.21% of the estate of the deceased

13. It is the Applicants' case that the estate is valued at Kshs. 176,100,000/=. Consequently 9.21% amounts to Kshs. 16, 218,810/=. The Applicants propose that they take the house without land on Plot [particulars withheld] valued at Kshs. 3,000,000/= which they currently occupy together with land and house Plot No. [particulars withheld] valued at Kshs. 5,000,000/=. They further propose that Plot No. [particulars withheld] valued at Kshs. 11,800,000/= be sold and they be paid the remainder of Kshs. 8,218,810 from the proceeds therefrom.

14. The Respondent on her part argues that the house without land on Plot No. [particulars withheld] which the Applicants claim has already been transferred to some of the beneficiaries of the estate. Swauriqy's share however can be derived from Plot Nos. [particulars withheld] were consolidated and sub-divided into several plots. Plot No.[particulars withheld] has been reserved as S's share. These properties have been reserved under the Orders of the Hon. Kadhi pending determination by this Court as to whether the Applicants have a right to inherit from the estate.

#### Determination

15. I have given due consideration to the Application together with the submissions as well as the authorities cited by the parties. After finding in his decision of 2.10.14 that the Applicants are not entitled under Islamic law to inherit Swauriqy, the Hon. Kadhi then stated that the Applicants were at liberty to apply to the High Court for determination of the issue. Although the Application does not seek determination of the issue of inheritance, the issue has been addressed extensively in the submissions of the parties.

16. The Applicants have cited the Constitution of Kenya, international and regional conventions as well as the Children Act to support their claim. All these instruments emphasise the respect and protection of the rights of the child without discrimination. The CRC at Article 2 provides:

***“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”***

Articles 19 and 37 of the CRC further protect the child from all forms of physical and mental violence as well as degrading treatment or punishment.

17. The ACRWC at Article 3 provides:

***“Every child should be allowed to enjoy the rights and freedoms in this Charter, regardless of his or her race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.”***

18. Article 2 of the Maputo Protocol defines women as persons of female gender including girls. It further provides in Article 1(j):

***“Violence against women” means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war;”***

19. These foregoing instruments are now part of our law by dint of Article 2(6) of the Constitution of Kenya, 2010 and Kenya is bound thereby. The rights of the child are also protected by the Constitution. Article 53 provides that in all matters concerning a child, that child's best interests shall be of paramount importance. This is reiterated in Section 4(2) of the Children Act 2001. Article 27 of the Constitution embodies the principle of equality and non-discrimination thus:

***“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law...”***

***(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”***

20. The Court is mindful of the provisions of Article 259 of the Constitution which requires it to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights. The rights and fundamental freedoms in the Constitution are wide and touch on numerous aspects of human life. However, these rights are not absolute and certain limitations have been imposed thereon by Article 24 of the Constitution. In particular the provisions on equality are limited in relation to persons who profess the Muslim religion. Article 24 (4) provides:

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

21. My understanding of the above provision is that Islamic Sharia shall be applied to Muslims in matters relating to personal status, marriage, divorce and inheritance notwithstanding the equality provisions in the Bill of Rights in the Constitution. Islamic Sharia is derived directly from the Quran. Any application of the law relating to a Muslim's personal status, marriage, divorce and inheritance outside Islamic Sharia

could be interpreted as an affront to a Muslim's freedom of religion which is guaranteed by the Constitution. Section 2(3) of the law of Succession Act provides that the applicable law in relation to a deceased Muslim shall be Muslim law. The provision is reproduced below:

***“Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.”***

22. In In the Matter of the Estate of Ishmael Juma Chelanga – Deceased [2002] eKLR, Etyang, J. was faced with a similar case had this to say:

***“Under Islamic Law no non-Muslim is permitted to inherit the estate of a Muslim. This was ably verified in this court by the Kadhi of Nairobi Mr. Hammat Mohammed Kassim. It follows therefore that C, who had conceded that she is a Catholic, cannot inherit a share of the estate of her deceased father, a Muslim, by reason of her being a non-Muslim.***

***Secondly, an illegitimate child does not inherit the estate of his or her father but is permitted to inherit from his or her mother. The reason for this can be found in the Principles of Mohammedan Law by Dr (Mrs) Nishi Patel 1995 CTS publication Cap XIII at page 251:***

***“LAW OF PARENTAGE: INTRODUCTION***

***The Law of parentage which includes paternity and maternity, is the result of the institution of marriage. A Mohammedan marriage is a contract, which confers the status of husband and wife on the parties and of legitimacy on the children. Parentage gives rise to the concepts of legitimacy and illegitimacy. Illegitimacy is totally intolerated and sexual-relations outside marriage are condemned as illicit and the woman who involved in it, is punishable for Zina (fornication)”.***

***It must then follow that, both C and N who are illegitimate children are not entitled to a share of the deceased's estate.***

23. I concur with Etyang, J. in his foregoing finding. Islam does not tolerate illicit sexual-relations outside marriage. Any child born out of an illicit and condemned relationship is considered illegitimate and does not qualify for inheritance of his or her father's estate. Indeed Islamic scholars are unanimous that an illegitimate child does not inherit nor is such a child inherited:

***“Amr Ibn Shuaib narrated that the Prophet (pbuh) said: ‘whoever has an illegal intercourse with a lady, free or slave, the child is illegitimate, it doesn't inherit or inherited.’”*** Tirmidhi

24. The Applicants further contend that when the deceased and Swauriqy were alive, they were housed by their grandfather. If indeed they were illegitimate they ought not to have been allowed to be so housed. Illegitimacy cannot arise upon death of their grandfather. The Court was therefore urged to adopt a liberal interpretation of the law bearing in mind the best interests of the children. Does Islamic Sharia allow children born out of wedlock to inherit their father if they were dependant on him while he was alive? I find the answer to this question in the finding Etyang, J. in the case of Ishmael Juma Chelanga (supra). The learned Judge addressed the issue of dependency of the excluded illegitimate children of the deceased and stated and found that dependency does not qualify them to inherit from their father. He opined:

***A supplementary issue is where C and N, who clearly the deceased was caring for during his lifetime, can inherit his estate as dependants. On this point the Kadhi of Nairobi Mr. Hammat Mohammed Kassim stated as follows:-***

***“Children who may have been supported by the deceased are still excluded because that alone***

***(the deceased's support) is not enough unless the deceased wrote out an acceptable will to include them".***

***I find favour with that testimony and I so hold that both C and N, as the deceased's dependants, are excluded from his estate and are not entitled to a share of the same by reason of the application of the principles of Islamic law.***

25. While the Court appreciates the predicament the Applicants find themselves in, the Court must fault the deceased and S. This is because, they being Muslims, were well aware that the Applicants are not recognised as heirs of either the deceased or S under Islamic Sharia. To forestall the sorry situation the Applicants are now in, the deceased and S ought to have made provision for them by way of will. Islam recognises the testamentary freedom of Muslims. A Muslim may dispose of his estate by will to non-heirs but up to 1/3 thereof. In the case of Saifudean Mohamedali Noorbhai v Shehnaz Abdehusein Adamji [2011] eKLR the Court of Appeal opined:

***"The limit on a Muslim's testamentary freedom, up to one-third of one's estate, is seen in Islam as a means to ensuring balance between a Muslim's freedom in this regard and responsibility to his or her heirs. Deriving sanction from a Prophetic tradition, it reflects indications in the noble scripture that a Muslim may not "so dispose of his property by will as to leave his heirs destitute". (Mulla, Ch, IX, Wills, p. 141).***

26. The Court was urged to infer a marriage between the Applicants' mother and S on account of their lengthy cohabitation and being held out to everyone that she was the wife of S. The case of Rose Mueni (supra) was cited to buttress this submission. It was argued that in that case upon divorce, matrimonial property was divided under common law and not under Islamic Sharia. With respect, that case is distinguishable as it relates to division of matrimonial property upon divorce and not distribution of property upon death as in the present case. In any event presumption of marriage as a concept is unknown in Islamic Sharia. Any cohabitation outside marriage is considered as illicit and the woman involved in it, is punishable for Zina (fornication). Dr (Mrs) Nishi Patel 1995 CTS publication Cap XIII at page 251: "LAW OF PARENTAGE: INTRODUCTION"

27. The Court appreciates the zealous submissions on behalf of the Applicants. Indeed referring to any child as illegitimate in this day and age appears to be outrageous. However, as long as the estate herein belongs to a deceased Muslim and as long as Article 24(4) remains in our Constitution and further as long as Section 2(3) remains in the Law of Succession Act, the Court's hands are tied. In any other circumstances, the Court would not require elaborate persuasion to find in favour of the Applicants.

28. Article 2 of the Constitution declares the supremacy of the Constitution over all other laws of Kenya including international treaties and conventions that form part of our law. The provision further states that the validity of the Constitution is not subject to any challenge whatsoever:

***(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government***

***(2) ...***

***(3) The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.***

29. Given the foregoing provision and the provisions of Article 24(4) of the Constitution, I do find that the exclusion of the Applicants from inheriting S's share of the estate of the deceased is not inconsistent with the provisions of the Constitution. Indeed to find in favour of the Applicants would be to challenge Article 24(4) of the Constitution contrary to the injunction in Article 2(3) thereof. The above being my finding, it would be unnecessary to delve into the second issue for determination as to what constitutes 9.21% of the estate of the deceased. In any event, the material placed before me is insufficient to determine the issue and a valuation of all properties would be necessary to do so. On the prayer for

injunction, no submissions were made on behalf of the Applicants whether written or oral. Besides, given the above finding the same would fail.

30. In the result, my conclusion is that the Application lacks merit and the same is hereby dismissed but with no order as to costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 15<sup>th</sup> day of December, 2017**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Applicants**

..... **for the Respondent**

..... **Court Assistant**