



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
SUCCESSION CAUSE NO. 129 OF 2015

(Formerly Nakuru High Court Succession Cause No. 444 of 2010)

IN THE MATTER OF THE ESTATE OF HUSSEIN HAJI ISSA (DECEASED)

ABDUL AZIM KASSAM.....PETITIONER

-VERSUS-

BADRUDIN HUSSEIN HAJI ISSA.....OBJECTOR

R U L I N G

1. This succession matter has a long and chequered history. It all started with the death of **Hussein Haji Issa** (the Deceased) at Narok on 4th May 2004. In the same year the deceased's widow **Khatija Hussein Haji Issa (Khatija)**, a son of deceased **Hakim Hussein Haji Issa** (now deceased) and a daughter **Naseem Hussein Haji Issa** filed a succession cause in the High Court of Kenya at Nairobi being Succession Cause No. 1567 of 2004. The cause was transferred to the High Court in Nakuru.
2. It would seem that a grant of Letters of Administration was issued to the Petitioners therein before the cause was transferred TO the High Court of Kenya in Nakuru, where it was registered as Succession Cause No. 415 of 2006. As now, the orders in favour of the widow and two of her children caused much disputation particularly from **Badrudin Hussein Haji Issa**, the Objector herein and also a son of the deceased. Tenants occupying rental premises of the estate were also sucked into the raging dispute.
3. **Koome J** (as she then was), did intervene and grant orders to include the Objector in the cause. A grant was issued in his name by **Koome J** on 27th October 2008. Thereafter, a will said to have been written by the deceased prior to his death and appointing his grandchild **Abdul Azim Kassam** the executor of the estate while bequeathing all his moveable and immovable properties to **Khatija**, was introduced into the cause. More applications ensued.
4. Eventually on 9th June 2010 **Maraga J** as he then was became seized of the matter. Citing the contention between the beneficiaries and their lack of candour, the Hon. Judge stated:

“This court cannot keep issuing grants and revoking them at the instance of the parties who as I have said have not been quite candid. In the interest of justice I set aside the stay order I made on 22/2/2010 and revoke any existing grant to either party. The parties are at liberty to petition and/or cross petition for a grant of representations so that the court can properly be seized of the matter and conclusively determine it. Both parties are hereby restrained from

interfering with the tenants in the estate in any way disposing or interfering with the estate until the issue of representation is determined.”

5. Pursuant to the above order, **Abdul Azim Kassam** the current administrator did on 7th September 2010 petition for Probate of written will in respect of the estate of the deceased, annexing a copy of the deceased's alleged will dated 15th August 2003. The above Petition was Nakuru Succession Cause Number 444 of 2010 and is the present cause that was transferred from Nakuru to the High Court in Naivasha on 22/7/2015.

6. Before then, a Grant of Letters of Administration Intestate had been made to **Abdul Azim Kassam**. Upon transfer to Naivasha the Cause was designated as Succession Cause No. 129 of 2015. In the present Petition, the beneficiaries are listed as the Deceased's widow Khatija, and four daughters, namely **Naseem Hussein Haji Issa, Mumtaz A. Kassam, Rukshana S. Kassam** and **Nimmi Ashraf Osman**. **Badrudin Hussein Haji Issa** obviously misdescribed as a daughter, is also listed among the beneficiaries as the undisputed surviving son of the deceased.

7. The assets of the deceased estate have not been disputed. These are:

- 1) Commercial Plot No. 207 (or 10) Narok Township
- 2) Commercial Plot No. 11 Narok Township
- 3) Residential Plot No. 48 Narok.

8. On 21/3/2016, the Objector who had instructed a new Advocate, Mr. Githui withdrew the applications filed earlier in order to pave way for the hearing of the Objection and the Summons for confirmation of the grant. Indeed, the file is full of applications and counter applications. The court directed that the said hearing proceeds by way of *viva voce* evidence with each party indicating that they would call one witness. On the next hearing (21/6/2016) parties were given liberty to adopt their respective filed affidavits. At issue during the trial was the question of distribution.

9. The Petitioner's evidence adduced through **Khatija**, the deceased's widow is simply that she adopted the mode of distribution proposed in her affidavit dated 7th March 2016 and filed on 14th March 2016. In the said affidavit, the widow had proposed as follows. That the Objector takes the whole of **Plot No. Narok/Township/10** (now No. 82). The affidavit further proposed that the deceased's daughters who are **Naseem Hussein Issa, Mumtaz Anwar, Rukshana Salim** and **Nimmi Ashraf** do share equally **Plot No. Narok/Township/11** (Now number 161) and **Plot No. Narok/Township/48** (now No. 75). In her oral evidence the widow intimated that she would share the above two plots with the daughters of the deceased.

10. For his part, the Objector stated that **Plots No. 10** and **11** measure 50 x 100 metres feet each while **Plot No. 48** is a developed residence with a family house and a storeyed guest house. That the deceased also had shares in Agip Service Station. His estimated value of **Plot 10** and **11** was given as Kshs 8 and 70 million respectively. He argued that the distribution should only be drawn upon a valuation of the estate properties.

11. He also complained that the widow had benefitted immensely from mesne profits in respect of the property and should account. He closed with a demand that Islamic law be applied to guide distribution as the family members are adherents of the Islamic Faith.

12. The Objector's evidence reiterated the contents of his affidavit filed on 31st May 2016 in opposition to the widow's proposed mode of distribution. Therein the Objector demanded that prior to distribution the widow, the administrator and an unnamed beneficiary be ordered to render accounts for the sum of Shs 50 million allegedly earned from the deceased's estate since his death, and that such profits be distributed equally between the beneficiaries. That in default, the shares due to such persons be

accordingly reduced by the court. He added that if the court deems it just for the property of the deceased be valued, the cost thereof should be offset as a liability in respect of the estate.

13. The submissions made by the parties reiterated the material contained in their respective affidavits. The Petitioner pointed out that estate accounts were rendered in 2014 up on application by the Objector; that the Objector's conduct demonstrated throughout the proceedings is dilatory and that the Objector's alleged value of the property is not supported by evidence.

14. Further that while opposing the method of distribution proposed by the widow, the Objector did not propose any alternative. The Petitioner noted that there were six beneficiaries among whom the widow ranks high in priority as regards the of the matrimonial home while other beneficiaries ought to share equally.

15. The Objector flagged four issues for determination, namely:

“1. The law applicable in the devolution of the estate of Hussein Haji Issa (deceased).”

2. Whether the will purportedly written by the deceased dated the 15th August 2003 (the basis of this petition) is valid under the applicable law.

3. Who the beneficiaries of the deceased estate are, and their respective shares of the estate.

4. Delivery of true accounts of administration of the deceased's estate.”

16. The Objector's first argument, premised on Section 2 (3) and (94) of the Law of Succession Act and supported by the decision in **Chelanga -Vs-Juma Nairobi Succession Cause No. 2288 of 1996** is that, Muslim Law and not the Law of Succession Act should apply to the testamentary or intestate succession of a person who is a Muslim at death.

17. On the second question, the Objector took issue with the alleged will of the deceased in that it went against the rules guiding the distribution in an intestate succession of a Muslim adherent. Thus the alleged will is invalid and the deceased ought to be presumed to have died intestate, whereupon the Islamic Law on intestate succession should apply.

18. On the third issue, the Objector submits that only three beneficiaries are entitled, namely the Objector, his mother **Khatija** and his unmarried sister **Naseem Hussein**. Three other sisters of the Objector being married, do not count. He argued that the Objector being the only surviving male heir is entitled under Islamic Law to 2/3 of the estate. Thus he argues that the Objector should take the parcel of land on residential **Plot No. 48** where a five roomed (guest) house stands, while the widow and the unmarried daughter share the residential home. Equally, the Objector asserts that he is entitled to 2/3 of town **Plots No. 82 (10) and 161 (11)**.

19. On the question of accounts, the Objector submitted that the Petitioner should account for the period since 2010 when he has been the administrator of the estate of the deceased.

20. In my considered view, the question of the will was rendered irrelevant even before the hearing. In the first place the current Petition was for probate in respect of the deceased will. The temporary grant issued to the present Petitioner by Ouko J (as he then was) was in respect of intestacy. However, at no point did the Petitioner at the hearing before this court seek to assert the said will. Seemingly, reliance on the same was abandoned, as evidenced by the affidavit and oral evidence concerning distribution. The will had purported to bequeath all the moveable and immovable assets of the deceased to **Khatija**, his widow. The latter's proposed mode of distribution does not in any way relate to the alleged will. Thus the question whether or not the deceased made a valid will is neither here nor there.

21. In my considered opinion only two issues stand to be considered, namely, the law applicable to this cause and the mode of distribution. In my opinion, the question of accounts in the circumstances of this

case is dilatory as the Objector failed to follow upon the accounts filed in response to his now withdrawn application filed on 15th January 2014. However, in the future the administrators will have to account to the court as required by law.

22. From the inception of this cause it is clear that the Petitioner, **Abdul Azim Kassam** was relying on the provisions of the Law of Succession Act and submitted to the High court rather than the Kadhi's Court. The Petition itself is brought in the format prescribed in Form No. 78 and entitled "Petition for Probate of Written Will or for proof of Oral Will". The same is dated 12th August 2010. Attached thereto is an affidavit sworn by the Petitioner in support of Petition "for probate or letters of administration with written will annexed" (Form P & A 3). The same was sworn on 12th August 2010. The stated will is annexed thereto.

23. On 3rd November, 2010, **Ouko J** as he then was granted Letters of Administration intestate (P & A 11) to the Petitioner, pursuant to the usual gazette notices in respect of the cause. This grant has been the source of multiple applications by the Objector, the earliest one being the application for revocation of the grant that was filed on 19th November 2010.

24. This application was supported by a strongly worded affidavit that raised various controversial issues including the allegation that the will was a forgery, other delicate questions, such as the relationship between the deceased and the widow at the time of the former's death etc. However at no time, did the Objector raise the question of the deceased's faith or in any way assert the exception under Section 2 (3) of the Law of Succession Act.

25. Subsequently the Objector filed several applications and affidavits. With particular regard to the application for the confirmation of the grant made by the Petitioner, the Objector swore an affidavit on 5th June 2014 disputing the alleged will of the deceased and seeking that the said confirmation be held in abeyance to give him opportunity to prosecute the Summons for revocation. Again, no reference was made to the faith of the deceased.

26. The faith question was therefore first raised in an application filed on 23/11/2015 (now withdrawn), and repeated in a letter from the Objector's advocate (Githui & Co.) dated 5th November 2015 which stated *inter alia* that:

"We note that this matter has come on several occasions before the High Court in Nakuru for hearing. We further note that all the parties here profess Muslim faith. This is a matter which has not been brought to the attention of the court in the past. This being the case, we shall invite the court to consider the provision of Article 170 of the Constitution and refer this matter to the Kadhi either in Nakuru or Narok to have the matter heard and determined under Islamic Law."

27. Directions were made by the court for the party's advocate to file a formal application. On 8/1/2016 the said firm wrote a further letter stating:

"The above matter and our letter dated 5/1/2015 refer. Kindly not that we wish to withdraw the contents of the letter and confirm that the matter may proceed in the High Court."

28. A further letter by the Objector's previous advocate S. M. Sagwe & Co. Advocates, dated 27th January 2016 was received at the registry on 29th January 2016. This letter, making references to the application filed on 23rd November 2015 was to the following effect *inter alia*:

"We filed an application under certificate of urgency. On 23rd November 2015 but the same could not be heard due to a letter written by the other law firm (Githui & Co. Advocates) dated the 5th November 2015 whereby they opined that this case be heard by a Kadhi."

After deliberations we agreed that this court should proceed to hear this case and the earlier letter was withdrawn by the said firm (Githui & Co. Advocates).....”

29. No doubt, this decision was guided by Section 5 of the Kadhi’s Court Act which states:

“A Kadhi’s court shall have and exercise the following jurisdiction, namely 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; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.” [Emphasis added]

30. The parties herein may or may not profess the Muslim religion despite their names but they did not submit this dispute to the jurisdiction of the Kadhi’s court. They came to this court. Ditto for the Objector. It is too late in the day for the Objector to seek shelter behind Article 170 of the Constitution or indeed Section 2 (3) of the Law of Succession Act. This section *inter alia* defines a “**Muslim**” as any person who professes the religion of Islam, and “**Muslim law**” as the law applicable to a person who is a Muslim at the time of death.

31. The exception cited by the Objector as removing Muslims from the application of the Law of Succession Act is found in Section 2 (3) of the Law of Succession Act which states:

“Subject to subsection (4), the provisions 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.”

32. The Petitioner herein whether Muslim or not is like every other person entitled to bring a succession cause under the Law of Succession Act. I fully adopt the sentiments of **Muriithi J** as made in the case of **R.B. & R.G.O. -Vs- H.S.B. & A.S.B. [2014] eKLR** to the effect that:-

“It is clear from the textual provision of Article 170(5) of the Constitution that the jurisdiction of the Kadhi’s Court is limited to questions relating to personal status, marriage, divorce or inheritance, in proceedings where all the parties profess Muslim religion and submit to the jurisdiction of the Court. It appears to me that the primary purpose of the Article 170 is to preserve a forum for the resolution of disputes as to personal law matters of Muslims as existed before the Constitution of Kenya 2010 under section 69 of the former Constitution. The new Constitution, however, recognised and gave effect to the right of Muslims to choose to utilize the regular system of adjudication through the High Court.

This right of choice is consistent with the constitutional values of liberty of the person embodied in the principles of “human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised” under Article 10 (2) (b) of the Constitution. To compel all Muslims to subject themselves to the jurisdiction of the Kadhi’s Court would be contrary to all notions of choice which is the basis of rights and freedoms in the Bill of Rights. Hence the provision for the Muslims to *submit*, rather than compulsion to subject themselves, to the jurisdiction of the Kadhi’s Court.

The Court of Appeal has interpreted Article 170 (5) of the Constitution on the jurisdiction of the Kadhi’s Court and held in the case of *Genevieve Bertrand v. Mohamed Athman Maawiya and Anor.*, Malindi Civil Application No. 24 of 2013 [2014] eKLR of 20th March 2014 (Okwengu Makhandia and Ouko, JJA) that –

“23. In the case of the Kadhi’s Court, it is a creature of the Constitution (section 66 of the retired Constitution and article 169 of the current Constitution). The jurisdiction of the Kadhi’s Court is specifically defined under Article 170 (5) of the Constitution and section 5 of the Kadhi’s [Court] Act, as “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". Thus the jurisdiction of the Kadhi's Court is determined by the existence of three factors. That is the subject matter of the claim or dispute, the party's Muslim faith, and the party's submission to the jurisdiction of the Kadhis Court. [Emphasis added]

33. The question in this case is whether the Objector established that the deceased was a Muslim adherent. From the (proceedings herein) and the evidence tendered at the hearing, one gets the impression that the question of the deceased's faith was approached in a half hearted manner by the Objector, apparently as an afterthought. The widow of the deceased was cross-examined at some length at the hearing. At no point was she asked to confirm or deny the deceased's adherence to Islamic faith or the application of Islamic law to his estate.

34. When the Objector took to the witness box he made a bald statement at the end of his testimony, to the effect: **"We are Muslims. We want Muslim law followed."** The matter of the Deceased's faith cannot be determined through assumptions. Evidence is required to prove his faith. The Court of Appeal in **Re Estate of Ismail Osman Adam (Deceased), Noorbanu Abdul Razak –Vs- Mombasa Civil Appeal No. 285 of 2009** the court observed (per Githinji J A) that:-

".....if the High court assumes jurisdiction to the estate of a deceased Muslim, then by virtue of Section 2 (3) of the [Law of Succession Act] the law applicable in the High Court as to devolution of the estate is the Muslim law and not the Law of Succession Act."

35. During cross-examination the objector stated that all he wanted was equity in the distribution of the estate and not that Islamic law ought to apply. In my considered opinion no evidence has been placed before this court to prove that the deceased died a Muslim and that Islamic law should apply. Secondly the Objector and the Petitioners have always proceeded on the basis that the Law of Succession Act applies herein, making no reference to the faith of the deceased. The mere use of a Muslim name cannot be the basis of the conclusion that the deceased was a Muslim at death. Indeed in his own submission the Objector dismisses the alleged will of the deceased as not conforming with Islamic devolution tenets.

36. In the **Chelanga** case that was called to aid by the Objector's advocate, evidence was tendered regarding the religious affiliation of the deceased, unlike the case herein. The court's decision was arrived at upon an evaluation of the evidence tendered and the law. What the Objector's counsel has sought to do is not only to present evidence in submissions but also to make certain arguments based on Islamic law that were not proved through expert evidence of scholars of Islamic law. Besides the fundamental question of the deceased's faith remained unsettled.

37. Thus the applicability of Muslim law by virtue of the deceased's faith in this case has no evidential basis. In my own view the same was a red herring and not a serious assertion. This also holds true regarding the beneficiaries of the deceased. All along, the Objector has by his pleadings admitted that he and his four sisters and their mother are beneficiaries of the estate. He confirmed this fact in his evidence during cross-examination. It was surprising therefore that in his submissions he recognised only three beneficiaries, namely his unmarried sister **Naseem**, his mother and himself.

38. Admittedly, the High Court has jurisdiction under Article 170 of the Constitution and Section 47 of the Law of Succession Act to entertain and determine succession disputes. Section 2 (4) of the Law of Succession Act states:

"Notwithstanding the provisions of subsection (3), the provisions of Part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim dying before, on or after the 1st January, 1991."

39. Part VII thereof deals with intestate and testate succession. Thus in my view in exercising its jurisdiction under Section 47 of the Law of Succession Act the High Court is empowered under Section 2 (4) to apply the provision in Part VII of the Law of Succession Act so long as it is not inconsistent with

Muslim law, where the deceased was a Muslim at death. The Petitioner is obviously not basing his Petition under Islamic law, and neither has the Objector in his evidence propounded on Islamic law.

40. In this case there is no firm evidence that the deceased's personal law was the Islamic law, or if so that the widow's proposed mode of distribution runs counter to Islamic law. It is therefore my considered view that the law applicable herein is as found in Part VII of the Law of Succession Act as it particularly relates to an intestate succession as envisaged in Section 66 of the Law of Succession Act.

41. Section 66 of the Law of Succession states:

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference:-

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c);

(d);”

42. The surviving spouse ranks higher in priority with regard to issuance of Letters of Administration, followed by other beneficiaries entitled. (See Section 66 as read with Section 35 of the Law of Succession Act). Despite Section 35 of the Law of Succession Act the proviso to Section 71 of the Law of Succession Act states that:

“Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.”

43. The exercise envisaged above is not necessarily one of the surgical precision but one where relevant factors are given consideration, the aim being to have an equitable and not necessarily equal distribution among the beneficiaries. (See **Omollo J.A** (as he then the was) in **Rono –Vs- Rono [2005] eKLR**).

44. In this case the widow of the deceased is advanced in years and has been sharing the residential home developed on Plot No. 48 with the unwed daughter of the deceased, **Naseem Hussein Issa**. Seemingly the two get along, but I think that it would amount to coercion have them share the main house while the Objector takes the guest house on the said plot as he proposes. Although the supposed values of the said plot were given by the Objector in his testimony, there was no actual evidence in proof of the values stated.

45. With regard to the plots in the town ship, both are commercial plots, one of them (**No. 11**) being developed with commercial premises. The parties were unwilling, when requested by the court at the close of the trial, to facilitate a valuation of the properties in question and indeed none of them were willing to bear the cost thereof.

46. The value of the estate given in the affidavit in support of the Petition is a total of Shs. 90,000,000/=. I am aware, having been seized of the Narok Sub Registry High Court Civil Case 01 and 02 of 2016 that were concluded 27th October, 2016 during the pendency of this ruling by a consent judgment recorded therein for the total sum of Shs 14,030,450 against the estate of the deceased. The administrator of the estate had been sued for damages by tenants, and following the consent judgment it was agreed that proceeds of rents from **Plot No. 11** were earmarked to go into the payment of the decretal sum. As the

proceedings in the said causes show, the cause of action arose from the actions of the Objector during tenure as an administrator of the estate. Thus the estate has a liability that has to be borne in mind. The widow said the rents from the said premises are irregular and modest. But it seems that she has depended on the said rent for her upkeep.

47. In my view, as a spouse to the deceased, the widow contributed to the acquisition of the property, even if in kind, and is entitled to a commensurate share thereto. Certainly, the widow is entitled to the matrimonial home situate on **Plot 48** and this court cannot force her to share the matrimonial house with an adult daughter. Equally, the relationship between the widow and the Objector appears broken down and it may not aught well to have them reside on the same location.

48. In the circumstances, I will order that the widow is entitled to the matrimonial house and the approximate piece of land upon which it stands while **Naseem Hussein Haji** will take the adjacent 5-roomed guest house and the approximate plot upon which it stands, and that the respective dimensions of the land parcels will be agreed between two beneficiaries. Hence, the two beneficiaries will share **Plot No. 48**.

49. As regards **Plot No. 11**, which has already acquired a liability in excess of Shs 14 million, the same is to be shared equally by **Khatija Hussein Haji Issa, Naseem Hussein Issa, Mumtaz Anwar, Rukshana Salim** and **Nimmi Sharif**. The Objector will take absolutely the Plot No. 10 which operates as a garage.

50. In view of the foregoing, the court finds no merit in the Objection and will proceed to confirm the grant in the name of the present administrator against whom no adverse findings have been made, the widow of the deceased, **Khatija Hussein Haji** and the daughter **Naseem Hussein Haji**. Because of the polarized state of relations between the Objector and the rest of his family, and his past conduct as reflected in the concluded suits against the estates namely **Narok High Court Sub-registry Civil Suit No. 01 and 02 of 2016** it is my considered view that it may be inimical to the administration of the estate to include him as an administrator. However, should the three administrators not act in accordance with the grant confirmed in their names, the Objector and any other beneficiary will be at liberty to apply to this court. Parties to bear own costs.

Delivered and signed on this 25th day of November, 2016.

In the presence of:-

Mrs Muigai for the Petitioner

Mr. Obino holding brief for J. Maritim for the Objector

Court Clerk : Barasa

C. MEOLI

JUDGE