



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
FAMILY DIVISION
AT MOMBASA
MISCELLANEOUS APPLICATION NO. 32 OF 2013

IN THE MATTER OF THE ESTATE OF: SWALEH OMAR SWALEH (DECEASED)
IN THE MATTER OF : KADHI'S COURT SUCCESSION
CAUSE NO. 218 OF 2012

- 1. AHMED SHARIFF SWALEH**
- 2. MOHSEN SHARIFF SWALEH**
- 3. AHMED SHARIFF SWALEH**
- 4. JAMAL SHARIF SWALEHAPPLICANTS**

=VERSUS=

- 1. ABDULGADER SHARIFF SWALEH**
- 2. OMAR SHARIFF SWALEH**
- 3. KHALID SHARIFF SWALEH**
- 4. MOHAMMED SHARIFF SWALEH RESPONDENTS**

RULING

By the Notice of Motion dated 5th September 2013 the Applicant seeks inter alia the following orders:

“The Honourable Court do order the transfer of Kadhis Court Succession Cause No. 218 of 2012 at Mombasa to the High Court of Kenya at Mombasa – Family Division for hearing and determination”

The application was opposed by way of a Replying Affidavit filed in court on 2nd October 2013. **MR.**

MOGAKA Advocate represented the Applicants while **MR. EGUNZA** acted for the Respondents. Learned counsel both made their oral submissions before the court on 10th December 2013. The estate in question is that of the late **SWALEH OMAR SWALEH ASSAFI** who passed away on the year 2006. Proceedings had been commenced for probate of the estate before the Kadhi's Court in Mombasa. As it turns out the beneficiaries are divided regarding the forum in which to conduct probate proceedings. The Respondent and three (3) others wish to have the estate determined by the Kadhi in accordance with Islamic Sharia Law. However the Applicant and 3 other beneficiaries have declined to submit to the jurisdiction of the Kadhis Court and seek to have the estate determined by the High Court under the law of Succession Act. It is a fact that Kadhi's Courts were set up to cater for the interests of muslim faithful in matters of marriage, divorce and succession. However the fact that one professes the Muslim faith does not oblige one to submit their disputes for determination in the Kadhi Court. Article 170(5) of the Constitution of Kenya provides:

“The jurisdiction of a Kadhis 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” (my emphasis).

Therefore to quote my own ruling in **JR No. 9 of 2013 MARIAM S. SWALEH & 4 OTHERS –VS- THE CHIEF KADHI & 3 others:**

“What this means is that there must be consensus between the parties that a matter of inheritance be determined in the Kadhis court”

Clearly here no such consensus exists. The Applicant and others have chosen (as they are entitled) not to subscribe to the jurisdiction of the Kadhi Court over this matter. I am fully mindful of the fact that a section of beneficiaries seek to have the estate determined by the Kadhi, whilst an equal number do not wish to subject themselves to the jurisdiction of the Kadhi. An estate cannot be partially administered by the Kadhi and partially under the law of succession. It must be under one or other regime. In view of the fact that Article 170(5) is a constitutional provision and in view of the fact that the Kadhis court is subordinate to the High Court I am inclined to allow the application to transfer the matter to the High Court.

In his submissions Mr. Egunza stated that the Respondents do not object in principal to the transfer of the matter to the High Court, but desire that certain conditionalities be met. One of such conditions was that the High Court Judge sit with a Kadhi and that the estate be shared out in accordance with Islamic sharia law. The court cannot entertain the said conditions because once the matter is before the High Court then the law of succession will apply. There is no provision in that law for a Judge to sit with a Kadhi in order to determine the estate of a deceased muslim. Further I do agree with Mr. Mogaka that to indulge this condition would make a nonsense of the applicants stated desire not to submit to the jurisdiction of the Kadhi. Similarly the other conditions that have been set out in the Replying Affidavit are not tenable..

Based on the foregoing I find that this application has merit and I direct that Kadhi's Succession Cause No. 218 of 2012 be and is hereby transferred to the High Court of Kenya at Mombasa Family Division for hearing and determination. No order on costs.

Dated and Delivered in Mombasa this 20th day of February 2014.

M. ODERO

JUDGE

In the presence of:

Mr. Egunza for Respondent

No appearance for Applicant