



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO.689 OF 2010

IN THE MATTER OF THE ESTATE OF MARYAM JUMA KIBANDA (DECEASED)

AND

IN THE MATTER OF ASHRAF ABDU KASSIM.....APPLICANT

VERSUS

KARAR OMAR

MUSA IBRAHIM

SWALEH ABDALLAH

MOHAMMED HUSSEN.....RESPONDENTS

RULING

Maryam Juma Kibanda, the deceased to whose estate these proceedings relate died on 11th March 2010. It is common ground that the deceased did not have any children. According to the Applicant, the deceased wrote a Will on 3rd October 2009. In the Will, the deceased identified her properties and further indicated how the said properties would be distributed. In that regard, the Applicant petitioned this court to be issued with a grant of probate of written Will on 13th April 2010. That petition has been challenged by the Respondents. The Respondents claim, *inter alia*, that some of the properties that were listed in the Will, particular Plot No.40 at Kibera did not exclusively belong to the deceased but rather, was jointly owned with other beneficiaries of the estate of Abdalla Juma Kibanda (deceased).

The question that arose for determination by this court regards whether this court had jurisdiction to hear the dispute in view of the fact that the deceased and all claimants are Muslims. The Applicant wants the court to refer the dispute to the Kadhis' Court for hearing and determination on the question of who are the beneficiaries of the estate of the deceased and secondly, the extent of the properties that comprise the estate of the deceased. The Applicant stated that all the parties to the dispute were Muslims. The deceased was a Muslim. The determination of who the beneficiaries of the estate of the deceased are and the extent of the properties of the estate of the deceased will be determined in accordance with Islamic Succession Law. The Respondents are opposed to the dispute being referred to the Kadhis' Court. In that regard, they have relied on the provision of **Article 170(5)** of the **Constitution** which provides that:

“The jurisdiction of a Kadhis’ Court shall be limited to the determination of the 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 Kadhis' Court."

The Respondents argued that since it was the Applicant who brought the case before the High Court, he cannot at this stage of the proceedings ask the court to refer the dispute for determination by the Kadhis' Court. The Respondents further submitted that this court can only refer the dispute for determination by the Kadhis' Court if both parties submit to the jurisdiction of the Kadhis' Court. In that regard, the Respondents relied on the cases of **Mariam S. Swaleh & 4 Others v The Chief Kadhi & 3 Others [2013] eKLR** and **Ahmed Shariff Swaleh & 3 Others v Abdulgader Shariff Swaleh & 3 Others [2014] eKLR** where it was held that a dispute involving Muslims can only be referred to the Kadhis' Court where parties agree that such dispute be determined by the Kadhis' Court.

This court has carefully considered the rival argument made by counsel for the Applicant and the Respondents in regard to whether the Kadhis' Court has jurisdiction to hear and determine the dispute between the two parties. There is no dispute that all the parties to this proceeding profess the Muslim faith. The deceased was a Muslim. In their pleadings, both the Applicant and the Respondents acknowledged to some extent, that the Islamic Succession Law will be applied in determining the beneficiaries of the estate of the deceased and the extent of the properties that comprise the estate of the deceased. Such disputes shall be determined by the Kadhis' Court. That is a Constitutional command. The Respondents submitted that **Article 170(5)** of the **Constitution** which grants jurisdiction to the Kadhis' Court requires that all parties to the dispute who are of Muslim faith first submit to the jurisdiction of the Kadhis' Court.

The Respondents argument is to the effect that a person professing the Muslim faith has an option of either submitting or refusing to submit to the jurisdiction of the Kadhis' Court. This court was not persuaded by this argument. The *raison d'etre* for the recognition of the Kadhis' Court by the Constitution was the demand by Muslims that matters relating to personal status, marriage, divorce and inheritance be governed by Islamic Law. Disputes involving persons of Islamic faith can only be determined by the Kadhis' Court because the holders of the office of Kadhi are required under **Article 170(2)** of the **Constitution** to be persons who profess the Muslim religion, and further, possess such knowledge of the Muslim Law as is applicable to the particular sect of Muslims. The only exception to this requirement that persons of Muslim faith submit to the jurisdiction of the Kadhis' Court is where both parties to the dispute indicate to the court their preference that the dispute be heard and determined by this court.

As regard to the question whether where a party who has lodged a petition for the grant of letters of administration intestate or a grant of probate is precluded from later requesting the court to refer the dispute for determination by the Kadhis' Court, this court holds that **Section 2(4)** of the **Law of Succession Act** grants this court jurisdiction to deal with the administration of the estates of deceased Muslims, under Part VII thereof, where there is no inconsistency with Muslim Law. The understanding of this court of this provision of the **Law of Succession Act** is that Muslims can petition this court for a grant of letters of administration intestate or a grant of probate of written Will provided that where there is a dispute such dispute shall be referred for determination by the Kadhis' Court.

In the premises therefore, this court holds that the parties to these proceedings being Muslims, and the deceased having been a Muslim, the dispute between them shall be referred for hearing and determination by the Kadhis' Court. Upon determination of the dispute, the decision of the Kadhi shall be referred back to this court for adoption. There shall be no orders as to costs.

DATED AT NAIROBI THIS 26TH DAY OF JUNE, 2014

L. KIMARU

JUDGE