In re Estate of Bare Adan Mohamed (Deceased) (Civil Case E013 of 2023) [2025] KEHC 2896 (KLR) (12 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2896 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CIVIL CASE E013 OF 2023

JN ONYIEGO, J

MARCH 12, 2025

BETWEEN

BALUGO ADAN MUHUMED (SUING AS THE ADMINISTRATOR OF THE ESTATE OF BARE ADAN MOHAMED) ..... APPELLANT

AND

ABDI ABDULAHI ADAN ..... 1ST RESPONDENT

ABDIRAHMAN ADAN MOHAMED ..... 2ND RESPONDENT

MADOW DAKAT TAKOY ..... 3RD RESPONDENT

(Being an appeal against the judgment of Hon. Mohamednoor H. Isaack delivered on 31.05.2023 in Succession Cause No. 1 of 2023 at Bute.)

JUDGMENT

1. The proceedings herein relate to the estate of Bare Adan Mohamed who died intestate on 14.06.2021 leaving properties in form of money, land and houses. According to the petition dated 20-02-2023 filed by the petitioner/1st Respondent herein, the deceased at the time of his death was survived by two sisters and a brother to wit; Abdirahaman Adan Mohamed(brother)(2nd Respondent) and father to the petitioner now the 1st respondent in this appeal, Madow Dakat Takoy(sister)(3rd respondent) and; Balugo Adan Muhumed(sister) now the appellant in this appeal.
2. Among the assets left were;
    i. Cash in hand 610,000
    ii. A shop valued at Ksh. 143,360
    iii. 1,205,600- advance cash collected by the right heirs

iv. 1,206,115-debt for shop

v. Kshs.2,200,975.70 at Equity Bank which was distributed by the Court

vi. A plot 1 developed (Rental houses) measuring 80 ft by 100 ft with 12 rooms permanent, 6 rooms semi-permanent, 2 iron sheet rooms, 2 trip stones and 1 vehicle kotokoto located at Gumar location, Bute town. Value 6710,310

vii. A plot 2 developed (shops and lodging) measuring 100ft x 50ft with six (6) rooms permanent, 13 rooms semi-permanent, 2 toilet and 2 bathrooms, 4 kiosk, half vehicle kotokoto and 1 vehicle stone located at Gumar location at Bute, Wajir North Sub-county. Plot value; 6,713,778

viii. A plot developed, measuring 80ft x 100 ft, with 3 permanent rooms, 2 semi-permanent rooms and 1 semi-permanent toilet (wasia left by the deceased that plot 3 given to Abdi Abdullahi Adan by the deceased) plot and its value; 2,710,000

ix. A piece of land equal to (18 plot undeveloped) given out for waqaf as agreed by the heirs.

x. 1 (one) vehicle Toyota Hilux model 2.8D. Vehicle value;700,000

xi. 1 (one) diesel engine generator -60,000

xii. 1 (one) big fridge -30,000

xiii. 1 (one) small fridge- 10,000

xiv. 1 (one) bed 4 by 5- 10,000

xv. Farm 1- 700,000

xvi. Farm 2- 500,000

xvii. Farm 3- 200,000

xviii. 1 donkey cart -20,000

xix. Block 1881- 131,810

xx. Building stone block – 1 vehicle -70,000

3. Besides, the deceased who died while single, left an alleged adopted young girl whom he had taken as his daughter and the 1st respondent (nephew) being a son to the 2nd respondent whom he had allegedly adopted also as his child. It is however worth noting that the said adoptions of the 1st respondent and the young girl were not formally executed.

4. According to the petitioner, upon the demise of the deceased, Bute area Ulmaas comprising of Sheikh Abikar Adan, Mohamed Abdikher and Mohamed Ali Golicha distributed to the heirs their rightful shares from the estate. That plot No.3 was given to Abdi Abdullahi (the 1st respondent) the alleged adopted son by the deceased when he was alive and healthy. That during the distribution of the estate by Ulumaas who allegedly made a ruling after listening to witnesses, they found that the plot belonged to Abdi Abdullahi.

5. It was averred that during the distribution exercise, the 1st respondent/petitioner availed four male witnesses who confirmed that the deceased had left a will bequeathing to him plot number 3. That all the heirs were satisfied with the ulmaas ruling save for the appellant who forcefully settled on plot

number 3 which was given to him. He therefore prayed for the court to honour the will and uphold the Ulmaas decision dated 8th and 9th February 2023.

6. In response, Balugo Adan Muhumed the appellant herein filed her defence which is undated opposing the Ulmaas decision giving the petitioner/1st respondent a son to the 2nd respondent a share which he was not entitled to. She claimed that Abdi Abdullahi had intermeddled with the estate of the deceased by unilaterally collecting rent from the estate premises since the deceased died without accounting for it. She denied that the deceased had given the petitioner any of the estate property. She vehemently challenged the existence of any will executed by the deceased. It was her case that the petitioner took away the deceased's safe containing millions of shilling but failed to account for it. According to her, the petitioner was a foreigner in the inheritance process as he was not a heir.

7. During the hearing, the petitioner/1st respondent told the court that he was an adopted son to the deceased for 30 years since he was 7 years. He maintained that he was given a plot by the deceased. That the deceased died suddenly, and therefore did not tell him anything. He admitted that he was not a direct heir to the estate but an adopted son. He acknowledged that the only heirs to the estate were his father (2nd respondent in this appeal), the appellant his aunt and Madow Dakat (3rd respondent in this appeal).

8. On his part Abdirahaman father to the petitioner basically adopted his son's testimony.

9. Madow Dakat only wished the case to end peacefully. She was not opposed to the ruling of the Ulmaas.

10. The appellant adopted her statement of defence. She claimed that the petitioner had no plot of his own and that the witnesses were brokers. She said that the elders had no power to distribute the property of the deceased.

11. The petitioner called a witness Ali Noor yallow (pw1) who claimed that in October 2015, the deceased called and informed him that he had decided to give the petitioner a plot where he intended to build a petrol station. Pw2 also one Osman Hassan stated that one time on a Tuesday at 11.am, the deceased called him to read a Quran for him as he was sick. That after the Quran reading, the deceased told him that he married the petitioner a girl and that he had given him a house. Pw3 Abdulqadir told the court how the deceased had met him in a certain room and in cause of their conversation the deceased disclosed that he had given the petitioner a plot.

12. Dw1 Ahmed Hussein gave evidence in support of the appellant stating that the rest of the estate had been distributed save for one plot. Dw2 Abdullahi Ibrahim who stayed together with the deceased stated that the deceased never told him about giving the petitioner a plot.

13. After hearing both sides, the learned Kadhi found that the petitioner's witnesses claimed to have been separately informed by the deceased that he had given the petitioner a plot. According to the learned Kadhi, it sounded doubtful and precarious. However, the learned Kadhi observed that the appellant at paragraph 10 of his defence had recognized the petitioner as one of the beneficiaries hence entitled to inheritance;

14. Regarding the appellant's claim that she had contributed towards the development of the disputed plot, learned Kadhi found that there was no proof on the ground as he had visited the site. That the only development he saw were 5 rooms made of sticks and mud built by the appellant and one room made of sticks and mud also used by the petitioner as a kitchen.

15. Upon conclusion of the case, the learned Kadhi rendered his decision on 31-05-2023 holding that;

a. the rest of the estate except for plot no. 3 had been distributed; that the disputed plot is owned by the deceased and subject to distribution;

b. that therefore the 25% of the disputed plot be allocated to the 3rd respondent in the petition(appellant);

c. 75% of the disputed plot be given to the petitioner being shares to the 1st and 2nd respondent who have no objection for the petitioner to own the entire disputed plot;

d. the petitioner should buy out the 3rd respondent(appellant) her 25% of the total value of the disputed plot;

e. That one room of the self-contained permanent house should be subject to inheritance.

f. That likewise, the petitioner to buy out the 3rd respondent of her 25 % of the total value of the said one room.

g. That the 75% of the said room value should be allocated and owned by the petitioner as the 1st and 2nd respondent have no objection to what is subjected to inheritance in this petition.

h. That the semi-permanent house with verandah should be inherited by the three respondents herein 1st, 2nd and 3rd.

i. That the 5 doors room like structures made of sticks and mud belongs to the 3rd respondent.

j. That the two rooms of the permanent house occupied by the petitioner should remain his property as it has been built by the deceased and has let the petitioner to occupy it during his life time and after his demise.

k. That the 75% shares of the disputed plot and the 75% shares of one room of self-contained house should be in favour of the petitioner as given out by the 1st and 2nd respondent in their statement of defense, hence no taking it back.

16. Aggrieved by the said judgment, the appellant proffered a memorandum of appeal dated 30.10.2023 on the following grounds:

i. That the learned Kadhi erred in law and fact by failing to consider the fact that the 1st respondent herein had no locus standi to institute the Bute Kadhi court KCSSUC No. E001 of 2023.

ii. That the learned Kadhi erred in law and fact by failing to consider the fact that there was no independent evidence adduced in support that the 1st respondent to affirm his paternity to the deceased and subsequently his entitlement as beneficiary of estate of the deceased.

iii. That the learned Kadhi erred in law and fact in disinheriting one of the beneficiaries, a minor adopted daughter namely MBAM in total contravention of the Islamic law of maintenance and *the constitution*.

iv. That the learned Kadhi erred in law and fact by disregarding and failing to uphold the principles engraved in the Islamic law of inheritance.

v. That the learned Kadhi erred in law and fact by preempting the ownership of the house being occupied by the appellant and disregarding the appellants evidence in total.

vi. That the learned Kadhi erred in law and fact by failing to put into considerations the appellant's contribution to the development of the disputed house and therefore subjecting the same as part of subject matter of distribution.

vii. That the learned Kadhi erred in law and fact by coercing the appellant through his judgment to dispose off her purported 25% of her shares in the alleged disputed plot to the 1st respondent, which is a total violation of the principles of natural justice and the precepts engraved in *the constitution*.

viii. That the learned Kadhi erred in law and fact by misinterpreting the ayah of the holy Quran as quoted in paragraph 15 of the judgment dated 31.05.2023.

ix. That the learned Kadhi erred in law and fact by failing to consider and appreciate the appellant weighty evidence which she tendered in court and also in her pleadings.

17. The appellant sought for orders that:

i. The appeal be allowed.

ii. That the subordinate court's judgment delivered on 31.05.2023 be set aside.

iii. That the subject case be tried de novo by a different court.

iv. Costs hereof be provided for.

18. The appeal was canvassed by way of written submissions.

19. The appellant via submissions dated 11.10.2024 stated the following issues for determination;

i. Whether the 1st respondent had locus standi to institute the Kadhi Court Case No. E001 of 2023?

ii. Whether the judgment conformed to the principles of Islamic law of inheritance and the tenets of *the constitution*?

iii. Whether the judgment was manifestly prejudiced and preemptive?

iv. Whether the judgment failed the principles of lack of objectivity in failing to consider the appellant's evidence and in coercing her to dispose her alleged share to the 1st respondent?

v. Costs.

20. On the first issue, it was urged that the capacity to sue is a prerequisite requirement in law and a party seeking a legal remedy must show that they have the same. In buttressing the same, the appellant relied on the case of Alfred Njau v City Council of Nairobi (1983) KLR 625 where the court stated that locus standi literally means a place of standing and the right to appear in court.

21. It was urged that the 1st respondent is neither a direct heir nor an interested party as defined in the Islamic law and the *Law of Succession Act*. That the Islamic law provides that only heirs such as parents, siblings, children and spouses have the legal capacity to claim inheritance. Counsel contended that heirs according to the Mohamedan law are classified in three categories such as: Ahlul – Faraidh (Quranic Sharers), Asabah (Residuary of agnates) and Dhawil – Arham (Distant kindred/uterine relatives). That ordinarily, the Quranic sharers are assigned to their entitlement in accordance to the primary sources of Sharia. Secondly, if there be any residue, the Asabah become entitled to certain shares as provided by the Sharia and thirdly, the distant kindred can only inherit the intestate estate in the absence of the first and second class heirs.

22. In this case, the 1st respondent being a nephew of the deceased, lacked the requisite standing to move the court for determination of the deceased person's estate for he belongs to the third class heir. Consequently, to the foregoing, the 1st respondent was mandated to seek for letters of grant before instituting the proceedings herein. The appellant relied on the case of Daniel Njuguna Mbugua v Peter Kiarie Njuguna & 2 others and Isaya Masira Momanyi v Daniel Omwoyo where it was held that instituting a suit against the estate of the deceased person prior to obtaining letters of administration is a nullity. As such, this court was urged to find that the 1st respondent lacked capacity to deal with the estate herein.

23. On the second issue, it was submitted that the Islamic law on inheritance is clear and specific as it provides equitable and just allocations to eligible heirs. That the law is a must and not if and the same must be adhered to in administering the estate of the deceased. It was urged that the Holy Quran and Hadith governs the mode of distribution of the deceased person's estate where a person has died intestate.

24. The Honourable Kadhi was thus faulted for failing to uphold the principles of the Islamic law of inheritance as enshrined in the Quran and Hadith. That Surah An-Nisa (4;11,4-12 and 4:176) lays out the mode of distribution of shares which should be allocated to each of the heirs. It was contended that without definitive proof of paternity, the court's decision to include the 1st respondent in the inheritance distribution was unjustified and in contravention of the Islamic law. It was contended that the deceased did not bequeath the 1st respondent any property and that explains the reason why the whole estate of the deceased was subjected to distribution.

25. On the third issue, it was urged that the judgment was manifestly prejudicial and preemptive. It was argued that before his demise, the deceased had adopted a daughter whom he acquisitioned for her a birth certificate in his name and whom he was providing for in terms of general upkeep and education. That in as much as there being no fatherhood blood, the Islamic law traditionally permit direct inheritance by adopted children. That the court failed to apply the principles of care and guardianship that Islamic law encourages towards adopted children. In buttressing the point, counsel urged that wasiyyah (will) in Islamic law allows the testator to will up to a third of his wealth to non-heirs. In the same breadth, the court failed to recognize the best interest of a child as provided for in article 53 of *the constitution*.

26. On whether the judgment failed the principles of lack of objectivity in failing to consider the appellant's evidence, it was urged that it was not in doubt that the appellant had contributed to the construction of the rooms she was residing in which formed part of the estate of the deceased. That the Kadhi did not consider the pleas of the appellant and proceeded to decree that the whole property belonged to the deceased.

27. On costs, counsel relied on the case of Devran v Manji Daltani (1949) where the court held that a successful litigant can only be deprived of his costs where his conduct has led to litigation, which might have been averted. It was thus urged that it would be in the interest of justice to accord the appellant costs for the reason that the she was compelled to move court after her rights were grossly compromised by the 1st respondent.

28. On the other hand, the 1st ,2nd and 3rd respondents in their written submissions dated 15.10.2024 isolated two issues for determination as listed hereunder:

    i. Whether the adopted child was legally adopted by the deceased and or whether the adopted child was dependent on the deceased.

ii. Whether the 1st respondent had locus standi to move to court.

29. On the first issue, the respondents argued that the deceased never legally adopted the 1st respondent and the alleged daughter. That at all material times, the 1st respondent cared and looked after the deceased till his death. While relying on section 29 of the *Law of Succession Act*, counsel urged that both the 1st respondent and the deceased adopted daughter don't qualify as beneficiaries of the estate of the deceased.

30. On whether the 1st respondent had locus to move the court, counsel argued that the deceased prior to his death had gifted the 1st respondent the house on the contested land as a wedding gift. That the 1st respondent thus lives on the said land together with his family. It was urged that despite the foregoing being within the public knowledge, the Kadhi still distributed the said property to the other beneficiaries of the estate. It was contended that via a letter dated 17.10.2023, the 2nd and 3rd respondents wrote to the Kadhi giving directions that they had gifted the 1st respondent their portion of inheritance thus the same loosely translates to the fact that the 1st respondent is to inherit 75% of the deceased's estate.

31. It was urged that this appeal is a clear indication that the appellant's intention was to deny the 1st respondent an opportunity to enjoy his inheritance. That noting that the 1st respondent had been gifted the said property, he thus had the locus to move the Kadhi's court for determination of his gift. The respondents thus urged this court to dismiss the appeal herein.

Kadhi's opinion.

32. The Court heard the appeal herein with the aid of two assessors pursuant to section 65 (1) (c) of the *Civil Procedure Act*, which provides for appeals to the High Court from original decree of a Kadhi's Court as follows:

> " c) from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors."

33. For the hearing of this appeal, I sat with Principal Kadhi A.D. Wako of Garissa Kadhi's Court and Kadhi Fahad Ismail Mohamud. In his opinion, Kadhi A.D. Wako reached a determination that the trial Kadhi erred in permitting the 1st respondent, who is not a legal heir, claim inheritance from the deceased's estate. Additionally, he opined that an adopted child under Islamic law is not entitled to inherit as a direct heir however, a deceased person prior to his death can make a provision for such a child via a valid will, wasiya. According to him, the trial Kadhi erred by failing to make provision for the welfare of the adopted minor contrary to the Islamic law and *the constitution*. In the end, Kadhi A.D. Wako urged that the determination by the trial Kadhi be set aside and the matter referred back for hearing de novo before a different Kadhi.

34. Kadhi Fahad Ismail Mohamud on the other hand opined that the respondent was not a Quranic heir whose share is fixed as he was not a biological son to the deceased. That hadith of the prophet Muhammad (p.b.u.h) gave the appointed portions to the people who are entitled to inherit from a deceased's estate and then whatever remains is to be given to the nearest male. As such, the trial Kadhi erred when he apportioned the 1st respondent a portion of the estate noting that he was not a direct beneficiary of the deceased. On whether the 1st respondent was qualified to inherit under the Islamic succession, the Kadhi stated that the hadith of the prophet Muhammad (p.b.u.h) allows a third of a property of the deceased to be given to charity. To that end, the Kadhi dismissed the ground of appeal urging that the 1st respondent qualified to inherit the deceased's estate upto a third but the same was

possible only via a wasiyya or a will. On the third ground, he urged that noting that the 1st respondent was not a biological son to the deceased, he could not disinherit the appellant who was a direct heir. As such, the trial court fell into error when he granted the 1st respondent an option to buy the appellant's share without considering that the 1st respondent was not a direct heir.

35. In as much as this court is not bound by Kadhis A.D. Wako's and Fahad Ismail Mohamud's findings, it is important to note that the court has considered the same for guidance so as to arrive in a just decision.

36. This being the first appellate court, it is thus bound to reconsider, re- evaluate and re-assess the evidence tendered before the trial court together with the assessors' opinions and arrive at an independent determination without losing sight of the fact that the trial court had the advantage of seeing and listening to the witnesses to be able to assess their general demeanour. [See Selle and another v Associated Motor Boat Co. Ltd and others [1968] E.A 123 and Peters v Sunday post limited [1958] E.A 424].

37. I have considered the record of appeal, grounds of appeal and submissions by the parties. The following issues are discernable for determination;

    i. Whether the 1st respondent had locus to move the court.

    ii. Whether there was a will left by the deceased

    iii. Whether the petitioner (1st respondent) was an adopted child to the deceased

    iv. Whether the petitioner (1st respondent) was gifted the disputed plot

    v. Whether the petitioner (1st respondent) was entitled to a share

    vi. Whether a girl by the name M allegedly adopted by the deceased was entitled to a share of the estate.

    vii. Costs.

38. In determining whether the 1st respondent had the requisite locus to move the court in regards to the estate herein, one would have to ascertain his beneficial interest in the estate. The term locus was defined in the case of Law Society of Kenya v Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000 as follows: -

> " Locus Standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in Court of Law"

39. Further in the case of Alfred Njau and Others v City Council of Nairobi [1982] KAR 229, the Court had this to say –

> " the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings".

40. Therefore, locus standi means the right to appear before and be heard in a court of law. Locus standi is so important that in its absence, a party has no basis to claim anything before the Court.

41. In the instant case, the appellant urged that considering that the 1st respondent belonged to a third caste as provided for in the Islamic religion, he lacked the requisite standing to move the court over the estate of the deceased.

42. It is important to note that Section 48(2) of the LSA provides that the Kadhi's court shall continue to have and exercise jurisdiction in relation to the estates of a deceased Muslim for the determination of inheritance in accordance with Muslim law and any other question arising under the Act in relation to such estates. [See the case of Chelanga v Juma KLR [2002].

43. Section 2(4) of the LSA provides as follows:(4)Notwithstanding the provisions of sub-section (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 on or after 1st January 1991"

44. In the same breadth, M. M. Khan in his 'Islamic law of inheritance' at, p22 states:

'Administration as understood by modern law, was unknown to Islamic jurisprudence. In Islam there is mere distribution of property of the deceased, by the state if not by the heirs themselves. Unlike other modern systems to dispose of the estate of a deceased Muslim, neither there is a need of executor or / and administrator nor probate or / and letters of administration. In the absence of an executor appointed by the will of the deceased, heirs of a Muslim have a right and capacity to dispose of the estate of the propositus according to law. In case they fail or refuse to do so, the Qazi (magistrate) may appoint an executor'.

45. Mohamed K. Ibrahim, J (as he then was) in the case of Rashid Zahran v Azan Zahran & 4 Others Civil Appeal No. 55 of 1999 stated;

'What is the effect of this provision? It is my view that this provision can only apply where the same shall not oust the application of Islamic law and principles in connection with the administration of the estate of a deceased Muslim. It is in effect directory and not mandatory as where there is any inconsistency or doubt as far as Muslim law is concerned then Muslim law shall prevail. Any requirement that one must obtain letters of administration to the estate of a deceased Muslim before management or distribution thereof would be inconsistent with Muslim law".

46. Therefore, all that a Muslim has to do to have locus standi, is to prove that he is a beneficiary or heir of the deceased. In the instant case, it is admitted by both parties that the petitioner is not a direct beneficiary or heir to the estate. It is further admitted at page 3 of the 1st, 2nd and 3rd respondents' submissions that the petitioner/1st respondent has no basis to inherit from the deceased as adopted children are not recognized under Section 29 of the law of succession.

47. Given that direct heirs to a Muslim deceased person are predetermined and clustered by the Quran. The petitioner in this case is in the third caste of inheritance hence, he had no capacity to petition for a grant to administer the estate. In fact, his father (2nd respondent), and the aunties had the legal capacity to petition as the members of the second caste of inheritance unless where there is leave from the court to petition on their behalf where there is proof that the legally entitled administrators are evading distribution to escape a claim against the estate. In the circumstances of this case, I agree with the kadhi assessors that the petitioner had no right to lodge the petition herein. He is deemed to be a beneficiary through his father who is the direct heir of the estate.

48. As to whether there was a will oral or written, there was no proof. The petitioner according to his testimony was not told by the deceased that he had been given the disputed plot. All the witnesses who testified claimed that, they were separately told of the petitioner's gift. Nobody corroborated the other. Section 10 of the law of succession provides that an oral will must be made in the presence of two witnesses and the testator must die within 3 months of making such a will. Pw1 stated that he was told by the deceased in 2015 that he had given the petitioner his plot/house. The deceased having died 2021, that is more than three months. The rest of the witnesses did not even state the date they

were told by the deceased that he had given the plot. In a nutshell, there was no proof that the deceased left or made a will.

49. As to whether, the deceased was an adopted son to the deceased, both parties admitted that the alleged adoption was not formal hence no proof.

50. As regards the young girl M said to have been adopted by the deceased nobody challenged that aspect although there was no formal adoption. In fact, the child was a mere dependant being maintained immediately prior to the deceased's death.

51. As regards whether the petitioner was gifted, it was submitted that the petitioner was given a gift intervivos by the deceased pursuant to section 31 of the law of succession. The respondents averred that the petitioner was since childhood staying in the disputed plot. It was equally admitted that the wife to the deceased was also staying there as well as the appellant. From the evidence, it would appear like the premises were like a family homestead.

52. The mere fact that the petitioner stayed with his parents did not make him the sole beneficiary of the property. The deceased did not execute anything to suggest that he had the intention of gifting the petitioner besides anybody else. The allegation by the respondent that he embarked on developing the plot as proof of having assumed ownership was not proved.

53. According to Halsburys Laws of England 4th Edition Volume 20(1) at paragraph *67* it is stated as follows with respect to incomplete gifts:

> " Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do."

54. Further, Musyoka J when discussing the same subject in re Estate of Etete Masakhalia (Deceased) [2021] KEHC 8337 (KLR) stated as follows;

> " Principally any gift inter vivos should be backed by some memorandum in writing, and the gift is complete once title to the subject property is transferred to the name of the beneficiary of the gift. Problems arise where such transfer is not effected prior to the death of the deceased. The ideal situation is that such property would remain the free property of the deceased, available for distribution at confirmation. The argument would be that such gift was founded on a mere promise which the deceased did not carry through prior to his death. If, however, he had taken preliminary steps towards effectuating his promise, so that all what remained after his death was mere registration of the property in the name of the beneficiary, then it would be presumed that that was a gift inter vivos. That would be the case where the deceased had complied with the *Land Control Act*, Cap 302, Laws of Kenya, where the land is subject to that law, by applying for consent to transfer the property from the name of the deceased to that of the beneficiary, the consent had been granted, and he had signed a transfer form to facilitate registration of the property in the name of the beneficiary. That would mean practically everything had been done to perfect or complete the gift were it not for the demise of the deceased."

55. A mere claim that a gift intervivos was made without the accompanying action by the donor geared towards effecting such intention is useless. In the circumstances of this case there was none hence no proof of any gift donated by the deceased.

56. On whether the petitioner was entitled to a share, the court is duty bound to consider the applicable law in the distribution of resources. On distribution, the heirs according to the Muhammadan Law are divided into three classes. The first class is called the Dhawil-il-Furudh or the Sharers, the second class is called the Asabah or residuaries or agnates and the third class is called the Dhaw-il-Arham or the Distant Kindred (uterine relations). Assigning these classes of heirs their respective shares, if any, is done in the following manner:

57. The first rule of intestate succession is that the Quranic "Sharers" must first (before all others) be assigned their Quranic shares. The Sharers, then are the most important class of heirs who take primacy in that they are entitled before all others. The shares are allotted to them either by the Holy Quran, or by the traditions. As an example, reference may be made to the Holy Quran, Surat Nisaa, 4:11 in which it is ordained as follows: - "God (thus) directs you, as regards your Children's (Inheritance) to the male, a portion equal to that of two females: if only daughters, two or more, their share is two-thirds of the inheritance; if only one, her share is a half. For parents, a sixth share of the inheritance to each if the deceased left children; if no children and the parents are the (only) heirs, the mother has a third; if the deceased left brothers (or sisters), the mother has a sixth...These are settled portions ordained by God, and God is all-knowing, all-wise."

58. The second rule of intestate succession is that if any balance is left after assigning the shares of the Sharers, the residue should go to the heirs of the second class, namely the Asabah or Agnates, also known as the Residuaries, because they take the residue of the estate of the deceased person.

59. Third rule of intestate succession is that if there are no Sharers and no Residuaries, the Distant Kindred are entitled to the deceased estate.

60. Based on the verses above, it can be concluded that:

    i. The principle of inheritance distribution in Islam is that the portion for a brother is equivalent to two parts of the sister. It also specifies that a widow, where there are children, is entitled to one eighth of the estate.

    ii. The beneficiaries from Qur'anic "sharers" and others have been clearly defined along with their individual inheritance portion. Among the Qur'anic "sharers" beneficiaries mentioned in that verse include a daughter, mother, father, husband, wife, male siblings of the same mother, female siblings of the same mother, female siblings of the same parents and female siblings of the same father.

    iii. The distribution of inheritance among the beneficiaries must be made after all debts being debts and after the deceased's will is settled (if any) on a 1/3 rate from the total inheritance amount.

61. In the case of Ibrahim Aboobaker and Anor. v Teik Chand Dolwani and Others. Reported in to AIR 1953 SC 298; [1954] 56 BOMLR6 it stated that:

> " It's well recognized proposition of law that the estate of a deceased Mohammedan devolves on his heirs in specific shares at the moment of his death..."

62. From the foregoing and noting that the deceased died intestate, it is apparent that only the appellant, 2nd and 3rd respondent who were entitled to a share as the direct heirs and not their children. To that extent, the petitioner was improperly considered under Islamic law to inherit from the deceased's estate. Any attempt by elders to distribute the estate before petitioning for a grant was illegal and an act of intermeddling with the estate contrary to section 45 of the law of succession.

63. In the case of In re Estate of John Wekesa Wafula alias Bengi (Deceased) (Probate & Administration E016 of 2023) [2024] KEHC 675 (KLR) (31 January 2024) (Ruling) Neutral citation: [2024] KEHC 675 (KLR) the court had this to say;

> " As the Respondents have admitted selling a portion of the estate, I find that they are guilty of intermeddling in the estate. They have no capacity to pass any interest in land to the alleged purchaser since there is no confirmed grant. It seems they have been misled by the alleged clan deliberations to go against the law yet the clan has no powers to distribute property of the deceased herein as that is a preserve of the courts. The Respondents must now be called to heel and warned to stop intermeddling with the estate of the deceased forthwith. The Respondents must wait for the grant to be issued to the petitioners and that all the beneficiaries will participate during the confirmation of the grant. An order for the preservation of the assets is appropriate at this state so as to ensure that they are not dissipated and to ensure that they are available for distribution to the beneficiaries once the grant is confirmed."

64. Since there was no proof of gift intervivos nor will, the elders' action in distributing the estate was illegal hence not binding unless parties by consent agree to adopt their resolution. To that extent, the petitioner cannot inherit the estate except through his father (2nd respondent).

65. Having held as above, the estate shall be distributed in accordance with the Islamic sharia law amongst the three beneficiaries namely Balugo Adan, Abdirahaman Afdan Mohamed and Madow Dakat Takoy.

66. Regarding the share of a young girl known as M who is not by blood related and who was being maintained by the deceased which is not disputed, she will be entitled to something out of charity as the Court may decide in accordance with Islamic sharia law.

67. In a nut shell, it is my finding that the appeal herein is merited and the same is allowed and the impugned trial court's orders substituted as with orders as hereunder;

    a. That appeal herein is allowed

    b. That the 1st respondent/petitioner is not a direct beneficiary to the estate.

    c. That the estate shall be shared out to the three beneficiaries namely; Balugo Adan, Abdirahaman Afdan Mohamed and Madow Dakat Takoy in accordance with the Islamic sharia law.

    d. That the three beneficiaries mentioned in (c) above shall be shall be the joint administrators of the estate in place of the 1st respondent/petitioner.

    e. That the minor herein a girl who was being maintained by the deceased immediately before the deceased died be provided for not as an heir but on humanitarian and charitable grounds in accordance with the Islamic sharia law.

f. That any property that is not capable of distribution, to be valued by a mutually agreed valuer and then be sold at the prevailing market price and the sale proceeds be shared out to beneficiaries according to Islamic sharia law.

g. That any of the beneficiaries shall be at liberty to buy out the beneficial interest of the other in the affected property.

h. That the file to revert back to any other Kadhi stationed in the Bute Kadhi's court station or nearby station other than kadhi Mohamed Noor H. Isaack for purposes of submission and determination of a token share of the minor dependant in accordance with the Islamic law

i. That any beneficiary who wishes to transfer his or her interest to any of the beneficiaries or next of kin or assignee or representative can do so with the consent of the other beneficiaries.

j. This being a family dispute, each party to bear own costs.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF MARCH 2025

J. N. ONYIEGO

JUDGE