



**In re Ali Said Basmer (Deceased) (Succession Cause E095 of 2021)  
[2023] KEHC 17475 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17475 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
SUCCESSION CAUSE E095 OF 2021  
JN ONYIEGO, J  
MAY 12, 2023**

**BETWEEN**

**ALI AWADH SAID BASMER ..... OBJECTOR**

**AND**

**AWADH SAID BASMER ..... 1<sup>ST</sup> RESPONDENT**

**BARKER SAID BASMER ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The deceased herein died on 16<sup>th</sup> October 2020 while domiciled in Mombasa Kenya. According to the petition for grant of representation filed on 26<sup>th</sup> August 2021 by Barka Said Basmer and Awadh Said Basmer widow and brother to the deceased respectively, the deceased had executed a written will dated 6<sup>th</sup> December 2018 wherein they were respectively appointed as the executors and trustees of his estate. The two executors having petitioned for a grant of probate, the same was made on 24<sup>th</sup> June 2022 and issued to them jointly on 4<sup>th</sup> day of July 2022.
2. However, vide an objection dated 15<sup>th</sup> June 2022, Ali Awadh Said Son to Awadh Said Basmer (2<sup>nd</sup> petitioner) by extension a nephew to the deceased filed an objection to making of grant stating that; the will dated 6<sup>th</sup> December 2018 was not attested in accordance with the law; the will was and distribution of the estate made contrary to Islamic law.
3. On 5<sup>th</sup> July, 2022, the objector filed answer to petition for grant and a petition by way of cross application for grant. In his answer to petition, he stated that; the will alleged to have been executed on 6<sup>th</sup> December 2018 had not been attested as required in law; the will was attested by a beneficiary; the said will is contrary to Islamic sharia with regard to the distribution of the estate; the deceased being a Muslim, it is fair that his estate be distributed in accordance with the Islamic sharia law in that the deceased having not left any child, the widows are entitled each to 1/8 share and the remainder(3/4)



- to the deceased's brother the second petitioner herein; that the second petitioner having died, his entitlement/share be shared out amongst his widow and children in accordance with the Islamic law.
4. In his cross petition and objection to the making of the grant, the cross applicant (objector) reiterated the content in his answer to petition thus urging that the deceased died intestate and that he be appointed as the administrator of the estate.
  5. In response, Barka Said Basmer the 1<sup>st</sup> petitioner herein and a widow to the deceased filed a replying affidavit sworn on 16<sup>th</sup> September 2022 thus stating that; although the will was attested by three witnesses among them Awardh Said Basmer a beneficiary herein, the same cannot be invalidated on account of that ground alone as the other two were independent witnesses.
  6. She contested the claim that the estate was not distributed in accordance with the Islamic sharia. She averred that according to Islamic law, the deceased was entitled to bequeath 1/3 of his estate in a manner he wanted and the rest in accordance with the Islamic law. That the issues being raised are irrelevant at this stage hence matters to be canvassed during confirmation stage. That the cross applicant has not presented any proof by way of a grant limited or otherwise that he is a legal representative of the estate of his late father Awadh Said Basmer.
  7. It was further averred that under Section 66 of the Law Of Succession Act, the widow is ranked higher than the brother to the deceased hence a grant cannot issue to the nephew to the deceased while the widow is still alive.
  8. Besides the cross application, the cross applicant filed summons for revocation of grant dated 1<sup>st</sup> September 2022 seeking revocation of the grant of probate on grounds that; the grant issued was defective in substance as it was issued while there was an objection pending determination. In response, the 1<sup>st</sup> petitioner Barka Said filed her replying affidavit sworn on 16<sup>th</sup> September 2022 opposing the revocation application on grounds that the grant was made on 24<sup>th</sup> June 2022 and issued on 4<sup>th</sup> July 2022 yet the objection and cross application were filed on 5<sup>th</sup> July 2022.
  9. When the matter came up for directions on 31<sup>st</sup> October 2022, parties agreed to have the summons for revocation of the grant allowed by consent. Further, parties agreed to canvass the objection dated 15<sup>th</sup> June 2022 through affidavit evidence and written submissions.

#### Objector/Applicant's Submissions

10. Through the firm of Khalid Salim & company advocates, the objector filed his submissions on 9<sup>th</sup> December 2022 thus reiterating the content of the objection, answer to petition and cross application. The objector framed three issues for determination as follows;
  - a. Whether the will was properly attested
  - b. Whether the will conforms with the Islamic sharia
  - c. Whether the deceased's property was properly distributed in accordance with the Islamic sharia
  - d. Whether the petitioners have intermeddled with the estate
11. In respect to the 1<sup>st</sup> issue, learned counsel referred the court to section 13 of the Law of succession Act which provides that a will shall not be considered as insufficiently attested simply because a beneficiary of the said will has attested to it and that such bequest shall only be void unless attested by two additional independent witnesses in which case the bequest shall be valid. To support that position, the court was referred to the case of Fadhiya Salim Faraj v Faiz Mohamoud Abdalla(2019) eKLR.



12. According to the objector, Awadh Said could not benefit from the gift bequeathed to him as he had attested the will. It was learned counsel's submission that the deceased being a Muslim, the law applicable is the Islamic law and not the Law Of Succession Act.
13. Touching on the 2<sup>nd</sup> issue on whether the will conforms to Islamic law, counsel contended that under Islamic law, only an oral will which must be attested by two male adults and that there is no formal way of executing a written will. In support of that submission, the court was referred to the holding in the case of *Mohamed Thabet Maktari Ali v Mohamed Rageh Mohamed Saleh Maktari &* (1996) EA 35.
14. It was further submitted that a Muslim cannot distribute more than 1/3 of his estate through a will and that such testator cannot through a will disinherit a person entitled to a share of his estate.
15. On the 3<sup>rd</sup> issue regarding distribution of the estate in accordance with Islamic law, it was counsel's submission that distribution of the estate of a deceased Muslim, is that only 1/3 is available for distribution under the will and the rest under Islamic law. That under chapter 4 verse 12 (sura nia), widows if they be more than one are entitled to ¼ of the estate and if only one, 1/8 and the remainder according to Islamic law.
16. Counsel further submitted that the distribution made through the impugned will was contrary to Islamic law as no valuation was done before a Kadhi to ascertain the value of the estate before determining 1/3 to be willed out. It was learned counsel's submission that although the second petitioner died before distribution of this estate, his estate can be collapsed and distribution done together under the Islamic principle known as Al-Munasakhat hence not necessary for the objector to first obtain a grant in respect of his father's estate. To buttress that position, the court was referred to the case of *Mako Yasin v Hribaye Nane Shege&2 others* (2018) eKLR and *in Re estate of Ali Nge'ntu(deceased)* (2020) eKLR.
17. On the 4<sup>th</sup> issue in respect to intermeddling with the estate, it was submitted that one Mohamed the deceased's business partner has sold some business and mismanaged the rent collected from rental properties.

### **Respondent's Submissions**

18. Through the firm of N. A. Ali and company Advocates, the respondent filed her submissions on 19<sup>th</sup> January 2022. The respondent basically adopted the issues for determination already submitted on by the objector save for the additional issue on whether the applicant has capacity to file an objection.
19. On lack of capacity to file the objection, counsel opined that the objector is not a direct beneficiary to the estate and his interest can only be recognized through his late father's estate after securing a grant in respect to that estate pursuant to section 82 of the law of succession.
20. On the question of improper attestation of the will with one being a beneficiary which is not in dispute, counsel opined that Section 13 of the Law of succession Act only voids a bequest made to a witness who is also a beneficiary of the same will. That as long as there are two independent witnesses, such will cannot be rendered invalid.
21. As to whether the will fails to conform with sharia law, counsel was in agreement with the objector that a deceased Muslim can bequeath through a will only 1/3 of his estate. Learned counsel submitted that the deceased only gave half of his shares in two of his co-owned properties to his wives and the remainder to be distributed in accordance with the Islamic law hence no wrong committed in violation of distribution of the estate in accordance with Islamic law.



22. It was counsel's view that even if the bequeathed estate through the will exceeded  $\frac{3}{4}$  of the estate, the same can be adjusted during confirmation after valuation. In that regard, counsel relied on the holding in the case of *In Re Estate Of Baakari Madi Chosi* (2016) eKLR.
23. Concerning intermeddling with the estate, counsel asserted that there was no proof of the allegation and that if anything, it is the objector's father being one of the petitioners who should have accounted for the same.
24. Regarding the appointment of the objector as a personal representative, counsel opined that under section 66 of the *Law of succession Act*, the respondent is ranked higher on priority as opposed to the objector who is a nephew.

### **Analysis and Determination**

25. I have considered the petition herein, objection to petition, answer to petition and cross application, supporting documents and parties' respective submissions. Issues that arise for determination are;
  - a. Whether the will was properly attested
  - b. Whether the will conforms with the Islamic sharia
  - c. Whether the deceased's property was properly distributed in accordance with the Islamic sharia
  - d. Whether the petitioners have intermeddled with the estate
  - e. Whether the objector has capacity to file the objection herein.
26. I will deal with issue number one and two concurrently as they are interrelated. The crux of the matter herein is firstly, whether the deceased executed a valid will and secondly, whether the mode of distribution is in conformity with the Islamic law. According to the petitioner, the will in question was properly attested. On the other hand, the objector contended that the will was not properly executed as one of the executors in this case Awadh his father now deceased having witnessed the will, could not benefit from the same will as a beneficiary.
27. There is no dispute that the deceased professed Islamic law and that he died as such hence the law applicable in distribution of his estate is Islamic law. This position is clearly captured under section 2(3) & (4) of the *law of succession* which provides that;
  - (3) 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 this 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.
4. 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.
28. My reading and understanding of the above provision is that part II of the *Law of Succession Act* which deals with the formal and legal way of executing a will does not apply to execution of a will by a Muslim. Therefore, the formalities expressed in execution of a will starting from Sections 5 to 24 of the *Law of succession Act* does not apply in the case of a will executed by a Muslim.
29. It then follows that the law applicable in testamentary succession of a Muslim is the Islamic law which is not stipulated in any formal or codified manner but through guidance drawn from the holy quran



and literature from Muslim jurists or case law. See *Mohamed Thabet Ali Maktari v Mohamed Rageh Mohamed Saleh & others* (*supra*) where the court held that;

“under Islamic law a will may be made either orally or in writing. It does not have a particular form. If oral, it must be made in the presence of two male adult Muslim witnesses. If it is in writing it need not be signed and if signed it not be attested”.

30. From the pleadings, it is admitted that the deceased left a will whose validity is in question. The key dispute is that Mr. Awadh the brother to the deceased being one of the witnesses of the will was a beneficiary thus rendering the will invalid. However, the petitioner contended that there were two more independent witnesses hence the will cannot be rendered invalid. From the wisdom captured in the Mohamed Thibet case above, two witnesses are sufficient in executing a will.
31. Since in the disputed will there were three witnesses two of whom were not beneficiaries, the will cannot be voided or invalidated on that ground. In the circumstances of this case, I do not find any sufficient ground to invalidate the will on account that the late Awadh attested the will yet he was a beneficiary. Also see *Fadbiya Salim Faraj v Faiz Mohamed Abdalla* (*supra*).
32. Regarding the question whether the will distributed the estate in accordance with the Islamic law, the court is being asked to find whether the Islamic law was followed. There is no doubt that a Muslim cannot bequeath more than 1/3 of his estate. See *Saifudeen Mohamedali Noorbhai v Shehnaz Abdehussein Adamji* Mombasa civil case no.142 of 2005(2011) eKLR where the court held that;

“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).
33. From the pleadings and submissions of both counsel, the will is not clear on 1/3 provision. It is admitted by the petitioner that in some of the properties co-owned by the deceased and some people, he bequeathed more than 1/3 of his share. Failure to distribute 1/3 of the estate through the will is a manifestation that the will is incapable of enforcement hence not validly executed. For those reasons, the impugned will is null and void.
34. Having held that the will is null and void, the deceased is deemed to have died intestate hence the Islamic law on distribution of intestate estate applies. To that extent the estate herein shall be distributed in accordance with the Islamic law.
35. Concerning the question on who is entitled to take out a grant of letters of administration, Section 66 of the *Law of succession Act* ranks a spouse first followed by children in order of priority. The objector herein who is a nephew to the deceased cannot take out a grant of letters of administration during the lifetime of the widow. This position was aptly captured in the case of *in re Estate of George Muriithi Gitab(deceased)* (2019) eKLR where the court said a spouse and children ranked in priority than any other person in seeking for a grant of letters of administration.
36. As to the objector and his siblings lacking capacity to institute the objection herein on behalf of their deceased father before taking out a grant of letters of administration in respect of his estate, the petitioner contended that the suit was anon starter. Whereas it is true that the objector and his siblings are children to the deceased co-petitioner, they are recognized by the petitioner as heirs to the deceased co-petitioner. However, the objector was in law duty bound to acquire legal capacity to sue or to institute any proceedings in respect of their father’s share. See *Re estate of Sabina Namukuru Okere*



*(deceased)* (2019) eKLR where the court declared objection proceedings null and void for failure to acquire a grant first before instituting the proceedings.

37. Since the petitioner is not disputing that the objector and the siblings are children to the co-petitioner now deceased and considering the fact that the deceased co-petitioner was a beneficiary, justice will demand that a grant in respect of their late father's estate do issue to enable them inherit his share in accordance to Islamic law.
38. Regarding the question that the petitioner had intermeddled with the estate, there was no specific mention on the property intermeddled with in order to attract criminal proceedings under Section 45 of the law of succession. On that reason, that ground fails.
39. Having held as above, am inclined to make orders as follows;
  - a. That the will dated 6<sup>th</sup> August 2018 is hereby declared null and void
  - b. That the deceased's estate shall be distributed as an intestate estate
  - c. That a grant of letters of administration intestate shall issue to Barka Said Basmer as the sole administrator
  - d. That the objector shall acquire a grant in respect of the estate of Awadh Said Basmer within 30 days to enable the court issue a certificate of confirmation recognizing him and his siblings as beneficiaries.
  - e. That the grant is hereby confirmed and the estate distributed in accordance with the Islamic law between the 1<sup>st</sup> petitioner and the heirs of the deceased Awadh Said Basmer the 2<sup>nd</sup> petitioner (deceased) upon production of the grant referred to herein above
  - f. Each party shall bear own costs

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12<sup>TH</sup> DAY OF MAY, 20**

**J. N. ONYIEGO**

**JUDGE**

