



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 93 OF 2004**

**IN THE MATTER OF THE ESTATE OF HASSAN ALI MWADZAYA (Deceased)**

**RULING**

1. Hassan Ali Mwadzaya (“the Deceased”) died in Mecca, in the Kingdom of Saudi Arabia way back on 12.1.74. A petition for a grant of letters of administration was on 27.4.04 filed by Hadija Hassan (Hadija) in her capacity as widow of the deceased. In her affidavit in support of petition sworn on 21.4.04, Hadija stated that the deceased was survived by his children, Juma Mwakalamu Hassan, Rajab Banju Hassan, Said Mbovu Hassan, Rasul Nzembe Hassan, Ahmed Jira Mwatsahu, Hassan, Hussein Mvurya Mwadzaya, Fatuma Mwaboza, Nuru Lula Hassan, Esha Hassan, and Afia Kamanza. Hadija further stated that the estate of the deceased comprised of 225 acres of land under group ranch given by Wachanda Clan, Residential land in Mariakani and 3 posho mills.

2. Contemporaneously with the petition, Hadija filed a petition for a special limited grant for the purpose of “filing a suit in court for grant of injunctive orders to protect the interest of the deceased”. In her affidavit sworn on 27.4.04, Hadija stated that she is 84 years old and the first of the deceased’s 3 wives; that prior to his demise, the deceased had made a will on 4.12.72 (the Will) in which he bequeathed all his property to all his wives as provided under Islamic law; that to her, the deceased bequeathed the 225 acre piece of land (the disputed land) which had been given and/or sold to him by Wachanda clan; that the other widows were content with what they had been given; that the 2<sup>nd</sup> widow died and left her property to her children who have squandered the same and are now invading Hadija’s piece of land; that her own son Ali Hassan is colluding with the 2<sup>nd</sup> widow’s children to invade the land.

3. Ali Hassan, the son of Hadija swore an affidavit on 31.5.04 in response to Hadija’s petition and did so on behalf of Halifa, Maimuna Hamisi, Nurein, Rehema, Salim, Zarina, Amina, Saida and Farida all children of the deceased (the Objectors). He avers that Hadija in her petition excluded all of them. He takes issue with the Will of the deceased on the ground that the same was not signed in the presence of 2 witnesses as required; that the Will surfaced over 30 years after the demise of the deceased; that during a dispute over the disputed land, Juma Hassan Mwakalu told the chief of Mwavumbo that he had found the Will of the deceased; that he declined to produce the same when ordered to do so; that the disputed land is part of Title No. Kwale/Mwavumbo/1 owned by Mwavumbo Goup Ranch; that no disposition could have been made to the deceased without the permission of the Group Representatives and approval of the Registrar of Group Representatives; that under Duruma Customary law, all male children of the deceased are entitled to his interest in the disputed land and the Group Ranch; that there is no invasion of the disputed land as alleged; that local authorities, elders and members of the Group Ranch have made efforts to resolve the dispute and have all said that the deceased’s interest in the Group Ranch should be shared equally amongst all children; that Hadija seeks the limited grant to apply for injunctive orders following a decision by the Samburu District Officer on 18.4.04, that the disputed land should be shared amongst all the deceased children.

4. On 12.8.04, Ali Hassan filed a caveat in this matter. Thereafter, on 1.7.05, the Objectors filed an application seeking enlargement of time to lodge an objection to the making of a grant to Hadija which was allowed on 13.7.05. The Objection was filed on 19.7.05 while the petition by way of cross-application was filed on 13.3.06. After a lull of several years, Hadija did on 29.9.11 file an application dated 23.5.11 seeking dismissal of the Objectors’ application dated 1.7.05 apparently ignorant of the fact that the same had been granted.

5. Nothing happened thereafter and Hadija died on 5.8.14. A limited grant ad litem was issued to Juma Mwakalamu Hassan and Hussein Mvurya Mwadzaya on 7.11.14 and by their application dated 10.4.15, which was granted, took Hadija’s place in these proceedings. Ultimately, by consent of the parties, a grant of letters of administration (“the Grant”) in respect of the estate of the Deceased was on 16.11.16 made to Hussein Mvurya Mwadzaya, Fauzia Hassan Ali and Hamisi Hassan Mwatsahu. Parties were unable to agree on the mode on distribution of the estate. The Court therefore directed the Administrators to file a summons for confirmation of grant. Parties were also directed to file affidavits listing assets, beneficiaries and proposed mode of distribution. It is this summons dated 26.9.18 (the Summons) that is the subject of the ruling herein.

6. Hussein Mvurya Mwadzaya (Hussein), one of the administrators, in his affidavit in support of the Summons sworn on 26.9.18 averred that his mother, Hadija’s house consisted of the following children:

Juma Mwakalamu Hassan

Ali Hassan

Rajab Banju Hassan

Said Mbovu Hassan

Rassul Nzembe Hassan

Ahmed Jira Mwatsahu

Fatuma Mwaboza

Nuru Lula Hassan

Afia Hassan,

Feda Hassan

7. According to Hussein the estate of the deceased comprised of:

200 acres land within Mwavumbo Group Ranch.

Posho Mill at Mariakani

House without land at Kilimangondo

Unadjudicated land in Magombani in Kilimangondo

Posho mill at Kilimangondo

Shop at Kilimangondo

House without land at Mwena

Nissan pick-up KJE 925

Posho mill at Mwangulu

Shop at Mwena

Unadjudicated land at Mwena

10 acres land at Mkilo

House at Mariakani sokoni, Kilifi County

House at Mkilo, Mariakani, Kwale County

8. Hussein maintains that the deceased had distributed to each house separate properties. Each house was to retain the properties where they stay. Hadija's family was living at Mariakani and therefore retained the properties at Mariakani. The 2<sup>nd</sup> family lived at Kilimangondo and retained the properties there. The 3<sup>rd</sup> family resided in Mwena and were to retain the property there. Hussein urged that this status quo be maintained.

9. According to the affidavit of Fauzia Hassan Ali (Fauzia) and Hamisi Hassa Mwatsau (Hamisi), the other 2 administrators, sworn on 12.10.18 the children of the first house are as listed by Hussein. The 2<sup>nd</sup> house consists of the following children:

Salim Hassan Mwatsahu

Rehema Nadzua Sebisubi

Amina Hassan Mwatsahu

Hamisi Hassan Mwatsahu

Zarina Hassan Mwatsahu

Saida Hassan Mwatsahu

Nurein Hassan Mwatsahu

Halifa Hassan Mwatsahu

Farida Hassan Mwatsahu

The 3<sup>rd</sup> house consisted of the following children:

Fauzia Hassan Ali

Zaharia Hassan Mwatsahu

Dalu Hassan Mwatsahu

Hamida Hassan Mwatsahu

10. Fauzia and Hamisi list the following assets:

200 acres land within Mwavumbo Group Ranch.

Posho Mill at Mariakani

Posho mill at Kilimangondo

Shop at Kilimangondo

Nissan pick-up KJE 925

Posho mill at Mwangulu

Shop at Mwena

5 acres land at Mkilo

Plot at Mariakani sokoni, Kilifi County

11. Notably, Fauzia and Hassan make no mention of the following properties listed by Hussein:

House without land at Kilimangondo

Unadjudicated land in Magombani in Kilimangondo

House without land at Mwena

Unadjudicated land at Mwena

House at Mkilo, Mariakani, Kwale County

12. I have considered the oral testimony of the witnesses together with the parties' written submissions. The issue for determination is how the estate of the deceased will be distributed. Hassan urges the Court to make a determination that status quo be maintained so that each of the 3 families retain the properties they have been occupying since the demise of the deceased. Fauzia and Hamisi however contend that the estate ought to be distributed so that each son gets 2/34 share and each daughter gets 1/34 share in accordance with Islamic law.

13. It is not disputed that the 3 families were settled on separate properties owned by the deceased. Hadija's family settled in Mariakani, Mboto's family in Kilimangondo and Kahaso in Mwena. It is also not disputed that the deceased lived and died a Muslim. By dint of Section 2 of the Law of Succession Act the governing law in respect of this estate is Muslim Law. Section 2(3) of the Act provides:

## **“2 Application of Act**

**(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 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.**

14. It is Hassan’s case that the deceased prior to his pilgrimage to Mecca did by a document akin to a will dated 4.12.72, settle each of the 3 families in specific properties. It has however not been demonstrated that the “settlement” of the 3 houses in the said properties was done in accordance with Islamic law. Under Islamic law, a Muslim may not make a bequest in his will in favour of a legal heir. The basis of this is that Allah legislated fixed shares for legal heirs. Any will that purports to make a bequest to an heir is not valid under Islamic Sharia. Allah’s Prophet (SAWS) said:

**"Allah has appointed for everyone who has a right what is due to him, and no bequest must be made to an heir. (Abu Dawud). Similar hadith is narrated by Abu Umamah (RA) and reported by Ibn Majah, Ahmad and others".**

15. The Qur’an stipulates the appointed share of every heir in Nisa 4:11:

**“Allah instructs you concerning your children [i.e., their portions of inheritance]: for the male, what is equal to the share of two females”**

Nisa 4:12 provides:

**“...And for them [i.e., the wives] is one fourth if you leave no child. But if you leave a child, then for them is an eighth of what you leave after any bequest you [may have] made or debt.”**

16. In the cited case of Re Estate of M’Muthuri Gituambae [2019] eKLR, the Court found against disturbing the 21 year *status quo* and upheld the deceased’s division of his property during his lifetime. That case is however distinguished in that it did not relate to the estate of a Muslim, unlike the present case.

17. The Court is aware that the existing state of affairs has prevailed for close to 50 years since the demise of the deceased herein. Any change in this arrangement will most certainly disrupt the *status quo*. However a long standing *status quo* does not oust the application of Islamic law in the distribution of the estate of a deceased Muslim. What needs to be achieved in the distribution of the estate, is minimal disruption of the lives of the parties, as far as is practicable.

18. In the end, my finding is that the *status quo* of 50 years notwithstanding, the estate of the deceased herein shall be distributed in accordance with Islamic law subject to the following:

- i. Valuation of all the properties of the estate shall be undertaken within 60 days.
- ii. Valuation and distribution shall take into account any property in the possession of, or sold by any of the beneficiaries.
- iii. The cost of valuation shall be borne by the beneficiaries in proportion to their entitlement to the estate.
- iv. Pending valuation, status quo shall be maintained.
- v. Mention on 23.3.2020 for compliance.

**DATED, SIGNED and DELIVERED in MOMBASA this 17<sup>th</sup> January 2020**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the 1<sup>st</sup> Administrator**

..... **for the 2<sup>nd</sup> & 3<sup>rd</sup> Administrator**

..... **Court Assistant**