



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION NO. 307 OF 2014

IN THE MATTER OF THE ESTATE OF M K K

RULING

1. H M K and A M K (the Applicants) were appointed administrators of the estate of M K K alias K K (the Deceased) on 2.3.18. This followed revocation of a grant of probate that had earlier been issued to H M K and F M K. The Court did find in its ruling of 2.3.18 that the will of the deceased, who lived and died a Muslim, was invalid for being contrary to Islamic law.

2. By their summons dated 4.2.19 and amended on 20.2.19, the Applicants seek confirmation of the Grant. A valuation of the assets of the estate had been carried out and a mode the distribution of the estate was proposed, based on the valuation. An Affidavit of Protest was however filed by F M M K K on behalf of herself, Z M M K, S N M K K, Y M K K and A M M K K (the Protestors). They object to the valuation of the assets forming the state of the deceased. They Protestors aver that the sum of Kshs. 5,000,000/= set aside as college fees for Y and A is inadequate. The value of the assets sold by S S K are worth more than Kshs. 5,000,000/=. They will be satisfied if a fresh valuation is carried out by a valuer of their choice. They sought to be supplied with records of funds that have been withdrawn from the bank account of the deceased. They oppose the distribution of the estate in accordance with Islamic law as it is discriminatory on the basis of gender and therefore unconstitutional.

3. On 29.4.19 the date fixed for hearing of the summons for confirmation, neither the Protestors nor their counsel attended Court. It is noted that the date was taken in Court on 26.3.19 when counsel for both parties were present in Court. Counsel for the Applicants stated that he had not been served with the Affidavit of Protest. Counsel perused the Court's copy of the Affidavit of Protest. The hearing thus proceeded. It was submitted for the Applicants that the Affidavit of Protest which has no annexures lacks substance. The deceased was a Muslim and the mode of distribution is in accordance with Islamic law. The Applicants prayed that the Summons be allowed as prayed.

4. The law relating to distribution of an estate of a person who was a Muslim at the time of his death is Islamic law. The Law of Succession Act at Section 2(3) of the provides:

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.

5. Islamic law is derived directly from the Quran. Allah has in the Quran legislated fixed shares for legal heirs of a deceased Muslim. 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.

6. The appointed share of every heir is stipulated in the Holy Qur'an 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.

7. The Protestors oppose the distribution of the estate of the deceased on the ground that it is discriminatory on the basis of gender and therefore unconstitutional. Article 27 of the Constitution of Kenya, 2010 embodies the principle of equality and non-discrimination as follows:

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

8. The right to equality and non-discrimination is not absolute and certain limitations have been imposed by Article 24 in relation to persons who profess the Muslim religion. Article 24 (4) provides:

The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

9. The foregoing provision requires that Islamic Sharia shall be applied to Muslims in matters relating to personal status, marriage, divorce and inheritance notwithstanding the equality provisions in the Bill of Rights in the Constitution. The proposed distribution of the estate of the deceased in accordance with Islamic law cannot therefore be said to be unconstitutional. The contention by the Protestors in this regard therefore fails.

10. On the Protestors' objection to the valuation of the assets of the estate of the deceased and the amount set aside for the education of Y and A as well as the sale of assets by S, this Court is unable to make anything of the same as the Protestors did not attend Court to make submissions on the same.

11. For the foregoing reasons I allow the Summons for Confirmation of Grant dated 4.2.19 and amended on 20.2.19 as prayed. This being a family matter, there shall be no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 17th day of May 2019

M. THANDE

JUDGE

In the presence of: -

.....**for the Applicants**

.....**for the Protestors**

.....**Court Assistant**