



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 85 OF 2018

ZULEKHA SALIM BANTUSHI.....1ST APPELLANT

SIHAM MODHIHIRI.....2ND APPELLANT

VERSUS

SHEHUNA MOHAMMED MODHIHIRI.....1ST RESPONDENT

NADHIRA MOHAMMED MODHIHIRI.....2ND RESPONDENT

NANDA SAID AHMED.....3RD RESPONDENT

ALI AHMED FAUZ.....4TH RESPONDENT

MUNIRA MOHAMED.....5TH RESPONDENT

IBTISAM MOHAMMED HARRASY.....6TH RESPONDENT

MOHAMED MODHIHIRI.....7TH RESPONDENT

WARDA MODHIHIRI.....8TH RESPONDENT

FATUMA MODHIHIRI.....9TH RESPONDENT

BITI MODHIHIRI.....10TH RESPONDENT

AHMED MODHIHIRI MOHAMED.....INTERESTED PARTY

(Being an Appeal from the Ruling of Hon. Rashid Ali Omar, Deputy Chief Kadhi delivered on the 8th of August, 2018 in Nairobi Kadhi Court Succession Case No. 49 of 2018 (in the matter of the Estate of Modhihiri Mohamed Modhihiri (Deceased) at the Kadhi's Court Nairobi)

JUDGMENT

1. This matter revolves around the estate of **Modhihiri Mohamed Modhihiri** who died on the 16th of November, 2012 leaving behind several heirs who include a widow. He also left behind a sizeable estate.
2. Gathered from the list of heirs filed in court and an application by an interested party; the deceased had married 5 different women at different times during his lifetime. One widow Zulekha Salim Bantushi survived him. She is the first Appellant herein. The other 4 widows pre-deceased him.
3. The estate was partially distributed in Kadhi's Case No. 85 of 2013, Mombasa. It is not clear to the court whether all those claiming to be heirs, including children of Dhahaben, a deceased daughter who died after the deceased were included in the said distribution. The issue is not before court for now and I will therefore say no more.

4. On the 2nd of February 2016, the Appellant Zulekha Salim Bantushi, the surviving widow, petitioned for grant of letters of administration in High Court Succession Cause No. 2372 of 2015 and gave names of those who survived the deceased as:

House No. 1

i. Fatuma Modhihiri – daughter

ii. Binti Modhihiri

House No.2

iii. Nana Said Ahmed

iv. Ali Ahmed Fauz

v. Abtisan Mohamed Harassy

vi. Munira Mohdhihiri Mohamed

vii. Shehuna Mohamed Modhihiri

House No. 3

viii. Mohamed Modhihiri

ix. Warda Mohamed Modhihiri

x. Nadra Mohamed Modhihiri

House No. 4

xi. Zulekha Salim Bantush

xii. Siham Modhihiri

5. The petition attracted objections to the making of the grant of letters of administration intestate from Fatuma Modhihiri, filed on the 5th of March 2016, who took issue with the list of heirs and assets.

6. The 2nd Objection was filed on the 29th by Ali Ahmed Fauz Modhihiri and Mohamed Modhihiri who claim interest in the estate as sons and a legal heir to the estate. They cited none inclusion of heirs, and wrongful inclusion of assets that do not form part of the estate as the deceased had gifted some properties during his life

7. Before determination of the above issues this court transferred the file to the Kadhi's court for determination.

It is apparent that the Kadhi is yet to determine the said matters. And clear that there are several pending issues before the Kadhi and not the singular issue of distribution.

8. Having stated as above, the appeal subject of this judgment is mainly the Kadhi's findings as relates to the application of Part VII; Section 45 of the law of Succession Act (**The Act**) and the alleged sale of property L.R. No. 36/VII/465 located at Eastleigh Garage, Nairobi by some of the beneficiaries.

9. In an application dated 19th July 2018 by Shehuna Mohamed Modhihiri and 7 others filed against Zulekha Salim Bantushi and 1 other filed before the Kadhi pursuant to Article 159 of the Constitution, Rules 49 and 73 of Probate and Administration rules the following prayers were sought;

1.

2. That a declaration be and is hereby issued that all that Land reference number 36/VII/465 located in Eastleigh Nairobi was sold with the consent of all the parties therefore its sale to Abdi Azizi Ali Abdilahi is legal valid and property.

3. That a declaration be and is hereby issued that all that property known as land Reference number 36/VII/465 located in Eastleigh Nairobi does not form part of estate of the deceased.

10. The application was based on grounds that a third party had expressed interest in the said Land, Reference Number 36/VII/465 thereafter consents were obtained from all parties, and the property since sold. That the respondents now Appellants had reneged on their consent and

were against the sale, yet the said sale would not occasion any prejudice to them.

11. That Respondents/appellants objected to the said application vide the 1st Respondent's/Appellant's replying affidavit filed on 30th July 2018, where she contended that the trial court was being asked to validate an illegality as the Applicant/respondents had no colour of right nor had they obtained the permission of court or consent of all heirs to sale the said property.

Further that the extent of the assets of the estate, the heirs and liabilities had not been ascertained to pave way for distribution and, further the ownership of the property subject matter could not be determined by way of an interlocutory application.

12. The respondents/ Appellants further contended that the court had not appointed administrators in the first place and the acts of the respondents amounted to inter meddling with the estate.

13. In his ruling, the Honourable Kadhi stated inter alia:

- **“There exists no provision of Islamic law that stipulates and causes a court to appoint an administrator to the estate of a deceased Muslim and in this regard to the prescribed shares of competent individuals save for that of incompetent persons i.e. lunatics and minors as spelt out in Ayat 5,6,9 and 10 of Surah an Nissa. That if such a procedure is an obligatory requirement the Holy Qur’an and Surah of Allah’s messenger would have instituted as it did in relation to incompetent individuals.**
- **That therefore provisions of Section 45 of the law of Succession Act Cap 160 and the relied authorities by the respondent do not apply to Islamic succession and that what is to be complied is Section 6 of Kadhi’s Court Act Cap 11 of the Laws of Kenya whereas rules of law and evidence applied in Kadhi’s court shall be those of Islamic Law.**
- **That the issue of administrator ship can only be allowed when parties on their own motion request it in a collective manner.**
- **That the applicant herein did not on her opposition aid nor give evidence to show how the sale of the property will disadvantage her prescribed share and affect her entitlement or that of her daughter.**
- **The sale took place 5 months before the matter was brought to the court’s attention and the court cannot deal in retrospect.”**

With the above The Deputy Chief Kadhi sanctioned the sale, and ousted application of Section 45 of the Act.

14. The Appellants were aggrieved by the decision of the Kadhi as a result of which they filed an appeal grounds of which are contained in the amended Memorandum of Appeal filed on the 14th of August, 2019. The grounds thereof may be summarised as follows;

- the Hon. Kadhi selectively applied the law to wit Part VII of the Law of Succession Act (The Act) ignoring Section 45 thereof and Article 27 of the Constitution;
- the Hon. Kadhi failed to make a finding that the property of a deceased cannot be sold before grant of letters of administration have been issued and confirmed,
- the Hon Kadhi erred by making a decision on the purported sale of L.R. No. 36/VII/465 vide an interlocutory application, made a determination on the purchase price having erroneously arrived at a conclusion that all heirs had consented to the sale, and
- the Hon Kadhi erred by arriving at a decision that he had no power to stop a sale retrogressively.

15. The Appellant prayed for setting aside of the Kadhi’s orders of 8th August, 2018, a declaration that the purported sale of Plot No. 36/VII/465 without a valid court order or a confirmed grant was an illegality, an order nullifying the transfer and an order referring the hearing and disposal of the matter back to the Kadhi.

16. Having considered the pleadings, submissions and authorities cited the issues for consideration are as follows:

- i. Whether Part VII and particularly Section 45 of the law of Succession Act is applicable to estate of deceased Muslims if so to what extent?**
- ii. Was the sale of L.R. No. 36/VII/465 legal?**
- iii. Did the Kadhi err in holding that the sale of L.R. No. 36/VII/465 would not disadvantage the respondent.**
- iv. Should the sale be nullified?**

17. In line with **Section 65 (1) (c)** of the **Civil Procedure Act** I sat with two Kadhis, **Hon. Mohamed A. Kutwaa** Principal Kadhi Kajjado

Law Courts and **Hon. Dogo Dabaso** Resident Kadhi, Garissa Law Courts as assessors. They duly wrote their opinion, which I will later in this judgment make reference to.

18. It is generally acceptable and has been the practice for parties in estates where the deceased person was a Muslim and likewise the heirs, to first apply for Grant of Letters of Administration in either the Kadhis courts or civil courts in line with Part VII of the Act before referring the matters to the Kadhi courts if need be for distribution of the estate under the Islamic Sharia.

19. The Law of Succession Act, Chapter 160 of the Laws of Kenya is an Act of Parliament that amended and consolidated laws relating to the administration of estates of deceased persons. The act came into force on the 1st of July, 1981.

20. At inception The Act drew hue and cry from Muslims. And this was because historically during the pre-independence period and after independence Muslims had negotiated to be excluded from provision of statute in matters of personal law including inheritance. Matters of inheritance in the life of a Muslim are governed to the letter by the provision of the Holy Qur'an.

21. Muslims were later to be exempted from the application of Cap 160 save for Part VII, and only where the provisions were inconsistent with the shariah. Amendment No. 21 of 1990 which came into effect in January 1991 came into operation as section 2(3) of the Act.

22. The questions before court hinge on the application of Part VII of The Act and more particularly Section 45 and its applicability on the administration of the estate of a deceased Muslim. I must observe that the same has received various interpretations by courts. Section 2(3) of the Act stipulates that:

“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.

(emphasize provided).

(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 of January, 1991.

24. Is Part VII inconsistent with Islamic Law?

Part VII of the Law of Succession merely deals with administration as far as;

a. Appointment of a person or persons to oversee administration of the estate by;

b. collecting and preserving the estate;

c. paying all charges against the estate,

d. paying debts and legacies,

e. distributing the remaining property among rightful heirs.

Section 45 of the Act provides;

(1) Except so far as expressly authorised by this Act, or by any other written Law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall-

(a) Be guilty of an offence and liable to a fine not exceeding ten thousand or a term of imprisonment not exceeding one year or both such fine and imprisonment; and

(b) Be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

25. In this instance the honourable Deputy Chief Kadhi held the view that the Quran did not require appointment of Administrators and therefore Section 45 of the Act did not apply to Muslim successions. The only applicable law is the Kadhis Act Cap 11 of the Laws of Kenya and that an administrator can only be appointed where parties request collectively.

23. As observed earlier in this judgment the parties herein subjected themselves from the beginning to the provisions of Section 45 of the Law of Succession Act. There is pending a petition for grant of letters of administration, objections to the granting of grant of Letters of administration and cross petitions pending.

Further the application before the Kadhi was brought pursuant to **Section 68(1), 60, 67 and 73** all falling under Part VII of the Law of Succession Act. Even if one were to take the preposition by the Kadhi, Clearly the parties of their own volition had subjected themselves to the application of Part VII of the act.

24. However, the underlying and predominant issue is whether the application of Part VII and specifically provisions requiring obtaining of grant of Letters of Administration, receiving, preservation of the estate, and identifying the heirs are inconsistent with the Islamic Sharia. Is the fact that the Quran does not require appointment of administrators mean that appointment of administrator and preservation of the estate to allow smooth transmission of the legacies is inconsistent with the shariah?

25. In order to arrive at a verdict on this subject, I will look at the pronouncement by Kadhis, and judges in our jurisdiction and the practice in other jurisdiction which apply the Islamic Sharia in distribution of properties of deceased Muslims to Muslim heirs.

In **Maimuna Kenyi Suleiman versus Amina Ibrahim Civil Suit No. 36** of 1999 a 2016 decision Hon. A. I. Hussein had this to say:

“Sincerely speaking, Islamic law of succession did not recognize the concept of administration of estate of the deceased Muslims. It merely laid down machinery for the distribution of the estate of the deceased among the legatees and the heirs.

In the words of Fyzee, “It is as though the estate were a round cake, which from a distance seems entire; but as each heir approaches the table, the cake is found to be carefully cut up and divided proportionately; and all that remains to be done is to hand over to him his particular piece”.

The concept of administration of estate was introduced in Kenya for the first time by the British rulers.

In modern Kenya, the administration of the deceased Muslim is governed by Law of Succession Act, Cap.160, where they are not inconsistent with those of Muslim Laws.

It should be noted that the substantive law that is applicable to the estate of a deceased Muslim is Muslim law as provided by Sec. 2(3) of the Act.

When a Muslim dies without appointing an executor, or dies intestate there is no harm in approaching the court of law in obtaining letters for administration for the purpose of: -

- a) collecting and preserving the estate of the deceased.*
- b) paying all charges against the estate.*
- c) paying debts and legacies.*
- d) distributing the remaining property among rightful heirs.... among others.”*

In **re-estate of Mohamed Kismali 2017 eKLR**, Kadhi Abdulrahman A. Athman had this to say;

“The applicable law in succession of estates of deceased Muslims is therefore Islamic law. Under Islamic law, letters of administration is not a requirement for purpose of instituting inheritance proceedings. This is because the general rule in Islamic law of succession is that estates do not stay in abeyance, it automatically vests in the heirs [unlike in common law, not the personal representative of the deceased]. M. M. Khan in his 'Islamic law of inheritance' at, p.22 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'.”

In **Rashid Zahran Versus Azan Zahran & 4 Others Civil Appeal No. 55 of 1999**, Mohamed Ibrahim J (as he then was) on his part 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”.

26. In **Najma Sumar Rizik Sumur vs Mansur Said & 8 others ELC NO. 234 OF 2004 (Eldoret)** a 2019 decision Yano J had this to say;

“In my view, and as rightly submitted by the plaintiff, Part VII of the Law of Succession Act cannot of itself be said to be in conflict with Muslim Law where the question revolves around the making of a grant only, being as it is providing only a mechanism by which a grant of representation is obtained, a process that in many cases would be facilitative of property to

heirs. Such a step would be desirable so as to meet the requirements of Section 119 of the Registered Land Act (now repealed) regarding transmission upon the death of a proprietor, which Act drew no distinction between a Muslim and other estates.”

27. In various jurisdictions that apply the sharia, some of which are dominantly Muslim such as Pakistan, Egypt, Syria, including India where sharia law is applicable to Muslims, statutes have been enacted to guide in the administration of estates of deceased Muslims, and where Like in Kenya the substantive Law applicable in the devolution of the estate of a deceased Muslim remains the Sharia law.

28. In my view the prepositions cited above in favour of Part VII of the Act was indeed the aim of the drafters of **Section 2(3) of the Act**. Clearly the intention of the Act is not to oust the application of the Islamic law on distribution but to complement the same in the administration of the estate to avoid disorder and greed by unscrupulous heirs to the detriment of others after all borrowing the words of **Fyzee** (supra) the cake is not always round and divided proportionately and carefully for one heir to pick his portion and satisfactorily and happily walk away. This is not always the case in the world and certainly not in Kenya today.

29. I will align myself with those who find the application useful and harmless and will therefore not hesitate to find and hold that the requirement of part VII of the Act and in particular Section 45 is not inconsistent with the Sharia and fault the decision of the Kadhi in holding so. The provisions are complementary and most useful in facilitating transmission of legacies in line with provisions of other laws applicable to all Kenyans in the said exercise. The provisions also ensure orderliness and proper administration is put in place.

30. In matters property distribution per se in Kenya does not conclude inheritance other laws in land law regime come into play so that any property of a deceased is transmittable from the deceased through a confirmed grant to the heir and in the event of a lawful sale by consent of heirs or by order of the court and therefore part VII cannot be applied selectively.

31. Was the sale legal?

As it were the properties herein have not been distributed, they remain estate property in the name of the deceased. As to whom the property will revolve is a question still pending determination, even if the will of the majority was to prevail was there an order of the court so to do in the absence of a confirmed grant? Whichever way one looks at the matter those who signed the agreement had no capacity or authority of the court and therefore no title could pass at least not under the land law regime. It is also obvious that those who purported to sell the property were doing so in total contravention of Section 45 of the Act and their action are quasi criminal and taken very seriously by the law.

In my considered view the scenario unfolding in this estate cannot be entertained, especially where the extent of the estate and the heirs are yet to be ascertained. Already monies have been distributed, the land subject matter purportedly sold and legal fees assigned at Kshs 30 million. Who ascertained the legal fees? Did the heirs sanction if so in what capacity?

32. This fact together with the courts finding above, it can only mean that the sale was illegal *abinitio*, it amounted to intermeddling with the estate herein, is an offence and no title could pass from the intermeddlers to the third party as the sellers had no capacity to engage.

33. The appellant, her daughter, the third party herein and the estate of Dhabeni were not involved in the sale. Further a whopping Kshs 30 million is not accounted for in the purporting sale, how then can the sale and the haphazard manner in which the estate is being distributed and dealt with be to anyone's benefit. I certainly fault the Kadhi's decision to uphold the sale against the above background

34. Based on the above findings I respectfully, differ with the decision of the Honourable Kadhi's who sat with me as assessors and who upheld the decision of the Kadhi and for failing to address their mind to the application of Part VII of the Act as in my view our point of departure is as a result of this failure

35. Consequently,

a. The ruling of the Kadhi of the 8th of August 2018 be and is hereby set aside.

b. The purported sale of L.R. NO. 36/VII/465 be and is hereby nullified.

c. The beneficiaries who purported to sell the said property are hereby directed to refund the purchase price to purported buyer forthwith.

d. The value of the estate herein being beyond the jurisdiction of the magistrate's court (Kadhi Court) the order transferring succession case No. 2372 of 2015 to the Kadhi's court is hereby reviewed and the file recalled back to the high court for determination of the pending applications. Should the need arise the file may be returned to the Kadhi's court for an opinion on distribution of the estate in accordance with the Sharia,

e. Costs to the Appellants in any event.

SIGNED DATED and DELIVERED in open court this 7TH day of NOVEMBER, 2019.

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ALI-ARONI

JUDGE