



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
FAMILY DIVISION
SUCCESSION CAUSE NO. 318 OF 2011

IN THE MATTER OF THE ESTATE OF RAMA MATANO MWAURINDA (Deceased)

FATUMA RAMA MWAURINDA

AMINA RAMA MWAURINDAADMINISTRATORS

VERSUS

KUSI MUKAMI MWAURINDA.....OBJECTOR

RULING

1. Before this Court is a Summons dated 14.9.16 seeking Confirmation of Grant in respect of the estate of **Rama Matano Mwaurinda (“the Deceased”)**.

2. The brief undisputed facts of the case are that the Deceased **died on 1.8.10. Grant of letters of Administration was issued** to Fatuma Rama Matano and Amina Rama Mwaurinda, the **widow and daughter of the Deceased respectively (“the Administrators”)**, on 7.11.12. **Prior to the issuance of the Grant, the Objector, Kusi Mukami Matano a daughter of the Deceased from another relationship** filed an objection to the making of Grant on the ground that she had been excluded in the list of beneficiaries. Pursuant to a consent of the parties recorded in Court on 20.2.12 the Objector was included as a beneficiary of the estate of the Deceased.

3. The parties are in agreement as to the list of beneficiaries as well as the list of assets of the estate of the Deceased. However, they differ on the mode of distribution of the estate. The Administrators propose that the estate be distributed according to Islamic law and have obtained advice from the former Chief Kadhi Hammad M. Kassim in this regard. The proposed distribution is as follows:

Fatuma Rama Matano	Widow	1/8
Amina Rama Matano	Daughter	7/80
Fatuma Kusi Rama	Daughter	7/80
Asha Nkulonda Mwaurinda	Daughter	7/80
Matano Rama	Son	14/80
Mwazondo Salim Rama	Son	14/80

Kassim Rama Chinjohi	Son	14/80
Kusi Mukami Matano	Daughter	7/80

The Objector on the other hand wishes that the estate be distributed to all the beneficiaries in equal shares in accordance with the provisions of the Law of Succession Act (“the Act”).

4. For the Objector, it was submitted that she is not a Muslim and has not consented to the estate being distributed in accordance with Islamic law. Relying on Article 170 of the Constitution it was argued that for Islamic law to apply, all parties must be Muslims and must submit to the jurisdiction of the Kadhi’s Court. She submitted that the estate should be distributed under the Act in equal shares to all and relied on Section 47 of the Act.

5. For the Administrators, it was submitted that Article 170 of the Constitution establishes the jurisdiction of the Kadhi’s Court and that the matter herein is not in the Kadhi’s Court. That Section 47 of the Act simply gives this Court the power to entertain any application and is therefore of no relevance herein. It was submitted that under Section 2(3) and (4) of the Act, the provisions of the Act do not apply to the estate of a person who was a Muslim at the time of his death and that devolution of a Muslim’s estate shall be governed by Islamic law. It was contended that the Objector as a daughter will share in the estate of the Deceased just like his other daughters. The Court was urged to follow the provisions of Section 2(3) and (4) of the Act and direct that the devolution of the estate be in accordance with Islamic law.

6. I have considered the submissions on behalf of the parties. Article 170(5) of the Constitution provides:

“The jurisdiction of a Kadhis’ court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi’s courts.”

7. The above Article of the Constitution establishes the jurisdiction of the Kadhi’s Court as correctly submitted for the Administrators. The Article strips the Kadhi’s court of jurisdiction in situations where not all parties profess the Muslim religion and not all submit to the jurisdiction of the Kadhi’s Court. Were these proceedings before the Kadhi’s Court then the Objector would have successfully challenged the jurisdiction of the Kadhi’s Court on account of her being a non-Muslim and her not submitting to the jurisdiction of the Kadhi’s Court. Article 170 does not oust the application of Islamic law in respect of the estate of a Muslim.

8. The Administrators herein being aware that the deceased died a Muslim opted to file the succession proceedings in the High Court. That is perfectly within their right. Indeed it is trite that Article 170(5) of the Constitution does not oust the jurisdiction of the High Court in dealing with estates of Muslims. Succession proceedings in respect of the estate of a Muslim may be filed in the High Court. In Saifudean Mohamedali Noorbhai v Shehnaz Abdehusein Adamji [2011] eKLR, the Court of Appeal stated:

“Kenyan Courts have held in past judgments that every litigant, of whatever religious persuasion, has the option of going directly to the High Court, and a Muslim is not necessarily restricted to the jurisdiction of the Kadhi’s Court”.

9. The deceased herein lived and died a Muslim. This fact is not disputed as both parties acknowledge as much. The issue for determination is not the jurisdiction of the Kadhi’s Court but the applicable law in respect of the devolution of the estate of the Deceased being a Muslim. The Law of Succession Act provides for the application of the Act in relation to a person who at the time of his death is a Muslim. Section 2(3) and (4) Act provide:

“(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.

(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”.

10. In dealing with the estate of a Muslim, this Court is required by Section 2(3) of the Act to apply Islamic law in the devolution of the estate. A reading Subsection (3) reveals that substantive provisions of the Act are not applicable to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim. In lieu of these provisions, the devolution of the estate of a Muslim shall be governed by Islamic law. The only provisions of the Act that are applicable to the estate of the Muslim as per Section 2(4) are the procedural provisions contained in Part VII of the Act relating to administration of estates.

11. In Re the Estate of Ismail Osman Adam, deceased, Noorbanu Abdulrazak v. Abdulkader Ismail Osman, Mombasa Civil Appeal No. 285 of 2009, the Court of Appeal while upholding the choice of parties to either file succession proceedings in the Kadhi’s Court or the High Court had this to say:

“...if the High court assumes jurisdiction to the estate of a deceased Muslim, then by virtue of Section 2 (3) of the [Law of Succession Act] the law applicable in the High Court as to devolution of the estate is the Muslim law and not the LSA.”

This Court has assumed jurisdiction in the matter herein which relates to the estate of a deceased Muslim. Consequently, by virtue of Section 2(3) of the Act, the Applicable law as relates to devolution of the estate is Islamic law.

12. In the circumstances, I do direct that the estate of the deceased **Rama Matano Mwaurinda be distributed in accordance with Islamic law.** There shall be no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 24th day of February 2017

M. THANDE

JUDGE

In the presence of: -

..... **for the Administrators**

..... **for the Objector**

..... **Court Assistant**