



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**SUCCESSION CAUSE NO. 229 OF 2011**

**In the matter of the Estate of ABUBAKAR IRERI KARUIRIA (Deceased)**

**KAIMU ABUBAKAR)**

**HASIA ABUBAKAR).....APPLICANTS**

**VERSUS**

**HALIMA MUTHONI.....RESPONDENT/PETITIONER**

**R U L I N G**

1. This is the ruling of the application dated 16/2/2016 seeking for orders that the court be pleased to transfer this matter for disposal by the Kadhis Court. The application is supported by the joint affidavit of Kaimu Abubakar, Omari Abubakar, Fatuma Abubakar, Swaleh Abubakar, Zainabu Abubakar, Mariamu Abubakar and Maranga Abubakar stating that the deceased called for a family meeting prior to his death and distributed his estate. All the children of the deceased were present except Mwanaidi Abubakar (now deceased).

2. All the family members signed the will and testament which was witnessed by their local Sheik Maalim Said Al – Khatat and Mr. Mokuha. Unfortunately the signed will containing the mode of distribution got lost. The deceased therefore died intestate. He was Muslim at the time of death and the law applicable in the distribution of his estate is the Muslim Law.

3. The petitioner filed a replying affidavit opposing the application. He stated that the deceased died intestate. It is argued that the matter can only be referred to the Kadhis court if all the parties profess Muslim faith. In this case not all the dependants of the estate of the deceased profess the Muslim faith. One Linda Zainabu Wambere and Fatuma Wambugi are not muslims. Some members of staff in the Kadhis court are members of the deceased's family and as such justice will not be done. The jurisdiction of the High Court in succession matters is unlimited and this cause should be heard in this court.

4. The 2<sup>nd</sup> protestor Hasia Abubakar filed a replying affidavit stating that her name cannot be used to prove that she professes Islamic faith. The matter can only be referred to the Kadhis court if there is no party claiming that he does not profess the Muslim faith.

5. Parties filed written submissions.

6. The applicant submitted that the Kadhis Court has jurisdiction to handle this matter as per section 5 of the Kadhis Court Act. All parties in this matter profess the Muslim faith. It is only the two members who are alleged not to profess the Muslim faith that can swear an affidavit confirming this.

7. The petitioner submitted that restated what was stated in the replying affidavit and cited the decision of **R.B & R.G.O V H.S B & A.S.B [2014] eKLR** where the court declined to have the matter transferred to the Kadhis court.

8. Article 170 (5) of the Constitution provides that;

*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.*

9. Section 5 of the Kadhis Court Act provides that;

*A Kadhi's court shall have and exercise the following jurisdiction, namely 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; but nothing in*

*this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.*

10. In the case of **NAZIMA JANMOHAMMED NASSAR VS NASREEN KAUSER [2015] eKLR** the court cited the court of appeal case of **RE ESTATE OF ISMAI OSMAN ADAM (DECEASED), NOORBANU ABDUL RAZAK VS ABDULKADER ISMAIL OSMAN, MOMBASA CIVIL APPEAL NO. 285 OF 2009** where the court ruled that it is the choice of Muslim parties to submit to a Kadhis court or to file succession proceedings in the High Court.

11. The court of appeal further held that "

*"There should not be any confusion between the jurisdiction of the High Court to entertain a dispute relating to testamentary or intestate succession to estates of Muslims and the substantive law applicable in the High Court in such disputes.....however 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 the devolution of the estate is the Muslim law and not the law of succession law. As an example, disputes relating to the validity of a will made by a Muslim and ascertainment of heirs and shares of each will be determined in accordance with Muslim law....."*

12. The court also cited Hon. Justice Edward M. Muriithi **IN THE MATTER OF THE ESTATE OF S.P.B (DECEASED); R.B AND ANOTHER VS H.S.B AND ANOTHER, SUCCESSION CAUSE NO. 301 OF 2014**, stated that

*"This right of choice is consistent with the constitutional values of liberty of the person embodied in the principles of human dignity, equality, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised under Article 10(2) of the Constitution. To compel all muslims to subject themselves to the jurisdiction of the Kadhis' court would be contrary to all notions of choice which is the basis of rights and freedoms in the bill of rights...."*

13. In the instant case, there has been a dispute as to whether all the parties profess the Muslim faith. For instance, the 2<sup>nd</sup> protestor who has been listed as a beneficiary of the estate of the deceased in form P & A.5 denies professing the Muslim faith in paragraph 5 and 6 of her replying affidavit. Some of the beneficiaries have stated that they do not profess the Muslim faith which fact has not been disputed by the applicant.

14. A Kadhis court is empowered by Section 5 of the Kadhis Court Act to determine inheritance matters where all parties profess the Muslim faith. This is not the case here. Transferring this matter to the Kadhis court is contrary to the Constitution of Kenya and to the Kadhis Court Act.

15. The jurisdiction of the high court in inheritance matters where the parties profess or do not profess the Muslim faith is unlimited. The same case applies to the subordinate court save where the value of the estate exceeds KShs.20,000,000/=.

16. I find no merit in this application and I dismiss it with no order as to costs.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 1ST DAY OF NOVEMBER, 2016.**

**F. MUCHEMI**

**J U D G E**

**In the presence of:-**

**Mr. Okwaro for Eddie Njiru for protesters**

**Both Protesters present**