

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO.1679 OF 2007

IN THE MATTER OF LAND REFERENCE NO.36/11/11

AND

IN THE MATTER OF THE ESTATE OF JATANE NAWA (DECEASED) ALSO KNOWN AS
JATANE wife of NOORDIN SAMJI

SAIDA BASHIR..... APPLICANT

VERSUS

HUSSEIN BASHIR.....1ST RESPONDENT

AHMED BASHIR..... 2ND RESPONDENT

RULING

The Respondents filed suit by originating summons in **Succession Cause No.10 of 2009(OS)** seeking a declaration that the parcel of land registered as Land Reference No. 36/11/11 (the suit property) is not the property of the deceased but was rather held in trust by the deceased for Ahmed Bashir and Hussein Bashir. When the suit was presented before court, Dulu J while noting that there was already in existence a substantive succession cause which had been filed in respect of the estate of the deceased, directed the originating summons be consolidated with the present succession cause. The Learned Judge, correctly in my view, was of the opinion that the issue as to whether there existed a trust or not would be determined at the proper venue i.e. in the succession cause.

After the consolidation, the Respondents filed an application seeking to have the suit property declared to have been held in trust by the deceased for the Respondents and therefore not part of the properties that comprised the estate of the deceased. The Applicant was opposed to the application essentially on two grounds: firstly, that the parties to this succession cause being Muslims, the proper venue for hearing and determination of the dispute is the Kadhis' court. Secondly, the Applicant denied the existence of the trust as claimed by the Respondent. The Applicant was of the view that the court could not, in an application, determine whether or not there existed such a trust without taking oral evidence. During the hearing of the application, an issue that came to the fore was the different types of trusts that exist under Islamic Law. It became apparent to this court that the proper venue that the issue can be properly ventilated is the Kadhis' court.

The basis of this decision is **Article 170(5)** of the **Law of Succession Act** which provides thus:

“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 Kadhis’ court.”

Section 2(3) of the **Law of Succession Act** states as follows:

“Subject to subsection (4), the provisions 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 such person shall be

governed by Muslim Law.”

In the present application, it is common ground that the deceased professed the Muslim faith. All the parties to this application also profess the Muslim faith. The aspect of the law that is being litigated is an aspect of Muslim Law. This court is of the considered view that the proper venue where the issue as to whether there exists a trust created under Muslim Law can be ventilated is the Kadhis' court. This court, having perused the file, noted that the proceedings before this court have substantially been concluded, especially as relates to the determination of the question of who the dependants of the deceased are. The aggrieved parties to the decision of this court have indicated their intention to appeal to the Court of Appeal against the decision that went against them.

In the premises therefore, this court will only remit one aspect of this case for determination by the Kadhis' court. That aspect is whether or not the suit property is part of the estate of the deceased or was held in trust for the Respondents by the deceased. After the determination of the issue, the Kadhi shall transmit his decision to this court for adoption. As regard other aspects of this case, the same shall be determined by this court. The Kadhi is requested to determine the dispute within forty-five (45) days of the delivery of this Ruling. The parties shall be at liberty to appear before the Kadhi and make their submissions. Costs shall abide the outcome of the decision of the Kadhi. It is so ordered.

DATED AT NAIROBI THIS 2nd DAY OF OCTOBER 2014

L. KIMARU

JUDGE