

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

SUCCESSION APPEAL NO E002 OF 2020

IN THE MATTER OF THE ESTATE OF MOHAMED ARTAN

ISMAIL AND HALIMA MOHAMMED ARTAN (DECEASED)

HUSSEIN MOHAMED ARTAN.....1ST

APPELLANT

ISMAEL MOHAMED ARTAN.....2ND

APPELLANT

YASSIN MOHAMED ARTAN.....3RD

APPELLANT

VERSUS

YUSUF MOHAMED ARTAN.....1ST

RESPONDENT

FATUMA MOHAMED ARTAN.....2ND

RESPONDENT

(Appeal from order passed on 02/12/2020 in Nyeri Kadhi's

Court Succession Cause No. 11 of 2019-

Said Hamisi Bedzenga (Principal Kadhi)

J U D G M E N T

1. By a petition dated 02/07/2019, the Respondents herein moved to Kadhi's court seeking for distribution of the two deceased's estates to their rightful heir. It was averred that the Respondents and the Appellants were the children of the deceased herein. The Appellants responded to the petition and consequently, the matter proceeded for hearing.

2. Vide a Judgment dated 04/12/2019 the Kadhi found that the estate of Mohamed Artan Ismael comprised of Plot No. C8 Majengo and the estate of Halima Mohamed Artan consisted of two plots namely; unsurveyed Commercial Plot No. C9 plot K Nanyuki and Unsurveyed Commercial Plot No. 3 Nanyuki. He also found that Mohamed Artan Ismael was survived by all his children namely;

Fatuma Mohamed Artan

Hassan Mohamed Artan (deceased)

Hussein Mohamed Artan

Abdul Mohamed Artan (deceased)

Yusuf Mohamed Artan

Ismail Mohamed Artan

Yassin Mohamed Artan

3. On the other hand, the mother was survived by four sons and one daughter excluding the deceased sons who predeceased her. He therefore directed that all children six sons and one daughter to inherit from the estate of their father and four sons and one daughter to inherit from their mother's estate.

4. Consequently, the Respondents in this appeal filed an application dated 10/01/2020 seeking for review of the said judgment on account of discovery of new matters and on the basis that the children of their two deceased's brothers were left out from the estate of their grandmother and that they were entitled to a share of their grandmother's estate being the grandchildren and dependants as they were being cared for by their grandmother after the demise of their fathers. They also averred that their deceased father was the one who had applied for the allocation of the said two properties before his demise.

5. In his ruling, the learned Kadhi held that the deceased Mohamed Artan Ismael died in the year 1991

whereas the allotment letter for unsurveyed commercial plot No. 3 Nanyuki Municipality was offered on 01/12/1992 and allotment letter for unsurveyed commercial C9 Plot No. K Nanyuki Municipality was offered on 01/10/1993. That upon consultation with the land registrar, he was informed that it is a long process and takes a period of time which maybe years before one is offered an allotment letter for a parcel of land. He therefore held that the two plots belonged to their father and the plots were subsequently registered in the name of their mother after the death of their father. He proceeded and subdivided all the deceased's plots amongst the six sons and one daughter including the two sons who pre-deceased their mother. He further held that the shares of the two deceased's sons devolve to their children/heirs.

6. Being aggrieved by this ruling, the Appellants filed the instant appeal opposing the said ruling on the following grounds;

- i. The learned Magistrate erred in law by allowing the Respondent's application dated 10/01/2020 for review of judgment entered on 04/12/2019.

- ii. The learned magistrate erred by omitting to verify the authenticity of the records of property ownership presented before him and attached to the application for review even after the Respondents raising issues on the same.
- iii. The learned magistrate erred by failing to consider the order of issuance of allotment letters by stating that the father applied for allotment but the same came out in mother's name.
- iv. The learned magistrate erred by failing to take into consideration the provisions of Quran 4 chapter 4 verse 11 and 12 on distribution of property.
- v. The learned magistrate erred in giving the Respondents shares in property whose owner was predeceased by the Respondents parents.
- vi. The process used in confirmation of validity of the allotment process was shady and unprocedural hence open for mistakes and irregularity.

7. The appeal was canvassed by way of written submissions. In their submissions, the Appellants argued that it is not in dispute that their parents died both Muslims and it is not in dispute that the estate needs to be shared out between all the children of the deceased's couple. That Islamic law does not differentiate on the kind of properties to be inherited and all types of properties are subject to inheritance and therefore the Kadhi's court had jurisdiction to deal with any property of a deceased muslim. In determining the rightful shares of inheritance, he referred the court to Quran Chapter 4 verse 11 and 12 where it states that;

...for parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has the third; if the deceased left brothers or sisters, the mother has a sixth..."and for them (your wives) one fourth of what you leave behind if you did not have a child and if you have a child then for them one eighth of what you leave behind..."

8. That the shares of Hassan Mohamed Artan (deceased) devolve to his heirs, two daughters and one son whereas the shares of Abdul Mohamed Artan(deceased) devolve to his two heirs. Therefore, the deceased's estate should be subdivided as follows;

Mother's plots UNS Commercial plot No. C9 Plot K and
UNS Commercial Plot No. 3

Fatma	11.11%
Hussein	22.22%
Yusuf	22.22%
Ismail	22.22%
Yassin	22.22%

Father's plot No. C8 Majengo-1/8 to their mother with 12.5% be
divided amongst all beneficiaries as she is deceased as per
Islamic law;

Fatma	6.73%
Hassan	13.46%
Hussein	13.46%
Abdul	13.46%
Yusuf	13.46%
Ismail	13.46%
Yasin	13.46%

9. That the Kadhi's court in its judgment had distributed the said properties in the above manner but later changed and issued another judgment without reasons and without their knowledge which was detrimental to the Appellants as they learnt about the orders after the eviction orders were brought to their attention. They submitted that their mother's properties were obtained after the death of their father in 1991 and are registered in her name and considering them as part of their father's property is bad in Islamic law. Further, the plot that was awarded to the Appellants may be taken over by county government as it is said to be a parking lot which was even admitted by the 1st Respondent and awarding the same to the Appellants amounts to giving them hot air. Therefore, the judgment of the Kadhi's court should be overturned for not following Islamic Law.

10. In rejoinder, the Respondents argued that the learned Kadhi correctly found that the properties of the estate were acquired by their father Mohamed Artan but two of the properties namely Uns. Commercial Plot No. C-9 Plot K-

Nanyuki Municipality and UNS. Commercial Plot No. 3 Nanyuki Municipality's allotment were issued in their mother's name after their father demise and that Appellants have failed to fault the learned Kadhi's findings. That the Appellants raised the issue of authenticity of documents produced in their memorandum of appeal but they failed to address that ground. Further, the Kadhi consulted on the issuance of allotment letter and was persuaded that the process takes time and that it is their father who applied for allotment of the two plots but were only registered in his wife's name after his demise.

11. On the issue as to whether the children of Hassan Mohamed Artan and Abdul Mohammed Artan who predeceased their mother are beneficiaries of the estate of both deceased herein, reliance was placed on the case of ***Re-estate of Abdul Rehaman Bin Miran (deceased) (2021) eKLR Mombasa High Court Probate & Administration Cause No. 43 of 1976*** and ***Re Estate of Hellen Wangari Wathiai (deceased) (2021) eKLR*** to emphasise that grandchildren whose parents predeceased their grandparents

are entitled to the share their parents could have inherited from their grandparents. Hence, the children of the late Hassan Mohamed and Abdul Mohammed are beneficiaries of the estate of their grandparents.

12. They further submitted that under Islamic law, the deceased's spouse, children and parents are primary Quranic shares as survivors of first class and the grandchildren fall under the third class and cannot inherit if there exist survivors of first class. However, the children of the late Hassan Mohamed and Abdul Mohammed are protected under **Article 27(1) to (5) of the Constitution**. Reliance was placed on the case of ***FAAF VS RFM & 2 others (CA No. E043/2022) KECA 1322 (KLR)*** where the court of appeal held that the Islamic law on that the children born out of wedlock were not entitled to inherit from their deceased's father was discriminatory.

13. Therefore, denying the children of the Late Hassan and Abdul benefit because their parents pre-deceased their grandmother will amount to harmful discrimination because the children of the Respondents and the Appellants will

benefit. That the Appellants have not faulted the findings by the Kadhi and they urged the court to uphold the mode of distribution adopted by the Kadhi.

14. I have considered the appeal, the submissions on record and case law cited. There are three issues for determination being;

- i. Whether the Principal Kadhi had jurisdiction to review the judgement dated 4/12/19.
- ii. Whether the Principal Kadhi rightly held that the two properties namely; Uns. Commercial Plot No. C-9 Plot K-Nanyuki Municipality and UNS. Commercial Plot No. 3 Nanyuki Municipality belonged to Mohamed Artan Ismail but were registered in the name of Halima Mohamed Artan.
- iii. If the aforesaid properties belonged to Halima Mohamed Artan, whether the children of of the late Hassan Mohamed and Abdul Mohammed are entitled to inherit from their grandmother's estate.

15. The power of a court to review its own orders is donated by Section 80 of the Civil Procedure Act and Order 45

Rule 1 of the Civil Procedure Rules (the Rules) which prescribe the circumstances which merit the exercise of the court's power of review. Section 80 provides that:

“Any person who considers himself aggrieved

—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

16. Order 45 Rule 1 states that:

“1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

17. From the facts of the matter before the Kadhi, it is quite clear that the court engaged in a voyage unknown in law, re-opening a determined matter, employed an inquisitorial process with a land registrar and ‘re-heard’ the case yet the threshold of the only open legal avenue of review was not achieved.

18. There was no demonstration at all of discovery of new and important matter or evidence which, after the

exercise of due diligence was not within his knowledge or could not be produced by the then applicants at the time when the decree was passed or the order made and neither was there evidence of some mistake or error apparent on the face of the record or any other sufficient reason to warrant the review orders that the court made.

19. In their opinion to this court, Principal Kadhi AJ Ishaq Hussein and Senior Resident Kadhi Gavava Awadh addressed the issue of review under Islamic law and they stated;

“ The doctrine of functus officio stipulates that once a court has delivered its final judgement, it cannot alter that judgement save within strictly delineated legal parameters. This principle is well-established in Islamic jurisprudence. As stated in Mausua al-Fiqh al-Kuwaitiyya (Encyclopedia of Islamic Jurisprudence) Vol. 33 p. 338: ‘Once a decision is rendered by a Kadhi (Judge), such decision is final and conclusive unless the decision is subject to appeal or review.’

The Principal Kadhi's original judgement explicitly found that 'the two mentioned deceased owned the properties separately.' This was a considered determination based on the parties' submissions.

The allotment dates (1992 and 1993) and Mohammed Artan Ismael's date of demise (19tti September 1991) were established facts. The chronological relationship between death and allotment was evident from the

record. No new evidence was uncovered that was not already known to the parties at trial.

20. The principles of review under the civil law are thus replicated in Islamic jurisprudence. The court therefore lacked the necessary jurisdiction to revisit the matter and without jurisdiction, the Kadhi had no powers at all to make the orders that he did. That said, even assuming that jurisdiction existed, I find it necessary to interrogate the merits of the findings of the Kadhi.

21. The Appellants position is that the Principal Kadhi erred in finding that the two properties belonged to their father but were registered in their mother's name upon their father's demise. That the learned Kadhi failed to scrutinise the documents that were produced and that the process of ascertaining the allocation of allotment letter was unprocedural and open to irregularity and mistakes.

22. I have gone through the record and I have noticed that the two allotment letters for the contested two properties are registered in the name of Halima Yusuf Dirie who I suppose is Halima Mohamed Artan(deceased) as therein appears to be no issue on this identity. The learned Kadhi in

his ruling stated that he consulted a land registrar who informed him that the process of obtaining allotment letter takes time and it can take some years and based on that, he found that the said properties were allocated to Mohamed Artan Ismael who died in the year 1991 and they were consequently registered in the names of his wife in the year 1992 and 1993. There are however no supporting documents on the record to show that indeed Mohamed Artan Ismael had applied for allotment or even had made any payment to such allocation.

23. The said Registrar was not a witness in the cause. Prove of ownership of property is achieved through evidence. It can never be by way of a judicial officer consulting a Land Registrar!

24. In the absence of evidence that Mohamed Artan Ismael was the allottee or owner of Uns. Commercial Plot No. C-9 Plot K-Nanyuki Municipality and UNS. Commercial Plot No. 3 Nanyuki Municipality, and with available evidence that the said properties are registered in the names of Halima Yusuf Dirie who I suppose is Halima Mohamed Artan, the trial Kadhi

misapprehended the evidence in his holding that these were properties of Mohamed Artan Ismael and he fell into error.

25. On the second issue, the Appellants want the children of their deceased brothers to be left out from the estate of their grandmother if the court finds that the contested two properties belonged to their deceased mother. The contention is that the deceased brothers predeceased their mother and so they have no share. The Respondents in their submissions admitted to these facts and stated that under Islamic law, the deceased's spouse, children and parents are primary Quranic shares as survivors of first class and the grandchildren fall under the third class and cannot inherit if there exist survivors of first class. They however referred this court to the holdings in ***Re-estate of Abdul Rehaman Bin Miran (deceased) (2021) eKLR Mombasa High Court Probate & Administration Cause No. 43 of 1976*** and ***Re Estate of Hellen Wangari Wathiai (deceased) (2021) eKLR*** to emphasise that grandchildren whose parents predeceased their grandparents are entitled to the share their parents could have inherited from their

grandparents. The Respondents also submitted that the children of the late Hassan Mohamed and Abdul Mohammed are protected under **Article 27(1) to (5)** of the **Constitution** on equality before the law.

26. Islamic law does not allow grandchildren whose parents have pre-deceased their parent whose estate is the subject of distribution to inherit such property. In the persuasive authority in the case of **Mohamed Juma v Fatuma Rehan Juma & 6 others [2017] eKLR** the court held that;

“It could be clearly evinced and gauged from the overwhelming evidence of the Plaintiff that the 3rd,4th,5th,6th and 7th defendants are grandchildren of the deceased, a relative of the third class, they cannot inherit if there is among the survivor relative of first class - the 1st and 2nd Defendant who are the daughters of the deceased...The Court’s attention was also drawn to Muslim family Law of marriage at Pg 284 that:-

“The right of Dhawil- Arham (third class) to inherit the deceased intestate can only be considered when the first two classes of the heirs are not available”

27. A strict application of the above dicta would mean that the children of Hassan Mohamed Artan and Abdul Mohamed Artan who predeceased their mother cannot inherit from their grandmother’s estate.

28. But our courts have considered such rigid laws to be unfair. The Court of Appeal in ***Saifudean Mohamedali Noorbhai V Shehnaz Abdehusein Adamji [2011] Eklr,*** addressed the issue. In that appeal, the deceased, a Muslim died without any surviving parent, grandparent, children, grandchildren, brothers or sisters. He bequeathed his entire estate to the respondent, his wife who was the closest surviving relative. The appellant, claiming to be a cousin of the deceased, challenged the Will as null and void on the basis that it was contrary to Islamic law on devolution of estates, which entitled him, as a cousin of the deceased, to three quarters of the estate of the deceased. In dismissing the challenge, the High Court held that under the Law of Succession Act, a person of sound mind was free to dispose of his property by reference to any secular or religious law of his or her choice. The appellant appealed to the Court of Appeal contending, among others, that the High Court had erred by applying the Law of Succession Act in lieu of Islamic law. In a wide-ranging review, the Court of Appeal noted, a few basic principles pertaining to Islamic law. The first is that Islamic

law is a moral doctrine at whose heart lie the values of justice and kindness translating into an ethic of care and compassion for the weak and vulnerable, especially among one's close relations. Secondly, in interpreting the Quran-inspired law, regard must be had to the Quran's moral teaching as a whole. Thirdly, Islamic law is dynamic and adapts to evolving social, political, cultural and economic conditions and realities and that *"not all rules of inheritance are rigidly fixed for all times since the development of Muslim jurisprudence has been and continues to be a search for the good law to be applied in differing times and situations."* Lastly, the Court stated that Islamic law does not constitute a single uniform code of law. On the contrary, its hallmark is legal pluralism and diversity, comprising a multiplicity of Muslim schools of law within the two major branches of *Sunni* and *Shia*. Ultimately the Court held that in writing the Will and in making his disposition the deceased did not contravene any Quranic guidance. The Court of Appeal categorically held that;

"When a change in a rule of Muslim law is deemed necessary in light of radically altered social conditions from those prevailing fourteen centuries ago, then, besides the courts and jurists, the Government in a

Muslim country may also lead the initiative for change in the traditional law even if this is said to be grounded in a Quranic injunction. An example is the Ordinance, passed at the instance of the Government of Pakistan, Ministry of Law, Ordinance No. VIII, of 1961 which introduced the rule of representation in a limited way in the law of inheritance. The relevant text reads:

“Succession - in the event of the death of any son or daughter of the propositus before the opening of the succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stripes receive a share equivalent to the share which such son or daughter, as the case may be, could have received if alive.”

This ordinance is said to have been enacted to redress what was seen as unfair for the orphaned grandchildren of a Muslim who, under the Hanafi law, could not inherit from their grandfather if the latter had living relations of his own at the time of his death. The above instances are recalled here simply to illustrate that Muslim jurists and law makers follow the traditional maxim that the law is where the good lies, to ensure an outcome that is humane and just following the overarching Quranic commandment to Muslims to be just and kind (Q. 16.90). The respondent, Shehnaz, was the wife of the deceased, and, in the absence of ascendants or descendants, the closest relation of her husband. As noted above, Muslim courts, jurists and law makers have, when necessary, sought to ensure that the humane intention of the law be upheld, whether to protect the interests of widows or orphaned grandchildren whom, a rigid reading of the letter of the law, would have deprived of much needed and expected support.”

29. While faced with a similar issue like in the instant appeal, the court ***In re Estate of Abdulrehman Bin Miran (Deceased) [2021] eKLR*** in a persuasive authority held that;

“It’s not in dispute that the applicants’ father predeceased the death of their grandfather. The bone of contention therefore is whether the grandchildren whose father predeceased the grandfather and who were sufficiently provided for by the deceased before his will and subsequent death, can be held to be beneficiaries of the estate. The respondent submitted that under Islamic law, the deceased’s spouse, children and parents are primary quranic sharers as survivors of first class and that grandchildren fall under the third class and cannot inherit if there exist survivors of first class. In re Estate of Hellen Wangari Wathiai (Deceased) [2021] eKLR the court stated that;

“looking at both parties’ submissions, my appreciation of the matter at hand is that the Applicant herein brought this summons before court as a Beneficiary of the Estate of his late father who predeceased the deceased herein. A grandchild is a direct heir to the estate of the grandparent where the parent predeceased the grandparent. The grandchildren get into the shoes of their deceased parents and take the parent’s share in the estate of the grandparents as was enunciated in the case of Re Estate of Wahome Njoki Wakagoto (2013) eKLR where it was held: -

“Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit

from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents."

30. The court finally held that;

"Accordingly, it's my finding that the applicants being grandchildren of the deceased and their father having predeceased the deceased qualifies them as beneficiaries."

31. In the same vein, the parents of the subject children in this appeal pre-deceased the grandmother. They ought, as in the decision above, to take the share which their parents would have inherited and in doing so the court will be breathing life to the basic principles pertaining to Islamic law as well captured by the Court of Appeal in **Saifudean Mohamedali Noorbhai V Shehnaz Abdehusein Adamji [2011] EKLR. (supra).**

32. From the foregoing, and having put into account the opinion of the 2 Kadhi who sat in this matter and for reasons above stated, this court finds that the Principal Kadhi

fell into error by exercising a jurisdiction to review the judgement that he did not possess. Further, even assuming he had jurisdiction, on the material on record, his findings are not supported by evidence to show that the two properties namely; Uns. Commercial Plot No. C-9 Plot K-Nanyuki Municipality and UNS. Commercial Plot No. 3 Nanyuki Municipality belonged to Mohamed Artan Ismail but were registered in the name of Halima Mohamed Artan. The evidence available supports the ownership of these properties by Halima Artan.

33. On whether the children of of the late Hassan Mohamed and Abdul Mohammed are entitled to inherit from the estate of Halima Mohamed Artan, their grandmother, the answer is in the affirmative.

34. It follows then that all the findings of the Principal Kadhi in the judgement dated 2/12/20 were a nullity for want of jurisdiction as the Kadhi engaged in opening a decided case and re-heard it in a scope beyond review jurisdiction. Even assuming there was jurisdiction, the findings were not

supported by evidence. The appeal herein thus has merit and succeeds.

35. With the result that the judgement of the Principal Kadhi dated 2nd December 2020 is hereby set aside and the judgement of 4th December 2019 at the Kadhi's court is reinstated and remains in force with modification that the children of Hassan Mohamed Artan (being Halima Hassan Mohamed, Hassan Mohamed and Famidah Hassan, and, those of Abdul Mohamed Artan (being Yasmin Abdul Mohamed and Sophia Abdul Mohamed) shall inherit their father's shares in the ratios as provided under Quran 4 Chapter 4 verse 11. For the avoidance of doubt, and for reasons expounded earlier in this judgement, these children are to inherit from both estates of the deceased herein.

36. This being a family matter, I direct that each party bears their own costs.

Dated signed and delivered in open court this 30th day of September, 2025.

A.K. NDUNG'U

JUDGE

ORIGINAL JUDGMENT