



**In re Estate of Abbas Rajabu Ali (Deceased) (Succession Cause
E360 of 2023) [2024] KEKC 13 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEKC 13 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT MOMBASA
SUCCESSION CAUSE E360 OF 2023
AH ATHMAN, CK
FEBRUARY 29, 2024**

BETWEEN

MARIAM RAJAB MUSA PETITIONER

AND

NEEMA ABBAS RAJAB 1ST INTERESTED PARTY

FATUMA ALI MWAKATENGO 2ND INTERESTED PARTY

RULING

1. The 1st interested party Notice of motion dated 8th January, 2024 seeks orders to stay arrest delivery of judgment in the matter, she be joined in the matter as interested party and opening of proceedings.
2. It is supported by her sworn supporting affidavit dated 8th January, 2024. She deposed that she is a sister of the deceased and that the petitioner and Ramadhan Abbas Rajab although children of the deceased, they were born out of wedlock. She deposed further that she is not a direct heir, that the petitioner, Ramadhan and Wanza have received NSSF funds although they are not legal heirs.
3. The petitioner / respondent opposed the application. She deposed that no evidence was produced to support the claim of illegitimacy. She further contended that the deceased elected his beneficiaries to the NSSF which distributed according to his directions and wishes.
4. The 2nd interested party opposed the application. She deposed that Ramadhan Rajab was a both a biological and legal child of the deceased born within the subsistence of the marriage. She deposed that the deceased appointed her son as a beneficiary to his NSSF benefits. She contends that under section 36A NSSF benefits do not form part of a deceased estate. It is paid to nominees in accordance to the scheme rules.
5. The applicant is a sister to the deceased. The prayer for joinder of interested parties is not opposed. It is granted.



6. The key issue in this application is whether or not the children of the deceased are his legal heirs and whether NSSF benefits can be redistributed.
7. The application raises very serious issues that needed strong and credible evidence to sustain. Nothing has been annexed to the application to support the claim that the Neema Abbas Rajab and Ramadhan Abbas Rajabu are not legal children of the deceased. The birth certificates indicate the deceased is their father. There is no dispute Fatuma Ali Mwakatengo was married to the deceased. It is noteworthy that the applicant was in court when the petitioner gave her evidence in chief. She was stated that the deceased was survived by his mother, widow and two children – a son and a daughter. She appears to have changed her mind but has not provided any proof to her claim.
8. The claimant has the burden to provide proof for his or her claim. *Bukhari [4552], Muslim [1/1711], Al Baihaki [10/252]* reported on the authority of Ibn Abbas [R.A.] that the prophet (May Allah' peace and blessings be upon him] said:

'The onus of proof lies on the plaintiff and the oath is to be taken by the defendant.
9. This is equally a requirement of the law. Section 107 of the *Evidence Act*; Cap 80 Laws of Kenya provide:

'Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.'
10. Marriage certificate of the deceased with the 2nd interested party indicate they married in Mombasa on 7th September, 2015. The birth certificate of Ramadhan Abbas indicate he was born on 13th June, 2016 nine months later. He is legitimate child of the deceased. There is no evidence adduced that the petitioner is not a legitimate child of the deceased. They are so declared.
11. On the issue of NSSF benefits, strictly under Islamic law anything of value left by and belonging to the deceased constitute his estate. However, some items may be excluded as estates if they are so declared by a recognized statute. Section 36A of the *Retirements Benefits Act* 2017 provide:

'Upon the death of a member of a scheme, the benefit payable from the scheme shall not form part of estate of the member for the purpose of administration and shall be paid out by the trustees in accordance with the scheme rules'.
12. The 2nd interested party admitted Wanza is not a legal child of the deceased. The deceased nominated her as a beneficiary in the NSSF scheme. Under Islamic law he is entitled to bequeath and gift to non-heirs within 30% of his estate. Apart from compliance the rules of the scheme and provisions of the Retirements Benefits Act, it was within his legal rights under Islamic law and therefore binding.
13. The application lacks merit. It is hereby dismissed. Costs be in the cause.

DATED, SIGNED AT MOMBASA ON 29TH FEBRUARY, 2024

HON. ABDULHALIM H. ATHMAN

CHIEF KADHI

In the presence of

Mr. Salim Kerrow, court assistant

Petitioner

1st interested party



Ms. Mulago for the 2nd interested party

