



**In re Estate of Mumtaz Hassan Sheikh (Deceased) (Succession Cause
E091 of 2022) [2023] KEKC 15 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEKC 15 (KLR)

**REPUBLIC OF KENYA
IN THE KADHI'S COURT AT UPPER HILL (NAIROBI MILIMANI LAW COURTS)
SUCCESSION CAUSE E091 OF 2022**

AH ATHMAN, SPK

JULY 27, 2023

IN THE MATTER OF THE ESTATE OF MUMTAZ HASSAN SHEIKH....(DECEASED)

WASIM IQBAL BUTT..... PETITIONER / RESPONDENT

VERSUS

RIZWAN HASSAN SHEIKH.....OBJECTOR / APPLICANT

RULING

1. Mumtaz Hassan Sheikh, a Sunni Muslim and Kenyan national died domiciled in Kenya at the Aga Khan Nairobi on 30th September, 2022 of cardiorespiratory arrest aged 86 years. He was survived by three adult sons: Atir, Rizwan and Tariq Hassan Sheikh all resident in the United States of America. He was also survived by a sister, Yasmin Begum Qureshi and niece Tabasum Wazir Hassan and nephew Wasim Iqbal Butt. He was divorced to his wife NAS. His sister and nephew are resident and nationals of the United Kingdom. The late Mumtaz Hassan Sheikh left a will dated 24th March, 2021 appointing his nephew and sister as executors. He specifically willed the sale of his Lantana Road flat, Westlands within a year of his death and the proceeds deposited in a Prime Bank account in his and nephew's name and thereafter distributed to his three sons in equal one (1) share each but after settlement of legacies; otherwise the Westlands property be transferred to his niece if she is alive and residing in Kenya.
2. Wasim Iqbal Butt, one of the executors of the estate moved court for and was granted letters of probate with will annexed on 21st December, 2022 as joint administrators with Yasmin Begum Qureshi. He filed summons for confirmation of grant dated 16th February, 2023. The court directed the sons be served with the summons.
3. The summons for revocation of grant dated 6th March, 2023 seeks the revocation of grant of probate with will annexed to Wasim Iqbal Butt and Yasmin Begum Qureshi on 21st December, 2022 on grounds:-
 - a. That the applicant is son to the deceased who is a beneficiary of the estate



- b. That the grant was obtained fraudulently by the making of a false statement and concealment from the court material facts.
 - c. The said grant was obtained by means of untrue allegations of a fact essential in a point of law.
4. The applicant also filed an affidavit of protest against confirmation of grant. It is dated 6th March, 2023. It raises the same issues as the summons for revocation of grant. He also petitioned court for letters of administration intestate.
 5. The court on 6th March, 2023 when the matter came up for hearing for the summons for confirmation of grant, stayed the hearing of the summons for confirmation of grant and granted the respondent leave to file objection to the petition. The respondent filed a response to the petition and cross petition for letters of probate. The petitioner filed a preliminary objection and a response to their cross petition. Parties by consent withdrew the preliminary objection, the response petition and cross petition and reply to cross petition and agreed to prosecute the summons for revocation of grant.
 6. The applicant deposed that the grant was obtained un-procedurally as their consent was not obtained and the petitioner did not disclose material facts and made untrue allegations of fact essential in a point of law, especially paragraph 5 of his petition for grant of letters of probate.
 7. The application was disposed by way of written submissions. The firm of Ibrahim, Dayib & company advocates represented the objector while Mr. the firm of Shehi, Kipkorir, Yusuf advocates represented the petitioner.
 8. The applicant through his advocated submitted that the will dated 24th March, 2021 is not valid, the proceedings to obtain were defective in substance and it was obtained through making of false statement, concealment of material fact essential in a point of law. He submitted that the will contravenes basic principles of Islamic laws of succession. He submitted that the will seeks to provide for and bequeath to beneficiaries contrary to principles of Islamic law. He contends this invalidates the entire will. He further submitted that the will does not disclose all the assets and liabilities of the estate, was not properly executed before two witnesses and its distribution of the estate pursuant to the will does not adhere to Islamic laws of inheritance. He contends a person cannot bequeath more than one-third of his estate. He argued that the will being invalid, the executor has no reason to be part of the estate.
 9. The applicant further submitted that the proceedings to obtain the grant are defective for not seeking consent of the beneficiaries of the estate of the deceased. He submitted further that the respondent stated in his petition that he could not get in touch with the beneficiaries to get their consent, which averment he submits is false and not supported with any proof. He wondered why the respondent has excluded the other co-executor.
 10. Mr. Yusuf on behalf of the petitioner / respondent submitted that it is not a requirement in law where the deceased left a will for the executors to seek consent of the beneficiaries. That notwithstanding, he argued the executor filed certificate of electronic evidence to prove that he engaged the applicant on the will in issue. He further submitted that the executor fully disclosed and listed all the beneficiaries in paragraph 3 of the petition for grant of probate with will annexed. He submitted further that the executor followed due process by filing the petition, seeking leave for gazettelement and had the notice gazetted in the Kenya gazetted; and when no objection was filed in the prescribed period, the grant was issued.



11. On the question whether the grant was obtained through fraud, Mr. Yusuf for the executor / respondent submitted that the applicant has neither disclosed which material facts were concealed or not disclosed nor provided any evidence of misrepresentation.
12. On the question of the respondent removing the 2nd executor from administration of the estate, the respondent through his counsel submitted that the grant was made to both the two executors and no one was removed. He submitted that the 2nd executor due to old age and deteriorating health designated responsibilities to the first executor.
13. On the question of will being invalid due to lack of witness contrary to law, he submitted that the will was witnessed by one Shasudin Babul and Peter Mugalo, advocate who swore an affidavit confirming he drafted it on the deceased's instruction. He submitted that in any case, under Islamic law for it is not a mandatory for a will to be witnessed.
14. On the question of will being invalid on account of bequest, he submitted that bequests are allowed provided they are for third parties and that the will provided for distribution of estate to heirs equally after settlement of debts. He contends the will does not offend Islamic law.
15. On the question of invalidity of the will on account of not listing entire estate, he agrees with the applicant that the list is not exhaustive but argues the will directed the executors to collect the assets and convert it to monetary form. He submitted that every clause in a will is several and invalidity of one clause or clauses does not render entire will invalid or unenforceable. He submitted that the no evidence was adduced to prove the executor is not qualified or cannot be trusted with administration of the estate and that the intention of the testator have to be respected.
16. The issues for determination in this application are:
 - i. Whether or not the grant was obtained through fraud or concealment of material facts
 - ii. Whether or not the respondent is qualified under Islamic law to be executor of the will
 - iii. Whether or not the will offends Islamic laws of inheritance on wills
 - iv. Whether invalidity of one or some clauses of a will renders the entire will invalid.
17. Section 76 of the [Laws of Succession Act](#), cap 160 Laws of Kenya allow for revocation on grounds of defective proceedings, if it were obtained on the basis of false statement or concealment of material facts or an untrue allegation of fact essential in point of law. It provides:

‘Grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion:

 - a. That the proceedings to obtain the grant were defective in substance;
 - b. That the grant was obtained fraudulently by the making of a false statement or by the concealment of something material to the case;
 - c. That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently...’
18. In *John Mundia Njoroge & 9 others v. Cecilia Muthoni Njoroge & another* [2016] eKLR, the court cited with approval Koome J, (as she then was) in the matter of the estate of Murathe Mwaria – deceased, where she summarized the grounds for revocation of grant under section 76 as follows:



- i. When the procedure followed in obtaining the grant is defective in substance
 - ii. When the grant is obtained fraudulently by making a false statement
 - iii. Making an untrue allegation of fact essential in point of law to justify the grant
 - iv. Or when the person who has the grant has failed to proceed diligently with the administration of the estate.
19. In the instant case, deceased and all heirs and parties profess the Muslim faith. The applicable law in succession of such estates under the sections 2 (3) and 48 (2) of the *Law of succession Act*, Cap 160 laws of Kenya is Islamic laws of inheritance. The application of probate rules may be applied where they are not inconsistent with Islamic law. The requirement for all heirs to give their consent for taking out of letters of administration is inconsistent with Islamic law that confers on all heirs the same right. Publication of the gazette ment affords any beneficiary or with interest in the estate to object and the right to be heard. In testate succession, the executor has original rights to petition for letters of grant. In *Noorbanu Abdulrazak v Abdukader Ismail Osman* [2017] eKLR, Thande J held:
- '13. The Law provides that a grant of representation may be revoked if the proceedings to obtain the same were defective in substance. The applicant claims that she was neither informed about the will nor about filing of the petition for grant of probate herein. I have considered the process of applying for grant herein. In testate succession, it is the executor named in the will of a deceased person who petitions for grant of representation unlike in intestate succession where any beneficiary in the order of priority provided for in section 66 of the *Law of succession Act* may petition for a grant. The Respondent, the executor named in the will filed the petition for grant of probate and annexed the will of the deceased as required. The petition was duly published in the Kenya Gazette Notice No. 4546 of 4.10.91 and no objection was filed. The grant of probate was subsequently issued to the respondent. It would appear that the Respondent did all that was required if him under the law.'
20. In this matter, the respondent, the executor named in the will annexed will to his petition, sought leave for gazette ment, petition was subsequently gazetted in the Kenya gazette Notice number 14492 of 18th November, 2022 and no objection was filed within the prescribed period. No claim or proof of forgery, coercion to the making of the will was made or tendered.
21. The grant of probate was accordingly issued as prayed. He fully complied with the requirements of the law.

Executor

22. The deceased appointed his nephew and sister to be the executors of his will while he had three adult sons. Is he obligated to appoint any of his sons or has liberty to appoint any other person other than his beneficiary as executor of his will? There is consensus among Muslim jurists that a deceased Muslim has liberty to appoint a person of his choice as executor of his will provided he is Muslim, male or female, of sound mind and capable of executing his will. The Conditions of Executor under Islamic law as enunciated in the 'al mausu'a al fiqhiyyat al Kuwaitiya' the Kuwaiti encyclopaedia on Islamic jurisprudence, include:
1. He must be a Muslim
 2. He must have legal capacity. He must be sane, free and adult.
 3. A female may be appointed an executor of a will. Umar Ibn Khattab appointed his daughter Hafsa as the executor of his will.



4. It is not mandatory for the executor to be able to personally exercise the duties of the will provided he or she is of sound reason to appoint somebody to assist him in the duties.
 5. The executor has to accept the appointment in the lifetime of the testator or after his death.
23. It is not mandatory that he appoint one or some of his beneficiary as executor. The rationale to this is informed by the fact that the testator best knows his interests and trustworthiness of his relatives and friends and is at liberty to protect his interests by appointing a person with the ability and he trusts the most to execute his will.

Does the will satisfy requirements of a will under Islamic law?

24. The applicant argued it did not. He contends it contravenes principles of Islamic laws of inheritance. The respondent, on the other hand, contended it did not.
25. There is consensus on the legality of Making of wills and testaments in Islamic law. Sir Dinshah Farduunji Mulla in his 'Principles of Muhammadan law, 1995, states:
 'wills are declared to be lawful in the Koran and the traditions, and all doctors, moreover have concurred on this opinion.' Hedaya 671.
26. This is based on the authentic Islamic authorities which include:
 "prescribed for you, when death approached [any] of you if he leaves wealth, is that he should leave a bequest for the parents and near relatives according to what is acceptable, a duty upon the righteous." Q.2.180.
 'Bukhari (2738) and Muslim (1637) reported on the authority of Abdullah Ibn Umar (may Allah's blessings be upon him) that the prophet [May Allah's peace and blessings be upon him] said: it is not permissible for any Muslim who has something to will, to stay for two nights without having his will written and kept with him.'
27. There are two limitations to making of testamentary disposition in Islamic law.; It is restricted to a third of the estate and it cannot be made to a legal heir. This is based on the following authorities:
 Al Bukhari 22294 [5/363], Muslim 4117 [11/54] narrated on the authority of Ibn Abbas (May Allah's blessings be upon him) that the prophet (May Allah's peace and blessings be upon him) in answer to Sa'd Ibn abi Waqas's question to bequeath his estate; '... a third and (even) a third is much (to bequeath), leaving your children rich is better than leaving them paupers depending on other'.
28. Muslim jurists are united in their concurrence on the limitations of a Muslim under the Islamic laws of succession. In Minhaj et Talibin, a manual of Islamic law according to the school of Shafi' by Al - Nawawy [D. 1914] as translated by E.C. Howard, it is stated at page 260 - 261 that:
 "testamentary disposition may not exceed a third of the estate; and those made in contravention of this precept of the law, may be reduced to the portion which may be disposed of, upon the application of the legitimate heir. If he declares his approval of the disposition, it is effective, whatever it amounts may be; but according to one jurist it is then considered as mere donation upon the part of the heir, and the legacy itself remains void for as much as exceeds the third."



29. This fact in Islamic law of succession has also been settled by case law as reported by Musyoka in his, Law of Succession, at pp 291 - 292, where he states:

"will making is allowed and even encouraged under Islamic law. However, the testamentary capacity of a Muslim is subjected to two limitations namely he can only bequeath one-third of his property by will and even then, he cannot give any part of the one-third to the heirs as stated in the estate of late Suleiman Kusundwa [1995] EA 247 (Sir Ralph Windham J) NB, Keatinge V Mohamed bin Seif Salim & others [1929 - 30] 12 KLR 74 (Thomas J) and in the estate of Faiz Khan, deceased [1929 - 30] 12 KLR 74 (Thomas J).

30. In the instant case, the impugned will lists all the deceased's children and provides each with one equal share. This clause does not contradict provisions of Islamic law of inheritance. It appears to have no other purpose except to emphasise the same share each son is entitled to under the relevant law. It also serves the purposes of identification of legal heirs entitled to inherit the deceased.
31. The impugned will majorly identifies one property. Parties agree there exist other properties of the estate. It would seem, the identified property is the most important and dear to the deceased and probably most valuable. It is helpful but not mandatory, in my view, to have a comprehensive list of the estate of a deceased. The defect is easily curable through an application to have those properties added to the estate.
32. As much as possible but in so far as they are not contrary to law, the wishes of the deceased must be respected. In 'Muslim Law, the personal law of Muslims in India, and Pakistan, Fourth Edition, Bombay, 1968, Faiz Badruddin Tyabji writes:

"In construing wills, the courts give effect, as far as possible, to the intention of the testator, albeit indirectly."

33. He further states:

'In all cases, the court must loyally carry out the will as properly construed and the duty of the court is universal and is true alike of all will of every nationality and every religion or rank of life.'

36. However, the intention of the maker of the will must be exercised in full compliance to the provisions of shariah. It cannot be exercised to disinherit or harm a legal heir, no matter his or her relationship with the deceased.

"... after any bequest which was made or debt, as long as there is no detriment [caused]..."
Q:4:12

Al Dar Qutni 4249 [4/86], Al Bayhaqi 12587 [6/444] narrated on the authority of Ibn Abbas [May Allah's blessings be upon him] said: "causing harm by will is one of the major sins.

37. On requirements of a valid will and grounds for its revocation under Islamic law, Musyoka, Law of Succession, pp 291 – 292 stated:

'Testamentary power is exercisable by any Muslim who is sane, rational and above the age of fifteen. A will is vitiated by undue influence or fraud and can be revoked at any time by the testator before his death or by operation of the law.'



38. On the form of a will under Islamic law Musyoka, supra, stated:

‘According to Sir Clement de Leistang in *Mohamed Thabet Ali Maktari v. Mohamed Rageh Mohamed Saleh Maktari & others* [1996] EA 35 Under Islamic law a will may be made either orally or in writing. It does not have a particular form. If oral, it must be made in the presence of two male adult Muslim witnesses. If it is in writing it need not be signed and if signed it need not be attested.’

39. He further added:

‘In *W.B. Keatinge v. Mohamed bin Seif Salim & others* (1929 - 30) 12 KLR 74 (Thomas J) it was held that an oral will would require two male adult Muslim witnesses but in the absence of witnesses the will would stand good if approved by the heirs. A similar holding was made in the estate of Faiz Khan, deceased (1929-30) 12 KLR 74 (Thomas J) where it was held that where there is a reputable witness supported by other witnesses, the court may accept the evidence of the reputable witness where it differs from that given by other witnesses. The will of a Muslim need not be attested as the Qur’anic injunction regarding witnesses is considered mere recommendation. It is not mandatory as what really matters is the intention of the testator, so long as the intention of the testator is reasonably clear, the will takes effect.’

40. It bears mention that on this issue there is consensus among all the major schools of Islamic jurisprudence. M.M. Khan in ‘Islamic law of Inheritance’ at page 37 stated:

‘Islam does not recognise the legality and validity of the repudiation if it is intended to disinherit or debar a prospective or presumptive heir. This will amount to change and modify the rules of inheritance directly ordained in the holy Qur’an’.

41. Executors are not beneficiaries to a will. They have a specific responsibility to ensure distribution of the estate of a deceased. The extent of bequeath being more than that permitted under Islamic law is not established.

42. The will emphasizes the disposal of the property in the will (the main property of the estate) and distribution of its proceeds to heirs after settlement of legacies and debts. The heirs’ right to the estate is protected as long they do get their due shares. It is not a must that it be the real property itself. It cannot be said they are prejudiced by receiving proceeds of the property rather than the property itself, especially as the most valuable property in this case, is the house; if disagreements among the surviving heirs occur, its distribution is often problematic. It could well be the reason the deceased made this provision in his will. This provision of the will, I find and hold, does not offend the law.

The will has one problem though. Paragraph 5 provides for disposal of the immovable property within one year of his demise, otherwise it be transferred to his niece otherwise the executors have discretion to do whatever they deem fit regarding the property. This can potentially disinherit the heirs due to time constraints on the disposal of the prime estate property. It cannot stand. Does this invalidate the entire will? The intention of the testator must be as much as practicable be respected and executed. Any clause that is inconsistent with or repugnant to the requirements of laws of inheritance are void only to the extent of their inconsistency. In Principles & precedents of Moohumudan law- a selection of



legal opinions involving those points, delivered in the several courts of judicature by W.H. Macnaghten and William Sloan, the authors in their preliminary remarks at page xxi observe that;

"the disposition of a testator is legally restricted to one third of his estate but little uncertainty can exist on the doctrine of wills and testaments. If the legacy exceeds the amount above specified, the will is considered inofficious and its provisions will be carried into effect pro tanto only."

43. Accordingly, this provision is expunged from the will. The legal heirs shall, at no time be denied their share of inheritance. They however shall get their said shares pursuant to the other provisions of the will.
44. Save for clause No. 5, the will is in consonant with and does not offend Islamic laws on wills. The application for revocation of the grant therefore fails.
45. The application having failed, the summons for confirmation of the grant of probate with will annexed dated 16th February, 2023 is hereby confirmed with the necessary amendment.

Orders accordingly.

DATED, SINGED AND DELIVERED VIRTUALLY ON 27TH JULY, 2023

HON. ABDULHALIM H. ATHMAN

SENIOR PRINCIPAL KADHI

In the presence of:

Mr. Suleiman A. Mohamed, court assistant

Mr. Dayib for objector / Applicant

Mr. Yusuf for petitioner /respondent

