



**FMM v AMF (Matrimonial Cause E015 of 2022)
[2023] KEKC 18 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEKC 18 (KLR)

**REPUBLIC OF KENYA
IN THE KADHI'S COURT AT UPPER HILL (NAIROBI MILIMANI LAW COURTS)
MATRIMONIAL CAUSE E015 OF 2022
AH ATHMAN, CK
OCTOBER 18, 2023**

BETWEEN

FMM PETITIONER

AND

AMF RESPONDENT

JUDGMENT

1. The petitioner petitioned this Honourable court for orders that the court be pleased to:
 - i. Declare that the petitioner’s marriage to AMF (deceased) is valid
 - ii. Declare that the marriage certificate issued to AMF bearing serial No 39xxxxx is valid
 - iii. Issue a permanent order of injunction restraining the respondent from occupying, using, trespassing into, dealing in, wasting, disposing of, constructing on or in any other way interfering with the estate of AMF (deceased) which solely devolves to the petitioner.
2. The respondent filed an application for stay of and/or striking of the proceedings due to a pending succession Cause No 691 of 2019 in RE: Estate of AMF in the High Court of Kenya at Milimani law courts – Nairobi. The court in its ruling made on February 16, 2023 while holding that the matter was not sub judice, struck out the 3rd prayer for injunctive restraining orders against the respondent. It directed that only the first two prayers shall be canvassed in this matter.
3. AMF a Canadian national of Somali origin died on November 17, 2016 in Canada. The deceased was married to one SMA with whom they had two children both daughters: A and MAM who lived in Canada. The deceased also lived in Kenya with FMM , the petitioner herein, in Nairobi. He had travelled to Canada for treatment where he succumbed to death. After burial, the petitioner returned to Kenya and through elders tried to settle the issue of inheritance of the deceased, especially with the deceased’s paternal brother, AMF, the respondent herein. The talks failed and no settlement was



reached. The petitioner then moved to the High court in succession cause No 691 of 2019 where she was granted letters of administration of the estate of the deceased. Subsequently certificate of confirmation of the letters of probate in the estate of the deceased herein was made pursuant to section 71 of the *Law of succession Act* on June 22, 2021. The three listed properties of the estate were vested to the petitioner absolutely. The respondent made several applications for revocation of the grant on the ground that the petitioner was not a wife of the deceased. The petitioner moved to this court with the current application.

4. It is notable that the High court (Maureen Odera, J) in its ruling made on June 12, 2023 struck out respondent's five applications and declared that the respondent was not a beneficiary to the estate of the deceased herein.
5. It is not disputed that the deceased was married to Sahro and had two daughters with him. It is also not disputed that the deceased lived with FMM the petitioner herein in Nairobi. What is disputed is whether or not they were legally and formally married under Islamic law.

The issues for determination in this matter are:

- i. Validity of the marriage certificate serial number 39xxxx issued on September 10, 1993 at Kadhi's court Nairobi.
- ii. Validity of the marriage between AMF (deceased) and FMM , the petitioner herein.

Validity of the marriage certificate.

5. The copy of marriage certificate issued by this Kadhi's court on September 10, 1993 registration number 1004 serial number 3937xx indicate the deceased and the petitioner married under Islamic law at Nairobi Kenya on September 10, 1993. The dowry was KES 10,000.00 of which KES 4,000.00 was paid. It is signed by the Kadhi Nairobi, Eastern and Central Kenya and bears the stamp of the court. Witnesses Dalmar Mohamed and Ali Jama Elmi appended their signature on the certificate.
6. *Marriage Act* No 4 of 2014 repealed provisions of the Mohammedan marriage and divorce registration Act Chapter 155 Laws of Kenya. Section 6 (1) (e) of the of the Act specifically recognises marriages celebrated under Islamic law. It provides:

‘a marriage may be registered under this Act if it is celebrated in accordance with Islamic law.’
7. The respondent contended the certificate is fake as the court upon perusal of its records confirmed the certificate was ‘not genuine’.
8. This was a key issue in this matter but it was not critically argued at trial. Rather than making profuse final written submissions, counsel ought to have put more emphasis on testing the authenticity of the document at trial. The process leading to the stamping of the document as ‘Not genuine’ is opaque and not participatory. The petitioner, the interested party affected by the decision, was never served or given opportunity to defend her position. In fact there was no application or proceedings to support the decision to declare the document invalid. It offends the rule of natural justice. The outcome of a skewed, opaque and illegal process is a void and a nullity.
9. The main concern in the certificate is that the petitioner, admitted not to have personally attended court to append her signature on the document. This is a key requirement for registration of marriages, unless her guardian / waliy or authorised attorney signed on her behalf. Again, although no document was produced to prove she appointed or gave anyone authority to sign on her behalf, the respondent failed to test the same at trial. It is trite law that an issue pleaded but not argued at trial is considered abandoned. It is also trite law that the petitioner's waliy has powers to sign on her behalf without need



for special power of attorney. For these reasons we cannot find the marriage certificate serial number 3937xx is not valid or genuine.

Validity of the marriage

10. The question of validity of a marriage is a question of Islamic law of marriage. The court is properly seized of the matter, conferred by Article 170 (5) of the *constitution* of Kenya (2010). Whether a certificate is genuine or not, the court, upon examination and analysis of the evidence and facts of a case should, be able to pronounce itself on the validity or otherwise of the marriage under Islamic laws of marriage. Section 15 of the Muslim marriage rules provide:

‘Nothing in these rules shall be construed to render valid or invalid, by reason only of registration or non-registration, any Muslim marriage which is otherwise valid or invalid, as the case may be, according to the law governing the respective Muslim school of jurisprudence to which parties to such marriage belong.’

11. A valid marriage under Islamic law must fulfil five key requirements: consent of bride and her waliy, husband and wife free from legal impediments, offer and acceptance, witnesses and dowry. Al Sharbini Al Khatib in his *Al Mughni al Muhtaj*, a commentary on Imam Nawawi’s *al Minhaj* at pg 139 [Al Babi al Halabi edition] states:

‘The pillars of marriage are five: the offer and acceptance of marriage, husband, wife [free from any impediments to marriage], waliyy [legal guardian] and [at least] two witnesses.’

12. Ibn Juzzy in his *Al-Qawanin al Fiqhiyah* (2010), 329, Ministry of endowments and Islamic Affairs Kuwait, concurs with other scholars on the requisites of an Islamic marriage. He states:

‘A legal marriage under Islamic law must fulfil five requirements: Husband, wife, waliy [legal guardian], offer and acceptance and dowry.’

13. The petitioner’s evidence is that a small wedding was made attended by witnesses Dalma Mohamed and Ali Jama Elmi her maternal uncle Salad Elmi Mohamed and Salad Mohamed Mire (paternal cousin). She stated that it was her first marriage and the dowry was KES 10,000.00 and did not know the name of the Sheikh who conducted the marriage. None of the witnesses who actually attended the wedding appeared. Most are deceased and one’s whereabouts is unknown. PW1 Stephen Kamani Muthiwa (caretaker at Pergola Flats), PW2 Mary Gathoni Muthaka (property manager) evidence is that they observed, saw the deceased and the petitioner live as husband and wife, and the deceased in fact identified and introduced the petitioner to them as his wife. It is their evidence that the deceased arranged for and had the petitioner’s mother live with them for some time at their residence. PW3 Zahra Mohamed was a neighbour of the deceased and the petitioner. Her evidence is that she knew and observed them living as a family. The deceased also met other people with the petitioner as his wife including PW4 Abdinoor Yasin Mohamed and PW5 Abdiaziz Ali Mohamed. Sheikh Mohamed Sheikh Osman, a lecturer at the University of Kenya, a renowned Muslim cleric and Somali elder, evidence is that he presided over a reconciliation meeting where the parties herein and their relatives unanimously listed the heirs of the deceased in this matter as the petitioner, Sahro and two daughters of the deceased. The respondent confirmed the petitioner was a wife of the deceased at the meeting.

14. The respondent relied on the certificate and lack of knowledge of the marriage between the deceased and the petitioner. He is an Italian national, resident in Italy and was not living or present in Kenya at the time the marriage was conducted. This is negative evidence, it does not affirm a fact or right. It is



inadequate and inadmissible under Islamic laws of evidence. Article 1699 of the Majalla [the Ottoman Courts manual] provides:

'the legal objective of evidence is to prove a right. Consequently, purely negative evidence is inadmissible, as where someone states that a certain person did not belong to a certain person, or that someone is not in debt to a certain person.'

15. Further his admission before the Sheikh that the petitioner was a wife to the deceased is strongest proof of the marriage. Under Islamic law of evidence, admission is the strongest form of evidence. Dr Muhammad Mustafa Al Zuhaily, in 'Modes of Evidence in Islamic law, Dar Al Bayan, at page 241. states:

'admission has, since time immemorial, been the master of all evidences. It settles with finality, disputes before the judge'.

16. The petitioner's evidence in its totality is, on the required standard of proof, credible. People who met the deceased testified that the deceased, a practicing Muslim informed and introduced the petitioner to many people as his wife. That description coming from a practicing Muslim signifies legal marriage. He was also seen living with the petitioner as husband and wife. The certificate being issued in 1993 long before the death of the deceased herein further strengthens the credibility of the marriage. This coupled by the respondents and other elders' admission before a renowned and respected Muslim cleric during reconciliation talks on the distribution of the estate of the deceased leaves us without any doubt that the deceased and the petitioner were not living together as boy-girl friends as alluded by the respondent, but under a legal marriage under Islamic law as espoused in Q.4.24 and 25. We accordingly declare that the marriage between Abdikadir Musse Farah (deceased) herein and the FMM , petitioner herein conducted on September 10, 1993 at Nairobi Kenya is valid.

16. Although we have no jurisdiction on the issue of succession because the issue of inheritance has been handled and determined by the High Court, we are obliged to remind the parties as Muslims, especially the petitioner, that strictly under Islamic law, the petitioner is not the only heir of the deceased based on her own admission in this court. The children and the other wife are also beneficiaries to the estate of the deceased herein.

Each party to bear its own costs.

Orders accordingly.

GIVEN AND DELIVERED VIRTUALLY THIS 18TH DAY OF OCTOBER, 2023

HON. ABDULHLIM H. ATHMAN

CHIEF KADHI.

In the presence of

Mr. Suleiman A. Mohamed, Court assistant

Mr. Orlando for petitioner

Mr. Etemere for respondent

