



REPUBLIC OF KENYA



**In re Estate of Jumaa Abdalla Munyu alias Jumaa Abdalla (Deceased) (Succession Cause 49 of 2020) [2023] KEKC 21 (KLR) (8 November 2023) (Judgment)**

Neutral citation: [2023] KEKC 21 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHI'S COURT AT UPPER HILL (NAIROBI MILIMANI LAW COURTS)  
SUCCESSION CAUSE 49 OF 2020**

**AH ATHMAN, CK**

**NOVEMBER 8, 2023**

**IN RE ESTATE OF JUMAA ABDALLA MUNYU ALIAS JUMAA ABDALLA (DECEASED)**

**BETWEEN**

**AMINA ALI ..... 1<sup>ST</sup> PETITIONER**

**MOHAMED MATIKU KHAMISI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**HALIMA JUMA ABDALLA ..... 1<sup>ST</sup> RESPONDENT**

**ABDALLH JUMAA MUNYU ..... 2<sup>ND</sup> RESPONDENT**

**FATUMA JUMAH ABDALLAH ..... 3<sup>RD</sup> RESPONDENT**

**MARIAM JUMA ..... 4<sup>TH</sup> RESPONDENT**

**SWALEH JUMA ..... 5<sup>TH</sup> RESPONDENT**

**BAHATI JUMA ABDALLA ..... 6<sup>TH</sup> RESPONDENT**

**MWANAISHA JUMA ABDLALLA ..... 7<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The late Jumaa Abdalla Munyu died 7<sup>th</sup> March 1993 in Maputi, Machakos County. Halima Juma Abdalla filed succession petition in this court on 10<sup>th</sup> August, 2020.
2. The respondents petitioned the High Court in Succession cause No. 666 of 2011 on 8<sup>th</sup> August, 2011 for probate with written will dated 12<sup>th</sup> December, 1992. The grant of probate with will was issued to the respondents on 12<sup>th</sup> July, 2012. The suit was dismissed for want of prosecution on 28<sup>th</sup> June, 2007 and re-instated on 7<sup>th</sup> October, 2020. A grant was issued on 11<sup>th</sup> September, 2020 to the respondents.



3. The petitioners filed protest to confirmation of grant on 9<sup>th</sup> October, 2020. The petitioner contends the will is contrary to Islamic law of inheritance and Amina Ali and Arua Ali have equal shares to the legitimate heirs. She sought the matter to be referred to the Kadhi's court. She moved to the Kadhi's court on 6<sup>th</sup> July, 2020 for letters of administration intestate and cited the petitioner to propound the will that was alleged to have been executed by the deceased. The respondents filed summons at the Machakos High Court seeking stay of confirmation of the grant of probate with will. The court, Muigai J, dismissed stay of proceedings at the High court and directed 'the matter in this court is hereby transferred to Kadhi Court for hearing and determination.'
4. Amina Ali and Arua Ali are nieces of the deceased herein while the respondents are his children.
5. The will dated 12<sup>th</sup> December, 1992 is signed by the deceased and two witnesses Lali Abdalla and Issa Musango and was drawn by T. K. Githora advocate of Nairobi. It provided inter alia:

'I appoint my nephew Mohamed Matiku Khamisi and my niece Amina Ali to be my joint executors and Trustees of this my will and guardians of my infant children... I give my plot 500 by 100 feet situated in Machakos municipality together with all developments thereon and income generated therefrom to the following members of my family jointly and in equal shares

- i. My wife Sofia Jumaa
- ii. My niece Arua Ali
- iii. My daughter Mariamu Jumaa
- iv. My son Swaleh Jumaa
- v. My daughter Halima Jumaa
- vi. My last-born daughter Mwanaisha Jumaa

I give my other plot No. 626 also situated in Machakos Municipality measuring 50 by 100 feet together with all developments thereon and income generated therefrom jointly and in equal shares, as well as my parcel of land measuring approximately 100 acres known as Kathekani Settlement Scheme Plot No. 2221 situated in Makueni District of eastern province to the following remaining members of my family jointly and in equal shares:

- i. My niece Amina Ali
- ii. My son Abdallah Jumaa
- iii. My son Ibrahim Jumaa
- iv. My son Fadhili Jumaa
- v. My daughter Fatuma Jumaa and
- vi. My daughter Bahati Jumaa

I direct that my trustees may in their discretion sell my motor vehicles, from implements as well as the scrap metal stored at Kibwezi town and apply the proceeds to the payment of my just debts. The balance if, any shall be divided in equal shares among the dependants named in this my will.'



Before distribution of the gifts, my executors shall hold and manage all funds and properties belonging or accruing to my estate upon death In Trust For The Benefit of the beneficiaries and in relation to my dependant children, for their education, welfare and maintenance until each shall have attained the age of majority when he or she may be given his or her share.’

6. The petition by consent was disposed of by way of written submissions. Counsels had agreed that the petition mainly raised questions of law and thus there was no need to go to trial through viva voce evidence.
7. Mr. Mutinda for the petitioner submitted that Amina Ali, the petitioner herein, had been appointed executor by the deceased through his will which has not been declared invalid. He submitted that the will expresses the wishes of the deceased and must be fulfilled. He submitted that the deceased knowing he was a Muslim did not break any law of inheritance and had freedom under section 5 of the [Law of succession Act](#) to make the will. He submitted that the provisions of the will for his two nieces was to ensure they do not live in abject poverty. The other appointed executor having renounced executorship, the petitioner Amina Ali, he urged court to issue grant to Amina Ali, the remaining executor of the will.
8. Mr. Yusuf for the respondents submitted that the will is defective and offends Islamic laws of inheritance on the grounds that the legitimate heirs were not aware of the impugned will, it purports to distribute more than one-third of the estate, it apportioned to nieces shares equal to that of legitimate heirs. He further submitted that the letters of administration were fraudulently acquired because the legitimate heirs were not informed and their signatures on the consent for letters of probate were forged. Mr. Yusuf submitted that the deceased died a Muslim and the distribution of his estate is governed by Islamic law which limits his testamentary freedom to one-third of the estate.
9. On the issue of administration, the respondents submit that the petitioner was appointed on the basis of a defective will, one of the executors withdrew his executorship and, in any case, they failed in the discharge of their duties as one of the estate property’s leasehold expired under her watch. He submitted that the respondent is qualified to be appointed administrator and has the support of all heirs on the same.
10. Inheritance of estates of deceased Muslims must comply with provisions of Q.4.11,12 and 176 and authentic traditions of the prophet Muhammad (may Allah’s peace and blessings be upon him). The provisions of the Qur’an revealed by Allah the almighty are not subject to change by any person. They provide detailed and accurate shares in different situations of each beneficiary of any particular estate.
11. By dint of article 170 (5) of the [constitution of Kenya](#) (2010) and section 2 and 48 (2) of the [laws of succession Act](#), cap 160 Laws of Kenya, Islamic laws of inheritance and not the [Laws of succession Act](#) apply to succession of estates of deceased Muslims.
12. Islamic law of inheritance confers to a Muslim man or woman, the power to give gifts, consecrate wakf and make wills. These are different instruments offering opportunities of Muslims to do good. Each has its own requirements and regulations. They cannot be used interchangeably to affect the other. Gifts and Wakfs are executed and effected in one’s lifetime. Wills come into effect upon one’s death. Gifts not handed over and / or actually received in one’s lifetime fall under wills irrespective of the name or phrase used; due consideration and importance is given to the meaning and not the phrase used. Section 3 of the Ottoman Courts Manual (Hanafi), al Majalla al Ahkam al Adliyah, provide:

‘In contracts effect is given to intention and meaning and not to words and phrases’



Islam recognises and even encourages making of wills and testaments. Sir Dinshah Fardunji 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.'

13. 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.'

14. Testamentary disposition in Islamic law has two limitations; 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'.

15. Muslim jurists concur on these limitations of wills under the Islamic laws of inheritance. 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."

16. Abu Daud 3/411 (2870), Al Tirmidhi 4/433-434 (2120), Ibn Maja 3/93 (2763), Ahmad 36/268 (2743), Nail al Awtar 6/40; Nusbul Raya 4 /403 reported on the authority of Abi Umama al Bahily (May Allah's blessings be upon him) that the Prophet (May Allah's peace and blessings be upon him) in his last sermon at Mt. Arafat said: "Allah has prescribed specific shares to each heir, there is no bequeathing to a heir"

17. Any change, distortion, modification, knowingly or otherwise, of the elaborate shares ordained by the almighty Allah in the holy Qur'an is unjustified, unacceptable and illegal. 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'.



18. The wishes of the deceased in making wills must be respected provided they do not offend the clear provisions of laws of Islamic inheritance. 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.'

19. 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. Allah explicitly directed complete and absolute compliance to the provisions of the will in the Qur'an.

"... 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.

20. A critical analysis of the will dated 12<sup>th</sup> December, 1992 by the deceased herein was correct in appointing executors and providing for his nieces. The nieces, not being legal heirs of the deceased herein, are entitled (together) to a bequeath not exceeding one-third (33.33%) of the estate. They can share the one-third equally as it is not mandatory to distribute gifts equally. If the nieces' share is equal or more than the share of a legal heir, it does not offend the will as long as it is at within the recognised one-third share. Were it more than one-third of the estate, the cure is not invalidating the entire will, but to amend it accordingly.
21. The propositus bequeath apportioning equal shares to the nieces as to his children in itself does not amount to an illegality. It has to be established that the shares they received is more or beyond the testamentary limit allowed by law. To demonstrate this fact, the respondent had to present the calculations and shares of each heir compared to that of the nieces. This did not happen. We will have to do the calculations ourselves to determine the same.
22. The deceased clearly overstepped his powers in providing to all his children jointly and equally. The share of sons and daughters are clearly provided for by Q.4.11. The verse gives each son a share twice to that of a daughter. Further, joint ownership limits heirs' freedom to do with their legal share as they deem fit.
23. The estate of the deceased herein consists of:
- i. Unregistered plot measuring 50 by 100 feet in Machakos county
  - ii. Plot No. 626 measuring 50 by 100 in Machakos county
  - iii. Kathekani Settlement scheme Plot No. 2221 in Makueni county
24. The legal heirs and beneficiaries of the deceased herein are:
- i. Sofia Jumaa widow
  - ii. Mariam Jumaa daughter
  - iii. Halima Jumaa daughter
  - iv. Mwanaisha Jumaa daughter



- v. Fatuma Jumaa daughter
- vi. Bahati Jumaa daughter
- vii. Swaleh Jumaa son
- viii. Abdalla Jumaa son
- ix. Ibrahim Jumaa son
- x. Fadhili Jumaa son
- xi. Amina Ali niece
- xii. Arua Ali niece

25. The maximum share the nieces can get through will is one-third of the estate. The widow is entitled to one-eighth and each son to twice the share of each daughter under Q.4.12 and 11 respectively.

The share of each niece = 16.665%

The share of the widow = 12.5%

The share of each daughter = 4.17%

The share of each son = 8.33%

26. It turns out individually, if the nieces were to be given the maximum share allowed through will, the share of each niece would be more than the share of each child by 4.165%. However, the collective share of the two nieces is less than the collective share of the widow and the children (66.66%). The share of the nieces is thus within the legal limits allowed in wills. By bequeathing his nieces an equal share to each of his children, he had in fact given them a little bit less (10.3% each and about 21% jointly) than the 33.33% maximum allowed by law. We shall thus consider the nieces as sons for purpose of computing the shares of each heir. Working with six sons, five daughters and one widow, the share of each son equals 10.39%, that of each daughter 5.14% and that of the widow remains 12.5%

27. I make the following orders:

- i. The will offended Islamic law of inheritance by distributing his estate to sons and daughters in equal shares.
- ii. The shares given to the nieces through bequeath is within the limits allowed under the laws of wills.
- iii. The petitioner is confirmed as administrator of the estate.
- iv. All the properties of the estate vest in and be distributed to heirs according to the shares as described in this judgment.
- v. The power of the administrator to sell vehicles, farm inputs and scrap metals and deal with them as directed in the will is not disturbed.
- vi. The properties of the estate be valued and distributed; allocating to heirs properties directed in the will, provide it is requisite to value of their shares as herein described.



- vii. Letters of administration made to Amina Ali on 11<sup>th</sup> September, 2020 is hereby confirmed in the shares given herein. Certificate of confirmation to issue.

Orders accordingly.

**READ, DELIVERED VIRTUALLY ON 8<sup>TH</sup> NOVEMBER, 2023**

**HON. ABDULHALIM H. ATHMAN**

**CHIEF KADHI**

