



**In re Estate of Late Mohamed Omar Sala alias Mohamed Abdo Sala (Deceased)
(Succession Cause E033 of 2023) [2023] KEKC 28 (KLR) (21 November 2023) (Ruling)**

Neutral citation: [2023] KEKC 28 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT MOYALE
SUCCESSION CAUSE E033 OF 2023
A GALGALO, PK
NOVEMBER 21, 2023
IN THE MATTER OF ESTATE OF LATE MOHAMED OMAR SALA ALIAS MOHAMED
ABDO SALA (DECEASED)**

**IN THE MATTER OF
HABIBA DIMA BUKICHA APPLICANT**

RULING

1. This is a succession cause brought under certificate of urgency, seeking for the honourable be pleased: -
 - a. To find that the intestate of Mohamed Omar Sala(deceased)be governed by Islamic law,
 - b. To directs that the petitioner or the applicant herein is and be the appointed representative to the estate of Mohamed Omar Sala (deceased),
 - c. To determine the rightful legal heirs to the estate of the late Mohamed Omar Sala (deceased),
 - d. To issue an order granting and allowing the applicant herein Habiba Dima Bukicha to act as a personal representative of the Late Mohamed Omar Sala (deceased),
 - e. To distribute the money in Ethiopian Birr amount 174216 under the care of one Mohamed Abdi Badho to the legal rightful heirs.
2. The application supported by sworn supporting affidavit of Habiba Dima Bukicha (the applicant), and witnesses' testimonies who are the beneficiaries and family members of the deceased.
3. It is agreed upon that the deceased herein died on 24th December 2022, as the same proved by chief's letter "HDB2" and death certificate "HDB3". Likewise, it is not in dispute that the deceased left behind his legal heirs as listed in the application and the chief's letter marked "HDB2". Also, the money left behind by the deceased herein not in dispute.



4. As per evidence before the court the deceased herein and his beneficiaries were all professing Islamic faith until the deceased Mohamed Omar Sala passed on.
5. During the hearing, the applicant mentioned other properties to be forming part of the deceased estate. The properties are; Probox car registered in the deceased's names, two unregistered plots within Marsabit county which then there is no disputes over its ownership to the deceased.
6. The questions for determination are:
 - a. Which law applicable to the estate of a deceased's Muslim person?
 - b. Who are the rightful and legal heirs to the deceased estate?
 - c. What properties of the should form part of the deceased's estate?
 - d. Whether this court can direct and or grant the applicant herein to be appointed as personal representative to the estate of deceased herein?
7. To answer the question over what law applicable to the estate a deceased Muslim person, I have to consult the *law of Succession Act* of Laws of Kenya.
8. Section 2 (3) of the *Law of Succession Act* (Cap 160), states; "subject to subsection (4), the provision of this *Act* shall not apply to the testamentary or intestate succession to the estate of any person who at the time of this death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law",
9.
 - (4) Notwithstanding the provisions of subsection (3), the provisions of part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim dying before, on or after the 1st January 1991".
10. Sub section 2 of Section 48 of the same *Act*, states;

"For the avoidance of doubt it is hereby declared that the Kadhis' courts shall continue to have and exercise jurisdiction in relation to the estate of a deceased Muslim for the determination of questions relating to inheritance in accordance with Muslim law and of other question arising under this *Act* in relation to such estates".
11. In the court appeal Githinji JA, as he then was, In *Re the Estate of Ismail Osman Adam (deceased), Noorbanu Abdul Razak v AbdulKader Ismail Osman*, Mombasa Civil Appeal No. 285 of 2009 as cited in *RB & RGO v HSB & ASB (supra)* where it was held that:

".....However, if the High Court assumes jurisdiction to the estate of a deceased Muslim, then by virtue of section 2(3) [of the *Law of Succession Act*], the law applicable in the High Court as to the devolution of the estate [of deceased Muslim] is the Muslim law and not LSA. As an example, disputes relating to the validity of a will made by a Muslim and the ascertainment of heirs and shares of each will be determined in accordance with Muslim law".
12. In *Saifudean Mohamedali Noorbhai v Shebnaz Abdehussein Adamji*, Mombasa Civil Appeal No 142 of 2005 (unreported) this Court said in part: "....."



However, by virtue of section 2(4) *LSA*, the law relating to the administration of the Estate of the deceased Muslim is the one stipulated in part VII of the Act, that is, sections 44-95 in so far as those provisions are not inconsistent with Muslim law.”

13. Considering the above sections of *LSA*, and authorities stated, it is clear that the law applicable to the estate of instant deceased person is Islamic law, as already preferred and agreed by the beneficiaries.
14. With regards to who are the rightful legal heirs to the deceased person and their shares, there are no disputes with regard to the list of the beneficiaries presented to the deceased’s estate before the court.
15. According to Islam, the heirs have been divided into three classes;
 - a. Dhaw-u'l-Fara'id - are those persons who have a right to definite shares in assets left by the deceased.
 - b. Asaba - They have no fixed shares and will receive their respective shares after the Dawul faraid (those will receive definite shares) have receive their respective shares.
 - c. Dhawul Arhaam – they are connected to the deceased through female relative, but it is in extremely rare cases that they get any share in the inheritance.
16. In the instant suit, the deceased heirs fall from two classes of heirs, those who receives definite and indefinite shares (Dhaul-faraid and Asaba respectively).
17. The deceased herein left behind a widow, a mother and four daughters and three sons. There are those belong to Dhawul-faraid, who have fixed shares. The widow takes one-eighth in the presence of deceased’s children, Mother is entitled to one-sixth when the deceased person has a child or grandchild, and in case of being childless she gets one-third of the share. If the deceased is survived either by paternal grandmother or maternal grand- mother or even by both, they are entitled to one-sixth. Herein for this case the deceased has children, hence the mother inherits one-sixth of the estate. Under Islamic law, daughters typically inherit half of the share of the son. Herein, the four daughters together with three sons form Asaba class (with no fixed shares). They will share such that a son will receive equal to two daughters from what remains after Dhawul faraid gets their shares.
18. The properties forming part of the estate of the deceased shall be shared among the beneficiaries as according to the mode shown hereinafter; Widow -12.5 %, Mother – 16.66 %, Daughter – 7.084 %, Son – 14.168 %.
19. The properties left behind by the deceased which are available for sharing as per the above mode are; Ethiopia Birr 174216 (equivalent to Kshs 238,652), Probox registered number KCQ 594R, Plot registered in seller’s name Mohamed at Daka Baricha Marsabit (plot size 50 by 60 fts) and Unregistered plot at Iyan Biche Goromuda Butiye Ward, Moyale Marsabit County (plot size 100 by 70 fts). Also shares of the deceased herein in the estate of his father at Ethiopia side not in dispute which shall be shared upon by the relevant heirs of that estate the deceased herein being one of them. His shares will be devolved to his dependants.
20. The remaining question on whether the court can appoint the applicant to be the personal representative to the deceased estate. Section 2 of The Probate and Administration Rules, 1980, states; “personal representative” means a person to whom a grant of representation has been made and is still subsisting”.
21. Therefore, once the shares to be distributed to the beneficiaries in accordance with Sharia law has been determined, the personal representatives named in the deceased’s will or determined in accordance with



- intestacy rules (where there is no will) would need to apply to the Probate Court to administer the deceased's estate in accordance with the *LSA*.
22. Inheritance of a deceased Muslim in the Kadhi's court are done pursuant to Islamic law. The *LSA* does not apply to the estate of a deceased Muslim, where it is inconsistent with Islamic law. Section 2(4) of the *LSA*, (Cap 160), provides, "Notwithstanding, the provisions of subsection (3) of the provisions of part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law shall apply in case of every Muslim dying before, on or after 1st January 1991".
 23. Etyang J in *Chelanga v Juma*- KLR (2002) VOL 2 held: "The *Law of Succession Act* does not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim. In view of those statutory provisions, the devolution of the estate of any such person has to be governed by Muslim law".
 24. In civil appeal No. 55 of 1999 at High court of Kenya Mombasa, *Rashid Zabran vs Azan Zabran & 4 others*, Mohamed K. Ibrahim, J (as he then was) opined; "what is the effect of this provision? It is my view that this provision can only apply where the same shall not oust the application of Islamic law and principles in connection with the administration of the estate of a deceased Muslim. It is in effect directory and not mandatory as where there is any inconsistency or doubt as far as Muslim law is concerned then Muslim law shall prevail. Any requirement that one must obtain letters of administration to the estate of a deceased Muslim before management or distribution thereof would be inconsistent with Muslim law, upon consideration, this court finds that letters of administration is not a requirement under Islamic law for the purpose of inheritance of succession proceedings".
 25. Under Islamic law, letters of administration are not a requirement for purpose of instituting inheritance proceedings. This is because the general rule in Islamic law of succession is that estates do not stay in abeyance, it automatically vests in the heirs, (unlike in common law), not the personal representative of the deceased.
 26. M.M. Khan in his "Islamic law of inheritance" at p22 states; "Administration as understood by modern law, was unknown to Islamic jurisprudence. In Islam there is mere distribution of property of the deceased, by the state if not by the heirs themselves. Unlike other modern systems to dispose of the estate of a deceased Muslim, neither there is a need for executor or / and administrator nor probate or / and letters of administration. In the absence of an executor appointed by the will of the deceased, heirs of Muslim have a right and capacity to dispose of the estate of the propositus according to law. In case they fail or refuse to do so, the Qazi (magistrate) may appoint an executor".
 27. A personal representative typically performs a number of tasks when acting as the executor of a deceased person's estate, including arranging funeral services, notifying those who are entitled to part of the estate's property, and determining the value of the estate, minus any debts.
 28. In many cases, a personal representative generally is a close relative or friend of the deceased. Given the significant amount of work involved, a personal representative often receives compensation from the estate. The personal representative merely ensures that all the tasks related to the estate are handled properly and in a timely manner.
 29. A personal representative usually is named in a will. However, courts sometimes appoint a personal representative. Usually, whether or not the deceased left a will, the probate court will issue a finding of fact that a will has or has not been filed and a personal representative or administrator has been appointed. The personal representative will use this document, along with the death certificate, to settle the deceased's affairs and dispose of his or her estate.



30. A personal representative or executor under Muslim law is called “Wasi” derived from the same root as “wasiyyat” which means a will. But it did not recognize as an administrator. The executor under the Muslim law was merely a manager of the estate and no part of the estate of the deceased vested in him as such.
31. However, for this matter before the court, the applicant is seeking grant to be appointed intestate personal representative of a deceased estate, which has almost similar function as an administrator of the deceased’s estate. Since the said deceased has not appointed an executor of his estate as in Islamic law hence she wants to be appointed by the court.
32. The estate of deceased herein is vested in the heirs in their respective shares. They need to file written consent appointing the applicant or one of them or two of them may be including the applicant together with another one to represent the estate of the deceased for the purpose of collecting assets, payment of debts as well as the distribution of assets.
33. No cost of the suit herein. Orders accordingly.

DATED, DELIVERED AND SIGNED AT MOYALE ON THIS 21ST DAY OF NOVEMBER 2023.

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**HON. GALGALO ADAN
PRINCIPAL KADHI
MOYALE KADHI’S COURT.**

In the open court and in the presence of:

Habiba Dima Bukicha – Applicant

And

Jattani Wako – Court Assistant

