



**In re Estate of Omar Mohamed Musa (Deceased) (Succession Cause E006 of 2022) [2022] KEKC 161 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KEKC 161 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT ISIOLO  
SUCCESSION CAUSE E006 OF 2022**

**IA HUSSEIN, PK**

**MAY 27, 2022**

**IN THE MATTER OF THE ESTATE OF OMAR MOHAMED MUSA (DECEASED)**

**BETWEEN**

**FATUMA MOHAMED ALI ..... PETITIONER**

**AND**

**JACKLINE SHINDA ..... RESPONDENT**

**JUDGMENT**

1. Omar Mohamed Musa died intestate on October 14, 2021. I shall henceforth refer to Omar Mohamed Musa as the deceased. By a petition dated January 17, 2022, Fatuma Mohamed Ali, the petitioner applied for an order to the effect that the petitioner and two issues of the marriage be declared as heirs to the estate of the deceased, secondly for determination of heirs and respective shares and any other
2. On May 24, 2022, the respondent, Jackline Shinda filed her Answer to the petitioner, after having successfully been enjoined to the proceeding vide a court's ruling delivered on May 17, 2022. In her answer to the petition, she prays for her and her son to be included among the legal heirs as the wife and a son to the deceased respectively.
3. The parties agreed by consent for a hearing of this matter on May 25, 2022. When this matter came up for hearing both parties unrepresented articulated their respective positions.
4. PW1 Fatuma Mohamed testified that in 1995 she got married Islamically to the deceased within Isiolo Country and together they were blessed with two children namely: Abdi Omar (24 years) and Yurub Omar (22 years). She further testified that the deceased left monies in KCB and Equity Accounts and a house.
5. PW1 further testified that, as the sole legal wife the respondent is known to her as the caretaker of the deceased home and that, some seven (7) months before the death of the deceased, the deceased



- informed her that there is a woman who claims to have his child and that the respondent was never introduced to the family as a second wife as such the respondent should be treated as a stranger.
6. On cross-examination she testified that she has been living for some time in Nairobi and that, she has never visited the matrimonial home in Isiolo where the respondent was a caretaker.
  7. PW2 Yakub Hussein testified that the deceased was a retired police officer and a close friend to him for more than 10 years and that as a friend he only knows the petitioner as the deceased wife and together they were blessed with two children.
  8. PW3 Hassan Yassin testified that the deceased is known him for more than 20 years as a police officer and that they both belong to the same Somali clan, that he was married to the petitioner, and said marriage was blessed with two children.
  9. PW4 Abdinassir Abdullahi Mohamed testified that he is a cousin to the deceased, that he attended his burial and that, the petitioner was married to the deceased, that they were both blessed with two children, and that he has no information regarding the respondent as the second wife.
  10. PW5 Sofia Farah Mohamed testified that she and the deceased schooled in the same school and that later he joined the Police Service and that she attended his wedding to the petitioner and together the couple was blessed with two children.
  11. On cross-examination she averred that the deceased used to visit them in their home and that he has never told them about his marriage to the respondent and that she also used to visit the deceased at his home where she met the petitioner and one Hadija.
  12. PW5 Abdi Omar testified that he is a brother to the deceased and that he's married to the petitioner and together they are blessed with two children.
  13. On cross-examination he admitted to have been seeing the respondent at the deceased home but the deceased never informed him of the relation between the deceased and the respondent even after asking him.
  14. DW 1 Jackline Shinda testified that the deceased was her husband and had gotten married to him under Islamic law in the year 2001 in a ceremony conducted by one Sheikh Daud in Bulla Pesa as it appears in the affidavit of marriage sworn by the deceased before the Isiolo Principal Magistrate dated June 18, 2003 marked as JS 1 and they were blessed with one issue namely; Hassan Omar Mohamed (19 years) as it appears in the birth certificate marked JS2.
  15. DW 1 further testified that sometime in the year 2009 they had a misunderstanding with the deceased, the fact that he wanted to take away the issue of the marriage, which prompted the deceased to institute a civil case No 14 of 2009 before this court seeking for the custody of the issue, as it appears in the plaint marked JS3, but the same case was never concluded by the court through merit but rather the elders were involved. On cross-examination, she maintained that the petitioner was divorced by the deceased at the time of her marriage to the deceased and that she has been looking after the two children of the deceased while the petitioner was away in Nairobi.
  16. DW2, Madina Lolosoli testified that the respondent is known her since they were children and that when she was getting married she was among the people who helped her with make-up and that said marriage was blessed with one child namely; Hassan Omar and, that she was among the people who discharged the Respondent from the hospital after the delivery.
  17. DW3, Hawa Boru Bonaya testified that respondent is known as a neighbour and that she participated in the respondent's wedding to the deceased by preparing a meal and that she was invited by the



- deceased to help the respondent throughout her labour pain until she delivered and that after the delivery she did carried the issue of the marriage towards were the deceased was and that she testified that she was present when the deceased recited adhan (Muslim prayer call) in the child's ears and later help the respondent when she was discharged from the hospital.
18. On the cross-examination she testified that she did not know the reason why the deceased never informed his family about the marriage between him and the respondent.
  19. DW4, Kalla Hapicha testified that as an elder he was involved in the case between the deceased and the respondent in the year 2009 which was before this court, when they tried to intervene in a dispute revolving around the custody of the issue of the marriage and that the case was never concluded by the court on merit.
  20. Having given due consideration to the evidence and submission by the parties the questions which, therefore, fall for my consideration are:
    - a. Whether or not the respondent was legally married to the deceased;
    - b. Whether or not Hassan Omar is the legitimate child of the deceased;
    - c. Whether or not the petitioner or respondent or both were legally divorced by the deceased before his death;
    - d. The legal heirs and their respective shares.
  21. To answer the question of whether or not the respondent was legally married to the deceased. The respondent testified that she was married Islamically to the deceased in the year 2001. Sections 48 and 49 of the Marriage Act, No 4 of 2014 provide that:

“ 48 This part shall only apply to persons who profess the Islamic faith.

49 A marriage under this Part shall be officiated by a Kadhi, Sheikh or Imam as

(1) may be authorized by the Registrar and celebrated in accordance with Islamic law.”
  22. There is no dispute that Muslim marriage is not sacrament but a purely civil contract. Marriage brings about a relationship based on and arising from a permanent contract for the intercourse and procreation of children between man and woman who are referred to as parties to the marriage and who after being married become husband and wife.
  23. Though generally solemnized with recitations from the Quran, no positive service peculiar to include the husband's family is prescribed by law; writing not required, validity and operation of whole depend upon declaration or proposal and acceptance or consent of contracting parties before a competent witness.
  24. In Asha B v Kadir B (1909) 33 mad 22 it states that “Marriage is a contract between parties to live as husband and wife for the term of their lives.”
  25. Parties to the marriage retain their rights against each other as well as against strangers and according to the majority of the scholars have the power to dissolve the marriage tie, should circumstance render it desirable but a man by law is not obligated to receive the blessings of his people since the law does not impose on a man requirement of having a wali (guardian).
  26. The question of whether there was a marriage or not is one of fact. It is a view of the court that marriage may be proved directly or presumptively; directly using the oral testimony of the witnesses present



at the marriage or by documentary evidence in the shape of a certificate of marriage or an affidavit; presumptively by a statement of parties or by evidence of conduct and reputation.

27. It is incumbent upon the respondent to prove, on a balance of probabilities, that she was married to the deceased. Rule 123 of The *Kadhis' Courts Rules, 2020* states that:

123.

- (1) The burden of proof of any fact rests with the claimant (al Mudda'i) and the person who denies or disputes a fact (al Mudd 'a 'alaih) takes the oath.
- (2) Whoever desires any court to give judgment as to any legal right or liability which is dependent on the existence of facts which he or she asserts must prove those facts.

28. Guided by the above provisions of the law the onus was on the respondent to establish that there was in existence an Islamic marriage between her and the deceased. It is clear that the respondent's evidence on whether she contracted an Islamic marriage between her and the deceased was established by an affidavit of marriage marked as 'JS1', and further corroborated by vivid accounts of DW2-DW4, further, there was no serious rebuttal by the petitioner and her witnesses against the existence of marriage between the respondent and the deceased save for general denial on account of non-information by the deceased.
29. It is the court's view that a husband's failure to inform his people or family about his new wife does not imply that the widow's marriage is invalid or that she is not entitled to any legally recognized right. If the husband or any other party denies the marriage to court, it would be the responsibility of such a person to prove that the marriage is not lawful.
30. In the premises given above and in absence of proof by the petitioner, the existence of marriage holds ground and the petitioner is considered as having failed to discharge the burden of proof and has insufficiently failed to establish that there was an unlawful marriage between the respondent and the deceased.
31. To answer whether or not Hassan Omar is the legitimate child of the deceased. In Islamic Law paternity of a child is confirmed by any of the three (3) ways viz; Marriage, Acknowledgment, and Evidence
32. The first is the most important. From the marriage there comes the offspring. It presupposes that the child had a parent from a valid marriage. The paternity of a child therefore under sharia is quite important. The grand principle that establishes paternity in Islamic law is drawn from a prophetic report that "the paternity of the child is for the owner of the conjugal bed or the rightful owner of the bed (al-walad lil-firash)." The Jurist disagreed over the exact meaning of the term 'firash', Ibn Qayyim al-Jawziyya recorded three leading opinions on the meaning of the term 'firash':- the marriage contract itself, according to Abu Hanifa; the marriage contract with the feasibility of consummation of marriage, according to al-Shaf'i and Ibn Hambal; and the marriage contract with the verified consummation of marriage, according to Ibn Taymiya.
33. A child without a traceable father does not command respect and honour in the eyes of the public. He suffers psychological debasement in society for not just fault of his. This is why legitimacy is viewed with all seriousness in Sharia legal system. That is why the great prophet (S A W) once admonished this by saying:

"A woman who ascribes a child's legitimacy, to someone who has not been responsible for it is conception has committed a grave offence thereby alienating herself from God and will be



denied the bliss of eternity. Likewise, a father who obscures his child's legitimacy by denying his responsibility from its conception has offended God and inflicted on himself universe disgrace."

34. Taking the general view of the majority of the Islamic jurists into consideration when a child is born in legal wedlock but under a period of six lunar months less than five days from the date of marriage then the child cannot be attached to that husband.
35. The authority of this statement is to be found in the *Jawahir al iklil* on pg 381 where it states that:-

"Under no circumstance shall pregnancy or child (of marriage) be denied where the wife delivers complete baby within a period lesser than six months five or six days less, from date of the marriage contract. In that situation, paternity can be denied without the necessity of having a resource to lian ( Mutual imprecation) as there exists a legal barrier (between the child and its suspected father)".
36. Therefore by way of summary for islamic law, paternity is presumed where:-A marriage contract exists between the spouses either de jure or de facto; There is actual consummation or possibility of consummation between the spouses without any hindrance. This includes seclusion between the spouses (Khalwah) sleeping together (mabeet); letting loose the curtain; The child is born between the minimum or maximum period of gestation and there is no legal denial, done by the spouses.
37. In the premises given above Hassan Omar was born in a lawful union between the respondent and the deceased he was born within the minimum period required by law and Hassan Omar is a legitimate child of the deceased.
38. To answer the question of whether or not the petitioner/respondent was legally divorced by the deceased before his death:- The court's attention was drawn to Al Quran Surah At-talaaq V 1 and 2. ".....and take from witness two-person from amongst you endured with justice and establish the evidence."
39. The mandate conformable to law derives from the word "wa ashhidu (take from witness) on the above Quranic verse in a subject of contravening in as much as whether it is incumbent or merely desirable.
40. According to the jurist belonging to the known four (4) schools of legal thought the presence of witnesses is no condition of the divorce being effective. It is rather desirable.
41. The eventual objective of any judicial scrutiny is to unravel the truth on the face of clinching evidence the court must separate the grain from chaff by ascertaining. From, the grand letter signed by petitioner's witnesses addressed to this court filed before this court on May 23, 2022 and signed by 5 Witnesses paragraph 1 states that '.....We are close relative of the late Mr Omar Mohamed Musa and we can say the late was working with Kenya Police, secondly, we were present during his marriage with one Fatuma Mohamed Ali later were blessed with two siblings a boy and a girl after a period of more than ten years later they divorced officially as per Islamic Sharia.....' there was no serious rebuttal from the petitioner save as general denial. The court's attention was drawn to the decision of *Eunice Karimi Kibuja v Mwirigi M'ringera Kibunja* Court of Appeal case No 103 of 1996 wherein it is stated that; 'A court should not make a finding without evidence before it.
42. Further, from the proceedings of Civil Case No 14 of 2009 dated April 16, 2009 paragraph one states that: '.... the plaintiff (Omar Mohamed) hereby alleges that I married in 2001 at Isiolo, her dowry was Kshs 5000/-, I have given the dowry to the defendant. I have one child with the defendant and his name is Hassan Omar 6.5. The boy is with the defendant. I divorced the defendant on February 26, 2009. I



am yet to give her divorce certificate.....’ the above assertion corroborated the respondent’s admission that since 2009 they separated and never returned to live together as husband and wife.

43. In the premises given above, both the petitioner and respondent were legally divorced by the deceased before his death.

44. To answer the question on the legal heirs; it is common ground among the parties herein that the deceased left a mother, including the children, and the mode of distribution the court attention was drawn to Holy Quran chap 4 verses 11 and 12 as follows;-

“Allah commands you regarding your children: the share of the male will be twice that of the female. If you leave only two #or more# females, their share is two-thirds of the estate. But if there is only one female, her share will be one-half. Each parent is entitled to one-sixth if you leave offspring. But if you are childless and your parents are the only heirs, then your mother will receive one-third. But if you leave siblings, then your mother will receive one-sixth—after the fulfilment of bequests and debts.<sup>5</sup> #Be fair to# your parents and children, as you do not #fully# know who is more beneficial to you. #This is# an obligation from Allah. Surely Allah is All-Knowing, All-Wise.”

45. The above verse does specify that a daughter should inherit half of the amount her brother inherits. It also specifies that a mother with whom the deceased left children are entitled to one-sixth of the estate.

46. The Court’s attention was drawn also to article 24(4) of the constitution which states as follows:-

“The provision of this chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim Law before the Kadhis Court to persons, who profess the Muslim religion in matters relating to personal status, marriage divorce, and inheritance”

47. Nevertheless, given the Quranic specification it appears that male siblings inherit double the amount inherited by their sister but there is one vital justification for variations.

48. The amount inherited by the sister is a net amount added to her wealth – this is a consequence of the rule of maintenance under islamic law; A woman has the exclusive right of disposal over her property whether she inherits it or earns it. She has no financial obligation/liability of maintaining even her children. The husband is bound to maintain her and her children however considerable her wealth may be.

49. The amount inherited by a brother is a gross amount from which he will have to deduct the expenses of supporting the various women, elderly men, and children in the family. Thus, the share given to a man is in proportion to his responsibilities and not due to any superiority over the female.

50. The court’s attention was also drawn to the decision of the Indian Court of Appeal of Ibrahim Aboobaker and Anor v Teik Chand Dolwani and others. (AIR 1953 SC 298; (1954) 56 BOMLR6) wherein it stated: “It is the well-recognized proposition of law that the estate of a deceased Mohammedan devolves on his heirs in specific shares at the moment of his death.....”

51. It is the view of the court that the provisions of Mawarith (Succession) give each heir his/her divinely-fixed shares. Efforts must be made to uphold the injunctions no matter the complexity.

52. In the upshot of the above, I make the following orders:-

- a. That, the respondent was legally married by the deceased;
- b. That, Hassan Omar is the legitimate child of the deceased;



- c. That, both the petitioner and respondent were legally divorced by the deceased before his death;
- d. That, the following are hereby declared as the legal heirs to the estate of the deceased;-Nima Mohamed Musa [Mother], Abdi Omar [Son], Yurub Omar [daughter], and Hassan Omar [son].
- e. That, the estate of the deceased is composed of monies held in his bank accounts (KCB & EQUITY) and the deceased house.
- f. That, the mode of the division and distribution of the deceased's estate shall take the following mode:- Nema Mohamed Musa (Mother) – 16.67%, Abdi Omar (Son) – 33.34%, Yurub Omar (daughter)- 16.67% and, Hassan Omar (Son)-33.34%;
- g. That, the petitioner (Fatuma Mohamed] and, the respondent [Jackline Shinda] are jointly appointed as the administrators of the estate of the deceased;
- h. That, there is no order as to cost.

**DATED AND DELIVERED AT ISIOLO ON THIS 27<sup>TH</sup> DAY OF MAY 2022.**

**AJ ISHAQ HUSSEIN**

**PRINCIPAL KADHI**

In the presence;

The Petitioner

THE Respondent

