



In re Estate of Fatmabhai Mohamed Saleh (Deceased) (Succession Cause E006 of 2022) [2022] KEKC 147 (KLR) (Family) (28 July 2022) (Ruling)

Neutral citation: [2022] KEKC 147 (KLR)

REPUBLIC OF KENYA
IN THE KADHIS COURT AT NAIROBI (MILIMANI COMMERCIAL COURT)
FAMILY
SUCCESSION CAUSE E006 OF 2022
AH ATHMAN, SPK
JULY 28, 2022

IN THE MATTER OF
KASSAM ESMAIL ABDALLA PETITIONER

RULING

1. The summons for confirmation of grant of administration intestate dated June 28, 2022 seek confirmation of the letters of administration intestate issued to Kassam Esmail Abdalla on June 20, 2022. It is supported by the even dated affidavit sworn by Kassam Esmail Abdalla.
2. Upon reading the summons and affidavit and annexures thereto and upon hearing Mr. Yussuf for the applicant and the petitioners and further upon perusal of the suit file Kassam Esmail Abdalla, the petitioner herein is the only heir of the estate of the late Fatmabhai Mohamed Abdalla. The deceased had two other children: Ramadhan and Junas Esmail Abdalla who predeceased her. Ramadhan was survived by two daughters: Rubina and Sabreena Ramadhan and Junas by two sons and one daughter: Ismail, Shairose and Karima Junas. The deceased had made a will 'authority' dated October 28, 2021 where she appointed the petitioner as executor of his will and one Abdulwahid Ramzan to oversight the actions of the executor. He willed that his lawful attorney / executor to 'distribute my properties equally amongst himself and the children of my deceased sons.'
3. One of the requirements to entitlement to inheritance under Islamic law is confirmation of death of the propositus and survival of a legal heirs under the provisions of Q.4.11, 12 and 176. The predeceased children are not entitled to a share of inheritance save as in this case. The provision of children of deceased's children through will is valid, legal and binding. In other jurisdictions, compulsory wills are enacted into laws to provide for vulnerable grandchildren of predeceased children.
4. Mr. Abdulwahid Ramzan, the overseer of the executor and the grandchildren of the deceased are satisfied with distribution of the estate properties. It was proposed the three families equally share the rent proceeds of one of the properties in Mombasa. This however, offends the provisions of the will



of the deceased herein. As much as possible and 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.'

5. There are two limitations to wills under Islamic law, one, it must not be made in favour of a legal heir and two it is limited to one third of the estate. In Minhaj et Talibin, *a manual of Islamic law according to the school of Shafi by Nawawi* [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."

6. M. Hidayatullah and Arshad Hidayatullah on Mulla's *principles of Mohamedan law* [18th edition] at pg. 140 making reference to the limit of testamentary power, state:

" A Mohamedan cannot by will dispose of more than a third of the surplus of his estate after payment of his funeral expenses and debts. Bequeaths in excess of the legal third cannot take effect, unless the heirs consent thereto after the death of the testator."

7. In *Principles & precedents of Moohummudan 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."

8. In this case, the first limb is satisfied but the latter is not. While due to the grandchildren being entitled to inheritance by virtue of a bequeath, the bequeath must, under Islamic law, be limited to a maximum of one-third of the estate. Accordingly, the deceased's will with respect to the share of the grandchildren is rectified and limited to the required share allowed under Islamic law.

9. The shares of the estate shall therefore be as follows:

- i. Kassam Esmail Abdalla 66.66%
- ii. Estate of Ramadhan Esmail 16.67%
- iii. Estate of Junas Esmail 16.67%

10. This applies to the entire estate of the deceased instead of only rent proceeds of one property as proposed by the executor and the overseer.

11. The final list of heirs and their respective shares are:

- i. Kassam Esmail Abdalla 66.66%
- ii. Rubina Ramadhan Esmail 8.335%



- iii. Sabreena Ramadha Esmail 8.335%
 - iv. Ismail Junas Esmail 6.668%
 - v. Shairose Junas Esmail 6.668%
 - vi. Karima Junas Esmail 3.334%
12. The estate of the deceased herein consists of:
- i. Apartment No. D-1 on title No. Mombasa / Block XI/158
 - ii. Apartment No. B-10 on tile No. Mombasa / Block XI/ 70
 - iii. Account No 500099019 with Victoria Commercial Bank
 - iv. Motor vehicle registration No. KAS 070Z Mitsubishi, Matatu.
13. All the heirs are adults. There is no pending application for provision of dependents. Under Islamic law estates automatically devolve to heirs in prescribed shares and distribution of estates should be done soonest possible after settlement of liabilities and bequests if any. Section 71 (i), (3) and (4) of the *Laws of Succession Act*, cap 160 Laws of Kenya provide, where there are no dependants, it is just and expedient in the circumstances of the case, for confirmation of grants of probate in a term less than the prescribed six months.
14. Accordingly, the letters of administration intestate of the estate of the deceased herein issued to Kassam Esmail Abdalla on June 20, 2022 be and is hereby confirmed in the shares indicated hereinabove. Certificate of confirmation of grant to issue.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON 28TH JULY, 2022

HON. ABDULHALIM H. ATHMAN

SENIOR PRINCIPAL KADHI

In the presence of

Ms. Judith, Court Assistant

Mr. Yusuf for the petitioner.

