



**In re Estate of Mohamed Idris Ahmed (deceased) (Succession Cause E053 of 2020)
[2022] KEKC 152 (KLR) (Family) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEKC 152 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT NAIROBI (MILIMANI COMMERCIAL COURT)
FAMILY
SUCCESSION CAUSE E053 OF 2020
AH ATHMAN, SPK
SEPTEMBER 29, 2022
IN THE MATTER OF THE ESTATE OF MOHAMED IDRIS AHMED (DECEASED)**

BETWEEN

MOHAMED ABUBAKAR IDRIS PETITIONER

AND

NUNU TAIBA MOHAMMED OBJECTOR

JUDGMENT

1. The petitioner through his succession petition dated November 12, 2020 filed on December 22, 2020 prayed for orders that he be appointed administrator of the deceased herein and that on order be issued that any deceased's benefits held anywhere be remitted to him for distribution according to Islamic law. The court directed him to file a petition for letters of administration. He complied by filing one dated December 27, 2020 on January 4, 2021.
2. The petitioner deposed that the deceased was survived by one wife and one son (himself) and left one property known as Mavoko town / Block 64 (GLMU) /504 measuring 0.0448Ha.
3. The petitioner was issued with a grant of letter of administration by this court on March 2, 2021. The objector filed summons for revocation of grant dated February 11, 2022 which was allowed by the court in its ruling given on June 8, 2022. The court re-opened the proceedings to allow the testing of the objector's evidence on her claim of being a legal of the deceased herein.
4. The objector relied on her supporting affidavit dated February 11, 2022 in the application for revocation of grant. She deposed that she is a daughter of the deceased herein and attached a birth certificate and copy of burial permit as evidence. She also filed copies of photos in support of her case.



5. The objector contended the deceased was survived by the one widow, one son and one daughter. She argued that the petitioner knows her very well and they are together in the two-family photos she provided and often visited their father at the Athi River home. Objector's witness, RW1 her uncle's evidence is that the deceased proposed to his first wife, Habiba Mohamed (now deceased), paid dowry and married her under Islamic law and that they had a daughter, the objector herein.
6. The petitioner reiterated that he is the only child of the deceased and that his father never informed him that he had another family or child.
7. Estates of deceased Muslims in Kenya are governed not by the laws of succession Act but Islamic law of inheritance. Section 2 (3) of the *Laws of Succession Act*, Cap 160 provide:
'Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of his 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'.
8. Section 48 (2) of the *Laws of Succession Act*, Cap 160 puts further emphasis on this issue. It provides:
'For the avoidance of doubt, it is hereby declared that the Kadhi's court shall continue to have and exercise jurisdiction in relation to the estates of a deceased Muslim for the determination of inheritance in accordance with Muslim law and any other question arising under this Act in relation to such estates.'
9. Case law has now settled the applicable law in disputes involving estates of deceased Muslims. The high court in the cases of Etyang J in *Chelanga v Juma* KLR (2002) volume 2 and the case of *the matter of the estate of Ali Shititalo Ibrahim*, P & A 151 of 94 eKLR [1994] M K Ibrahim J, 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.'
10. The Court of Appeal, by Githinji JA *in Re Estate of Ismail Osman Adam (Deceased), Noorbanu Abdul Razak v Abdulkader Ismail Osman*, Mombasa Civil Appeal No 285 of 2009, pronounced himself as follows:

"There should not be any confusion between the jurisdiction of the High Court to entertain a dispute relating to testamentary or intestate succession to estates of Muslims and the substantive law applicable in the High Court in such disputes...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 is the Muslim law and not the law of succession law. As an example, disputes relating to the validity of a will made by a Muslim and ascertainment of heirs and shares of each will be determined in accordance with Muslim law..."
11. In the instant case, it is not disputed that deceased lived and died a Muslim on March 15, 2020 due to a tragic road traffic accident at Mtito Andei aged 59 years old. He was buried under Islamic burial rites. It is also not disputed that he was married to one Caroline alias Hadija Beja with whom he had one child, one Abubakar Mohamed Idris. What is in dispute is whether he had married another wife, one Teresia Nyambura alias Habiba Mohamed (who pre-deceased him in 2006) and had one child, Nunu Taib Mohamed from their legal wedlock.
12. The basis of paternity in Islam is a legal marriage. The prophet [PBUH] said: 'the child belongs to the owner of the bed" Bukhari [2218], Muslim [3610]. For the child to be legal he must have been



conceived after consummation of marriage and born at least six months after the marriage. Anwar A Qadri, in 'Islamic Jurisprudence in the modern world', 402- 405 states:

'There are three degrees in the establishment of paternity. At first it is by a valid marriage, secondly, an irregular or fasid contract of marriage coming near to the former and lastly by bondage... Where there exists between a man and a woman the relationship of husband and wife or such semblance as is recognised by the law, the children are either admittedly the lawful children of the man or capable of being made so by his acknowledgment. The semblance of lawful marriage for this purpose includes fasid marriage, and even batil marriage, where it subsisted in bona fide ignorance of the bar or shubha. Legitimacy results from the absence of criminal intent on the part of parents. Indeed, in sunni law, even the child of criminal intercourse or walad-ul-zina has full rights of inheritance to its mother though not to its father...'

13. The *marriage Act* No 4 of 2014 recognizes marriages celebrated under Islamic law. Section 49 (I) [part VII] of the Act provide:

A marriage under this Part shall be officiated by a Kadhi, sheikh or imam as may be authorized by the Registrar and celebrated in accordance with Islamic law.

14. Marriage certificate is now a requirement to remove disputes. However, lack of a marriage certificate does not invalidate a valid marriage under the law. Section 15 of the Muslim marriage rules, 2017 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'.

15. A valid marriage under Islamic law is one that satisfied its requirements: offer and acceptance of the bride and groom, consent of the wife's wali [guardian] and witnessed by at least two male witnesses. A marriage certificate while recommended and even demanded by law, its absence does not invalidate a valid marriage. Al Sharbini Al Khatib in his *Al Mughni al Muhtaj, a commentary on Imam Nawawi's al Minhaj* at p 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], wali [legal guardian] and [at least] two witnesses.

16. The key question in this succession case is whether the objector is a legal child of the deceased herein. None of the parties produced marriage certificates (the petitioner had alluded to have filed one but I found none in the physical record or the e-filing portal). The objector's birth certificate entry No xxxxxxxxx/xx issued in 2013 indicate she was born in Kajiado District on July 17, 1988 of Idris Mohamed and Teresa Nyambura. The birth certificate, strictly under Islamic law, proves biological but not legal relationship between father and child. PW1 evidence was unshaken on the fact of the deceased's proposal, payment of dowry and marriage to Teresa Nyambura. The deceased's sibling: Shahida Shuaib Adam and Shahnaz Sultana Ahmed filed affidavits. They deposed that the objector is a daughter of their deceased brother. Under cross-examination the petitioner admitted knowledge of her paternal aunts. It is noteworthy that Teresa alias Habiba had reverted to Islam prior to the marriage. This further strengthens the proposition of their marriage under Islamic law. The petitioner's main contention is that his father had not informed him that he had another family. Although prudent, husbands are not obligated to inform their children when they enter into another marriage contract. Muslims under Q 4.1 are allowed to marry up to four wives. Disclosure to parents, siblings and even children about intent to marry another wife is not a requirement to validity of an Islamic marriage



which is potentially polygamous. In any case, the deceased had apparently married Teresia alias Habiba before he married the petitioner's mother. The petitioner did not offer any evidence to rebut the evidence of the objector. Lack of marriage certificate notwithstanding, on the strength of the evidence adduced in court and application of Islamic law of marriages, we find and hold, the deceased was married to Teresia alias Habiba Nyambura under Islamic law. It follows and is hereby declared, that the objector is both a biological and legal child of the late Mohamed Idris Ahmed, the deceased herein.

17. The legal heirs of the late Mohamed Idris Ahmed are therefore:
 - i. Caroline Amubeir Amukango widow
 - ii. Mohamed Abubakar Idris son
 - iii. Nunu Taiba Mohamed daughter
18. The widow is entitled to one-eighth of the estate and the son to twice the share of the daughter under Q 4.11
The share of the widow = 12.5%
The share of the daughter = 29.17%
The share of the son = 58.33%
19. It is not disputed the property known as Mavoko town / Block 64 (GLMU) /504 belongs to the estate. The objector through his advocate alluded that the deceased left other properties in Tanzania and insurance monies. This issue was not, contrary to law, pleaded. It came up in the proceeding at the cross-examination stage. Further no evidence was produced to support the claim save that the petitioner admitted under cross-examination to receiving Kes 400,000.00 on behalf of the estate from Alliance Insurance.
20. All wealth of the deceased, after settlement of bequests and legacies constitute the estate available for distribution of heirs. Muhammad Ali Al-Sabuny in 'Inheritance in Islamic Shariah', Dar ul Hadith at page 34 defined estate as:
'All wealth left by the deceased, whether financial, non-financial or legal rights.'
21. Muhammad M Khan in 'Islamic laws of inheritance at page 13 stated:
Muslim law makes no distinction between various kinds of properties for purpose of succession. Under Islamic law whether the property is real or personal, ancestral or self-acquired, corpus or usufruct, movable or immovable is immaterial, the rules of succession are one and the same.
22. Insurance funds paid as a result of death of a Muslim, would thus form part of his estate. Although not pleaded but based on petitioner's own admission, the court's inherent powers to make orders necessary for the application of Islamic law under section 171 (1) of the KCPPR, 2020 and the overriding objectives of the rules to give effect to the principles and spirit of Muslim law, I find it prudent to find and declare the insurance funds paid as part of the estate of the deceased herein.
23. The estate of the deceased herein therefore comprises:
 - i. Property known as Mavoko town / Block 64 (GLMU) /504
 - ii. Kes 400,000.00 insurance monies paid by Alliance Insurance



24. The petitioner to account for the insurance funds. Any funds that remained after settlement of any debts, medical or funeral rites of the deceased, the objector is entitled to be paid her 29.17% share thereof.
25. The petitioner filed summons for confirmation of grant dated February 11, 2022. The grant of letters issued to the petitioner on March 2, 2021 was revoked in the ruling given on June 8, 2022. Now that the issue of the legal heirs and estate of deceased have been determined, for ends of justice, the grant is amended to be issued jointly to the parties herein as joint administrators and same is confirmed in the shares indicates herein above.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI ON 29TH SEPTEMBER, 2022

HON. ABDULHALIM H. ATHMAN

SENIOR PRINCIPAL KADHI

In the presence of

Mr. Suleiman, Court assistant

Mr. Yusuf for the applicant

Mr. Dagaye for the respondent

