In re Estate of Dilawar Khan & Hava Bhai Khan (Deceased) (Succession Cause E012 of 2020) [2022] KEKC 159 (KLR) (10 November 2022) (Judgment)

Neutral citation: [2022] KEKC 159 (KLR)

REPUBLIC OF KENYA

IN THE KADHI'S COURT AT UPPER HILL (NAIROBI MILIMANI LAW COURTS)

SUCCESSION CAUSE E012 OF 2020

AH ATHMAN, SPK

NOVEMBER 10, 2022

IN THE MATTER OF THE ESTATE OF DILAWAR KHAN AND HAVA BHAI KHAN (DECEASED)

BETWEEN

FIAZ KHAN DILAWAR ..... PETITIONER

AND

MUNIRA KHAN ..... OBJECTOR

JUDGMENT

1. By way of notice of motion dated August 20, 2020, the respondent filed for letters of administration intestate. He contends the deceased died intestate in Makkah while on Hajj on 8.12.1431 H (corresponding with November 14, 2010), left one property known as LR No 209/10721/83 and improvements thereon situated in Halai estate, south C Nairobi and was survived by one son and four daughters.

2. By way of cross petition dated May 18, 2021 the objector also applied for grant of letters of administration testate in her name or in the alternative in both parties' names. She deposed that the deceased testate. She annexed handwritten wills one dated October 31, 2010 and another dated May 23, 2003.

3. The parties, siblings objected to each other's application to be issued with sole grant of letters of administration but are agreeable for issuance of the grant of probate jointly in their names. No notice for petition letters of administration is yet published in the Kenya gazette by the government printer.

4. The late Dilawar Khan, a Sunni Muslim died in 2010 at Makkah, Kingdom of Saudi Arabia while performing the Hajj pilgrimage. He was survived by his wife, one son and four daughters. His wife died in 2015 and the two daughters three months apart in 2018. The property, a four-bedroom mansionette

LR No 209/10721/83 situated in Halai estate, south C Nairobi is registered in the names of Dilawar Khan and Hava Bhai Khan. The deceased and all the beneficiaries are Sunni Muslims.

5. The deceased's handwritten will dated October 31, 2010 and signed by Mr Dilawar Khan and Mrs Hava Bhai Khan stated *inter alia*:

> "This is our last will and is to be implemented in case we die during the pilgrimage.
>
> 1. The house (No 77 in Halai Estate south C) will be the property of Imtiaz Khan and Munira Khan (our daughters) as both of them are unmarried.
> 2. In case one of them does get married, the house remains the property of the unmarried daughter."

6. The objector contended the house is the only property of the estate and admitted under cross-examination that the deceased had not left any property to the respondent or the other heirs.

7. The parties were represented by counsels. Mr Wandati represented the objector while Mr Yusuf represented the respondent. Counsels filed written submissions. Mr Wandati for the objector submitted that the will dated October 31, 2010 is not valid because it had not been witnessed by two independent witnesses but that the one dated May 23, 2003 complied with all the requirements of section 11 (c) of the *Laws of succession Act* and therefore valid. He further submitted that a Muslim is permitted to bequeath a maximum of one-third to third parties if he so wishes but there is no provision in the Qur'an or in the law restricting the deceased from bequeathing more than 1/3 of his estate to his heirs as he did in the instant case. He submitted further that a there is no law that demands from Muslims to seek consent of the beneficiaries before making a will. He argued that so long as the deceased is very clear in his wishes, including that his wishes is to disinherit a heir for one reason or another, then their wishes ought to be respected and adhered to. He submitted further that absence of an executor does not invalidate a will.

8. Mr Yusuf for the petitioner / respondent submitted that the purported wills upset the rules of Shariah on wills. He submitted that the provisions of Laws of succession Act on will do not apply to estates of deceased Muslims. He submitted that under Islamic law, a deceased Muslim can only make a bequeath up to one-third of his property and only to third parties and not his heirs. He argued that the impugned will is invalid, contrary to the rules of Islamic law and therefore the deceased died intestate.

9. The issues for determination in this matter are:

    1. The applicable law in succession of deceased Muslims
    2. Requirements of a valid will under Islamic law
    3. Limitations to making of wills under Islamic law
    4. Whether the will by the deceased herein satisfied the requirements of a valid will under Islamic law.
    5. Mode of distribution of the estate of the deceased herein.

10. The applicable law in succession of estates of deceased Muslims in Kenya is Islamic law of succession and not the provisions of Laws of Succession Act, cap 160 laws of Kenya. Article 170 (5) of the *Constitution of Kenya, 2010* conferred on the Kadhi's court jurisdiction to determine questions of Islamic law in personal status, marriage, divorce and inheritance between parties professing the Muslim faith and submit to its jurisdiction. Further section 2 (3) of the *Laws of Succession Act* cap 160

categorically exempted estates of deceased muslims from the application of the Laws of successions Act. It provides:

> "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."

11. This is further clarified and emphasised by section 48 (2) of the *Laws of Succession Act*, cap 160 laws of Kenya. 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."

12. Case law has settled this issue. Etyang J in the case of *Chelanga v Juma* KLR (2002) vol 2 and M K Ibrahim J, (as he then was) in the case of *the matter of the estate of Ali Shitialo Ibrahim* P & A 151 of 94 eKLR [1994] 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."

13. Save for the application of part VII on letters of administration where it is not inconsistent with Muslim law, there should be no controversy on the applicable law in testamentary or intestate succession of estates of deceased Muslims in Kenya.

14. Islamic law allows and even encourages Muslims to make wills. The following provisions of the sources of Islamic authority illustrate this fact.

> "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.
>
> "... after payment of legacies that they may have bequeathed or debts..." Q 4.11
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> 'Ibn Maja 2709 [3/308], Al Bayhaqi 12571 [6/441] narrated on the authority of Abu Huraira, Abu Al Dardai' Mua'adh Ibn Jabal and Abubakar Al Sadiq (may Allah's blessings be upon them) that the prophet (May Allah's peace and blessings be upon him) said: ''Allah made charity upon you at death, [by allowing you to give] one third of your wealth [as charity] to increase your good deeds.'
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> '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."

15. Wills under Islamic law have two limitations; It can only be in favour of non-heirs and is restricted to a third or less of the estate. It cannot be made to a legal heir or be more than one-third of the estate. 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'.
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> Abud Daud 2870 [3/411], Tirmidhi 2120 [4/433-434], Ibn Maja 3/93 (2763), Ahmad 36/268 (2743), Nail al Awtar 6/40; Nusbul Raya 4 /403 narrated on the authority of Abu Umama Al Bahily; that the Prophet (pbuh) said: "Allah has prescribed specific shares to each heir, there is no bequeathing to a heir".

16. This fact in Islamic law of succession has been settled by case law as reported by Musyoka in his, *Law of Succession*, at pp 291 - 292, where he states:

> "Will making is allowed and even encouraged under Islamic law. However, the testamentary capacity of a Muslim is subjected to two limitations namely he can only bequeath one-third of his property by will and even then, he cannot give any part of the one-third to the heirs as stated in the estate of late Suleiman Kusundwa [1995] EA 247 (Sir Ralph Windham J) NB, Keatinge v Mohamed bin Seif Salim & others [1929 - 30) 12 KLR 74 (Thomas J) and in the estate of Faiz Khan, deceased [1929 - 30] 12 KLR 74 (Thomas J)."

17. Muslim jurists are united in their concurrence on the limitations of a Muslim under the Islamic laws of succession. In *Minhaj et Talibin, a manual of Islamic law according to the school of Shafi'* by Al - Nawawy [D 1914] as translated by EC 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."

18. In *Principles & precedents of Moohummudan law*- a selection of legal opinions involving those points, delivered in the several courts of judicature by WH 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."

19. As much as possible but 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."

20. The intention of the maker of the will must be exercised in full compliance to the provisions of shariah. It cannot be exercised arbitrarily. It is prohibited under the express provisions of the Qur'an and hadith for one to make a will with the intention of harming one of his heir or heirs. If made contrary to the mandatory requirements of the Qur'an and sunnah, a will is repugnant to law and invalid to the extent of its inconsistency with the law.

> "... after any bequest which was made or debt, as long as there is no detriment [caused]..." Q:4:12
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> The prophet [PBUH] said: "It could happen that a man spends sixty years in obedience to Allah and when he is on his deathbed, he may cause harm to his heirs in his will, so the hellfire becomes inevitable to him." Abu Daud 2867 [3/195], Al Tirmidhi 2122 [4/431]
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> 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."

21. Testamentary power is exercisable by any Muslim who is sane, rational and above the age of fifteen. A will is vitiated by undue influence or fraud. A will may be made either orally or in writing. It does not have a particular form. If oral, it must be made in the presence of two male adult Muslim witnesses. If it is in writing it need not be signed and if signed it need not be attested as the verse regarding witnesses is considered a recommendation and not mandatory. It is however strongly recommended in these times of many disputes to remove ambiguity on the intention of the testator, to have the will witnessed, attested and registered with the relevant authorities. The testator is allowed to change or revoke his will in his lifetime. On requirements of a valid will under Islamic law, Musyoka, *Law of Succession*, pp 291 – 292 stated:

> "Testamentary power is exercisable by any Muslim who is sane, rational and above the age of fifteen. A will is vitiated by undue influence or fraud and can be revoked at any time by the testator before his death or by operation of the law."

22. On the form of a will under Islamic law Musyoka, *supra*, stated:

> "According to Sir Clement de Leistang in Mohamed Thabet Ali Maktari v. Mohamed Rageh Mohamed Saleh Maktari & others [1996] EA 35 Under Islamic law a will may be made either orally or in writing. It does not have a particular form. If oral, it must be made in the presence of two male adult Muslim witnesses. If it is in writing it need not be signed and if signed it need not be attested."

23. He further added:

> "In WB Keatinge v Mohamed bin Seif Salim & others (1929 - 30) 12 KLR 74 (Thomas J) it was held that an oral will would require two male adult Muslim witnesses but in the absence of witnesses the will would stand good if approved by the heirs. A similar holding was made in the estate of Faiz Khan, deceased (1929-30) 12 KLR 74 (Thomas J) where it was held that where there is a reputable witness supported by other witnesses, the court may accept the evidence of the reputable witness where it differs from that given by other witnesses. The will of a Muslim need not be attested as the Qur'anic injunction regarding witnesses is considered mere recommendation. It is not mandatory as what really matters is the intention of the testator, so long as the intention of the testator is reasonably clear, the will takes effect.'

24. Parents may be inclined, for one reason or the other, to favour some of their beneficiaries over others. Islamic law of inheritance does not, for equity, fairness and cohesion of the family unit, allow any discriminate distribution of one's wealth upon one's death and encourages fairness during one's lifetime. The verses on inheritance are explicit on man's inherent limitation to know who among their beneficiaries will be most considerate to them. While encouraging gifting generally, Islamic law specifically prohibits unfair treatment of children in this regard.

> "Bukhari [25867] and Muslim [1633] narrated on the authority of Nu'man Ibn Bashir (may Allah's blessings be upon him) said, my father went to the prophet (may Allah's peace and blessings be upon him) and informed him, "I have gifted to this my son a male slave", the prophet asked him "have you gifted the same to all your children?" he said "no", the prophet told him, "return your gift", in another version of the hadith the prophet told him, Fear Allah and be fair to all your children", in another he said, "I shall not be a witness to an illegality'.

25. Limitations to testamentary or intestate capacity of a Muslim are made in the recognition of the infallibility and all-knowing attributes of Allah the almighty, for cohesion of the family unit and for general good of the society. The suggestion that a Muslim is allowed to bequeath to heirs and his will should be respected even if he were to disinherit a heir is misleading, devoid of legal basis and a misapprehension of the applicable law. The endings of the inheritance verses carry with it very strong warnings on attempts at tampering with the firm edicts on inheritance shares. Al Shaukany (d 1250 H) in his Fath-el Qadir on commentary of the 'ghair mudhar' qualification of will in Q 4.12 stated:

> "All admissions by the deceased of debts, illegal wills or wills whose intent is to harm heirs are invalid and inexecutable; not a third or less. Al Qurtuby said 'scholars have concurred that a bequeath to a heir is invalid."

26. Due to its gravity and importance, allocation of shares to heirs was not left even to the prophet Muhammad (may Allah's peace and blessings be upon him) or the discretion of scholars and jurists, it was undertaken by Allah the almighty Himself. It bears mention that on this issue there is consensus among all the major schools of Islamic jurisprudence. MM 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."

27. In the instant case, the will of 2003 was replaced with the one of 2010. Only a last will of a deceased can be recognised. The form of the will of 2010 is valid. However, by bequeathing to heirs, the will offends the explicit and mandatory requirements of a valid will under Islamic law as illustrated by authorities hereinabove. It has the effect, intentional or otherwise, of disinheriting other legal heirs of their prescribed Qur'anic shares and interfering with the allocations made by the provision of Q 4.11. The maker of the will overstepped his mandate in making the will. Accordingly, the will is declared invalid and is hereby revoked. The estate shall be distributed pursuant to the provisions of Q 4.11, 12 and 176 on distribution of estates of deceased Muslims.

28. The deceased was survived by his wife and five children. His widow who died five years later was survived by the five children, two of whom are now deceased. Her estate devolves to her children. The children are full siblings. For purposes of distribution of estate, the legal heirs of the estate are the five children. They are:

i. Gulnar Dilawar Khan daughter deceased (August 4, 2018)

ii. Imtiaz Dilawar Khan daughter deceased (May 2, 2018) not married

iii. Munira Dilawar Khan daughter

iv. Faiza Dilawar Khan daughter

v. Fiaz Dilawar Khan son

29. Sequence of death is important in determining bona fide legal heir and devolution of their shares. Under Islamic law, a beneficiary's rights are not extinguished by death. Unlike common law where the shares of a deceased beneficiary devolve to the surviving heirs, under Islamic law of inheritance, his proportionate shares devolve to his respective heirs under the process of al-munaskhat.

30. Imtiaz died first. She was not married and had no children. Gulnar was survived by her husband Gulab Khan and siblings: Munira, Faiza and Fiaz Dilawar Khan. The share of Imtiaz devolves to her four siblings the male getting twice the share of the female under Q.4.176. Accordingly, there remain four heirs for purpose and ease of distribution of the estate; one son and three daughters.

The share of the son = 40%

The share of each daughter = 20%

31. The 20% share of Gulnar Dilawar devolve to her husband and three siblings, the husband getting one-half and the remainder to the siblings in the ration of 2:1 under Q.4.12 and 176. Their shares shall be as follows:

Husband = 10%

Brother = 5%

Each Sister =2.5%

32. The final list of heirs and their respective shares under Islamic law are as follows:

i. Munira Dilawar Khan daughter 22.5%

ii. Faiza Dilawar Khan daughter 22.5%

iii. Fiaz Dilawar Khan son 45%

iv. Gulab Khan son in law 10%

33. Apart from the property in South C, there is no other property for distribution to heirs. None was specifically pleaded. Although the will alluded to monies in two bank accounts in Tanzania, no evidence was produced to support their existence and availability for distribution to heirs. Nothing stops any heir with evidence on other properties of the estate from applying for consideration for its inclusion in the estate of the deceased herein.

34. The parties, in compliance with requirements for grant of letters of administration, should now move with haste to pay requisite fees for publication of the petition for letters of administration in their joint names, notice of which is hereby granted and eventual confirmation of the grant in the shares indicated herein above. The direction is aimed at protecting rights of any third parties who may have interest in the property.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON 10TH NOVEMBER, 2022

HON. ABDULHALIM H. ATHMAN

SENIOR PRINCIPAL KADHI

In the presence of

Mr. Suleiman A. Mohamed, Court Assistant

Mr. Yusuf for the Petitioner / respondent.

Mr. Wandati for the Objector / applicant