



**REPUBLIC OF KENYA**

**IN THE KADHI'S COURT AT MOYALE**

**SUCCESSION CAUSE NO. 36 OF 2019.**

**IN THE MATTER OF THE ESTATE OF KASSIM ABDALLA HUSSEIN (DECEASED)**

**JUDGEMENT**

**FATUMA DIMA HIRBO.....PETITIONER.**

**VERSUS**

**ABDALLA SHARIFF HUSSEIN.....RESPONDENT.**

1. The petitioner claims the late **Kassim Abdalla Hussein**, died on 30<sup>th</sup> January, 2011 and was survived by his mother, father (now Deceased) widow (petitioner), two daughters and a son and adopted father (Respondent).
2. The petitioner in her supporting affidavit indicated that since the demise of her husband, she has been the guardian to all beneficiaries.
3. She claims that the deceased had two plots, one at Ongata Rongai in Kajiado county and the other one in Moyale.
4. That the family of the deceased lives in the plot at Moyale, while the plot at Ongata Rongai is under rent and the proceeds from the said plot is held in joint account, the signatories are **Shariff Abdallah**, the adopted father of the deceased, who is also cousin to the deceased and the petitioner.
5. The Petitioner moved this court on 29<sup>th</sup> July of 2019 by way of notice of motion for the following orders:
  - a) That the honorable court be pleased to determine the estate of the said deceased person.
  - b) That the honorable court be pleased to determine the mode of distribution and each beneficiary's individual share to the estate of the deceased.
6. The Respondent filed a replying affidavit, dated 4<sup>th</sup> December 2019, claims that:
  - a) The deceased during his life time declared the Respondent in his service register as his next of kin as well as administrator and successor of his estate.
  - b) That the petitioner lived and enjoyed the estate of the Deceased as widow on an agreement that she would not remarry.
  - c) That the petitioner remarried on the 18<sup>th</sup> of April 2019 vide certificate number 27/19 of Isiolo kadhi's court and still resides on the matrimonial home of the Deceased.
  - d) That the Deceased was survived by the following beneficiaries;
    - i) Abdallah shariff Hussein - next of kin/successor to the estate.
    - ii) Fatuma Dima Hirbo-widow (petitioner).
    - iii) Najima Hage Kassim- Daughter
    - iv) Mariam Kassim Abdallah -Daughter

v) Hussein Kassim Abdallah- son

vi) Halima Hage Qumbe- Mother

vii) Hussein Shoge Siba- father

viii) Amina Sora Gube- Paternal Aunt

e) That the petitioner has never been a guardian but a mother to the three children of the Deceased, and that he has been the guardian to all the beneficiaries and the administrator of the estate of the deceased since his demise.

f) That as an administrator, he incorporated the petitioner in the banking for accountability for the period the petitioner lived as a widow on the deceased estate.

h) That he prays to the honorable court to determine the beneficiaries to the estate of the deceased and the mode of the distribution.

7. On 4<sup>th</sup> February 2020, one Amina Sora Gube, mother to the Respondent filed an affidavit protesting, claims that:

a) She is the paternal aunt to the Deceased (Kassim Abdalla Hussein) whom she brought up from childhood.

b) That the Deceased was a police officer, service no. 69015 and died of cancer on 30<sup>th</sup> January 2011 while still in service.

c) That the Deceased declared her as successor of his estate in his service register held by the Kenya police service while other beneficiaries shall be determined by the court.

d) That she is the owner of the plot in Moyale and that she only allowed the deceased to build residential houses there in agreement that after building the houses, she will be collecting the rental incomes.

e) That since the house was built, she has never received rent or compensation, hence remains the owner of the plot.

f) That she is a beneficiary of the plot in Ongata Rongai in Kajiado county.

8. The petitioner further filed a replying affidavit dated 19<sup>th</sup> February 2020 to the respondent:

a) That she strongly opposes the content of paragraph 4 on the face of the replying affidavit of the respondent, that she was legally married to the deceased and not aware of the allegation made by one Abdallah shariff Hussein as being the next of kin and administrator of the estate of the deceased thus she challenged the respondent to substantiate his claim.

b) She further disputed the content of paragraph 5 and stated that she was under no obligation to enter into an agreement with anybody on whether to remarry or not, nor whom to marry, it is solely within her discretion and her right.

c) That she (the petitioner) admits to the content of paragraph 7 save for the inclusion of the Respondent, Mr. Abdallah Sharriff Hussein, as one of the beneficiaries, however it's an issue for the determination by the court.

9. On 3<sup>rd</sup> March 2020, when the matter was called for the inter parties hearing, three witnesses testified under oath in favor of the petitioner's case, while the Respondent also paraded seven (7) witnesses under oath in support of his case.

10. The petitioner in her final written submission stated that the Respondent and the protestor is to attempt to push for a share from the deceased estate of which to her belief is against Islamic law of succession, however she demonstrated the ability of this honorable court to discern the rightful heirs of the estate.

11. The Petitioner lastly submitted that the Respondent in his custody has several documents and properties belonging to the deceased family that ought to be in the custody of the Petitioner, the document are; the title deed of deceased's plot at Ongata Rongai, Death certificate of the petitioner's husband, marriage certificate of the petitioner, birth certificate of petitioner's daughter(Najma Kassim), total sum of ksh 993,954/= from the proceeds of the rental income since 2014 that is in joint account and his personal account and furniture of the Deceased.

12. The Respondent in his final written submission urges the honorable court to respect the will of the late kassim Abdalla, and reminded the court that this court is a court of law, evidence and court of value and principles based on religion and of significance of Islamic doctrine and be guided by Islamic teaching, and also to consider legal, cultural and religious principles so justice is met.

13. Lastly the Respondent submitted by urging the court to apply the law giving measure to the weight of the evidence and give all the beneficiaries a fair and equitable share of the estate of the deceased, the deceased may only fully rest if his will and wishes have been fulfilled.

14. It is the petitioner's case that the Deceased's estate comprised of the following:

i) Death Gratuity and benefits- Nation police service

ii) Land parcel No. NGONG/OLE KAGASI TOWNSHIP/438 Located in kajiado.

iii) Plot No. 861- Located in Manyatta area Moyale.

v) Rent accrued from the land parcel no. NGONG/ OLE KAGASI TOWNSHIP/438 located in kajiado.

15. It is also petitioner's case that she is the sole heir together with her children and be the administrator of the Deceased's estate.

16. The protestor's (Amina Sora Gubo) case, who is the Deceased's paternal aunt is that she is the owner and proprietor of the plot No. 861 Moyale, Manyatta area and that the deceased only developed the piece of land for his benefits and that of the protestor.

17. it is also both the protestor and the Respondent's case that the deceased in his dying wish appointed Shariff Abdalla Hussein (respondent) to be his successor/ custodian of his estate and the legal guardian and custodian of his children.

18. From the record and finding of this Court, the following facts are common grounds:

a) That the Petitioner was the legal wife of the Deceased at the time of his demise.

b) That the Deceased was survived by three (3) children, father (now deceased) mother, and a paternal aunt.

c) That the Deceased had a plot at Ongata Rongai in kajiado county.

e) That the bone of contention involves the ownership of the plot at Moyale, the existence of the oral will and who the rightful heirs or beneficiaries to the Deceased estates are.

19. Having given due consideration to the both oral and written submission of the parties during the trial and perusing through the documents before the court from both side, the question which therefore, falls for my consideration is:

a) What is the concept of 'next of kin' in Islamic law?

b) What does estate (*tarikah/tirkah*) mean in Islamic Law?

c) Who is the legal heir (*waarith*) of the Deceased in Islamic perspective?

d) Whether the plot at Moyale will form part of the deceased's estate?

e) Who is the rightful custodian of the children of the deceased?

20. On the first issue of consideration, the concept of next of kin does not arise in Islam because there are quite a number of people that are recognized as close relations, and they are regarded as qualified to inherit the estate. Under Islamic law, one is entitled to inheritance by blood or marital relationship and religion as provided in (*Qur'an: 4:11, 12 and 176 and Sunnah*). The rational being fairness among beneficiaries for one knows not who is most beneficial to him or her.

21. This makes it clear that the concept of next of kin as one person does not really occur in the Quran. Allah says in Quran that it is only Allah that knows who is closer to you, whether your parents or children.

***"...Your parents or children - you know not which of them are nearest to you in benefit. [These shares are] an obligation [imposed] by Allah. Indeed, Allah is ever Knowing and Wise". Nisa : 11***

22. However, if it happen that a Muslim names one as the next of kin from his or her close relatives, it depends on the circumstances, availability and ability of their relation as to who would perform the intended function.

23. Therefore being next of kin does not necessary give the particular person concerned any special privilege over and above the other members of the family.

24. Because whether he or she is stated as next of kin or not, the right of each and every other person is already fixed in the estate of the person that has departed.

25. The second issue for consideration is the estate (*tarikah*) of the deceased, the estate comprises of all property that the deceased has owned, whether his ownership of the substance or corpus of a thing, moveable and immoveable, realty or personally.

26. In Islamic law of inheritance, it makes no difference the type of the property heritable by the heirs provided that it has monetary value and it is halal (lawful).

27. Therefore, the death gratuity that was used to develop the plot of the deceased at Ongata Rongai and the proceeds of rental incomes that is in the possession of the Respondent, both in joint account and in his personal account formed part of the Deceased estate under Islamic law and all the deceased heirs were entitled to inherit.

28. The third issue for consideration is the legal heirs of the deceased; this term is properly applied only to those relatives upon whom the property devolves, after the demise of its owner.

29. The Deceased was survived by two parents (father is now deceased), three (3) children, a widow and a paternal aunt, no dispute was recorded in this regard by either parties.

30. Heirs according to Islamic Law of succession are classified into three (3) categories namely;

1. Dhawil-Furudh (Qur'anic Sharers)
2. Asabah (Residuaries/Agnates)
3. Dhawil-Arham (Distant Kindred)

31. The first rule of intestate succession is that the Quranic sharers must first (before all other) be assigned their shares. The Quranic sharers are the most important class of heirs who take primacy, they are entitled before all others the shares allocated to them either by the Holy Quran or by the tradition. Reference may be made to **Holy Quran chap 4:11 and 12**, in this matter only the widow (petitioner), three children of the deceased and two parents of the deceased belong to first class of heirs, non is superior to the deceased than the other, but the paternal aunt(Amina Sora Gube) and her son Abdalla shariiff Hussein (the respondent) belong to the third category( distant kindred) that they cannot inherit in the presence of any Quranic sharer or residuary (asabah).

32. In respect to the above rule, the Quran, in regards to children of the deceased in chapter 4:11, states,

***" Allah( thus) directs you as regards your children's(inheritance):to the male, a portion equal to that of two females....."***

33. The Quran also stated in the same chapter in regards to the parents of the deceased;

***".....for parents, a sixth share of the inheritance to each, if the deceased left children....."***

..as for the widow Allah says;

***"...in what you leave, their share is a fourth, if you leave no child; but if you leave a child, they get an eighth....."***

34. The fourth issue for consideration is whether the plot no.861 located in Manyatta area of Moyale sub county will form part of the estate, from the proceedings on record the witness of the respondent, AMINA IBRAHIM SORA, who is the deceased aunt, confirmed to the court in her testimony that she gave plot No. 861 to the late Kassim Abdallah and, this was corroborated by Mumina Boshe, also the respondent's witness. She echoed the same sentiment that the late Kassim had two plots, that of Ongata Rongai and the one in Moyale.

35. On the same note, Mrs. Halima Qumbe mother to the deceased who was summoned by the respondent as his witness confirmed to the court that her deceased son had a plot in Moyale and Mr. Mohamed Hussein Siba, who is the Deceased brother and the protestor's nephew stressed and confirmed to the court the plot No. 861 was given to the deceased by his aunt (the protestor).

36. 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 the truth, but the Respondent and the protestor have not proven to the court on the balance of probability during the trial of the suit that Mrs. Amina Sora, the deceased paternal aunt, owned the said plot No186 at Moyale during the demise of late Kassim Abdalla.

37. The burden of proof is the obligation of the party in a trial to produce the evidence that will prove the claims they have made against the other party.

38. The messenger of Allah said *"if the people were given what they claimed, men would claim the wealth and blood of the people, but the burden of proof is upon the claimant....."* and the court 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'***

39. The court is persuaded by the petitioner's and the Respondent's witnesses, which is overwhelming, therefore, the court finds that the said plot No.861 of Moyale, forms part of the estate of the Deceased.

40. The last issue for consideration is who the rightful custodian of the children of the deceased between the petitioner, who is mother to the children and the Respondent, who is the cousin to the deceased.

The petitioner's evidence was to the effect that she is the more suitable parent to have custody of the children having raised them all along.

She has more time for the children than the Respondent.

41. In ascertaining which party to award custody, the court must be guided by what is in the best interest of the child.

see Art 53(2) of the constitution which states that;

***“A child’s best interest are of paramount importance in every matter concerning the child.***

42. The general principle regarding custody of children is that unless there exists peculiar and special circumstances, the mother has priority. In **mehrunisa v. pravez (1982-1988) 1 KAR 18** the court appeal stated;

***“The general principle of law is that custody of such children shall be awarded the mother unless special or peculiar circumstances exist to disqualify her from being awarded custody”***

43. Under Islamic law, the same principle of priority of custody of children of tender age to mother applies, it is based on traditions of the prophet Muhammad (may peace and blessing be upon him), the second source of Islamic law, interpretation of Muslim jurists of the highest eminence and panel of contemporary Muslim scholars who authored the Islamic charter on family under the international Islamic committee for women and child (IICWC).

44. It is reported that a lady complained to the Prophet (peace be upon him) O prophet, my stomach has been my son's bed, and my breast his source of nourishment and my lap his place of rest, but his father has divorced me and wants to take him from me', the prophet said:

***'you are more entitled to him(his custody).....'; Nail al Awtar vol. 6 p 384***

45. The Respondent seeks the custody of the children because according to him, it is the will of the Deceased. After all is said, I am of the view that the petitioner has not been shown to be an unsuitable parent. It has not been shown that granting custody to the petitioner will not be in the best interest of the children of the deceased. Therefore, the petitioner, who is the mother to the children, will thus be awarded custody of the children.

46. The mode of the distribution in respect to the Deceased estate will take the following mode:

- A) FATUMA DIMA HIRBO (WIDOW).. 12.5%**
- B) HUSSEIN KASSIM ABDALLA (SON).. 27.1%**
- C) MARIAM KASSIM ABDALLAH (DAUGHTER)...13.5%**
- D) NAJMA KASSIM ABDALLAH (DAUGHTER)...13.5%**
- E) HALIMA HAGE QUMBE (MOTHER)...16.7%**
- F) HUSSEIN SHOGE SIBA, NOW DECEASED (FATHER)...16.7%**

47. However being the aforementioned mode of distribution is the position of sharia as far as Islamic law of succession is concerned; I call upon the legal heirs of the deceased to the spirit of the verse of the Quran 4:8

***(if other relatives , orphan, or needy people are present at the distribution, give them something too, and speak kindly to them).***

48. As clearly stipulated in the Qur'an as to the share of the widow (petitioner), I hereby order that she be given her share from the proceeds of the rental income since 2014 that is in joint account and the respondent's personal account and any other in regards to the deceased estate. Let it be known that as long as the deceased estate is there, the petitioner's share will be as calculated and indicated above.

49. Lastly, I do appoint and order the administrator of the estate of the deceased until the children of the deceased attain the age of maturity be the petitioner by virtue of being a mother to the children of the deceased, assisted by the Respondent who brought up the deceased and schooled him.

50. Each party will bear their own cost.

**Dated, Delivered and Signed at Moyale this 31<sup>st</sup> day of August, 2020.**

**Hon. A. D. WAKO**

**SENIOR RESDINT KADHI.**

**MOYALE LAW COURTS.**

