



REPUBLIC OF KENYA

IN THE KADHI'S COURT AT MOYALE

SUCCESSION CAUSE NO. 24 OF 2019

IN THE MATTER OF THE ESTATE OF ALI ADAN MOHAMED (DECEASED)

HADIJA IBRAHIM ABDULLAHI.....PETITIONER

VS

HALIMA MOHAMED BORU.....RESPONDENT

JUDGEMENT

1. On 2nd May, 2019 the Petitioner filed Notice of Motion and supporting affidavit in this court stating that ;

- a) That ,she is the Deceased's wife(widow).
- b) That, her Deceased husband passed away on 10th August, 2016 due to cardio respiratory Arrest.
- c) That ,prior to the demise of her husband(Deceased herein)the petitioner lived in Nairobi with her family members.
- d) That after the death of her husband, the family members, family friends and other clan members of the Deceased decided to offer some support towards the young family through fund-raising both in Nairobi and Moyale.
- e) That, Kshs. 650,000/= was separately raised in each of the fund drive which totals to **Kshs. 1,300,000/=**
- f) That , the young family, after the death of her husband(Deceased herein)moved back to Moyale where they bought a plot using part of the money contributed in support of the family.
- g) That, the young family built a residential house in the said plot and currently living there.
- h) That, the amount of money used to buy the said plot was **ksh 250,000/=** while the Respondent who supervised the construction claim that further **ksh 400,000/=** was used in construction of the house for the family.
- i) That , some **ksh 650,000/=** which was the remaining balance from the above activity was deposited in joint account which the Petitioner and the Respondent signatories.
- j) That, some of the money deposited in joint account was also utilized for family needs.
- k) That ,the Deceased also had two camels prior to his demise which is still in custody of one clan member and a close friend of the Respondent.

2. On 10th June, 2019 the Respondent filed replying affidavit and stated the following;

- a) That, she is female adult of sound mind hence competent to swear this affidavit.
- b) That, she is the Deceased's mother being her second son in a family of eight.
- c) That, it is true the Deceased is a resident of Butiye location however he passed away while in Nairobi.
- d) That, it is true the Petitioner is wife to the Deceased and Amran and Amida are both are Deceased's daughters.

e) That, it is true the fundraising was done after the demise of the Deceased both at Nairobi and Moyale.

f) That, the money raised in fundraising is not **ksh 1,300,00/=** as stated by the Petitioner.

g) That, it is true out of the raised money **ksh 250,000/=** was used to buy plot for Petitioner where two rooms house, bathroom and toilet was built in the said plot.

h) That, the Respondent and Petitioner withdraw **Ksh.750,000/=** which was utilized in construction of the residential house for the widow.

i) That, it is true on several occasions when need arise money was used for domestic purpose that was deposited in joint account.

j) That, Respondent and the Deceased never own single camel as stated by the Petitioner.

k) That, there is nothing to be distributed in terms of camels as stated by the Petitioner however since the plot where the Petitioner currently resides was bought with proceeds of fund raising and be distributed among the beneficiaries.

l) That, the main matter is in connection with plot the same was discussed at chiefs office and finally referred to the elders for resolution however the Petitioner decided to move to court when the matter is still with elders.

3. On 12th June 2019 when the matter call for hearing, the Petitioner stated that the Deceased was survived by two daughters ,mother, and herself.

4. The Petitioner also stated that her Deceased husband had not left behind any property at time of his death but after his demise the family and family friends held a fund raising for his young family, the proceeds of the fund drive was put in joint account in Equity Bank, later some of the money was used to bought plot and construction of two rooms house for the widow and her children.

5. The Petitioner also lamented that prior to death of her late husband own a camel and is the custody of one clan member.

6. The Petitioner finally requested the court to safe guard the property of the orphans and the widow since the property is the proceeds of fund drive from the well-wishers not estate of the Deceased

7. The Respondent who is the mother of the deceased also testified on oath and denied that her late son did not left behind any camels as claimed by the Petitioner.

8. The Respondent took the denial oath as required by sharia law of Islam after the Petitioner failed to proof her claimed that her late husband had camels .

9. Finally the Respondent in her final oral submission prays for the custody of the children and the said plot be given to her in order raised the two daughter of deceased in that plot.

10. I have given consideration to the submissions by both parties, The main issue raised in is weather the proceeds of fundraising was conducted by well wishers after death of the deceased be considered as his estate? who has the right to custody of two daughters of the Deceased?

11. To answer the first issue of consideration the court have to defined What is an estate or *tarikah*. Although the law of Succession Act to some extent does not apply to Muslims, the Act defines the word "**estate as**" follows: -

"Estate" means the free property of deceased person.

The late Ali Adan mohamed died in 2016. By that time there is nothing like fund raising was conducted. In simple terms the deceased was not aware of fund raising. By the time he died, the said proceeds of fund raising from well wishers had not accrued as part of his properties. It is possible that the late Ali Adan Mohamed had other properties which formed part of his estate. This included his personal items such as clothes, Television, radio as well as his death benefits. therefore the question which beg the answer is whether a dead Muslim can continue acquiring estate long after his death.

12. the definitions of *Tarikah* or estate from the perspective of the Islamic law of succession , the Arabic word *tarikah or tirkah* literally denotes things left behind by the deceased, it also indicates the estate or the heritage left behind by the Deceased (*Ibn manzur, Muhammad, lisan al Arab vol.10 p 4.*)

13. However the Muslim jurist have based their definitions on version of Hadith which reads " **one who leaves the mal or the property ,behind him ,it is for his legal heirs**".

14. Having said that from the both parties submissions in court there is no dispute that the said property is from the proceeds of the fundraising that was conducted after the death of late Ali Adan Mohamed by well wishers therefore cannot be subjected or considered as an estate of the deceased thus the said plot belong to the petitioner and her children.

15. Concerning the amount of money at the Equity bank which both the Petitioner and the Respondent are signatories be shared equally by the Petitioner and the Respondent.

16. On the second issue of considerations In Islam mother have more right to custody of children than other person, because generally they are more compassionate and more kind ,and they know better how to rise small children, and they are more patient in dealing with difficulties involved.

17. The condition of custody are ; being accountable (i.e an adult of sound mind) being of good character, and being able to fulfill all obligation towards the child, therefore since there no evidence on record was adduced by the Respondent to challenge the aforementioned condition showing that the Petitioner does not met the above threshold, the right to custody is hereby restored and granted to the Petitioner.

It is so ordered.

Dated and delivered 31st day of July, 2019.

Hon. A. D. WAKO

SENIOR RESIDENT KADHI.

MOYALE LAW COURTS.