



REPUBLIC OF KENYA

IN THE KADHI'S COURT AT KISUMU

SUCCESSION CAUSE NO 37 OF 2014

IN THE MATTER OF THE ESTATE OF; MUSA ODERA WAMBALE; DECEASED

AND

IN THE MATTER OF AN APPLICATION BY;

ABDI MOHAMED.....1ST APPLICANT

MUSA ODERA MOHAMED.....2ND APPLICANT

VERSES

SAIDI MOHAMED.....RESPONDENT

RULING

1. The court is faced with a new decision to make on the introduction of new documents on 2/2/2018. The documents are; - Certificate of confirmation, grant, will. This matter has progressed since 19/7/2014 when it was filed. The same was done through a petition naming Musa Odera Wambale as the deceased. Abdi Mohamed and Musa Mohamed were the petitioners while Said Mohamed was the respondent.

2. The petitioners named the children of the late Musa Odera and the respondent who were survivors. They include; - Tufa Lisero-wife, German Mohamed-son, Mariam Aduda Musa-daughter, Amina Musa-daughter and Ayieko Musa-All deceased.

3. The estates named were 2 plots in Kaloleni. one plot at Nubian, one at Maseno, One at Dunga and land in Bunyore.

4. They also named the surviving heirs;-
 - a) Five wives- four divorced and one still legally married.

 - b) Abdi Mohamed

 - c) Asha Kadogo

 - d) Zainab Mohamed-deceased

e) Hassan Mohamed

f) Said Mohamed

g) Musa Odera Mohamed

h) Musa Odera Wambare.

5. They prayed that the estate of the deceased be distributed in accordance with Islamic law. The defendant entered appearance and filed his defense and admitted part of the petition and denied part.

6. At the start of the petition, the defendant was ordered to adduce all the relevant Documents to court. These were; death certificates, that of Musa Odera, the widow Tufa, the son German Mohamed, Musa Ayieko, Aduda and Amina. He presented some and some were not. Title deeds-which were not presented as were ordered.

7. What is worth observing here is that the two documents that are the focus of this ruling was not presented. Save for the *will* that was expansively argued by the parties during the several hearings of this matter.

8. That throughout the hearings, the beneficiaries have never raised any objections to the issue of format of filing and consequently the court proceed to pronounce itself on the same matter that ended in consent judgment and later on redistribution of the same. The filing of certificate of confirmation on 2/2/2018 fronted by the respondent and the shadows of some beneficiaries advocate has impelled a new argument that in broader understanding negates the process /hearing and long arguments that have lasted more than 3 years.

9. It is their view that if the certificate indeed took place and the late German acquired/was issued with certificate of confirmation of grant. It will be against the normal procedure to indulge in a similar process hence a new succession cause in relation to holder of the grant this court should therefore down the tools as the High court had already conferred ownership to the said person. They have urged this court that since the success cause 25/1994 has been availed and there is no order as to its revocation or nullification. It renders this cause void.

10. The applicants/respondents have held that they will not agree with the two advocates in that this is an Islamic matter and should be dealt with in accordance with Quran directions. They agreed to file the matter replied the same and defended it until the court pronounced the judgment. The documents are not admitted because they were not produced during the hearing. This is only the tactic to delay their enjoyment of the court's judgment.

11. The issues in the circumstance that need to be answered are;

a) Whether the grant is valid or not and its application in relation and Islamic law and the law of succession Act cap 160 and the general chronological of events since filing of this cause 37/14 and interest of justice.

b) If the estates in the same and the heirs the same would this really warrant new filing and fresh hearing

12. To the first question, am aware that I am stopped by law to proceed in a matter already heard by another cause which is rendered Res judicata sec 7 of the CPA this is in fact abuse of court process and time. The record in the case of 25/94 is not clear whether the grant was nullified or not but what we are sure is that there was grant confirmed and certificate issued there was an objection .the same was given in favor of the deceased German MOHAMED Musa allocating him all the assets, estates as an administrator.

13. The idea of administration in Islamic jurisprudence is new. Muslim law did not recognize the concept of administration of estate. It has laid down mechanisms for administration of the estate of the deceased among heirs and legatees. The main solution being distribution amongst the rightful heirs in their respective Quranic shares.

14. Matters of succession in Kenya are managed governed by law of succession cap 160, when they are not in consistent with Muslim laws. A deceased Muslim has his estate subjected to the substantive Muslim law. The act in section 2(3) states that clearly that if the laws are in consistent we acknowledge that Muslim take representation of the estate but with substantive law calls for immediate distribution of the estate in the Quranic portions allocated to them. The grant has allocated all the states to one person who happens to be the owner contrary to the practical application of the same, where the mode of distribution is normally done in the Islamic way.

15. Sections 2(3), (4) and 48(2) of the Act provides as follows;

(3) 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.

(4) Notwithstanding the provisions of subsection (3), the provisions of Part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim dying before, on or after the 1st January, 1991.

48 (2) For the avoidance of doubt it is hereby declared that the Kadhi's courts shall continue to have and exercise jurisdiction in relation to the estate of a deceased Muslim for the determination of questions relating to inheritance in accordance with Muslim law and of any other question arising under this Act in relation to such states.

16. In the case of *Nazima Janmohammed Nassar v Nasreen Kauser*, (2015) eKLR ‘ The application filed on 12th June 2014 is allowed, the applicant is free to choose whether to submit to either Kadhi’s Court or High Court but whatever choice of forum, the choice of law to execute the will shall be sharia law. It is clear in the above provisions that the estate of a deceased Muslim is to be determined using Muslim law regardless of the forum.

17. I agree with the sentiments of the beneficiary advocates that indeed the succession should not be repeated However the management of grant in this Act is section 76 where in it states that; 76 Revocation or annulment of grant (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) To proceed diligently with the administration of the estate; or

(iii) To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs

(e) And (g) of section 83 or has produced any such inventory or account which is false in any material particular; or (e) that the grant has become useless and inoperative through subsequent circumstances.

18. The second question to what the above has referred to and In lieu of this I unpretentiously disagree with the argument that this matter should be filed again as the spring of the grant is an addendum and malicious concealment of material facts and documents which the respondent and the beneficiaries have had in possession and have never produced even after the court ordered so. Further the grant was

obtained in 1994 but until the date of hearings nothing had changed the estate were still in the name of **Musa Odera Wambale** hence the grants stands nullified and useless 24 years ago.

19. I therefore can't allow the argument to prevail it will be a waste of this courts time and efforts and the denial of justice to the parties
Considering the above and in application of the Islamic law I would like to direct as follows;

1. The suit petition relating to estate of German Mohammed which is the same as the Estate in question will proceed to determination of the application filed on 19/9/2017 by The respondent as the Islamic law allows us after representation to distribute the estate In accordance to the shares of the Quran.

2. The petition may be amended to qualify and Capture the arguments of advocates.

3. It is so ordered.

4. Hearing 8/3/2018

In the presence of all the parties

Mr. Anyul for the first respondents

Mr. Adiso for the beneficiaries

Abdi Mohamed p/p Musa Odera p/p

C/A Rehema Akidah

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S. Resident Kadhi

16/2/2018