



In re estate of Mohamed Kismala (Deceased) (Succession Cause 15 B of 2015) [2017] KEKC 17 (KLR) (20 March 2017) (Judgment)

In re estate of Mohamed Kismala [2017] eKLR

Neutral citation: [2017] KEKC 17 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT ISIOLO
SUCCESSION CAUSE 15 B OF 2015
AH ATHMAN, PK
MARCH 20, 2017**

IN THE MATTER OF THE ESTATE OF MOHAMED KISMALA (DECEASED)

BETWEEN

ALI MOHAMED KISMALA PETITIONER

AND

MOHAMED AHMED MOHAMED RESPONDENT

JUDGMENT

1. The petitioner claim he is a son of the late Mohamed Kismala who left among other properties a Plot No 18 in Salama village at Meru Town which is currently under the respondent's care. He contends him being a son is more entitled to be in control of the property than the respondent who is a grandson but despite numerous request for the respondent to release the property to him he has refused. He prays the defendant be ordered to revert management of the plot to him.
2. The respondent filed a defence on 9th September 2015 amended on 29th December 2016. He denies the petitioner is son of the deceased herein. He admits although he has made development on the plot at a cost of KES 700,000.00 the property still belongs to the deceased herein.
3. The petitioner appeared in person, the respondent was represented by the firm of M/S D.K. Lekoona & company advocates.

Facts

4. The plaintiff claims Mohamed Kismala [Gismala] married his mother Zainab Ali at Meru around 1941. According to him the couple went to Uganda where the patriarch worked with Kenya Railways. His wife came back first and then Mohamed returned to Meru at the Nubian village. where he married two other wives: Fatna Farlala and Jamila. He states there were problems between his parents and his



mother was taken by her father but they had not divorced. He lived with his mother and grandfather and worked in Nanyuki with Municipal Council of Nanyuki until his retirement but used to often visited his father at Meru and the other family members knew him as his son until recently.

5. The respondent on the other hand the respondent claims he lived with his grandfather all his life till he went to India for studies in 1974. He returned to be informed of his death while he was in India. He states the petitioner lived in the third house after theirs in the Nubian village [before moving to Salama] but did not know his parents. He contends he is a stranger. He states he has not claimed any interest in the property till 2015.

Issues

6. The issue for determination in this case is whether or not the petitioner is a legal heir of the late Mohamed Kismala and therefore entitled to a share in his estate.

Analysis

7. The petitioner produced his birth certificate and national Identity card to support his claim. The birth certificate No, xxxxxx issued on 23rd July 2014 indicate Ali Mohamed was born on 10th July 19452 [1945] at Township Meru of Mohamed Kisumula and Zainabu Ali. Although an identity card is not a conclusive evidence of paternity, the ID card clearly reflect the names of the petitioner as a child of Mohamed Kismala. Fatuma Hamisi Mugambi [PW1] born in 1928 and a neighbour of the deceased testified witnessing the Islamic marriage between the deceased and Zainab Ali at Ng'ambo ya Wanabi in Meru. Under cross examination her memory was vivid of the occasion, she as a young girl then, remembered dancing in the ceremony and that the marriage was performed by one Maalim Athman Musa now deceased.
8. Defence witness Asha Khalifa [DW1] remembers seeing the petitioner living close by at his maternal grandfather's, one Ali Kenyi but could not confirm if he was a son of the deceased herein. Kassam osman [DW2] testimony was that the deceased had only wife which contradicts even the respondent's claim. He is not aware the deceased married to Zainab. The evidence of DW3 and DW4 is lack of knowledge that the petitioner is the son of the deceased.
9. 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.
10. A marriage under Islamic law is effective upon offer and acceptance of the bride and groom and consent of the wife's waliy [guardian] and witnessed by at least two male witnesses. A marriage certificate is recommended but its lack 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], waliyy [legal guardian] and [at least] two witnesses.

11. 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.



12. Marriage certificate is now a requirement to remove disputes. However lack of a marriage certificate does not invalidate a valid marriage under the law. Sec 24 of the *Mohameddan Marriage and Divorce Registration* Cap 155 [repealed] provide:

Nothing in this Act contained shall be construed to—

- (a) render invalid, merely by reason of its not having been registered, any Mohammedan marriage or divorce which would otherwise be valid;

13. We note that the new rules for registration of Muslim marriages and divorces are yet to be published.
14. A close scrutiny of the evidence produced in the instant case, shows the petitioner's case is stronger. There is an eye witness whose evidence was not shaken at cross examination, the birth certificate confirms he was a son of the deceased herein, the national ID card further strengthens this fact. The defence evidence is based on lack of knowledge and probably alleged lack of claim on interest in the estate by the petitioner for many years. The defence witnesses confirm seeing the petitioner living neighboring the deceased house indeed the respondent himself admitted the same. This corroborates the petitioner's narration and claim. Further lack of knowledge of marriage is negative evidence, it does not prove that the fact did not happen. Article 1699 of the *Majalla [the Ottoman Courts Manual]* provides: 'the legal objective of evidence is to prove a right. Consequently, purely negative evidence is inadmissible, as where someone states that a certain person did not belong to a certain person, or that someone is not in debt to a certain person'. Further passage of time does not extinguish a heir's right to demand his or her share.

Finding

15. I find overwhelming evidence that the petitioner is the biological and legal son of the late Mohamed Kismala.

Heirs

16. The legal heirs of the late Mohamed Kismala are:

1. Nasra Mohamed Kismala daughter deceased
2. Kaltuma Mohamed Kismala daughter deceased
3. Osman Mohamed Kismala son deceased
4. Ali Mohamed Kismala son surviving
5. Mabruka Mohamed Kismala daughter deceased

Each son is entitled to twice the share of the daughter under Q:4:11

'Allah instructs you concerning your children [i.e. their portions of inheritance]: for the male, what is equal to the share of two females.

The share of each son = $\frac{2}{7}$ 28.58%

The share of each daughter = $\frac{1}{7}$ 14.28%

17. The share of the deceased primary heirs devolve to their respective heirs, the son getting twice the share of the daughter under Q:4:11.
18. The legal heirs of Nasra Mohamed Kismala are:
1. Maimuna Ahmed Mohamed daughter



2. Mohamed Ahmed Mohamed son
 3. Ibrahim Ahmed Mohamed son
 4. Ali Ahmed Mohamed son
 5. Yusuf Ahmed Mohamed son
 6. Mustafa Ahmed Mohamed son
 7. Abdul Ahmed Mohamed son
19. The legal heir of Kaltuma Mohamed Kismala is Abdalla Omar. He is entitled to her entire share.
20. The late Osman Mohamed Kismala was survived by two daughters: Fatuma Osman is deceased but was survived by children. They two sisters are entitled to two thirds of his share under Q:4:11, the surviving brother, the petitioner herein gets the remaining one third being an agnatic heir. This based on the Sunnah narrated by Ibn Abbas.
- Ibn Abbas (R.A.) narrated the Prophet (PBUH) as saying : 'the Prophet (pbuh) as saying : ' Give shares prescribed in the Qur'an [al Faraidh] to those entitled to receive them. Then what remains should be given to the closest male relative.' Nail al Awtar Vol. 6 pp 86
21. The legal heirs of Osman Mohamed Kismala are:
1. Rukia Osman Mohamed
 2. Ibrahim Ahmed
 3. Mohamed Ahmed
 4. Zeena Ahmed
 5. Zahra Ahmed
22. The legal heirs of Mabruka Mohamed Kismala are:
1. Fatna
 2. Hawa
 3. Hawa
 4. Ali Mohamed Kismala brother
23. The daughters share two thirds of the estate and the surviving paternal brother, being an agnatic [residuary] heir, the remaining one third under the hadith narrated by Ibn Abbas.
24. The final list of heirs of the late Mohamed Kismala and their respective shares are as follows:
1. Ali Mohamed Kismala son 42.86%
 8. Maimuna Ahmed Mohamed daughter 1.104%
 9. Mohamed Ahmed Mohamed son 2.196%
 10. Ibrahim Ahmed Mohamed son "
 11. Ali Ahmed Mohamed son "
 12. Yusuf Ahmed Mohamed son "
 13. Mustafa Ahmed Mohamed son "



6. Abdul Ahmed Mohamed son "
 7. Abdalla Omar grandson 14.288%
 8. Ibrahim Ahmed grandson 3.175%
 9. Mohamed Ahmed grandson "
 10. Zeena Ahmed granddaughter 1.587%
 11. Zahra Ahmed granddaughter "
 12. Rukia Osman Mohamed granddaughter 9.52%
 13. Fatna granddaughter 3.173%
 14. Hawa granddaughter "
 15. Hawa granddaughter "
25. The estate of the late Mohamed Kismala be and is hereby vested in the heirs above in the respective shares.
 26. There were five primary heirs of the deceased herein. One heir from each primary heir may be registered by transmission in the estate of the deceased herein. The heirs of each primary heir need to file written consent appointing one of them for this purpose.

Estate

27. The plot No. T/1037 [Formerly Plot No. 18 Salama village, Meru] at Meru constitute the estate of the late Mohamed Kismala.

locus standi

28. Mr. Lekoona for respondent submitted the petitioner lacked *locus standi* because he had not been issued with any letters of probate or grant of administration. The petitioner being un represented left it to court to decide. Succession in the Kadhi's Court are done pursuant to Islamic law. The [Law of succession of Act](#) is not applicable for succession of estates of deceased Muslims. Section 48(2) of the [Law of Succession Act](#), Cap 160 provide:

'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.

29. Section 2(4) of the [Law of Succession Act](#), Cap 160 provides as follows:
 - (4) Notwithstanding the provisions of sub-section (3) of the provisions of part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law shall apply in case of every Muslim dying on or after 1st January 1991"
30. Etyang J in [Chelanga v Juma](#) KLR (2002) VOL 2. 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.



31. The applicable law in succession of estates of deceased Muslims is therefore Islamic law. Under Islamic law, letters of administration is not a requirement for purpose of instituting inheritance proceedings. This is because the general rule in Islamic law of succession is that estates do not stay in abeyance, it automatically vests in the heirs [unlike in common law, not the personal representative of the deceased]. M.M.Khan in his 'Islamic law of inheritance' at, p22 states:

'Administration as understood by modern law, was unknown to Islamic jurisprudence. In Islam there is mere distribution of property of the deceased, by the state if not by the heirs themselves. Unlike other modern systems to dispose of the estate of a deceased Muslim, neither there is a need of executor or / and administrator nor probate or / and letters of administration. In the absence of an executor appointed by the will of the deceased, heirs of a Muslim have a right and capacity to dispose of the estate of the propositus according to law. In case they fail or refuse to do so, the Qazi (magistrate) may appoint an executor'.

32. Section 2(4) of the *Law of Succession Act* provides as follows:

'Notwithstanding the provisions of sub-section (3) of the provisions of part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law shall apply in case of every Muslim dying on or after January 1, 1991"

33. Regarding part VII of the *Laws of Succession Act*, Cap 160, Mohamed K. Ibrahim, J (as he then was) in civil appeal No 55 of 1999 at the High court of Kenya at Mombasa, Rashid Zahran vs Azan Zahran & 4 others, opined:

'What is the effect of this provision? It is my view that this provision can only apply where the same shall not oust the application of Islamic law and principles in connection with the administration of the estate of a deceased Muslim. It is in effect directory and not mandatory as where there is any inconsistency or doubt as far as Muslim law is concerned then Muslim law shall prevail. Any requirement that one must obtain letters of administration to the estate of a deceased Muslim before management or distribution thereof would be inconsistent with Muslim law".

He went on to find:

"Upon consideration, this court finds that letters of administration is not a requirement under Islamic law for the purpose of inheritance of succession proceedings.

34. In Misc. application No. 746 of 2011, MSA, the matter of the estate of Saidi Abdalla [deceased] and an application for the issue of a vesting order in favour of Shee Hassan Mwachangoni the petitioner in the Kadhis Court at Kwale succession cause No. 222 of 2010, the High Court, [E.M. Murrithi J] held:

"a requirement of a vesting order or a confirmation of vesting order of the High Court to confirm or approve the determination of the Kadhi's Court on matters of succession of estates of deceased Muslims has no basis in Law and is unconstitutional for offending two articles of the *Constitution of Kenya 2010*, article 170 (5) and article 159 (2) (b) and (d)... accordingly I find that the Land Registrar is constitutionally and legally bound to give effect to an order or decree of a Kadhi's Court over succession to the estate of a deceased Muslim without necessity of production of a



grant of probate or letters of administration to the said estate on transmission. [Emphasis given]

35. All a Muslim has to do to have *locus standi*, is to prove he is beneficiary of the deceased, which the petitioner has sufficiently done. Accordingly, I find, the suit was properly instituted.

Distribution

36. The respondent has incurred costs of KES 700,000.00 towards the development of the estate property. He shall recoup his expenses. Thereafter the property be managed jointly by the petitioner and respondents on behalf of the other heirs and proceeds after payment of fees and utilities be distributed to all heirs in the shares described herein above periodically but at least once every year.

Each party to bear its own cost.

DATED AND DELIVERED AT ISIOLO ON 20TH MARCH, 2017.

ABDULHALIM H.ATHMAN

PRINCIPAL KADHI

In the presence of

Mr. Denge Boru, Court Assistant

Petitioner

Mr. Lekoona for respondent

