



**In re Estate of MSH (Deceased) (Succession Cause 70 of 2013)
[2016] KEKC 17 (KLR) (5 May 2016) (Judgment)**

A M S v H A & another [2016] eKLR

Neutral citation: [2016] KEKC 17 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT MOMBASA
SUCCESSION CAUSE 70 OF 2013
AH ATHMAN, PK
MAY 5, 2016
IN THE MATTER OF THE ESTATE OF MSH (DECEASED)**

BETWEEN

AMS PETITIONER

AND

HA 1ST RESPONDENT

NM 2ND RESPONDENT

JUDGMENT

1. The petitioner claims the deceased herein left one house without land on Plot No [particulars withheld] and was survived by three sons and two daughters but that the respondent refuses to hand over the documents for the house and benefits alone with only one of the deceased's children.
2. The defendant did not file a reply but she participated in the proceedings. She contends the , house was belonged to her and the deceased and was survived by his mother, one widow, four children. She admits N is her child from another marriage but he was brought up by the deceased from infancy.

Facts

3. The deceased was an employee of Kenya [particulars withheld]. he died on January 8, 2013 at Chaani of diabetes aged [69] years. The deceased had married four wives. He had children with them. He also brought up N, the son of his last wife, the respondent herein.

Issues

4. The issues for determination in this matter are:



1. What constitutes the estate of the deceased herein
2. The legal heirs and their respective shares
3. Distribution of the estate.

Estate

5. The respondent claimed she had a share in the house. She stated the house was bought from the lump sum payment of the deceased's retirement benefit. The Approved building plan dated 11th January 1996 clearly shows the house on Plot No [particulars withheld] belonged to [particulars withheld]. He sold it to the deceased. The sale agreement dated June 10, 1997 indicates the buyer is the late MSH. We find the house constitutes the estate of the deceased in this matter.

Heirs

6. The legal heirs of the deceased herein are:
 1. KI mother
 2. HMA widow
 3. YMS son
 4. AMS son
 5. UMS son
 6. NMS daughter
 7. SMS son
7. Nassor is not a biological or legal son of the late on admission of the respondent and the child himself. All heirs agree he was brought up by the deceased as his son and even adopted his name as his father. N stated the deceased orally willed that he gets a share in the estate. All the beneficiaries do not object to the same.
8. A Muslim is allowed to give through will up to a third of his estate to non heirs. A will ought to but is not mandatory that it be written.
9. Musyoka in his *Law of Succession* 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 S & others [1929 - 30] 12 KLR 74 (Thomas J) and in the estate of Faiz Khan, deceased [1929 - 30] 12 KLR 74 (Thomas J).
10. 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".



11. NMS would thus be entitled to the estate through bequeath up to a third of the estate or equivalent of the son's share whichever is lower.

Distribution

12. If N were to be given one third he would get 33.33% while each son would get 8.33% , four times more than the share of a legal son. In the circumstances he should get up to a maximum share each son would get. Accordingly the shares of the heirs and beneficiary are:

The share of the mother = 16.66%

The share of the widow = 12.5%

The share of the daughter = 6.43%

The share of each son = 12.87%

13. Most heirs want the share in monetary terms. H and S opposed the sale but are unable to pay off the shares of the other heirs. The respondent has been using three rooms for her own and S's accommodation. She has not been distributing the proceeds of the rent. The house be valued and sold. The respondents to get first priority to buy off the shares of the other heirs.

Each party to bear its own costs

Orders accordingly.

DATED AND DELIVERED AT MOMBASA ON 5TH MAY, 2016.

ABDULHALIM H. ATHMAN

PRINCIPAL KADHI

In the presence of

Mr. Yusuf K. Abdulrahman, Court Assistant

Petitioner

Respondent

