



**In re Estate of Awadh Salim Awadh (Deceased) (Succession Cause 95 of 2013) [2015] KEKC 44 (KLR) (2 April 2015) (Judgment)**

*Fatma Kandash Suleiman v Swaleh Awadh Salim & 3 others [2015] eKLR*

Neutral citation: [2015] KEKC 44 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT MOMBASA  
SUCCESSION CAUSE 95 OF 2013**

**AH ATHMAN, PK**

**APRIL 2, 2015**

**IN THE MATTER OF THE ESTATE OF AWADH SALIM AWADH (DECEASED)**

**BETWEEN**

**FATMA KANDASH SULEIMAN ..... PLAINTIFF**

**AND**

**SWALEH AWADH SALIM ..... 1<sup>ST</sup> DEFENDANT**

**SALIM AWADH SALIM ..... 2<sup>ND</sup> DEFENDANT**

**ARIF AWADH SALIM ..... 3<sup>RD</sup> DEFENDANT**

**NAIF AWADH SALIM ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff claims the late Awadh Salim Awadh was survived by one widow, four [4] sons and three [3] daughters and left the following properties:
2. She claims none of the beneficiaries has received their respective shares and rent from estate properties, that her constant requests for accounts and distribution of the estate, the defendants failed to comply to her requests.
3. The 1st, 2nd and 3rd defendants do not oppose the petition. The 4th defendant does. He had not filed a defence to the plaint in time. He however prayed and was granted to file his defence out of time. His 'answer to petition' dated September 26, 2014 attached to the even dated notice of motion, was deemed filed and served. He also filed a further affidavit dated October 6, 2014 on the same. The 4th defendant admits the deceased left the heirs as listed in the plaint and some properties however he denies the late Awadh Salim Awadh left a slaughter house at Mariakani [Mkillo] area. He contends the slaughter house is his property as it had changed hands from the deceased to himself prior to his death. He averred



further that residential Plot 'B' is registered in his name but the deceased willed it be allocated to his female children, however he has no objection for it to be included as part of the estate. He stated he does not object for the estate to be distribute save that the slaughter house should not part of the estate. In his further affidavit the 4th defendant attached documents in support of his contention that the slaughter house.

4. The late Awadh Salim Awadh died on June 3, 2010 Mombasa Hospital aged [70] years or cardiopulmonary arrest.

### **Issues**

5. The issues for determination in this matter are:
  1. What constitutes the estate of the late Awadh Salim Awadh
  2. The legal heirs and their respective shares
  3. Distribution of the estate
  4. Whether or not the respondents should account for the proceeds of the estate from 2010

### **Estate**

#### **A slaughter house on Plot No LR 6 at Mariakani**

6. The 4th defendant claims this property is his and does not belong to the estate. The petitioner and the other three respondents agree it belongs to the estate of the deceased in this matter. They annexed a letters of allotment dated November 3, 1995. It indicates Plot No LR 6 Zone 3 at Mariakani [Kalalani] was allocated to Awadh Salim Awadh by the County Council of Kwale for slaughterhouse purposes.
7. The 4th defendant did not appear to argue his defence on the day scheduled for defence hearing. I have however considered his defence and documents attached thereto. He annexed affidavits showing his father had appointed him as manager of his business, the Mariakani slaughter house and handed the business to him, He also annexed several documents: Electricity connection, Food Licence, Overland machinery services invoices for maintenance of machinery, KRA tax returns, showing the business run in his name.
8. The 4th defendant relies on the affidavit dated June 24, 2009 at Mariakani to support his claim. Para 6 in the said affidavit is disputed. It does not appear in the same affidavit given in reply by the petitioner. The affidavit is a copy and was not tested and even if it had been authentic, which it is not, it would have had no power to give or gift to only one child out of many, according to Islamic law. It is prohibited, under Islamic law, to gift only one or some of one's children.

Nu'man Ibn Bashir said, my father went to the prophet (pbuh) and informed him, "I have gifted to this my son a male slave", the prophet asked him "have you gifted the same to all your children?" he said "no", the prophet told him, "return your gift", in another version of the hadith the prophet told him, Fear Allah and be fair to all your children", in another he said, "I shall not be a witness to an illegality'. Bukhari and Muslim

9. The 4th defendant argument support the petitioner's claim that the property was not his. Up to the time of his death, on 4th defendant's own admission, this property belonged to the deceased. He has not demonstrated how, if at all, it was transferred to him. Being a manager does not confer ownership to one. I find and hold that the slaughter house on Plot No LR 6 Zone 3 at Mariakani [Kalalani] is part of the estate of Awadh Salim Awadh.



### **A cinema and shopping complex in on Plot No 2 at Mariakani**

10. The letter of allotment dated September 20, 2002 indicate the Plot No 2 Mariakani Town measuring 0.123 Ha was allocated to Awath S Awath. The 4th defendant alluded the deceased had willed it be given to the daughters only. There is no dispute it belongs to the estate. It is so declared.

### **A residential plot 'A' at Mariakani**

11. The plaintiff's annexed a letter of allotment dated September 20, 2002 showing this plot measuring approximately 0.09 Hectares, was offered to the deceased herein for a period of [99] years. I find and hold that it belongs to the estate.

### **A KCB bank account**

12. No evidence was given of the Bank account. Unless otherwise proven, it cannot be declared part of the estate.

The estate of the late Awadh Salim Awadh consist of the following:

1. A slaughter house on Plot No LR 6 at Mariakani
2. A cinema and shopping complex in on Plot No 2 at Mariakani
3. A residential plot 'A' at Mariakani

### **Heirs**

13. There is no dispute on the legal heirs of the deceased in this matter. His legal heirs are:

1. Fatma Kandash Suleiman widow
2. Swaleh Awadh Salim son
3. Salim Awadh Salim son
4. Arif Awadh Salim son
5. Naif Awadh Salim son
6. Warda Awadh Salim daughter
7. Swalha Awadh Salim daughter
8. Samira Awadh Salim daughter

One [1] widow, four [4] sons and three [3] daughters.

14. The widow is entitled to one eighth [1/8] of the estate under Qur'an:4:12

And for them [i.e. the wives] is one fourth if you leave no child. But if you leave a child then for them is an eighth of what you leave after any bequest you [may have] made or debt.

15. Each sons is entitled to twice the share of the daughter under Qur'an: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 the widow =  $\frac{11}{88}$  12.5%



The share of each daughter =  $\frac{7}{88}$  7.95%

The share of each son =  $\frac{14}{88}$  15.9%

### **Accounts**

16. Clearly the 4th defendant is the one managing the estate properties, the other defendant do not and they also want their share of the estate. The 4th respondent is hereby ordered to give accounts of the estate since 2010 to date.
17. The plaintiff was appointed, on her application, to be the sole administrator of the estate. She is the mother of all the children. For avoidance of doubt she retains this position till the distribution of the estate is finalised. She is directed to keep records and accounts and share same with the other beneficiaries at least once a year.

### **Distribution**

18. The estate be valued and all heirs to give their proposal on final distribution of the estate. Meanwhile, net proceeds after payment of rates and utilities and other expenses be distributed to heirs in the shares indicated herein above.

Orders accordingly

**DATED AND DELIVERED AT MOMBASA ON 2ND APRIL 2015**

**ABDULHALIM H. ATHMAN**

**PRINCIPAL KADHI**

**In the presence of**

Mr. Yusuf K. Abdulrahman

Mr. Mohamed for petitioner

1st respondent

2nd respondent

3rd respondent

4th respondent

