In re Estate of OSS (Deceased) (Succession Cause 89 of 2012)
[2015] KEKC 12 (KLR) (4 June 2015) (Judgment)

In re Estate of OSS (Deceased) [2015] eKLR

Neutral citation: [2015] KEKC 12 (KLR)

REPUBLIC OF KENYA

IN THE KADHIS COURT AT MOMBASA

SUCCESSION CAUSE 89 OF 2012

AH ATHMAN, PK

JUNE 4, 2015

BETWEEN

GOS ..... PETITIONER

AND

MAB ..... RESPONDENT

JUDGMENT

1. The petitioner prays for the determination of the estate of the late OSS, his legal heirs and their respective shares under Islamic law, distribution of the estate among the legal heirs and the respondent to account for the proceeds of the estate.

2. The petitioner claims the deceased left one property, a house with land on Plot [patriculars withheld] situated at Taveta - Mwatate, was survived by a widow, four [4] daughters and three [3] sons but the respondent has taken control of the entire estate locking other heirs from the same.

3. The respondent through her statement of defence dated January 12, 2102 admits the heirs left by the deceased and that he left no liabilities. She denies the property belongs to the estate of the deceased.

Background

4. The late OSS died on May 9, 2011 at Mwatate aged [75] years. He had two wives: FA and MAB, the respondent. The first wife was divorced before his death. He had children with both wives. His FA are: G [petitioner], M, R, M and R O S. His children with M A B are: S and J O S. The deceased had been living in a house in Mwatate. The petitioner and her mother were out of the country in the Middle East working. He left and developed another house on Plot No [particulars withheld] where he lived with the respondent till his death in 2011.

5. The petitioner claim the deceased only left the property on Plot [particulars withheld] which should be distributed to all heirs. The respondent on the other hand claim both houses belonged to the deceased and he gave the first house on Plot [particulars withheld] to his first family and the one on Plot No. [particulars withheld] to the second family, herself and her children.

Issues

6. The main issue for determination in this matter is what constitutes the estate of the late OSS, specifically whether the alleged gift of the house with land on Plot No[particulars withheld] Mwatate is legal and valid.

Estate

7. The respondent stated in her evidence that the deceased owned the house on [particulars withheld] which R, the petitioner sister, forced their father and her to vacate for them. The petitioner's argument is that the property belonged to her mother. Whether or not a property belongs to an estate is an important claim that should have been specifically pleaded. It was not. Further no evidence was adduced to prove the same. I cannot find that the house on Plot No [particulars withheld] belongs to the estate. The respondent and one of her witnesses alluded that the deceased left a farm. It is rejected for the same reason.

   The house with land on Plot [particulars withheld] Mwatate A.

8. In her petitioner, the petitioner cited the property as Plot No.[particulars withheld]. The copy allotment letter attached to the petition was faint and not clear. It could be the reason of the error. Another copy of the allotment letter and a demand notice were produced that clearly show Plot No [particulars withheld] Mwatate A is registered in the name of OS. The respondent herself does not claim the property is registered in her name, she admits it is registered in the name of the deceased herein. She in fact does not categorically state [neither in her defence nor in her evidence in chief] that the property belongs to her or was gifted to her. She however called witnesses who testified that it was gifted to her and her children by the deceased. I take her position to mean that the property does not belong to the estate by virtue of gift by the deceased to herself and her children. Respondent's own witnesses confirm the house belonged to the deceased herein. I find the house with land on Plot No [particulars withheld] Mwatate 'A' belonged to the late OS.

9. The question that remains is whether it is available for distribution or it is now the property of the respondent and her two children by virtue of gift or will? This is a question of law on gifts. Mr Mwawasi for the respondent submitted the Muslims are allowed to give gifts inter vivos. He relied on a treatise Law of Succession by *William Musyoka and Gulab v Khaleq* [1963] EA 523. Mr Mazrui for the petitioner submitted that under Islamic law there is no bequest to a heir and even to a non heir it is limited to third of the estate. He argues even if the deceased had gifted the property to the respondent, it could not stand because she and her children are heirs and the property is the entire estate.

10. Did the late OSM actually gift the property on Plot No. [particulars withheld] to the respondent and her two children? The respondents called three witnesses to support the claim that the deceased gifted her the property. The alleged gift was not documented. RM DW1 testimony is that the late OS told him that he had left a will 'that in the event of his death that his first wife and their children had gotten the first house and farms and the second wife and her children should get the second house'. He stated that both houses are registered in the name of the deceased. JOS's DW2, evidence is that his father had two houses, that his daughters told him to vacate the first house and that he told him the first house

was for his first family and the second house was for his two children with the respondent but that they should not chase their mother. ROS's [DW3] evidence is that the deceased orally willed to her that the property at Taita be issued to M, J, and S but later she states the house is for the widow and sons, under cross examination she reiterated that it was for the sons.

11. The will was not documented. The witnesses state it was made orally apparently at different times with different people. DW1 evidence is that the house is for the second family, DW2's evidence is that it for J and M only, while DW3's evidence is that it for the three sons only. This is a clear contradiction on the content of the oral will. DW2 and DW3 are children of the deceased, they may have an interest in the will and the other children are not aware of the will. Their testimony on the same cannot stand.

12. It is important, under Islamic law, but not mandatory, that a will must be documented and signed by the testator. If given orally, the will must be witnessed by at least two male adult Muslims.

    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.

    Musyoka, Law of Succession, pp 293.

13. In this case there are many contradictions to the contents of the will and there are insufficient and unreliable witnesses. I cannot find that the late OSS bequeathed the property.

14. None of the witnesses gave evidence that the deceased gifted the house to the respondent. A gift transfers ownership between living persons when they are still alive. Mr. Mwawasi correctly submitted that Islamic law allows Muslims to give gifts inter vivos. The prophet Muhammad [pbuh] encouraged Muslims to give out gifts. He is reported to have said: 'Give gifts to each other, you will love each other more'. It however has put in limitations to this act. When giving gifts to one's family, one is obliged to be fair to all his children. When giving to non heirs, it should be reasonable and not more than one third of one's property.

    > 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

15. Abi Umama al Bahily [RA] narrated that the Prophet (PBUH) in his last sermon at Mt. Arafat said: "Allah has prescribed specific shares to each heir, there is no bequeathing to a heir"

16. Ref: Abu Daud 3/411 (2870), Al Tirmidhi 4/433-434 (2120), Ibn Maja 3/93 (2763), Ahmad 36/268 (2743),Nail al Awtar 6/40; Nusbul Raya 4 /403.

17. Minhaj et Talibin, a manual of Islamic law according to the school of Shafii by Nawawi [1914] as translated by E.C. Howard, it is stated at page 260 - 261 that:

    "testamentary disposition may not exceed a third of the estate; and those made in contravention of this precept of the law, may be reduced to the portion which may be disposed of, upon the application of the legitimate heir. If he declares his approval of the disposition, it is effective, whatever it amounts may be; but according to one jurist it is then considered as mere donation upon the part of the heir, and the legacy itself remains void for as much as exceeds the third."

    Musyoka in his treatise ' Law of Succession' observes:

"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 Salim & others [1929 - 30) 12 KLR 74 (Thomas J) and in the estate of Faiz Khan, deceased [1929 - 30] 12 KLR 74 (Thomas J).

Musyoka, Law of Succession, pp 291 - 292.

18. In *Gulab v Khaleq* [1963] EA, the beneficiary of the written will was a sister and not a heir in the estate. The case is markedly different from the one in this matter. That decision also sets out the conditions for validity of a gift inter vivos under Muslim law [manifestation of the wish to give on the part of the donor, acceptance by the donee and taking of possession of the subject matter of the gift by the donee] which have not been fulfilled in the alleged gift in this case.

19. I find and hold that the late OSS neither willed nor gifted his property to any of his beneficiaries. If he had, it would still be a nullity, the beneficiaries of the will also being some of his heirs while the others were not issued with any property. The house with land on Plot No.[particulars withheld] Mwatate 'A' constitutes the estate of the late OSS. It is available for distribution to heirs.

Heirs

There is no dispute on the heirs of the deceased herein. They are:

1. MOS son

2. GOS daughter

3. ROS daughter

4. MOS daughter

5. ROS daughter

6. MAS widow

7. JOS son

8. SOS son

The share of the widow = 12.5%

The share of each daughter = 8.75%

the share of each son = 17.5%

20. The share of the first family [FA's children with the deceased] is 52.5%

21. The share of the 2nd family [MA and her children with the deceased] is 47.5%

22. The estate property is hereby vested in the heirs in their respective shares. It be valued and parties to present proposals on its distribution.

23. The Respondent to file accounts of the proceeds of the estate property for consideration during final distribution.

Orders accordingly.

Costs to the petitioners.

Dated and delivered at Mombasa on 4th June 2015.

ABDULHALIM H. ATHMAN

PRINCIPAL KADHI

In the presence of

Mr. Mazrui for the petitioner

Mr. Mwawasi for the respondent