



REPUBLIC OF KENYA

IN THE KADHI'S COURT AT NAIROBI

SUCCESSION CAUSE NO. 60 OF 2013

IN THE MATTER OF THE ESTATE OF RAMADHAN HASSAN (THE DECEASED)

AND

NAOMI NZULA KAVOI.....PLAINTIFF/APPLICANT

V E R S U S

SALIM RAMADHAN..... DEFENDANT/RESPONDENT

JUDGEMENT

The deceased whose estate is the subject of these proceeding died in May 2012.

The applicant by way of OS and supporting affidavit dated 15th February, 2013 and received in the court on the same date, seeking this Honorable Court to hear and determine the dispute in accordance with the Islamic Laws.

It is not disputed that **Ramadhan Hassan** (herein after 'the deceased') died a Muslim and died intestate leaving behind following issues:-

- a) Hassan Ramadhan - born 1978**
- b) Hadjia Ramadhan - born 1980**
- c) Mohamed Ramadhan - born 1983**
- d) Musa Ramadhan - born 1988**
- e) Ali Ramadhan – born 1990**
- f) Mwanaidi Ramadhan - born 1991**

It is also not in dispute that the deceased owned the following properties at the time of his death.

- i. A residential house in Kariobangi South, Civil Servants Estate House number 11 L.R No. Nairobi Block 96/200.**
- ii. A plot No. 2453 at Kwandolo Settlement scheme.**

The matter came up for hearing on 20th January 2014 where both parties, represented by advocates,

articulated their respective positions.

The argument by the Applicant was that she got married to the deceased under Islamic Law on 10/6/1983 and was issued with a marriage certificated serial number **B06022** by the assistant registrar of Mohammedan Marriage and Divorce. (Marked as exhibit '**PEx1**')

The Applicant also argued that the respondent was divorced by the deceased vide Divorce letter dated 24/2/1996 (marked as Exhibit '**PEx2**').

The plaintiff further testified that Suleiman Ramadhan was the son of the deceased. He was born on 6/12/1983, six (6) months after the marriage between the applicant and the deceased. And that the deceased did not at any point neglect the needs of Suleiman Ramadhan.

He was educated with the rest of his siblings from the rental proceed of the property situated in Kariobangi. And as such he is legally entitled to inherit from the Estate of the deceased.

The applicant further stated that she was not aware of the existence of Plot No.2584 and 2585 and that the respondent is the custodian of all the original documents as to the property of the deceased.

Lastly the applicant submitted that if indeed Plots No. 2584 and Plot No. 2585 form part of the estate of the deceased, the said property be shared equally amongst the two households in accordance with Islamic Law of inheritance and each family receives a fair share of the estate.

The argument by the Respondent was that she was the only rightful widow of the deceased as she has never heard of the marriage of the applicant though she knew the applicant was cohabiting with the deceased.

The Respondent further argued that she was married under Islamic Law to the deceased in 1977 in Kericho at her sister in law's house and that she was not aware of the alleged claims and their marriage was blessed with three(3) issued namely:-

a. Hassan Ramadhan

b. Mohammed Ramadhan

c. Khadija Ramadhan

She further testified that the applicant and deceased never married and disputed the veracity of the marriage certificate issued on 13/4/2012 vide Forensic Document examination Report marked as '**DEx1**' which was presented to Court by DW 1 the Chief Inspector of Police Jacob Oduor.

She further submitted that the applicant was aware of existence of another second plot bought and curved at from plots No. 2584 and 2585.

The Respondent prays that the court hold that no marriage exists between the Applicant and the deceased which also leads Applicant's children to be the illegitimate children and hence no entitled to inherit the deceased.

Lastly the Respondent submitted that Suleiman Hassan the first born of the Applicant was illegitimate son of the deceased for the reason that the known gestation period of a human being is nine months vis a vis the alleged date of marriage of 10/6/1983 and the date of birth of Suleiman on 6/12/1983.

Having given due consideration to the evidence and submission by the parties the questions which, therefore, fall for my consideration are:

1. Whether or not the applicant was legally married to the deceased?

2. Whether or not Suleiman Hassan is the legitimate child of the deceased?

3. Whether or not the Respondent was legally divorced by the deceased before his death?

4. Whether or not plots No.2584 and 2585 constitute the estate of the deceased?

5. The mode of distribution.

To answer the question whether or not the applicant was legally married to the deceased?

Let us consider the concept of marriage under Islamic Law. Marriage under Islamic Law is a civil contract requiring no ceremony or special formality.

In Harvard Law Review, XXVII, 387 an article appears on '**Requisites and proof of common Law marriage**'. F.B. Tyabji in his Mohammedan Law at Pg 101 said the Principles stated in the article may be helpful in the decision of similar questions arising under Mohammedan Law. The article reads this:-

“From early times, it has not always been clear that acts were necessary to the validity of a marriage. According to early civil law the consent of the parties was sufficient but it seems doubtful, whether under the early English common law a marriage without a minister was valid. In this country however many states have adopted the view that a marriage be valid even without even without a ceremony before third parties.”

The rule is usually stated to be that an agreement to be married henceforth, followed by cohabitation, constitutes the so called common law marriage. But both on principle and authority, it would seem that the agreement alone is sufficient to consummate a common law marriage, and that the subsequent cohabitation is important only as evidence of the agreement.

There is no dispute that the Mohammedan Marriage among Muslim is not Sacrament but purely civil contract. Marriage brings about a relation based on and arising from a permanent contract for the intercourse and procreation of children between man and woman who are referred to as parties to the marriage and who after being married become husband and wife.

Though generally solemnized with recitations from Quran, yet no positive service peculiar to the occasion is prescribe by law; writing not required, validity and operation of whole depends upon declaration or proposal and acceptance or consent of contracting parties before competent witness; (Bail 1.4).

In *Asha B. v Kadir B (1909) 33 mad 22* it states that,

“Marriage is contract between parties to live as husband and wife for term of their lives.”

The Islamic Law does not insist upon any particular form in which the contracted performance should be effected or that ***“the union should be evidence by any writing nor is the presence of witnesses essential for the validity.”***

In this connection Syed Ameer Ali in his Mohammedan Law, 6th edition, following *Fatawae alamgiri* vol. 11 pg 209 and *Radd –al-Muktar* Vol.11 pg 429 opined, though among the sunnis the presence of witnesses is considered necessary to the validity of a marriage their absence only renders it invalid which is cured by consummation.

A marriage contract, it is stated, as a civil institution, rests on the same footing as other contracts. The parties retain their personal rights against each other as well as against strangers and according to the majority of the scholars have power to dissolve the marriage-tie, should circumstance render it desirable.

The question whether there was a marriage or not is one of fact. It is a view of the court that marriage may be proved directly or presumptively; directly by means of the oral testimony of the witnesses present

at the marriage or by documentary evidence in the shape of a certificate of marriage signed by both parties and their witnesses; presumptively by statement of parties or by evidence of conduct and reputation.

It is clear from the evidence adduced before the court the applicant failed to prove her marriage to the deceased by calling witness who were present at time of marriage and in regard to the applicant exhibit no. 1 being her alleged marriage certificate has been disputed and discredited by DW 1 who presented to court defence exhibit No. 1 being the forensic report which cannot stand in Law, thus the applicant evidence marked 'PEX1' is forged and cannot stand in law.

The Court's attention was drawn to Faiz's B Tyabji, Mohammadan Law in chapter 'proof and presumption of marriage' in paragraph 81 states;

"When the question arises whether a marriage has been contracted in due form, the burden of proving that the alleged wife consented to it is upon the person who affirms it; provided that unless the parties were prohibited from inter-marring it is in the following cases presumed that they were validly married and the burden of proving that their cohabitation was illegal viz where it is proved that the parties cohabited together continuously and for a long period as husband and wife and were treated as such by their friend or either party has acknowledged that he/she was married to the other and the other party has been confirmed in acquiesced in, the acknowledgement".

There exceptions to the presumption of cohabitation, it is said – co-habitation means something more than mere residence in the same house.

Residing as a menial servant, in the house of a Muslim and bearing a child to him does not raise presumption of marriage or where the relation admittedly began as concubinage, lapse of time, and property of conduct and the enjoyment of confidence with power of management reposed in the woman cannot sufficiently raise presumption of subsequent marriage.

The Court's attention was drawn to decision of **Mohammed Amin v Vakil Ahmed AIR 1952 SC 358** – decided by Mahajan J and Bhagwati J.

The Court stated that a presumption in of a lawful marriage arose in the absence of direct proof, based on a prolonged and continuous cohabitation as husband and wife.

It is a court view that in the absence of a direct proof , the presumption in favour of a lawful marriage arose where there is **"no insurmountable obstacle to such a marriage"**- such as prohibited relationship between the parties, the woman being an un-divorced wife of a husband who was alive, etc.

Based on the fact of the case – the Applicant and the deceased had lived together continuously for a period of thirty (30) years openly and to the knowledge of respondent all their relatives and friends, the children born through the relationship stayed with the applicant and the deceased.

It is the Court's view that a woman's failure to produce or prove the marriage contract in court does not imply that her marriage is invalid or that she is not entitled to any matrimonial right.

She can gather and produce evidence indicating prolonged and continues cohabitating with her husband. If the husband or any other party denies the marriage to court, it would be the responsibility of such a person to prove that the marriage is not lawful.

In the premises given above and in absence of proof by the Respondent the presumption of marriage holds ground and the Defendant is considered as having failed to discharge the burden of proof and has insufficiently failed to establish that there was unlawful marriage between the applicant and the deceased.

To answer whether or not Suleiman Hassan is the legitimate child of the deceased;-

In Islamic Law paternity of a child is confirmed by any of the three (3) ways viz;

- **Marriage**
- **Acknowledgement**
- **Evidence**

The first is the most important. From the marriage there comes the offspring. It presupposes that the child had parent from the valid marriage. Paternity of a child therefore under sharia is quite important.

A child without traceable father does not command respect and honor from the eyes of the public. He suffers psychological debasement in the society for not just fault of his.

This is why legitimacy is viewed with all seriousness in Sharia legal system. That is why the Great prophet (S.A.W.) once admonished this:

“A woman who ascribes a child’s legitimacy, to someone who has not responsible for it is conception has committed a grave offence thereby alienating herself from God and will be denied the bliss of eternity. Likewise a father who obscures his child’s legitimacy by denying his responsibility from its conception has offended God and inflicted on himself universe disgrace.”

It follows from the above Hadith, therefore, that if a child is born outside wedlock is not considered legitimate. But if the illicit relationship is established appropriate sanctions on the parties involved are given.

However, when a child is born in wedlock the delivery must have been within the generally acceptable period of gestation, being the minimum or maximum. The general view of majority of Islamic jurist is that a period of six months less five days, after consummation of the marriage or possibility of consummation of marriage, is regard to be the minimum period of gestation.

Imam Malik , Shafi and Ibn Hanbal agree to this view. Imam Hanifah on the other hand considers the child legitimate six months after the conclusion of the marriage contract not necessary consummation of the marriage.

See Ad-Dasuki’s Hashiyat ala al sharh al Kabir vol. 2 page 459 and Ibn Rushd’s Bidayat al Mujtahd wa Nnihayat al Muqtasid vol. 2 pg 352.

Taking general view of the majority of the Islamic Jurist into consideration where a child is born in a legal wedlock but under a period of six lunar months less five days from the date of marriage then the child cannot be attached to that husband.

The authority of this statement is to be found in the *Jawahir al iklil* in pg 381.

“Under no circumstance shall pregnancy or child (of marriage) be denied where the wife delivers complete baby within a period lesser than six months five or six days less, from date of the marriage contract. In that situation, paternity can denied without the necessity of having resource to lian (Mutual imprecation) as there exists a legal barrier (between the child and its suspected father)”.

Therefore by way of summary for the purpose of Islamic Law, a paternity is presumed where:-

- Marriage contract exists between the spouses either de jure or de facto.
- There is actual consummation or possibility of consummation between the spouses without any hindrance. This include seclusion between the spouses (Khalwah) sleeping together (mabeet); letting loose the curtain.
- The child is born between the minimum or maximum period of gestation.
- There is no legal denial, done by the spouses.

In the premises given above the Suleiman Hassan was born in a lawful union between the applicant and the deceased and that he was born within the minimum period required by law and that Suleiman Hassan is a legitimate child of the deceased.

To answer the question whether or not the Respondent was legally divorced by the deceased before his death:-

The Court's attention was drawn to Al Quran Surah At-talaaq V 1 and 2.

“.....and take from witness two person from amongst you endured with justice and establish the evidence.”

The mandate conformable to Law derives from the word “wa ashhidu (take from witness) on the above Quranic verse in a subject of contravening in as much as whether it is incumbent or merely desirable.

According to the jurist belonging to the known four (4) schools of legal thought the presence of witnesses is no condition from the divorce being effective. It is rather desirable.

It is a trite law that if a document is alleged to be signed or to have been written wholly or in part by any person the signature or the handwriting if so much of the documents as is alleged to be in person's handwriting shall be proved to be in his handwriting.

In regard to the applicant Exhibit marked 'PEx2', Talaq Letter, dated 24/2/1996 the signature and the handwriting of the deceased as alleged was never proven by the applicant thus failed to stand in law.

It is also in the view of the Court that the knowledge of the wife is necessary for certain collateral purposes.

In the premises given above, the Respondent was not legally divorced by the deceased before his death.

To answer whether or not plots no. 2584 and 2585 constitute the estate of the deceased:-

The Court' attention was drawn to the decision of Eunice Karimi Kibuja V Mwirigi M'ringera Kibunja Court of Appeal case No. 103 of 1996 wherein it is stated that;

‘A Court should not make a finding without evidence before it’.

It is the view of the Court that sufficient evidence has not been adduced and indeed if plots no. 2584 and plot 2585 form a part of the estate of the deceased the said property be shared amongst the two household in accordance with the provision of Islamic Law of succession and each beneficiary receives a fair share of the estate.

To answer the question on the mode of distribution the Court attention was drawn to Holy Quran chap 4 verse 11 and 12 as follows;-

“Allah commands you regarding your children – for the male a share equivalent to that of two females....”

“And for them (your wives) one forth of what you leave behind, if you did not have a child but if you have a child then for them one-eighth of what you leave behind.”

The above verse does specify that a daughter should inherit half of the amount her brother inherits. It also specifies that a widow who has children is entitled to one eighth of the estate.

The Court's attention was drawn also to chapter 24(4) of the constitution which states as follows:-

“The provision of this chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim Law before the Kadhis Court to persons, who profess the Muslim religion in matter relating to personal status, marriage divorce and inheritance”

Nevertheless, given the Quranic specification it appears that male siblings inherit double the amount inherited by his sister but there is one vital justification on variations.

The mount inherited by the sister is a net amount added to her wealth – this is a consequence of the rule of maintenance under Islamic law; A woman has exclusive right of disposal over her property whether she inherits it or earns it. She has no financial obligation/liability of maintaining even her children. The husband is bound to maintain her and her children however considerable her wealth may be.

The amount inherited by a brother is a gross amount from which he will have to deduct the expenses of supporting the various women, elderly men and children in the family. Thus the share given to a man is in proportion to his responsibilities and not due to any superiority over the female.

The Court attention was also drawn to the decision of Indian Court of Appeal of ***Ibrahim Aboobaker and Anor. Vs. Teik Chand Dolwani and others.*** (AIR 1953 SC 298; (1954) 56 BOMLR6) wherein it stated that:

“It is well recognized proposition of law that the estate of a deceased Mohammedan devolves on his heirs in specific shares at the moment of his death.....”

These facts illustrate what Jurists have known all along namely that inheritance law under Islamic Law are quite complicated and cannot be reduced to a single slogan.

It is the view of the court that the provisions of Mawarith (Succession) give each heir his/her divinely-fixed shares. Effort must be made to uphold the injunctions no matter the complexity.

In the premises given above the division and distribution of the deceased’s estate shall take the following mode:-

- i. Rukia Ramadhan (widow) - 6.26 %***
- ii. Salima Ramadhan (widow) - 6.26 %***
- iii. Suleiman Hassan (son) - 14.58 %***
- iv. Hassan Ramadhan (son) - 14.58 %***
- v. Ali Ramadhan (son) - 14.58 %***
- vi. Musa Ramadhan (son) - 14.58 %***
- vii. Mohamed Ramadhan (son) - 14.58 %***
- viii. Mwanaidi Ramadhan(daughter)- 7.29 %***
- ix. Hadjia Ramadhan (daughter) - 7.29 %***

Orders accordingly

Dated and delivered at Nairobi this 28th day of March, 2014.

HON. A.I. HUSSEIN

KADHI – NAIROBI

In the presence;

Mr. Ali for Respondent

Applicant

Respondent