



REPUBLIC OF KENYA



KENYA LAW
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**Mwangi v Mwangi & 4 others (Civil Appeal E095 of 2022)
[2025] KECA 925 (KLR) (7 March 2025) (Judgment)**

Neutral citation: [2025] KECA 925 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E095 OF 2022
AK MURGOR, P NYAMWEYA & GV ODUNGA, JJA
MARCH 7, 2025**

BETWEEN

DEPHINE IBRAHIM MWANGI APPELLANT

AND

AYUB MZEE MWANGI 1ST RESPONDENT

KIBIBI WAIRIMU MWANGI MZEE 2ND RESPONDENT

RAMADHAN MWANGI MZEE 3RD RESPONDENT

ELIZABETH NYAMU 4TH RESPONDENT

NORAH SHADRACK GAKERE 5TH RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Mombasa (J. N. Onyiego, J) delivered on 20th June, 2022 in Succession Cause No. 34 of 2019)

JUDGMENT

1. Mzee Ibrahim Memia (the deceased) passed away on 9th December 2018 leaving a will dated 13th March 2001. In his will, the deceased appointed the appellant, whom he referred to as his wife, as the sole executrix of his estate and named the appellant and Salma Ibrahim Memis, his daughter, as the only heirs to his estate. Listed as his properties were LR No. 2105 Mombasa Municipality Mainland Section 1 measuring 0.0312 ha, LR No Kilifi/Mtwapa/1368 measuring 2.43 ha, LR No. 2095 Mombasa Mainland North measuring 0.0302 ha and “any other property that may be considered as inclusive”. The deceased gave the appellant the power to distribute the estate as she wished.
2. Upon the death of the deceased, the appellant, on 2nd July 2019, petitioned for grant of probate of written will, disclosing the heirs of the deceased as herself as the deceased’s widow; the 1st, 2nd and 3rd respondents as the deceased’s sons and Salma Wanjiru Memia as the deceased’s daughter. On 6th



March 2020, a grant of probate of written will was issued to the appellant and vide summons dated 15th September 2020, the appellant applied for the confirmation of the said grant. However, the respondents, by summons dated 16th November 2020, applied for revocation and annulment of the said grant and sought orders that they be declared as dependants of the deceased entitled to benefit from the estate; that the distribution of the estate be done in accordance with Islamic Sharia Law; that the said will be investigated by the relevant authorities and consequently expunged; that the estate of the deceased be declared as intestate and be shared as provided by law; and that the court be pleased to grant any other order it may deem fit to grant in the circumstances.

3. The respondents in their summons contended that the 1st to 3rd respondents were children of the deceased, while the 4th and 5th respondents were the deceased's wives having married the deceased under customary law; that the appellant was equally the deceased's wife; that the deceased died a Muslim and the respondents were also Muslims; that the estate of the deceased should be shared out in accordance with the Islamic Sharia Law; that being a Muslim, the deceased ought not to have written a will excluding the respondents; and that the deceased having died a Muslim, the respondents, being his dependants, ought to benefit from his estate.
4. In response, the appellant filed a replying affidavit in which she deposed that the 1st and 2nd respondents were children of the 4th and 5th respondents respectively; that she was the one who brought up the 1st and 2nd respondents in her home during the absence of the 4th and 5th respondents who had separated from the deceased; that the 4th and 5th respondents did not celebrate any marriage with the deceased under Islamic Law or tradition hence could not claim to be subject to Islamic Law; that the deceased had three children with the 5th respondent who was his first wife, those children being the 1st respondent, the 2nd he deceased life after the 5th respondent left and together they sired the 3rd respondent; that the 4th respondent also left sometime in 1975 leaving behind her child as well as those of the 5th respondent under the care of the appellant; that the 4th and 5th respondents moved on with their lives and even bore other children with other men contrary to Islamic Law; that she solemnised her marriage with the deceased before the Registrar of Marriages in Nairobi in 1994 after their long period of cohabitation; that although the deceased was a Muslim, he opted for a civil marriage ceremony as opposed to an Islamic or Mohamedan one; that both herself and her daughter, Salma, were not Muslims; and that she did not file the succession proceedings secretly since she disclosed all the children of the deceased.
5. The appellant disclosed that she met the deceased while she was working as an administration manager with East African Office Equipment and that together they bought properties in Kilifi and Kongowea; that the two properties cannot therefore form part of the deceased's estate as they are matrimonial properties; that she had no idea why the deceased excluded the respondents from his will although the deceased was not in good terms with the 1st to the 3rd respondents who never even visited him when he was bed-ridden; and that she was not opposed to the court making provision for some of the excluded dependants.
6. The matter was canvassed by way of viva voce evidence. The 1st respondent stated that the deceased was his father while the 3rd respondent was his step brother from the 4th respondent's house; that and apart from the appellant, the deceased had been married to the 4th and 5th respondents; that he was the son of the deceased's 1st wife, the late Norah (the 5th respondent) and that the 4th respondent was the deceased's second wife; that his ground for seeking the revocation of the grant was their exclusion from the deceased's will; that the deceased was a Muslim and he was also a Muslim; that the 4th respondent was however not a Muslim and had a marriage certificate; that Muslims do not write wills as they are governed by Sharia Law; that being a Muslim, the deceased's estate ought to be distributed in accordance with the Islamic Sharia Law and not in accordance with his will which is not recognised



under the Islamic Law; that the appellant was not a Muslim and was married to the deceased at the office of the Registrar of Marriages in 1994; that his mother was married in accordance with the Islamic Law although no marriage certificate was issued; that there was a letter written by the deceased disclosing that he had paid dowry; that his mother had three children, himself, the 2nd respondent and one Mercy who was not the deceased's child; that it is not proper for a Muslim to marry in the Attorney General's office; that while it was true that the deceased wrote a will, under the Islamic Law it was not right to do so; that while it was true that it was appellant who raised all the deceased's children after the 4th and 5th respondents separated from the deceased, there was no divorce between the deceased and the latter two; that while the Kilifi property was bought during the period of the marriage between the appellant and the deceased, the Kongowea property, a storey building with two floors, was one storey when the appellant got married to the deceased.

7. In her testimony, the 2nd respondent relied on the contents of her affidavit sworn on 2nd December 2020 in which she deposed that the deceased had three wives, the appellant, the 4th and 5th respondents; that the deceased was a practising Muslim hence his estate ought to be distributed in accordance with the Islamic Law; that the deceased never made any provision for her and other dependants in the will; that the deceased ought not to have made the will since it is not provided for in Islam hence ought to be revoked; and that she ought to get her share of the estate under the Islamic Law. The 3rd respondent's evidence corroborated the evidence of the 1st respondent.
8. In her evidence the appellant reiterated the contents of her replying affidavit and while admitting that she was a Christian, insisted that the will was valid and lawful; that she was ready to distribute part of the estate to her step children.
9. In his judgement, the learned Judge identified for his determination the following issues: whether the respondents had met the criteria for revocation of the grant; and whether the will was valid. In determining these issues, the learned Judge found that the deceased had married thrice in his lifetime, the 4th and the 5th respondents having been married under customary law; that the 4th and 5th respondents separated with the deceased in early 1960 and 1970s respectively; that the appellant celebrated her marriage with the deceased at the Registrar of Marriages office in 1994 after a long cohabitation; that the 1st, 2nd and 3rd respondents were the deceased's children; that the deceased also had a daughter named Salma with the appellant; that the deceased was a Muslim who executed a will bequeathing all his property to the appellant who was to decide how to distribute the same; that the respondents failed to meet the threshold of proving that the proceedings were defective in substance since no procedural or substantive fault in instituting or prosecuting the application for the grant of representation was proved; and that there is no requirement in a probate application that the applicant must disclose the deceased's faith.
10. According to the learned Judge, the key element in determining one's faith is whether he professes it and not whether he is a strict adherent of that faith; that the deceased was a Muslim and died a Muslim hence section 3(2) of the *Law of Succession Act* came into play; that since the deceased died a Muslim, the distribution of his estate was to be guided by the Islamic Sharia Law; that based on the case of Saifudean Mohamedali Noorbhai v Shehnaz Abdihussein Adamji (2011) eKLR (Saifudean) and Gubo Darche and 2 Others (2019) eKLR Islamic religion does not per se or absolutely bar the element of writing a will as a mode of distributing an estate save for the limitation that only one third of the estate should be bequeathed through a will; that the will did not conform with the qur'anic principles which emphasises on the need to balance between a Muslim's testamentary freedom and the responsibility to one's heirs; and that having failed to bequeath 1/3rd of the estate by a will and 2/3rd remainder to other heirs, the will was invalid.



11. The learned Judge then nullified the will and revoked the grant of probate. He proceeded to deal with the issue whether the appellant, a Christian, was legally married to the deceased, who was a Muslim. Based on the cases of Ramadhan Mustafa v Zulfa Ngasia Juma [2019] eKLR and Re Salum [1973] EACA 522, the learned Judge found that the appellant was properly and legally married to the deceased hence entitled to a share of the deceased's estate in her capacity as a widow. The learned Judge also found that the 4th and 5th respondents were recognised by the appellant as the deceased's wives and since they never divorced nor remarried, were wives of the deceased and their children, born out of the marriage, were heirs to the deceased.
12. The learned Judge then directed that fresh grant of letters of administration intestate be issued to the appellant, as the only widow residing within the estate and ranking in priority to the children and directed that the Islamic Sharia Law would apply to the distribution of the estate save for the matrimonial properties that were acquired after the appellant got married to the deceased; that LR No Kilifi/Mtwapa/1368 and LR 2095 be first shared equally between the appellant and the deceased's estate and the remainder to form part of the estate to which the 7 heirs would share in accordance with the Islamic Law; and that as regards, LR 2105 which was acquired in 1973 before the appellant was married, but developed during the subsistence of the marriage with the deceased, it be shared out in accordance with the Islamic Sharia Law amongst the seven beneficiaries.
13. In his final orders, the learned Judge after setting out the assets and the beneficiaries of the estate directed that the estate be shared out in accordance with the Islamic Law to the 7 heirs and directed that the file be forwarded to the Chief Kadhi for valuation and determination of each heir's share and that a report on the same be filed within 45 days for the final orders and issuance of a certificate of confirmation of the grant.
14. Aggrieved by the said decision, the appellant lodged this appeal contending that the learned Judge erred in law and fact: in finding that the deceased was a Muslim, a fact undenied and uncontested; in finding that the deceased's actions were diametrically conflicted to the practice and tenets of Islam; in failing to hold that an individual has a superior constitutional and personal right over his property both in life and in death; in holding that the deceased's constitutional right to property and testamentary disposition was secondary to his religious persuasion; in holding that the deceased could not will away his property; in directing the deceased assets be distributed by the Kadhi's court in accordance with Sharia Law whereas the appellant is a Christian; in identifying the 4th and 5th respondents, the former partners of the deceased, as beneficiaries of the deceased's estate; in failing to recognise that under Sharia Law, a spouse when divorced is not recognised as a beneficiary of the estate; in applying and misapplying the law thus providing conflicting applications of the law; and in failing to apply either the law of succession fully or Mohamedan Law and not both, therefore arriving at the wrong conclusion and judgement.
15. It was sought that the appeal be allowed, the will, executed by the deceased on 13th March 2001, be recognised to be the testamentary disposition of the deceased, the grant of probate issued on 6th March 2020 be reinstated and that the appellant be awarded the costs of the appeal.
16. We heard this appeal on this Court's virtual platform on 15th July 2024 during which learned counsel, Mr Matheka, appeared for the appellant while learned counsel, Mr Lianza, appeared for the respondents. Both counsel relied on their written submissions which they briefly highlighted.
17. As regards the appeal, it was contended on behalf of the appellants that the learned Judge failed to appreciate that the deceased had a constitutional right to dispose of his property as he saw fit; that the learned Judge failed to consider the fact that the appellant and her daughter were covered under the



Marriage Act since the appellant was married to the deceased in a civil marriage; that the deceased, a Muslim opted to wed in civil ceremony; that the appellant and her child did not profess the Muslim faith and on the authority of *CKC & CC v ANC*, Msa CA No. 121 of 2018, were not subject to the jurisdiction of the Kadhi's Court.

18. On their part, the respondents submitted that the appellant in her affidavit and submissions acknowledged that the deceased professed Islam and was a Muslim as defined in the case of *Sakina Sote Kaitany & Another v Mary Wamaitha* [1995] eKLR, and this fact was observed by the learned Judge; that being a Muslim, the deceased was bound by the doctrines of the Islamic Sharia Law; that Islamic Sharia Law allows a union between a Muslim man and a non-Muslim woman as held in *Ramadhan Mustafa v Zulfa Ngasia Juma* (supra) and hence his actions were not diametrically conflicted to the practice and tenets of Islam; that on the authority of the cases of *In Re Estate of OSS (Deceased)* [2015] KEKC 12 (KLR) and *Saifudean*, a Muslim can write a will but it has to abide with the condition of only bequeathing one-third of the estate otherwise it will not be in compliance with the teachings of Islamic Sharia Law, thus the trial court did not err in revoking the will; and that since there was no evidence that the 4th and 5th respondents divorced the deceased, they were wives to the deceased hence were properly identified by the trial court as heirs to the estate.
19. Furthermore, that from the provisions of section 2(3) of the Law of Succession Act, Article 170(5) of the Constitution and section 5 of the Kadhi's Court Act, the applicable law to a Muslim in matters of succession is the Islamic Sharia law, and that the Kadhi's Court has the jurisdiction to hear and determine matters of inheritance where parties profess Muslim religion; that pursuant to the decisions in *Re Estate of CCBH (Deceased)* [2017] eKLR, Islamic Sharia Law prohibits a non-Muslim from inheriting the estate of a Muslim hence the appellant was not entitled to inherit from the estate and the trial court did not misapply the law in distributing the assets between the appellant and the respondents; that the share that was to be subject to the Kadhi's Court was the 50% forming part of the estate for distribution to the respondents in accordance with the Islamic Sharia Law. We were thus urged to dismiss the appeal.
20. We have considered the appeal and the submissions made in respect thereof. We are alive to our mandate in this first appeal, and that we are enjoined to consider the submissions made before us as well as the record of the proceedings before the trial court. In so doing we are under a duty to analyse and re-assess the evidence on record and reach our own conclusions on the issues for determination in the appeal. Caution must however, be exercised that in so doing since, unlike the trial court, we had no benefit of seeing or hearing the witnesses testify and we must give allowance for that handicap. This position was restated in *Selle v Associated Motor Boat Co.* [1968] EA 123, where this Court held that:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif –vs- Ali Mohamed Sholan* (1955), 22 E. A. C. A. 270).”



21. The Court, sitting as the first appellate court, must however appreciate, while undertaking its said obligation, that as held in *Alfarus Muli v Lucy M Lavuta & Another* [1997] eKLR, it will interfere with the findings of the first trial court:

“only if it is shown that there was absolutely no evidence or that the evidence that was there could not possibly support such a finding...Even if a Judge does not give his reasons for his finding the appellate Court can find the same in the evidence.”

22. In this appeal the issues that fall for our determination are: whether the deceased was a Muslim; whether the 4th and 5th respondents were the deceased’s wives and were entitled to benefit from his estate; whether the deceased’s estate ought to be distributed in accordance with the Islamic Shariah Law; whether the deceased’s wishes as expressed in his will were valid; whether the learned Judge was correct in his mode of distribution of the deceased’s estate; and whether it was proper to direct that the distribution of the deceased’s estate be undertaken in the Kadhi’s Court.

23. On the first issue of whether the deceased was a Muslim, there is overwhelming evidence that he was indeed a Muslim. In her affidavit sworn on 7th December 2020, the appellant deposed that:

“That I knew the deceased to be a Muslim but he chose to marry me in accordance with the civil ceremony and not under Muslim/Mohammedan Law.”

24. There is no evidence that the deceased at any time renounced his faith. Accordingly, we find that the deceased was, until his death a Muslim. Based on the decision of H. A. Omondi, J (as she then was) in *Ramadhan Mustafa v Zulfa Ngasia Juma* [2019] eKLR, we find that the mere fact that the deceased married the appellant, a Christian, did not change his religion. That decision holds that:

“Again, falling back on the teachings of the Quran, chapter 2 Al-Baqara verse 221, there is spelt out prohibition of marriage between Muslims and persons of other religious faiths, the exception however allows Muslim men to marry women of the beliefs i.e Jews and Christians as provided under chapter 5 verse 5.”

25. The next question is whether the 4th and 5th respondents were the deceased’s wives. The learned Judge in this respect held that:

“Regarding Elizabeth and Norah who claimed to have been married under unspecified customary law, they were recognised by the respondent as wives to the deceased but who were never divorced. For all purposes they were wives to the deceased. Equally the children born out of these marriages (wives) are naturally heirs to the deceased.”

26. In her replying affidavit sworn on 8th December 2020, the appellant deposed:

“That Mzee had three kids with Norah (Baina, Ayub and Kibibi) and this was probably around 1960’s. He lived with the kids alone as the mother had left.

That he then started seeing Elizabeth (2nd wife) who then came into his house and bore him a son (Ramadhan) and likewise, she left him and went away leaving Mzee now with four children all of tender years to care for them alone.”

27. From the foregoing, it is clear that the appellant recognised the 4th respondent as the deceased’s 2nd wife. It follows that there was a tacit acknowledgement that the 5th respondent was the deceased’s 1st wife. Although part of the affidavit seems to suggest that the deceased never mentioned the 4th and 5th



respondents as his wives, the above depositions indicate otherwise. While we appreciate our mandate to subject the evidence adduced to a fresh scrutiny and re-evaluation, when it comes to findings of fact by the trial Court, this Court's position is reflected in the holding of Hancox, JA (as he then was), in *Mohammed Mahmoud Jabane v Highstone Butty Tongoi Olenja* [1986] KLR 661; [1986-1989] EA 183, where the learned Judge held that:

“The appellate Court only interferes with the trial Court's findings of fact if it is shown that he took into account facts or factors which he should have not taken into account, or that he failed to take into account matters of which he should have taken into account, that he misapprehended the effect of the evidence or that he demonstrably acted on wrong principles in reaching the findings he did.”

28. In light of the internal contradictions in the appellant's said affidavit, we are guided by this Court's decision in *Lalji Bhimji Sanghani and Another v Chemilabs* [1978] KLR 200; [1976- 80] 1 KLR 968, that the appellate court would not be justified in differing from the judge's findings and inference where it is based on contradictory evidence which he considered in detail in the course of his judgement, having heard and seen the witnesses and preferred the evidence of one side.
29. We have no reason to interfere with the findings by the learned Judge that the 4th and 5th respondents were married to the deceased albeit their staying apart at the time of the marriage between the deceased and the appellant. There is no evidence on record that the deceased divorced the 4th and 5th respondents.
30. The third issue for determination is whether the deceased's estate ought to be distributed in accordance with the Islamic Shariah Law. Section 2 of the [Law of Succession Act](#) provides that:
 1. Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.
 2. The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.
 3. Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.
 4. Notwithstanding the provisions of subsection (3), the provisions of Part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim dying before, on or after the 1st January, 1991.
31. From the above provision, although the [Law of Succession Act](#) applies to all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of the Act and to the administration of estates of those persons, the 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 and whose succession is governed by Muslim law. The question that this Court is now called to determine after finding that the deceased was a Muslim at the time of his death, is whether the succession of his estate ought to be undertaken in accordance with Islamic law.



32. We are in this regard urged by the respondents to invoke the Islamic Shariah Law in order to limit the testamentary freedom of the deceased which he exercised in bequeathing his property to the appellant and her daughter. Section 5(1) of the [Law of Succession Act](#) provides that:

Subject to the provisions of this Part and Part III, every person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses.

33. From the above legal provision, a person is entitled to dispose of his or her property by will by reference to a particular secular or religious law as long as the disposition does not violate the law or [the Constitution](#). In this case, the deceased did not make any reference to any secular or religious law while disposing of his property by will. The fact that he, being a Muslim, knowingly entered into a statutory marriage with the appellant, a Christian, and proceeded to bequeath his property to the appellant and her daughter in a will, well aware that they were non-Muslims, is an indication that he did not intend that his estate be disposed of by reference to a religious law, in this case, the Mohamedan law.
34. In his article The Concept of ‘Will’ Under Muslim Law: A Study, published in International Journal of Law and Legal Jurisprudence Studies: ISSN: 2348-8212: Volume 4 Issue 3, Dr Anand Kumar Tripathi opines that:

“The Muslim law of wills affects only Muslims. Where a Muslim gets married under the Special [Marriage Act](#), 1954 either to a Muslim or a non-Muslim, he or she along with the respective spouse and the children born of this marriage would no longer be governed by the Muslim law of Succession but will be governed by the provisions of the Indian Succession Act, 1925. The essential differences between the rules governing disposition of property by a will under Muslim Law and under Indian Succession Act, 1925 is that under Muslim Law, a testator cannot make a will of more than one-third of his or her property but under Indian Succession Act, a person can make a testamentary disposition of 100% of the property. Secondly, under Muslim Law there are restrictions on the powers of the testator in case of an heir and under Indian Succession Act there is no such restriction.”

35. Therefore, in these circumstances, to make a finding that Islamic Shariah Law limited the testamentary freedom of the deceased which he exercised in bequeathing his property to the appellant and her daughter would amount to derogation of the testator’s testamentary freedom. Such a finding would also fail to meet the qualification that “the persons involved must be persons who profess the Muslim faith” since the appellant and her daughter did not profess the Muslim faith.
36. This Court in Saifudean reiterated testamentary freedom when it expressed itself as hereunder:

“The critical issue that this court is asked to determine, therefore, is whether the deceased was a Muslim, and intended to dispose of his estate according to the Muslim law. As the Honourable Justice Khaminwa observed in her ruling, the document of the will does not indicate so. On this basis, and assuming that in modern times people do change their faith, or adopt a way of life which may not strictly conform to their faith, she ruled that the [Law of Succession Act](#), Cap. 160, Laws of Kenya, was applicable to the disposition of the estate of the deceased. Now, the Act allows a testator the freedom of choice to make any disposition by reference to any secular or religious law. The deceased did not choose to do so by reference to the Muslim law or the law of any other religion. In his study of “Muslim Law, The Personal Law of Muslims in India and Pakistan, Fourth edition, Bombay, 1968”, Faiz Badruddin



Tyabji, writes: ‘In construing wills, the Courts give effect, as far as possible, to the intention of the testator, albeit indirectly.’

Referring to a number of judicial decisions, the learned scholar goes on to state the rule:

‘In all cases, the Court must loyally carry out the wills as properly construed, and this duty is universal, and is true alike of wills of every nationality and every religion or rank of life.’

One may, therefore, reasonably infer that the Honourable Justice Khaminwa was observing the universal duty of courts to seek to give effect, as far as possible, to the intention of the testator who was exercising his law-given testamentary freedom.”

37. In determining whether or not the Mohamedan law applies, it is imperative to ascertain the intention of the deceased at the time when the Will was written. The Court must therefore look at all the circumstances surrounding the writing of the Will including but not limited to the relationship between the deceased and his heirs as well as his relationship with his wife as well as the form of marriage entered into between the deceased and his wife.

38. It is appreciated in the Bill of Rights in Chapter Four of *the Constitution* that the rights and fundamental freedoms recognised thereunder are not exclusive. Article 19(3) thereof provides that:

The rights and fundamental freedoms in the Bill of Rights—

(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter.

39. In other words, *the Constitution* recognises that there are other rights and fundamental freedoms that are recognised or conferred by law but which are not expressly set out in the Bill of Rights. Such rights and fundamental freedoms, as long as they are not inconsistent with the Bill of Rights, are valid and enforceable just like the other rights and freedoms that are expressly set out in the Bill of Rights. Relevant to the instant case is section 5(1) of the *Law of Succession Act* which provides that every person who is of sound mind and not a minor may dispose of all or any of his free property by will. This section recognizes and confers the testamentary right of all adult persons of sound mind. This Court, in *Everlyn Wanja & Another v Gladys Nkirote M-Itunga Nyeri Civil Appeal No. 199 of 2019*, while citing the case of *Erastus Maina Gikunu & Another v Godfrey Gichuhi Gikunu & another* [2016] eKLR, appreciated this fact when it stated that:

Having recognized that the deceased’s Will was valid, was the judge right in re-distributing the deceased’s property on the basis that it was unconstitutional as it discriminated against the deceased’s daughters?... In our view, the law recognizes a testator’s power to distribute his property as he deems fit. He may give unequal shares to his children, be they boys or girls. He can even opt to give his estate to charity. A court can only interfere with this testamentary freedom if a testator has failed to make reasonable provision for his/her dependents... In our view, to interfere with the deceased’s Will and proceed to distribute property as if the deceased had died intestate, would be to make a mockery of a deceased’s free will to distribute his/her property as long as he/she has made reasonable provision for his dependents...A testator is at liberty to distribute his/her estate as he/she deems fit as long as he/she has made reasonable provision for his/her dependents.”

40. Although the testamentary freedom is not expressly guaranteed in our Constitution, Article 20(2) recognizes that every person is entitled to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. Where, however, a law does not give effect to a right or fundamental freedom (whether expressly recognised



under *the Constitution* or given effect to pursuant to Article 19(3)(b) aforesaid), we are enjoined by Article 20(3)(a) of *the Constitution*, to develop such a law so as to give effect to the right or fundamental freedom. This is in tandem with the constitutional imperative in Article 20(3)(b) which impels us to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

41. It is in that regard that we understand the position adopted by this Court in *CKC & another (Suing through their mother and next friend JWN) v ANC* [2019] eKLR. The short background to that case was that the deceased, a Muslim, died on 18th December 2012 and was buried according to Islamic rites. During his lifetime, although he lived with JWN as husband and wife from 1992 until his death, there was no evidence on record that they contracted any marriage under Islamic law. They however had two children, the appellants, whom the deceased, during his lifetime supported and provided for. At the time of his death, the deceased did not have any property of his own, save for a share of property that he expected to inherit from his father, who predeceased him. In the succession proceedings that followed the death of the deceased's father, the deceased was confirmed as one of the beneficiaries of that estate. Although the deceased's share in his father's estates was determined by the Kadhi's Court to be 9.21% JWN was not a party to those proceedings. It was however held that JWN and that her two children were not entitled to inherit the deceased's said share on the basis that JWN was not married to the deceased. The Kadhi's Court dismissed a subsequent application by JWN to set aside that decision which was challenged before the High Court. The High Court in its decision dismissing the application held that the exclusion of JWN and her children from the deceased's share of the estate of his father was not inconsistent with the provisions of *the Constitution*.
42. This Court allowed an appeal filed by deceased's children, and found that it was the High Court that would determine the succession to the deceased's estate under the *Law of Succession Act* because not all claimants to his estate were Muslims, and the appellants in particular had not submitted to the jurisdiction of the Kadhi's court. Further, that the claims of any other persons alleging to be dependants of the deceased and entitled to inherit from his estate would be heard by the High Court together with that of the appellants. This Court emphasised that:
- “...*the Constitution* demands that in applying a provision of the Bill of Rights, they must develop the law to the extent that it does not give effect to a right or fundamental freedom and adopt the interpretation that most favours the enforcement of a right and fundamental freedom. The courts must also promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and object of the Bill of Rights.”
43. Our Constitution, in Article 259(1), proceeds to lay down important guidelines on how it must be interpreted and expresses that it should be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; permits the development of the law and contributes to good governance. The development of the law in order to realize the constitutional values and principles in Article 10 of *the Constitution* is therefore a theme that runs throughout our constitution. Those values and principles, it is recognized in Article 4(2) of *the Constitution*, are the foundation of our multi-party democratic State.
44. Based on the foregoing, we hold that pursuant to Article 19(3)(b) of *the Constitution*, testamentary freedom forms part of our Bill of Rights and is therefore one of the fundamental freedoms and rights under our law. Accordingly, it may only be limited pursuant to Article 24 of *the Constitution*. In *CKC*



& another (Suing through their mother and next friend JWN) v ANC (supra) this Court expressed itself on the said Article as hereunder:

“We have already adverted to Article 24, which provides the circumstances under which rights and fundamental freedoms may be limited. The provision prohibits limitation of rights and fundamental freedoms except by a law, which is clear and specific on the right and fundamental freedom to be limited and the nature and extent of the limitation. In addition, such law must state expressly its intention to limit the right or fundamental freedom in question. The limiting law is further subject to strict controls that are intended to avoid facile or casual derogation. Thus for example, limitation is allowed only to the extent that it is reasonable and justified in an open and democratic society based on human dignity, equality and freedom and taking into account a host of considerations such as the nature of the right or fundamental freedom to be limited, the purpose of the limitation and its nature and extent and whether the purpose of the limitation could be achieved through less restrictive means. The limitation cannot derogate from the core or essential content of the right or freedom. Lastly, the burden is on the person seeking to justify limitation of a right or fundamental freedom to satisfy the court that the limitation in question satisfies the conditions for derogation set by *the Constitution*. We have set out all the above provisions to demonstrate the centrality of rights and fundamental freedoms in Kenya’s constitutional set up and the fact that derogation is a strict exception to the rule...Article 24(4) has narrowed down the possibility of derogation and now allows that limitation of the right to equality and freedom from discrimination in matters relating to personal status, marriage, divorce and inheritance, only to the extent strictly necessary for the application of Muslim law before the Kadhi’s courts, to persons who profess the religion.”

45. This Court further held that:

“A reading of Article 24(4) together with Article 170(5) of *the Constitution* shows strict conditions that must be satisfied before a person can invoke Islamic law to derogate from or limit the right to equality and freedom from discrimination. First, the derogation must be “only to the extent strictly necessary”. Second, the derogation must relate to matters of personal status, marriage, divorce and inheritance. Third, the persons involved must be persons who profess the Muslim faith.” [Underlining ours].

46. We are also of the view that the appellant and her daughter’s freedom of religion is protected under *the Constitution*, hence they cannot be compelled to act, or engage in any act, that is contrary to their belief or religion. Article 32 of *the Constitution* in this regard provides that:

1. Every person has the right to freedom of conscience, religion, thought, belief and opinion.
2. Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief of a day of worship.
3. A person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of the person’s belief or religion.
4. A person shall not be compelled to act, or engage in any act, that is contrary to the person’s belief or religion.



47. We accordingly agree with the decision of a three-Judge bench of the High Court in *Re Kadhis' Court: Very Right Rev Dr. Jesse Kamau & Others v The Hon. Attorney General & Another Nairobi HCMCA No. 890 of 2004* (Nyamu, Emukule & Wendo, JJ) that:

“...personal law of one community religious or otherwise cannot override or qualify the Bill of Rights – fundamental rights guaranteed under *the Constitution*.”

48. We therefore find that in arriving at the finding that the deceased's will was a nullity, the learned Judge failed to appreciate the relevant constitutional and statutory provisions and arrived at a wrong decision. We must emphasize that this is indeed one of those exceptional cases where, although the Kenyan Constitution and laws grant formal legal recognition to Islamic law in resolving family law disputes involving Muslims, the personal law that applies to the inheritance of a deceased's estate is determined by factors other than the Islamic religious law, arising from the pluralistic nature of the legal, cultural and religious transactions entered into by the parties.

49. The next issue for determination is whether the deceased's wishes as expressed in his will were valid. It is a well-established law that effect must be given to the wishes of the testator and those wishes must not be disregarded merely from consideration of expediency or possible greater benefit to beneficiaries. See *Abdulla Rehemtulla Waljee v Alibhai Haji and Rajabali Hasham Paroo* [1943] 10 EACA 7. The general law is, therefore, that the court ought to, as much as possible, uphold the wishes of the deceased as expressed in the will.

50. This leads us to the issue whether the learned Judge was correct in his mode of distribution of the deceased's estate. In his determination, the learned Judge expressed himself as follows:

“Concerning confirmation of the grant and distribution of the estate, Islamic Sharia law shall apply. However, matrimonial properties that were acquired after the respondent got married to the deceased shall first be shared out equally at the ratio of 50:50% between the respondent and the deceased's estate. It is the remaining ½ out of the effected properties that will form part of the estate to which the 7 heirs shall share in accordance with the Islamic law. In the instant case, parties are in agreement that property LR Kilifi/Mtwapa/1368 was acquired during the subsistence of the marriage between the deceased and the respondent long after the other two wives had walked out of their marriage. The respondent is entitled to her 50% absolutely. The balance of 50% is what constitutes the estate for distribution in accordance with Islamic law...According to the registration documents, LR 2095 was acquired on 19th April 1979. By this time Norah and Elizabeth were not in the picture. Accordingly, this property is deemed to have been acquired jointly by the deceased and the respondent hence shared in the ratio of 50:50 between Daphne and the estate. Therefore it is 50% of this property which is shareable to the seven beneficiaries in accordance with the Islamic law. LR 2105 was acquired in 1973 but before the respondent was married. This property was however developed during the subsistence of the marriage between the deceased and the respondent. The same shall be shared out in accordance with Islamic sharia law.”

51. In our view, the fact that a deceased person's Will is upheld does not necessarily mean that all deserving heirs of the deceased are to be rendered destitute. The law makes provision for such circumstances in Part III of the *Law of Succession Act* that deals with “Provision for Dependants”. Nothing stops a genuine dependant from moving the court under that Part in order to be considered in the distribution of the state. In the exercise of the powers under that part, the court is entitled to consider all



relevant factors hence religious practices may, if appropriate be considered in determining the mode of distribution. This is because section 27 of the *Law of Succession Act* provide that:

In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.

52. This thorny issue of both Muslim and non-Muslim heirs inheriting property from a deceased Muslim relative has been dealt with in other jurisdictions by application of the principle of Mandatory Will to fill in a lacuna where strict adherence to religious law and practice of succession is likely to cause injustice. That was the position adopted by the Supreme Court of Indonesia in Decision No: 16K/AG/2010 where, just as in the present case, there marriage in question was contracted under civil law between a Muslim husband and a non-Muslim wife. We must point out that in that case there was no Will and the lower courts found that the wife was not entitled to benefit from her deceased's husband estate. In the present case there was a valid Will. Notwithstanding the absence of a Will, the Supreme Court of Indonesia awarded the wife half of the joint property and ordered that the other half be shared amongst the heirs including the wife who was entitled to a quarter share thereof. See also Elle Tasya Putri Benny Djaja on Inheritance Rights in Interfaith Marriages According to Inheritance Law published in Edunit Vol. 2 Nunr 2023.
53. From that judicial innovation, it is clear, and as appreciated by this Court in Saifudean, that Islamic law is dynamic and adapts to evolving social, political, cultural and economic conditions and realities and that "not all rules of inheritance are rigidly fixed for all times since the development of Muslim jurisprudence has been and continues to be a search for the good law to be applied in differing times and situations." The Court expressed itself as hereunder:
- "The respondent, Shehnaz, was the wife of the deceased, and, in the absence of ascendants or descendants, the closest relation of her husband. As noted above, Muslim courts, jurists and law makers have, when necessary, sought to ensure that the humane intention of the law be upheld, whether to protect the interests of widows or orphaned grandchildren whom, a rigid reading of the letter of the law, would have deprived of much needed and expected support. In construing the will of the deceased, therefore, the pertinent question to ask is whether he would have happily contemplated to see his widow and life-time companion, whose care and protection was a solemn duty imposed upon him by the Quranic teachings, deprived of three quarters of his estate in favour of a cousin, a person presumably of independent means, and a person who has not been shown to have had, or likely to have, any concern or interest in the welfare of the respondent. Nor can any court of law, acting in good conscience and charged with the duty of administering justice and equity, a duty which also resonates with the Quranic injunction emphasizing justice and kindness - entertain such a contemplation."
54. In our view, there is no reason why principles of mandatory Will cannot be developed to cater for situations where strict adherence to Islamic law is likely to cause injustice to those whom the deceased took care of and who took care of the deceased in his lifetime, and to ensure that justice and fairness is done to those entitled to benefit from the estate of a deceased person.
55. Based on our findings above, we hold that in the present appeal, there was no justifiable reason for interfering with the deceased's testamentary freedom in disposing off his properties and without an application under Part III of the *Law of Succession Act* or an application of the principle of "mandatory



Will”. The learned Judge therefore erred in directing that the deceased’s estate be distributed in the manner he did.

56. The last issue for determination is whether it was proper to direct that the distribution of the deceased’s estate be undertaken in the Kadhi’s Court. The learned Judge, in his judgement directed that:

“The file is hereby forwarded to the Chief Kadhi for valuation and determination of each heir’s share.”

57. It is clear that the appellant and her daughter, Salma Wanjiru Memia, were not Muslims. They were not subjected to Islamic Sharia Law. The learned Judge, rightly in our view, identified them as beneficiaries of the estate of the deceased. Section 5 of the *Kadhis’ Courts Act* provides that:

A Kadhi’s court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.

58. This Court in *In CKC & another (Suing through their mother and next friend JWN) v ANC* (supra) held that:

“...as regards jurisdiction of the Kadhi’s court, all the parties to the dispute must profess the Muslim faith and submit to the jurisdiction of the Kadhi’s court.”

59. It is clear from the above provision that a Kadhi’s Court can only exercise jurisdiction where all parties in the proceedings in question not only profess the Muslim religion but also submit to the jurisdiction of the Kadhi’s court. In this case, since the appellant and her daughter neither professed the Muslim religion nor submitted to the jurisdiction of the Kadhi’s court, that court had no jurisdiction over them and the learned Judge erred in subjecting the determination of their share to the Kadhi’s court.

60. In the premises, we allow the appeal, set aside the decision of the learned Judge made on 20th June, 2022 and substitute therefor an order dismissing the summons dated 16th November 2020 seeking the revocation and annulment of the grant of probate of written will issued on 6th March 2020.

61. There will be no order as to the costs of this appeal, this being a family dispute.

62. Judgement accordingly.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF MARCH 2025.

A. K. MURGOR

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL



I certify that this is a true copy of the original.

Signed

Deputy Registrar

