



**Farooq & 3 others v Ramadhan (Civil Appeal 30 of 2019)
[2024] KECA 1774 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KECA 1774 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 30 OF 2019
SG KAIRU, JW LESSIT & JM MATIVO, JJA
DECEMBER 6, 2024**

BETWEEN

**NOORDIN FAROOQ 1ST APPELLANT
AHMED TARLOOK FAROOQ 2ND APPELLANT
JF (SUING THROUGH HER NEXT KIN MMI) 3RD APPELLANT
MMI 4TH APPELLANT**

AND

ASHA RAMADHAN RESPONDENT

*(Being an appeal against the judgment in the High Court of Kenya at Nairobi
(J. Gacheche, J.) dated 18th March, 2011 in Succession Cause No. 1679 of 2007)*

JUDGMENT

1. The appellants, Noordin Farooq, Ahmed Tarlook Farooq, JF (suing through her mother and next of friend MMI (who is also the 4th respondent herein)), seek to overturn the judgment of the High Court (Gacheche, J.) delivered on 18th March, 2011 in which the learned Judge dismissed their objection to the issuance of the grant of letters of administration to the respondent in Nairobi Succession Cause No. 1679 of 2007 to administer the estate of her late mother, Jatani Nawa Gube (deceased). The learned Judge also dismissed the appellants' cross petition filed in the said proceedings.
2. The gist of their objection was that the 1st and 2nd appellants were opposed to the respondent's appointment as the sole administrator of the deceased's estate which they claimed they were rightfully entitled to participate in its administration. They also complained that the 1st and 2nd appellants had been omitted from the list of beneficiaries to the said estate and that the entire estate had not been disclosed.



3. It is common ground that the deceased was blessed with three children during her life time. However, her third child died at infancy while her only son, Farooq Noordin predeceased her in the year 2005, leaving the respondent as her sole surviving child. It is also common ground that the deceased died intestate on 26th February, 2006 and during her life time, she professed the Muslim faith. There is no dispute that the deceased's only son Farooq Noordin pre-deceased her and he was survived by his biological children, namely, the 1st, 2nd and 3rd appellants while the 4th appellant was the late Farooq Noordin's wife.
4. In her petition for Letters of Administration intestate dated 20th June, 2007, the respondent listed Kajanja Nawe, Fatuma Nawe, Halima Nawe (her mother's sisters), the 3rd appellant and herself as the only beneficiaries of the deceased's estate. The respondent maintained that after her deceased brother divorced his first wife (the 4th appellant, who is the mother to the 1st and 2nd appellants), she remarried, and therefore, she cannot be a beneficiary to the deceased's estate. It was also her case that the 1st and 2nd appellants converted into Christianity and as a result they cannot inherit the deceased's estate who died a Muslim.
5. Aggrieved by their exclusion from the list of the deceased's beneficiaries, the appellants filed an objection to making of grant dated 25th October, 2007 and a cross petition dated 13th December, 2007. Their complaints were that they had been left out as beneficiaries, and that the whole estate had not been listed and the 1st and 2nd appellants not only opposed the respondent's appointment as an administrator, but they also sought to participate in the administration of the estate.
6. In the impugned judgment delivered on 18th March, 2011, Gacheche, J. found that the deceased was a Muslim and she died intestate, therefore, her estate would be administered in accordance with Islamic Law. She also found that it had been proved that the 4th appellant had been divorced by the late Farooq Noordin and since Farooq Noordin had predeceased his mother, then the 4th appellant could not inherit the property of her former mother -in law (Fatawa Islamiyah - Islamic Verdicts, Vol. 5, page 88), and that her only claim, if any, would have been an interest in the estate of the late Farooq, who, the court was told had no assets of his own.
7. The learned Judge further found that the 1st and 2nd appellants would have no right to inherit their grandmother as their only right was to inherit their father who had no assets of his own and also having converted to Christianity, the 1st and 2nd appellants would not qualify to inherit the estate of a Muslim for "the Muslim does not inherit the disbeliever neither does the disbeliever inherit the Muslim" (Fatawa Islamiyah - Islamic Verdicts, Vol. 5, page 804) and that in any event it appeared from the evidence by Kamonde that the deceased had expressed her displeasure at the conduct of her grandsons (the 1st and 2nd appellants) in that they, as the "the intended beneficiaries had no respect for her, they had become abusive towards her and had no right to inherit her, as they had abandoned the Islamic faith because their mother had already remarried in Tanzania to a husband of European origin."
8. In conclusion, the learned Judge held that the 1st, 2nd and 4th appellants failed to qualify for inheritance within the confines of Islamic law and it does not matter whether or not Jatane Nawe (deceased) had expressly recognized or accepted them and or had assumed permanent responsibility over them. Therefore, there was no reason why the respondent cannot faithfully administer her mother's estate, and in the circumstances the appellant's objection and cross - petition failed.
9. The learned Judge found that the deceased had died intestate and therefore Section 2 (3) of the [*Law of Succession Act*](#) was applicable. Further, only those who qualified under Sharia law could inherit her estate. The learned Judge further held that the 1st and 2nd appellants having converted to Christianity,



could not inherit their grandmother's estate. The trial court held that they could only inherit their father, who,

it was admitted had no assets of his own. The learned Judge held that the 1st, 2nd and 4th appellants had no right to inherit the deceased and proceeded to distribute the estate as follows:

- a. Aisha Ramadhan (the respondent) ...a half of the estate.
- b. Jatane Jawe (the 3rd appellant) A sixth of the estate.
- c. Kajanja Nawe, Fatuma Nawe and Halima Nawe to share a third of the residual of the estate.

10. In their quest to overturn the said judgment, the appellants in their memorandum of appeal dated 18th January, 2019 mounted eighteen grounds of appeal some of which are repetitive and or narrative. In summation, the appellants fault the trial court for: (a) lack of jurisdiction, (b) failing to uphold Articles 3 and 27 (4) of *the Constitution*, (c) improperly exercising her jurisdiction, (d) finding that the 1st and 2nd appellants could not share their father's inheritance just because they had changed their religion from Islam to Christianity, and conversely awarding the 3rd appellant 1/6 of the deceased's estate, (e) violating Article 27 of *the Constitution* by awarding the 3rd appellant 1/6 of the estate and nothing to the 1st and 2nd appellants, and failing to appreciate the constitutional underpinning of the issues urged by the appellants, (f) failure to accord due weight to the appellants' affidavit evidence and contradicting herself by holding that daughters could inherit but proceeded to only consider the interests of the 3rd appellant, (g) dismissing the 1st and 2nd appellants' objection and cross petition holding that Farooq Noordin had no assets of his own yet she awarded the 3rd appellant 1/6 of the deceased's estate, (g) dismissing the cross petition without considering it on merits, (h) failing to allow their plea for joint administration of the estate and, (i) exhibiting bias and considering extraneous matters.
11. The appellants pray that this Court sets aside the said judgment and in lieu thereof allow their application and cross- petition and remit the matter to the trial court for hearing and determination. They also pray for costs of the appeal.
12. At the hearing of this appeal, learned counsel Mr. Harrison Kinyanjui appeared for the appellants while Mr. Mohamed Ali appeared for the respondents. Both parties highlighted their written submissions.
13. In support of the contestation that the trial court lacked jurisdiction (ground 1), Mr. Kinyanjui contended that the learned Judge having decided to determine the succession cause under Islamic Law, she should have submitted the matter to the Kadhi's Court which has the necessary Islamic religious expertise.
14. Regarding the accusation that the learned Judge improperly exercised her jurisdiction, Mr. Kinyanjui faulted the learned Judge for constructively confirming the grant contrary to section 71 (3) (a) (b) of the *Law of Succession Act* before the lapse of the six months provided by the law and asserted that there was nothing to justify the learned Judge's distribution of the estate in the manner she did and as a result the learned Judge sunk into the arena of the litigation and made provision for the distribution of the estate in a scheme not set out in the respondent's plea contrary to Section 66 of the *Law of Succession Act*.
15. Submitting on the accusation that the learned Judge failed to uphold Articles 3 (defence of *the Constitution*), Article 27 (4) (freedom from discrimination) and decided the case contrary to the weight of the evidence, (grounds 2, 16, 17 and 18), Mr. Kinyanjui submitted that the learned Judge without any questions adopted Islamic writings in her ruling which are not settled and, in the process, violated Article 27 (4) of the Constitution which outlaws discrimination. Counsel maintained that Islamic Law discriminates against the appellants in the distribution of the estate and cited the High Court decision in Republic vs Kadhis Court Nairobi & 2 Others ex-parte TL [2018] eKLR in support of the



- proposition that Kenya is a secular state. He also cited Article 8 of *the Constitution* which provides that there shall be no state religion and argued that except where it is expressly provided by *the Constitution* or a statute, religion must be distanced from the law. He implored this Court to interpret the law not in light of the tenets of the parties' religion or religious affiliations but in keeping with legislative intent and the letter and spirit of *the Constitution*.
16. Addressing the grounds that the impugned decision is unreasonable and unfair, that the mode of distribution is unfair, and the alleged violation of Article 27 (4), (grounds 3, 5 and 13), Mr. Kinyanjui reiterated the arguments in support of grounds 2, 16 and 18 and accused the learned Judge of exhibiting patent and open discrimination against the appellants thereby elevating the respondent's inheritance rights while at the same time negating the appellants' rights without citing any provision of the law to justify the negation of their right to equality. He faulted the learned Judge for exercising her discretion perversely by allowing the 3rd appellant to inherit 1/6 of the estate without justification other than the 1st and 2nd appellants' religious inclination contrary to Article 32 (1) and (2) of *the Constitution* which provides that every person has the right to freedom of conscience and religion.
 17. In opposition to the appeal, the respondent's counsel Mr. Ali submitting on grounds 1 and 16 maintained that it was not in dispute that the deceased died a Muslim, therefore, her personal law for the purposes of succession is Islamic law. He argued that the learned Judge's finding is supported by Section 2 (3) and 4 of the *Law of Succession Act* and cited this Court's holding in *Re the Estate of Ismail Osman Adam (Deceased), Noorbanu Abdul Razak vs AbdulKader Ismail Osman, Mombasa Civil Appeal No. 285 of 2009* that if the High Court assumes jurisdiction in a matter involving a deceased Muslim, then by virtue of Section 2 (3) of the *Law of Succession Act*, the applicable law is the Islamic Law and not the *Law of Succession Act*.
 18. Addressing the contention that the trial court lacked jurisdiction to entertain the case, Mr. Ali submitted that Article 165 (3) (a) of *the Constitution* grants the High Court unlimited original Jurisdiction to hear and determine criminal and civil matters. He argued that the Kadhi's Court could not assume jurisdiction because some parties in this case did not profess the Islamic faith.
 19. Addressing grounds 3, 7, 8, 9, 10, 15 and 17 of the memorandum of appeal, Mr. Ali contended that the judgment of the court was not contradictory, unfair or unreasonable nor did the learned Judge consider extraneous matters in arriving at her decision to dismiss the appellants' cross-petition and objection to making of the grant. He also submitted that no evidence was tendered to prove that the whole estate was not disclosed.
 20. Regarding the conversion of the 1st and 2nd appellants into Christianity, Mr. Ali maintained that the difference in religion is a bar to Islamic inheritance and that the Prophet stated that Muslims do not inherit from the disbeliever and neither does the disbeliever inherit the Muslim (Fatawa Islamiyah - Islamic Verdicts, Vol.5 pg. 80).
 21. Concerning the 3rd appellant's participation in the estate administration, the respondent's counsel submitted that since the 3rd appellant was a minor, she could not be considered for appointment as an administrator. Nonetheless, he maintained that the 3rd respondent was very disrespectful to the deceased to the extent that the trial court directed her to write an apology in her handwriting to the respondent and with such demeanour, it is very unlikely that the 3rd appellant and the respondent can pair as administrators and work in harmony for the best interests of the estate.
 22. Regarding the 4th appellant's claim, the respondent's counsel maintained that his late brother Noordin Farooq divorced her before his demise. He asserted that in any event, whether divorced or not, a daughter in law cannot inherit her mother- in-law or father-in-law because she is not amongst class of



heirs recognized both under Sunni and Shia law. Furthermore, in this case her former husband died before the demise of the deceased. If at all Noordin Farooq died after his mother then the 4th appellant would have inherited from the estate of Farooq Noordin provided she was not divorced.

23. Submitting on the alleged intermeddling with the deceased's estate, Mr. Ali argued that the said allegation and accusation of fraud against the respondent were never proved by way of evidence except submissions from the bar.
24. Regarding the submission that the decision violates the law (grounds 11 and 12), Mr. Ali maintained that the judge did not violate any law by dismissing the appellants' cross-appeal since it is trite law that the concept of administration being alien to Islamic succession and provisions of section 2 (4) using the word 'may' did not make it mandatory for the trial court to infer a continuing trust to appoint more than one administrator and therefore, the court did not err in law or fact and it had the discretion to make the said appointment and in any event under the Islamic law, the respondent ranks in priority in terms of petitioning for grant of letters of administration of the estate of her late mother. In support of this submission, Mr. Ali cited the Kadhi's Court decision in the Matter of the Adam Syngidura Marjan (Deceased), KCC Succession No. E044 of 2020, where while dealing with a similar objection observed that by virtue of section 66 of the Law of Succession and Rules 26(1) and (2) of the Probation and Administration Rules, whose applicability is fortified by section 2 (4) of the *Law of Succession Act*, the petitioner ranked in priority to the objectors in seeking grant of letters of administration.
25. Mr. Ali dismissed the alleged discrimination as unfounded and lacking legal basis since the legislative decision to allow the Muslim to be inherited in accordance with Islamic personal law was made to facilitate rights of minorities and foster inclusivity and cohesion, which is the hallmark of our legal system which promotes legal pluralism. Therefore, Section 2(3) of the *Law of Succession Act* has a legitimate purpose. Mr. Ali maintained that there is no discrimination or violation of right to equality or at all on the part of the appellants because the *Law of Succession Act* sanctions the differentiation. In support of this submission, counsel relied on the High Court decision in Joseph Karisa Mwarandu & 2 Others vs Scorpion Villas [2020] eKLR in which the Court cited Nelson Andayi Havi vs Law Society of Kenya & 3 Others [2018] eKLR where the High Court held that where there is a legitimate reason, then, the conduct or the law complained of cannot amount to discrimination.
26. In determining this appeal, we bear in mind that Rule 31 (1) of the Court of Appeal Rules, 2022 empowers this Court to subject the whole of the evidence tendered before the trial Court to a fresh and exhaustive scrutiny and make our own independent conclusions. However, we must bear in mind that unlike the trial court, we did not have the advantage of seeing and observing the witnesses testify. (See *Selle & another vs Associated Motor Boat Co. Ltd. & Others* [1968] EA 123). Regarding the trial court's finding on matters of fact, we must exercise caution while overturning such findings unless, the conclusions are premised on no evidence or the decision is perverse or it is manifestly clear that the trial judge considered irrelevant matters or ignored relevant considerations. (See *Mwangi vs Wambugu* [1984] KLR page 453). As was held by the Court of Appeal for East Africa in *Peters vs Sunday Post Limited* [1958] E.A. page 424:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”



27. Upon analyzing the entire record, the parties' submissions and the law, we find that the following issues fall for determination, namely:
- a. Whether the trial court constructively confirmed the grant of letters of administration it issued to the respondent before the lapse of six months.
 - b. Whether the constitutional issues urged by the appellants and submitted on by the respondent ought to have been raised first before the trial court.
28. Regarding the first issue, the appellants' counsel faulted the learned Judge for constructively confirming the grant issued to the respondent before the lapse of six months. For a proper appreciation and determination of this issue, it is important to recall that by a petition dated 2nd June, 2007, the respondent petitioned for grant of letters of administration intestate and listed Kajanja Nawe, Fatuma Nawe Halima Nawe (her mother's sisters), the 3rd appellant and herself as the only beneficiaries of the deceased's estate. Ordinarily, once a petition for grant of letters of administration is filed, the petition is advertised in the Kenya Gazette specifically notifying the public of the existence of the petition and calling upon any person with an objection to do so, failure which, the grant is issued after the expiry of 90 days from the date of the gazette. In the instant case, the petition was not advertised in the Kenya gazette as required by section 67 of the [Law of Succession Act](#) which reads:
- “67. Notice of application for grant
1. No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for such grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.
 2. A notice under subsection (1) shall be exhibited conspicuously in the court- house, and also published in such other manner as the court directs.”
29. Prior to the gazette of the petition in accordance with the above section, the appellants filed an objection to the making of the grant dated 25th October, 2007 and a Cross Petition dated 13th December, 2007 pursuant to Section 68 of the [Law of Succession Act](#) objecting to the respondent's appointment as administrator and protesting that they had been left out as beneficiaries of the estate. They also complained that the whole estate of the deceased had not been listed.
30. Pursuant to Section 69 (2) of the [Law of succession Act](#), the learned Judge proceeded to hear and determine the dispute. In the impugned judgment, the learned Judge observed as follows:

“I see no reason why Aisha cannot faithfully administer her mother's estate, and in the circumstances, hereby dismiss the objectors' cause as well as their cross petition.

I do accordingly order that Aisha be appointed as the administrator of the estate of the late JATANE NAWA, with a further order that she files in court a list of the assets and liabilities of the estate within the next twenty-one days.

I do thus order that the estate shall thus be distributed in accordance with Sharia and in line with the requirement that "the daughter gets half, the son's daughter a sixth, making two thirds, and what remains goes to the sister." [Report by Al-Bukhari] (Bulugh Al-Maram, pg. 334), it shall be as follows:

- i. Aisha Ramadhan 1/2 (a half of the Estate)



- ii. Jatane Nawe 1/6 (a sixth of the Estate
- iii. Kajanja Nawe, Fatuma Nawe and Halima Nawe to share 1/3 of the estate being the residual of the Estate.

As I have already found, the 1st, 2nd and 4th objectors would not have a right to inherit the deceased.

I do in the interest of justice order, that Aisha who becomes the administrator of the estate do cater the education and upkeep of Jatani Farooq until she attains the age of majority. The sums so expended shall be debited from Jatani's said share of the estate”

31. As stated above, at the point at which the objection and cross- petition were filed, the grant had not been gazetted nor had it been issued to the respondent. The germane issue before the trial court was the appointment of the administrator(s) and determination of the lawful beneficiaries of the estate. Simply put, considering that no grant had been issued prior to the filing of the objection, could the court distribute the estate without going through the process of confirming the grant. Was there an application before the judge seeking confirmation of the grant? Could the issue of distribution properly be determined prior to going through the process of confirmation of the grant?
32. Section 55 of the [Law of Succession Act](#) prohibits distribution of capital assets before confirmation of grant. It reads:
“
“(1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until the grant has been confirmed as provided by Section 71.
2. The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises
in respect of a period wholly or partly before or after the date of death.”
33. Clearly, the issues presented before the learned Judge as delineated earlier were the appointment of the administrator(s) and determination of the beneficiaries. The distribution of the estate was not one of the issues presented to her, and even if it was, a pertinent question still arises, that is whether the estate could be distributed prior to the confirmation of the grant without offending Section 55 (1). Equally important is Section 71 (3) of the [Law of Succession Act](#) which provides:
2. The court may, on the application of the holder of a grant of representation, direct that such grant be confirmed before the expiration of six months from the date of the grant if it is satisfied-
 - a. that there is no dependant, as defined by section 29, of the deceased or that the only dependants are of full age and consent to the application;
 - b. that it would be expedient in all the circumstances of the case so to direct.
34. Notably, the court is empowered under Section 71(3) of the [Law of Succession Act](#) to confirm a grant under certain circumstances before the expiry of six (6) months. Assuming that the grant is to be



deemed as having been issued to the respondent on the date of the judgment, the question whether the grant was subject to the six months period before it could be confirmed still arises. The learned Judge did not address this pertinent point in her judgment. Instead, the learned Judge constructively confirmed the grant in favour of the respondent yet there was no application before her seeking its confirmation prior to the expiry of 6 months. As a matter of fact, the question of confirmation of the grant was not an issue before the learned Judge.

35. Equally disturbing is the question whether the learned Judge distributed the estate pre-maturely. Much as the learned Judge invoked the provisions of Section 2 (3) of the Law of Succession Act and Islamic Law while distributing the estate, there was no prayer before her for distribution of the estate. In absence of an application for confirmation of the grant detailing the beneficiaries and the proposed mode of distribution including their respective shares, it is not clear on what basis the learned Judge proceeded to make such a determination. Accordingly, we are persuaded that this appeal succeeds on the issue under consideration. It follows that the order distributing the estate cannot be allowed to stand.
36. The other ground urged by the appellants' counsel is that the trial court's reliance on Islamic writings was discriminatory against the 1st and 2nd appellants. The appellants also argued that the impugned decision discriminates against them on grounds of their choice of religion in violation of Articles 27 (4) and 32 (2) of the Constitution. The learned Judge held that having converted to Christianity, the 1st and 2nd appellants would otherwise not qualify to inherit the estate of a Muslim for "the Muslim does not inherit the disbeliever neither does the disbeliever inherit the Muslim" (Fatawa Islamiyah - Islamic Verdicts, Vol. 5, page 804).
37. The respondent on the other hand maintained that the appellants never raised any constitutional issues at the High Court and that the alleged violation of constitutional rights has not been specifically pleaded contrary to the law as stated in *Mumo Matemtu vs Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR.
38. The respondent also contended that there is no discrimination or violation of the right to equality or at all on the part of the appellants because the Law of Succession Act sanctions the differentiation and therefore, the alleged discrimination is not unfair because it is founded on a legitimate purpose to allow a Muslim to be inherited in accordance with Islamic personal law.
39. The constitutional issues urged by the appellants, though attractive, they are, being raised before this Court for the first time in this appeal. In our view, it would have been prudent for the parties to urge the said issues before the trial Court so as to afford the court of first instance the opportunity to pronounce itself on the said issue.
40. Accordingly, flowing from our finding on the first issue discussed above, we set aside the Judgement and Order issued by Gacheche, J. in Nairobi High Court Succession Cause 1679 of 2017, delivered on 18th March, 2011, declining to grant the appellants' summons dated 25th October, 2007 and dismissing their cross petition filed on 13th December, 2007 in the said Succession Cause, and in lieu thereof, we issue an order remitting the matter to the High Court for the prosecution and determination of the appellants' objection to the making of the grant dated 25th October, 2007. Upon determination of the said issue and the issuance of the grant by the Court, the administrator(s) shall, as the law provides apply for confirmation and distribution of the estate and any dispute arising including the details of the deceased properties, her lawful beneficiaries and the mode of distribution shall be determined by the Court. This being a family matter, each party shall bear his/her own costs for this appeal.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2024.

S. GATEMBU KAIRU, CIArb, FCIArb



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JUDGE OF APPEAL
J. LESIIT

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JUDGE OF APPEAL
J. MATIVO

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JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR.

