



REPUBLIC OF KENYA



KENYA LAW
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**Mwadazaya v Mwatsahu & another (Civil Appeal 26 of 2020)
[2022] KECA 746 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KECA 746 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 26 OF 2020
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
MAY 27, 2022**

BETWEEN

HUSSEIN MVURYA MWADAZAYA (1ST ADMINISTRATOR) APPELLANT

AND

HAMISI HASSAN MWATSAHU (2ND ADMINISTRATOR) .. 1ST RESPONDENT

FAUZIA ALI HASSAN (3RD ADMINISTRATOR) 2ND RESPONDENT

(Being an Appeal arising from the Ruling and Order of the High Court of Kenya at Mombasa (Hon. Lady Justice M. Thande) dated 17th January 2020) in Mombasa High Court Succession Cause Number 93 of 2004)

JUDGMENT

1. This appeal arises from a ruling delivered on 17th January 2020 by the High Court at Mombasa (Thande J.) on a summons for confirmation of grant concerning the distribution of the estate of Hassan Ali Mwadzaya (“the Deceased”). The background to the appeal is that the Deceased, who died on 12th January 1974, had three wives, Hadija Hassan, Mgeni Mboto and Halima Kahaso, who each had children. The first wife, Hadija Hassan had initially applied for a grant of letters of administration intestate by way of a petition dated 21st April 2004, which was objected to by some of the children of the Deceased. On 27th October 2014, during the hearing of the said petition, and after her evidence had been taken, the Court was informed that Hadija Hassan had passed away. The parties herein thereupon filed a new petition, in which a consent was entered on 8th November 2016 in which three administrators of the estate of the Deceased were appointed, after the houses of the three wives agreed on their representatives. Consequently, the Appellant and Respondents were confirmed as administrators on 16th November 2016, and filed the subject summons for confirmation of grant dated 26th September 2018.



2. During the hearing of the summons, the three administrators filed affidavit evidence and also gave oral testimony. The 1st Administrator in his evidence testified that by the time the Deceased went on pilgrimage to Mecca where he died on 12th January 1974, he had distributed his properties, with those in Mariakani to be taken by Hadija Hassan, those in Kilimamdogo by Mgeni Mboto and those in Mwena by Halima Kahaso, and relied on a document dated 4th December 1972 by the Deceased in which he gave the said instructions. Further that the widows settled and remained in the said places after the death of the Deceased. However, that the family of Mgeni Mboto sold all their property after their mother died, and started demanding to be allocated the first house's share in Mariakani.
3. The 2nd Administrator denied selling their mother's share and testified that the Deceased's estate be distributed under Sharia Law with sons getting two-thirds and daughters one-third share of the estate. The 3rd Administrator likewise testified that the estate should be distributed according to Islamic law and that the Deceased did not distribute his estate.
4. After hearing the parties, the High Court (Thande, J.) found that the deceased lived and died a Muslim, and therefore that under section 2 of the *Law of Succession Act*, the law that would govern the estate of the Deceased would be Islamic Law. It was also found that the will that was alleged to have been made by the Deceased was not valid under Islamic Sharia because it made a bequest to an heir. With those findings, the Court in its ruling ordered that:

“...the status quo of 50 years notwithstanding, the estate of the deceased herein shall be distributed in accordance with Islamic law subject to the following:

 - i. Valuation of all the properties of the estate shall be undertaken within 60 days.
 - ii. Valuation and distribution shall take into account any property in the possession of, or sold by any of the beneficiaries.
 - iii. The cost of valuation shall be borne by the beneficiaries in proportion to their entitlement to the estate.
 - iv. Pending valuation, status quo shall be maintained.
 - v. Mention on 23.3.2020 for compliance.”
5. The findings and directions aggrieved the Appellant who was the 1st Administrator, who filed a notice of appeal dated 31st January 2020 and raised eight grounds of appeal in his Memorandum of Appeal dated 30th March 2020. The said grounds revolve around three main areas, namely, whether the doctrine of estoppel by acquiescence, deed and conduct applied to the distribution of the Deceased's estate; whether the High Court failed to appreciate the principles of equity embedded in the ideals of Islamic Sharia Law and by Article 10 of *the Constitution*; and whether the High Court made appropriate orders in the circumstances of the case.
6. We heard the appeal on 28th February 2022, and the appellant was represented by learned counsel Mr. Hassan, while the Respondents were represented by learned counsel Mr. Obara. Mr. Hassan, while relying on submissions dated 15th June 2021 urged that the Deceased had devised a scheme of distribution of his estate that was acquiesced to by all the beneficiaries, therefore the court could not interfere with the said distribution. Further, that the *Law of Succession Act* in this regard ought to be interpreted in line with Article 10(2)(b) of *the Constitution* on the application of equity, which principles of equity are embedded in Islamic Sharia Law as stated in the case of *Saifudeen Mohamedali Noorbhai vs Shehnaz Adamji* (2011) eKLR. It was therefore the argument of counsel that the court made inappropriate orders that were not in accordance with Islamic Law and practice. Lastly, it was



- submitted that some of the properties of the deceased were alienated and therefore could not be considered during the distribution of the estate of the deceased.
7. Mr. Obara on his part highlighted his written submissions dated 28th July 2021, and maintained that the estate of the Deceased was of a Muslim and Islamic law doctrines applied under both *the Constitution* and the *Law of Succession* which recognized Islamic law as applying to persons who professed the Islamic faith. Reference was made in this regard to Article 24 4 of *the Constitution*, and section 2 (3) of the *Law of Succession Act*. Counsel contended that equity could not be applied when it contradicted Islamic law found in the Quran, there is no limitation period regarding grant of letters of administration of an estate, and that the doctrines of estoppel and acquiescence apply in common law and not in Islamic law. Further, that the Deceased died without making a will, and that the document dated 4th February 1972 was not a distribution of the estate of the deceased, and merely contained the wishes of the wives of the Deceased. Counsel further argued that the said document disinherited the Deceased's children, which is prohibited under Islamic Law. Lastly, that the trial Court did consider the position of the Deceased's properties that had been sold, and ordered their inclusion in the valuation of the Deceased's estate.
 8. As this is a first appeal from the decision of the High Court, we reiterate this Court's role as expressed in *Selle & Another vs Associated Motor Boat Co. Ltd. & others* (1968) EA 123, where it was stated that an appeal to this Court is by way of retrial, and the principles upon which this court acts in such an appeal are that it 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 to follow the trial judge's findings of fact if it appears either that they are not based on the evidence on record, or where the trial court is shown to have acted on wrong principles of law, as held in *Jabane vs Olenja [1986] KLR 661*.
 9. It is not disputed that the substantive law that applies in the distribution of the estate of a deceased person who professes the Muslim religion is Islamic Law, by virtue of both *the Constitution* and the *Law of Succession Act*. Article 2 of *the Constitution* in this respect guarantees the right to freedom of conscience, religion, thought, belief and opinion, and of persons to manifest any religion or belief through worship, practice, teaching or observance. Specifically on the application of Islamic law on inheritance, the *Law of Succession Act* provides as follows in section 2 (3) and (4):
 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.
 10. It is not in dispute that the Deceased was a practicing Muslim and he indeed died while on pilgrimage to Mecca, which is a religious obligation of persons of Muslim faith. Therefore, the High Court did not err in holding that Islamic law applied to the distribution of the Deceased's estate by virtue of section 2(3) of the *Law of Succession Act*. The Islamic law principles on succession in this regard are settled. While the making of wills is permissible, testamentary freedom is restricted to just one third of the Deceased's net estate, and the remaining two thirds is shared among the deceased's heirs in accordance with principles set out in the Quran. In addition, the willable one-third cannot be bequeathed to the testator's heirs but must go to outsiders, except with the consent of the heirs. The Quran provides a system of precise and fixed shares of the estate for each of the deceased's relatives, and a general rule is



that where a deceased is survived by a son or son's son, none but the surviving spouse, daughter and the parents will inherit, and a daughter receives half as much as a son. (See the chapter on "Islamic Law of Succession" in *The Law of Succession* by W.M. Musyoka, and the explanation on the existing Islamic laws on wills and intestacy in the Report of the Commission on the *Law of Succession Act*).

11. It is also pertinent to note that these rules of inheritance are not interpreted in the same manner in the different systems of Muslim law, as observed by this Court in *Saifudean Mobamedali Noorbhai vs Shebnaz Abdebusein Adamji* [supra] wherein it was held that an essential feature of Muslim jurisprudence is that it does not constitute a single, uniform code of law, but manifests a diversity of legal doctrines comprising a multiplicity of Muslim schools of law, within each of Islam's two major branches, the Sunni and the Shia.
12. The main issues in this appeal are therefore firstly, whether the applicable principles of Islamic law on inheritance can be limited by the Deceased's wishes, acquiescence to the Deceased's perceived wishes, or by equitable principles and values. Secondly, what is the appropriate relief in the circumstances of this appeal. On the first issue, the Appellant's case is that the status quo pursuant to the scheme of division devised by the Deceased was acquiesced and maintained by the beneficiaries, and that the parties were estopped pursuant to their acquiescence and conduct from claiming that the properties must not be redistributed afresh according to Islamic law. The Respondents' position on the other hand is that the document submitted by the Appellant was not the one the deceased wrote and the document in the Deceased's own handwriting was not produced, and did not conform to Sharia Law which provided for specific shares to each beneficiaries.
13. Short of evidence that the Deceased was not a Muslim or having been a Muslim had renounced the Islamic religion which was not adduced during trial, this Court cannot decree that Islamic law will not apply to the inheritance of the Deceased's property. It is also instructive that Article 24(4) of *the Constitution* provides that the provisions of the Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance. Any limitations to the application of Islamic law by ideals and values of equity can in this respect only be interpreted in the context of the applicable Islamic Law.
14. This position was recognized in the decision by this Court in *Saifudean Mobamedali Noorbhai vs Shebnaz Abdebusein Adamji* [supra] wherein the deceased, who did not have a child, bequeathed all his estate to his wife. The deceased's cousin argued that this was contrary to the Islamic law principle of representation, which is to the effect that "in the absence of brothers, uncles or aunts, their respective children take their share", and that he was consequently entitled to two-thirds of the deceased's estate. The wife argued that the exclusion of the deceased's cousins from his will is permissible in Islamic law. The Court framed the question before it as: "can a Kenyan Muslim man, of the Shia Dawoodi Bohra persuasion, who has no children, grandchildren, parents or grandparents, leave his entire estate by will to his wife? What is the law that applies to him? Section 2 (3) of the *Law of Succession Act* Cap 160 of the Laws of Kenya precludes the application of that Act to Muslims, who shall be governed by "Muslim law". If that is so, what is the applicable Muslim law in this case?"
15. The Court in upholding the deceased's will observed that:

"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 been 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 emphasising justice and kindness – entertain such a contemplation.”

16. The Court in that case relied on evidence of provisions in the Quran that allow for a Muslim man to bequeath his estate to his wife and siblings in the absence of direct descendants or ascendants, and that the principle of representation is not universally acknowledged in all Muslim legal traditions and schools. In *CKC & another (Suing through their mother and next friend JWN) vs ANC* [2019] eKLR the issue before this Court was “whether the appellants, children born of a Muslim father and a non-Muslim mother who were not formally married, can inherit the estate of their deceased father.” That Court in finding that the Islamic law of inheritance was not applicable, held that the appellants did not profess the Islamic faith and had not submitted themselves to the jurisdiction of the Kadhi’s court, which are absolute preconditions for application of Islamic law.
17. Unlike in the above cases, in the present appeal the Deceased had surviving children at the time of his death, who were all born of Muslim parents and were practicing Muslims. The Appellant has not brought any evidence of any special circumstances which would justify the exclusion of the children of the Deceased from their rightful share of inheritance under Islamic Law. The document relied upon by the Appellant as evidence that the Deceased bequeathed certain properties to his wives could not qualify as a valid will under Islamic law, for the reason that the Deceased could not under Islamic law will all of his properties to exclude his children, who are entitled to specific shares as explained in the foregoing.
18. We note in this respect that the decisions relied upon by the Appellant on the application of the doctrine of estoppel namely *748 Air Services Limited vs Theuri Munyi* [2017] eKLR and *Re Estate of M’muthuri Gitumbae* [2019] eKLR are not on the Islamic law on inheritance, neither do they address the application of the said doctrine in Islamic law. Likewise, the decision cited of *Willy Kimutai Kitilit vs Michael Kibet* [2018] eKLR that all statutes including Section 2 (3) of the *Law of Succession Act* must be interpreted in line with national values of *the Constitution* did not deal with the application of these values in the context of Islamic law on inheritance.
19. Lastly, it is also notable that there are in built doctrines in Islamic Law that provide for equitable distribution of an inheritance. Under the doctrine of Awl when the total shares of the heirs exceed the inheritance, then the shares of each or some of the heirs (depending on the school of Islam) is reduced proportionately to cater for the deficit, while under the doctrine of Radd, where the respective shares of the heirs do not exhaust the whole estate, the excess will be returned to the said heirs in the proportion of their shares, except the husband and the wife, who are not entitled to the return.
20. This brings us to second issue as to appropriate relief in the circumstances. The Appellant submitted that the High Court should have appreciated that the 1st Respondent stated in his evidence that, some properties no longer existed. Therefore, that by failing to appreciate that some properties were alienated, the High Court consequently wrongly made a primary order that the estate be valued as a whole and distributed generally among all beneficiaries. Further, that the attempt by the High Court to qualify its orders by stating that the properties already alienated should be considered during distribution is impossible as they no longer existed.



21. The Appellant therefore seeks orders that the estate of the deceased be ordered to be distributed in accordance to Islamic Sharia law, but that the properties situated at Mariakani to be solely distributed to the children of Hadija Hassan i.e. family of the Appellant; the properties situated at Kilimangondo be distributed amongst the children of Mgeni Mboto that is, family of the 1st Respondent and finally, the properties situated at Mwena be distributed amongst the Children of Halima Kahaso the family of the 2nd Respondent. These prayers are however not merited arising from the findings made in the foregoing on the application of the Islamic law on inheritance, and for the additional reason that the estate of a deceased under Islamic Law is the entire and all- inclusive property that remains, after the payment of funeral expenses, debts, and legacies, whether movable or immovable.
22. Islamic law does not differentiate between corpus or usufruct, corporeal or incorporeal property, and there is no concept of ‘joint family property’ and ‘separate property’ of a deceased person under Islamic law. Jamil Ddamulira Mujuzi in his article on “ *The Islamic Law of Marriage and Inheritance in Kenya*”, published in the Journal of African Law , Volume 65 , Issue 3 , October 2021 at pages 377 to 401 reviewed various decisions of the High Court on the nature of the estate that is subject to succession under Islamic Law, including *Abmed Abbas Edin & Abdinasir Adan Somo vs Hassan Abdul Adan* [2018] eKLR, *Mako Yassin v Hribaye Nane Shege & 2 others* [2018] eKLR, *Mohamed Hanif Kberdin vs Mohamed Sheriff Khairdin* [2016] eKLR, and *In re Estate of Lante Osman Sharriff Omar Noor A.K.A (Osman Omar) (Deceased)*, [2015] eKLR. The said author explains as follows in this regard:

“Under Islamic law of inheritance, whatever belonged to the deceased or whatever the deceased was entitled to form part of his estate and is available for distribution to the heirs. ... Islamic Law of inheritance makes no difference on the type of property heritable by the heirs provided that it has monetary value and it is halal (lawful). The property is not limited to real property and tangible property, but also includes pension and death gratuity. Hence, all types of properties are subject to inheritance under Islamic law. However, the deceased's estate does not include the money being paid to the widow in her capacity as a widow or the property that was sold by the deceased in his lifetime and the property he holds in trust on behalf of others.”
23. We therefore see no valid ground to upset the decision of the High Court, and note in this regard that the High Court properly took into account the existing status quo in its orders that the valuation and distribution shall take into account any property in the possession of, or sold by any of the beneficiaries. The manner of such accounting is one left to the experts in the field of evaluation, and is not for this Court to pre-empt or speculate on its possibility.
24. We consequently find no merit in this appeal, which is hereby dismissed with costs to the Respondents.
25. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF MAY 2022

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL



J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

