



**THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: WAKI, GATEMBU & ODEK, JJA)**

**CIVIL APPEAL NO. 1 OF 2017**

**BETWEEN**

**SKHS.....APPELLANT**

**VERSUS**

**SSNS .....RESPONDENT**

*(An appeal against the Ruling of the High Court of Kenya at Nairobi (W. Karanja, J) dated 25<sup>th</sup> July, 2012*

**in**

**HC SUCC CAUSE NO. 1769 OF 1999)**

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**JUDGMENT OF THE COURT**

1. The appellant, SKHS, who is the executor and trustee of the Will of SNS, deceased, is aggrieved by the decision of the High Court (W. Karanja, J, as she then was) given on 25<sup>th</sup> July, 2012 in which that court referred the succession matter in the estate of the deceased to the Chief Kadhi to determine the “*entitlement*” of the beneficiaries under the Will.
2. The appellant complains that in referring the matter to the Kadhi’s court, the Judge failed to recognize that the deceased’s Will is a secular Will under the Law of Succession Act; that the judge failed to apply Article 170(5) of the Constitution; and that the Judge was wrong in holding that the Kadhi’s court has jurisdiction to determine the matter.
3. The background, in brief, is that the deceased, SNS, died on 23<sup>rd</sup> June 1999 at the Nairobi Hospital and was domiciled in Kenya. By a petition dated 13<sup>th</sup> August 1999, the appellant petitioned the High Court for a grant of probate of the last Will of the deceased under which the appellant had been appointed and nominated as the sole executor and trustee of the Will. Under the Will, the deceased directed the appellant, as the executor of the Will, “*to look after the welfare*” of the daughters of the deceased, one of whom is the respondent in this appeal. On 27<sup>th</sup> October 1999, the High Court, in High Court Succession Cause No. 1769 of 1999, issued a Grant of Probate of Written Will to the appellant to enable him administer the estate of the deceased in accordance with Will.
4. On 1<sup>st</sup> December 2010, the respondent presented an application by way of a chamber summons to the High Court seeking an order that, “*this succession cause be referred to the Chief Kadhi for determination in accordance with Islamic sharia*”. The application was based on the grounds that the deceased was a Muslim by faith; that the appellant, the administrator of the estate and the respondent are Muslims by faith; that there are substantial issues of Islamic law on inheritance arising in the matter; and that of the appellant had failed to administer the estate in accordance with the applicable Islamic sharia.
5. In her affidavit in support of that application, the respondent deposed that the Will is contrary to well established dictates of Muslim sharia on inheritance and that there was need to refer the matter to the Kadhi’s court in order to ascertain the applicable Muslim sharia on the distribution of the estate.
6. In opposing the application, the appellant asserted that the deceased had made provision for everyone in the Will; that by virtue of the Will, the deceased chose to be governed by the provisions of the Law of Succession Act; that it was not open to the respondent to vary the Will of the deceased; that under the Law of Succession Act the High Court had the requisite jurisdiction to conclusively deal with the matter and there was no basis for seeking to have the matter transferred to another court.

7. In a ruling delivered on 25<sup>th</sup> July 2012, the High Court (W. Karanja, J, as she then was) allowed the respondent’s application and referred the matter of succession of the estate of SNS, deceased “to the Chief Kadhi for him to determine the entitlement” of the beneficiaries under the Will.

8. In the ruling, the Judge referred to Articles 165(3)(a) and 175(5) of the Constitution; Section 2 (3) of the Law of Succession Act; and to Section 5 of the Kadhi’s Court Act and held that the High Court had original and unfettered jurisdiction to deal with matters pertaining to Muslims. However, in what the court considered to be “the larger interests of justice for all parties” it ordered that:

***“This matter should be referred to the chief Kadhi for him to determine the entitlement of the applicant and her sister M as provided under clause 3 of the deceased’s Will. Thereafter, the matter should be brought back to this Court for confirmation of the Grant as by law required.”***

9. As already indicated the appellant complains that the Judge was wrong in holding that the Kadhi’s court has jurisdiction to hear and determine the matter. During the hearing of the appeal, the appellant who appeared in person relied entirely on his written submissions as well as his rebuttal of the respondent’s written submissions. Mr. Farrah Dawood, learned counsel, represented the respondent. He equally relied entirely on the respondents written submissions.

10. Although both parties made extensive submissions supported by authorities, which we have duly considered, we think that the only question that arises is whether the learned Judge erred in referring the matter to the Chief Kadhi for determination of the question of entitlement. The answer to that question, in our view, is to be found in Article 170(5) of the Constitution to which the learned Judge referred. It provides that:

***“The jurisdiction of a Kadhi’s court shall be limited to the determination of questions of Muslim Law relating to personal status, marriage, divorce and inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi’s court.” [Emphasis]***

11. Whereas there is no dispute that all parties herein, including the deceased, professed the Muslim religion, there was no evidence before the Judge that all parties, including the deceased and the appellant, submitted to the jurisdiction of the Kadhi’s court. It was not a matter on which the Judge had a discretion to determine on the basis of “the larger interests of justice for all parties” as the Judge considered. We think that was a misdirection.

12. The question whether or not the deceased made adequate provision in the Will for the respondent and her sisters, which appears to be the real grievance, is a matter that the High Court should address within the parameters of the Law of Succession Act under which the succession proceedings in respect of the estate of the deceased were initiated. Considering the matter is live before the High Court, we must pen off here lest we say more than we should.

13. The result is that we allow the appeal and set aside the ruling of the High Court delivered on 25<sup>th</sup> July 2012 and substitute therefor an order dismissing the respondent’s application dated 1<sup>st</sup> December 2010. As this is a family matter, we order that each party will bear its own costs of the application before the High Court and the costs of this appeal.

Orders accordingly.

***Dated and delivered at Nairobi this 25<sup>th</sup> day of January, 2019.***

**P. N. WAKI**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

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**JUDGE OF APPEAL**

*I certify that this is a*

*True copy of the original*

