IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: BOSIRE, ONYANGO OTIENO & VISRAM, JJ.A)
CIVIL APPEAL NO. 142 OF 2005

BETWEEN

SAIFUDEAN MOHAMEDALI NOORBHAI .....…... APPELLANT

AND

SHEHNAZ ABDEHUSEIN ADAMJI …… RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Mombasa (Khaminwa, J) dated 25th July, 2003

in

H. C. Succession. Cause No. 91 of 2001)
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JUDGMENT OF THE COURT

This case is unique, and presents an equally unique challenge. There is no precedent to guide us, and we are honoured to pronounce on the complex arguments presented to us. The material facts, to which we will return later, are not in dispute. The issue is purely one of law; more specifically, the interpretation of Muslim law governing inheritance and succession. 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?

From a perusal of the sources cited by both parties to the suit, and of the authorities to which these sources refer, certain basic principles are discernible that are germane to the determination of the issue at hand.

The Muslim law, in its essence, is an ideal, a moral doctrine, "proclaiming, as fundamental commandment, the noble Quranic verse: Verily God commands you to be just and kind!" **(Asaf A. A. Fyzee**, citing **Count Leon Ostrorog**, **The Angora Reform**, 99; **the Quranic verse ref. Q.16:90)**. According to **Fyzee** and other specialists, the law, in Islam, is, thus, a matter of discovering the Divine Will, an ongoing process calling for the human rational endeavour to interpret, expand, and supplement basic moral precepts of human conduct derived from the noble Quran and the example of the Prophet, the Sunna. As modern scholarship has demonstrated, the growth of Muslim law has been linked

to evolving social, political, cultural and economic conditions. The Muslim family law illustrates well the dynamic of the legal tradition to successfully adapt itself to the needs and temper of society in varying climes and contexts.

This brings us to another essential feature of Muslim jurisprudence, namely 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. **N. J. Coulson** in his book *Succession in the Muslim Family* (Cambridge University Press, 1971, p. 4) states:

"In substantive law generally, and certainly in the law of succession at death, the differences between these various schools are often not merely variations in detail but matters of a fundamentally different approach. Furthermore, the authoritative texts of each particular school embody variant shades of opinion as between individual jurists subscribing to that school. From all this it will be apparent that diversity of doctrine is of the essence of traditional Shari'a law."

In a statement issued by the International Islamic Conference held in Amman, the Hashemite Kingdom of Jordan, under the title: '*True Islam and its Role in Modern Society*' (**Ghazi Bin Muhammad Bin Talal**, 3d. Ed. p. xix), the Muslim leaders stated, in part:

"(1) Whosoever is an adherent to one of the four Sunni schools (Mathahib) of Islamic jurisprudence (Hanafi, Maliki, Shafi'I and Hanbali), the two Shi'i schools of Islamic jurisprudence (Ja'fari and Zaydi), the Ibadi school of Islamic jurisprudence and the Thahiri school of Islamic jurisprudence, is a Muslim.

Declaring that person an apostate is impossible and impermissible. Verily his (or her) blood, honour, and property are inviolable. Moreover, in accordance with the Shaykh Al-Azhar's fatwa, it is neither possible nor permissible to declare whosoever subscribes to the Ash'ari creed or whoever practices real Tasawwuf (Sufism) an apostate. Likewise, it is neither possible nor permissible to declare whosoever subscribes to true Salafi thought an apostate.

Equally, it is neither possible nor permissible to declare as apostates any group of Muslims who believes in God, Glorified and Exalted be He, and His Messenger (may peace and blessings be upon him) and the pillars of faith, and acknowledges the five pillars of Islam, and does not deny any necessarily self evident tenet of religion.

(2) There exists more in common between the various schools of Islamic jurisprudence than there is difference between them. The adherents to the eight schools of Islamic jurisprudence are in agreement as regards the basic principles of Islam. All believe in Allah (God), Glorified and Exalted be He, the One and the Unique; that the Noble Qur'an is the Revealed Word of God; and that our master Muhammad, may blessings and peace be upon him, is a Prophet and Messenger unto all mankind. All are in agreement about the five pillars of Islam: the two testaments of faith (shahadatayn); the ritual prayer (salat); almsgiving (zakat); fasting the month of Ramadan (sawn), and the Hajj to the sacred house of God (in Mecca). All are also in agreement about the foundations of belief: belief in Allah (God), His angels, His scriptures, His messengers, and in the Day of Judgment, in Divine Providence in good and in evil. Disagreements between the 'ulama (scholars) of the eight schools of Islamic jurisprudence are only with respect to the ancillary branches of religion (furu') and not as regards the principles and fundamentals (usul) [of the religion of Islam]. Disagreement with respect to the ancillary branches of religion (furu') is a mercy. Long ago it was said that variance in opinion among the 'ulama (scholars) "is a good affair".

As regards "the testamentary freedom of the testator", this principle is stressed in an appeal judgement by Shah J.A. (as he then was) who, also, observed: "*Jonathan's application, for a reasonable provision, amounts to greed rather than a search or quest for justice to seek reasonable provision for*

*maintenance as an alleged dependent". (**John Gitata Mwangi vs Jonathan N. Mwangi, Civil Appeal No. 213 of 1995, H. C. Succession Cause No. 494 of 1999**).*

The judge's rebuke, in fact, encapsulates another principle which resonates well with the principles of ethics which underlie the law of the Muslim or any other faith.

As to the legality of wills in Muslim law, **Sir Dinshah Fardunji Mulla**, in his *Principles of Muhammadan Law*, 1995, explains
"Wills are declared to be lawful in the Koran and the traditions, and all doctors, moreover have concurred in this opinion (Hedaya, 671)".

The limit on a Muslim's testamentary freedom, up to one-third of one's estate, is seen in Islam as a means to ensuring balance between a Muslim's freedom in this regard and responsibility to his or her heirs. Deriving sanction from a Prophetic tradition, it reflects indications in the noble scripture that a Muslim may not ***"so dispose of his property by will as to leave his heirs destitute".*** (**Mulla**, Ch, IX, Wills, p. 141).

The emphasis is thus, on the Muslim ethic of care and compassion for the weak and vulnerable, especially among one's close relations. In Ch. XIX "*Maintenance of Relatives*", p. 383, **Sir Dinshah F. Mulla** reinforces the above principle to say that, in Islamic teachings, a Muslim is not obliged to maintain adult sons unless they are disabled by infirmity or disease, or even a child who is capable of being maintained out of his or her own property.

In fact, therefore, this balancing of a parent's responsibility of care of his or her issue with the latter's ability to take care of themselves, underlines an established juristic maxim that, in interpreting a Quran-inspired rule of law, account should be taken of the Quran's moral teaching as a whole.

Also cited, as an authority, by one of the parties to this appeal is the case of ***Aziz Bano (Appellant) v/s Mohamed Ibrahim Hussein (Respondent)***. Allahabad, 72Q; All India Reporter, 1925, Allahabad section. In their reasoning of their findings in favour of the appellant, **Sulaiman and Mukerjee**, JJ reiterate well-established principles which are pertinent to us, even though the case itself is clearly distinguishable from the one before this Court.

For instance, **Sulaiman J**, citing the eminent Muslim law specialists, **Faiz Badruddin Tyabji** and **Syed Ameer Ali**, stated:

"It is a well-settled rule that the law to be observed in the trial of suits shall, in the absence of any enactment or usage having the force of law, be the law of the defendant, and in the absence of any specific law and usage, justice, equity and good conscience."

Both by enactment and usage, Kenya Courts concede that right of the defendant. This, indeed, is an affirmation of the new Constitution's recognition of plurality of schools of law and thought within Muslim and other communities. So does the Muslim law as affirmed by **Imdad H. Minhas** in his "*Inheritance in Islam*", (Nadeen Law Books House 1997), one of the sources cited by the appellant in this Appeal. This and other sources of Muslim law, cited by both parties, unambiguously, attest to the historic reality of legal pluralism within Islam. The attitude of the Kenyan Judiciary, in this respect, has been demonstrated in actual cases. For example, the Honourable Justice Khamoni, sitting at the High Court of Kenya in the Matter of the Arbitration Act, 1955, specifically in the Matter of an Arbitration Between ***Rozina Jan Mohamed vs Farouk Jan Mohamed,*** said "I should state that Kenya…. recognizes and allows the application of personal law of Ismailis," referring approvingly to the following words of the late **Madan J.A**. who stated in the Court of Appeal Judgment in ***Nurani vs. Nurani (1981) KLR 87***:

"In an orderly society the High Court gives, as it ought to give, recognition to a tribunal which is set up by the consent of members of a sect to administer their personal law. Such non-statutory tribunals are useful adjuncts to courts of law which administer justice under their inherent and statutory

jurisdictions. They usefully reduce the burden of the courts of law in an ever-increasing complex society…….".

Echoing the late Justice Madan's ruling, the Supreme Court of the United Kingdom, in a recent appeal judgment, upheld the role of a non-statutory tribunal grounded in the religious ethos of a muslim community. (***Jivraj v. Hashwani [2011] UKSC 40***).

Thus, the rule prevalent in Kenya and elsewhere in the Commonwealth, and that of Muslim law are in accord on this question of the plurality of approach to be observed in the present dispute. The respondent, Shehnaz Abdehussein Adamji, claims that, in matters of personal law, herself being of Shia Dawoodi Bohora Muslim persuasion, she adheres to the Jaffery (Shia) legal tradition, as interpreted by her community's Chief Dai, to whom she has pledged an oath of allegiance as the religious, spiritual and temporal leader of the community, and, therefore, she does not consider herself bound by any decision of the Chief Kadhi, Mombasa. Her concern about submitting to the jurisdiction of the Kadhi's Court is misplaced. Kenyan Courts have held in past judgments that every litigant, of whatever religious persuasion, has the option of going directly to the High Court, and a Muslim is not necessarily restricted to the jurisdiction of the Kadhi's Court. (see, for example, **Visram, J** (as he then was) in the matter of the ***Estate of Hemed Abdulla Kaniki (P & A Cause No. 1831 of 1996 (UR)***. Indeed, ***section 170 (5)*** of the new Constitution of Kenya, affirms this right. It states as follows:

"The jurisdiction of a Kadhis' court shall be limited to 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 and submit to the jurisdiction of the Kadhi's courts". (emphasis added)

This, indeed, accords with the new Constitution's recognition of plurality of schools of law and thought within muslim and other communities.

The facts of the case before us are as follows. The respondent's late husband, Abdel Hussein Ebrahim Nurbhai Adamji, died on 6th November, 2000. He left a written will, assigning his entire estate to his widow, the respondent Shehnaz Abdehussein Adamji (Shehnaz) who was granted probate of the written will on 6th February, 2002. The appellant, Saifudean Mohamedali Noorbhai (Saifudean), claiming to be a cousin of the deceased, applied to the High Court of Kenya at Mombasa District Registry on 8th May, 2002 for the revocation of the grant of the Written Will issued to the respondent, Shehnaz, named in the will as the sole heir, trustee and executor. The application for revocation was lodged on the grounds that it was contrary to the Muslim Law of devolution of an estate of a deceased Muslim, and therefore it was null and void and of no effect. Further, the appellant claimed that, according to the Muslim law, he, being a cousin of the deceased, was entitled to three quarters of the deceased's estate as directed by the Chief Kadhi of Kenya. The application for revocation also alleged that the respondent had obtained probate fraudulently by failing to disclose in her petition that the deceased was a Muslim and, hence, the Muslim law of devolution should have applied, and by falsely claiming that she was the sole heir of the deceased.

In her affidavit, opposing the application for revocation, the respondent argued that the application was based on the erroneous premise that the grant of probate was made to her in the matter of the estate of Ebrahimji Noorbhai Adamji as shown by the Chief Kadhi's certificate dated 30th January, 2002. The said Ebrahim N. Adamji was the father of the deceased Abdel Hussein Ebrahimji Nurbhai Adamji. Her affidavit also claimed that the appellant's application had not questioned the validity of the written will left by her late husband, that she was the only wife of the deceased and that they had no children or grandchildren; that the deceased's parents and grandparents had also predeceased her late husband. The deceased, therefore, was not survived by any descendants or ascendants within the meaning of the noble Quran which, the appellant claims, to be the basis for the devolution of a Muslim's estate. Nor was the deceased survived by any brother or sister. That left her, the respondent, according to her affidavit, the only heir as the closest living next of kin of the deceased.

In her ruling, rejecting the application for revocation of the probate, the Honourable J. Khaminwa,

noted that the deceased was 63 years of age at the time of his death in November 2000, and had made a will in November 1999, naming his wife as executor and trustee of his will, and leaving his entire estate to her. The Honourable Justice Khaminwa did not find any evidence to support the appellant's claim that the deceased was a devout Muslim, observing that it was quite common in modern times for people to change their faith or adopt a way of life which does not conform to their faith.

She also held that the appellant had objected to the grant of probate without challenging the will itself. The Hon. Judge upheld the validity of the will by reference to ***section 5 (i)*** of the Law of Succession Act, Cap.160, Laws of Kenya, which provides that any person who is of sound mind, and not a minor, is free to dispose of all of his/her free property by will, and may thereby make any disposition by reference to any secular or religious law of his or her choice. In this case, the deceased did not choose to make disposition by reference to the Muslim law or the law of any religion.

The ruling also rejected all the allegations of fraud and false claims against the respondent. Holding that, the serious arguments, raised by the counsel for the applicant, on issues of Muslim law of inheritance, were of relevance to a suit for an annulment of the will, and not to the application for revocation of probate, the Honourable Judge dismissed the application as of no merit.

The appellant, Saifudean, has appealed to this Court to reverse and set aside the ruling of the Honourable Justice J. Khaminwa, on the following grounds:

"(a) That the learned Judge erred in holding that there was no evidence to support the appellant's sworn statement that the deceased Abdel Hussein Ebrahimji Noorbhai Adamji was a Muslim, and therefore, she erred and misdirected herself in applying the Law of Succession Act, Cap. 160, Laws of Kenya, particularly Section 5 thereof, to the devolution of the estate of the deceased, which law was not applicable as the deceased was a Muslim; she, thereby, also erred in not finding the deceased's will invalid under Muslim law.

(b) That the Learned Judge erred in failing to hold that the respondent, Shehnaz, had made a false statement in her petition for grant of probate, and concealed material facts."

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.

On the other hand, we have the testimony of the respondent, Shehnaz, by way of an affidavit, that her late husband was a devout Muslim who made his disposition through a written will according to the guidance in the noble Quran as set out in Chapter 4, verse 12, and verse 176. According to a literal reading of these verses, the guidance imparted to a male Muslim is that, in the absence of direct descendants or ascendants, he should make the prescribed provision for his wife and siblings (full or half). Since the deceased had no descendants, ascendants or siblings, he left his entire estate to his widow, the respondent Shehnaz.

It would, therefore, seem that, neither in writing the will nor in making his disposition, was the deceased contravening the Quranic guidance, if the latter is read literally.

However, arguments have been submitted to the Court that the edifice of the Quranic law of inheritance is much more comprehensive, and embraces, not only ascendants, descendants, siblings, uncles and aunts, but also, in the absence of the last three, their descendants, following the interpretative principle of representation, according to which the children of deceased siblings, uncles and aunts take the prescribed portion of shares of their respective parents.

We are also told, in a source cited by the appellant, (*Inheritance in Islam*, **Imdad H. Minhas**, p. 29) that, as a general rule, the principle of representation is not recognized. The Hanafi law rejects it altogether. For example, children of a predeceased son, in strict law, do not inherit in their father's stead, from the estate of their grandfather.

Closer to home, in ***Chelanga v. Juma, (2002) 1 KLR 339*** the Honourable Etyang, noted:
"The other of the deceased's brothers are Muslims. They are, however, again caught up by the Islamic law which was correctly stated by Mr. Hammat Muhammad Kassim, the Kadhi of Nairobi, that as long as the deceased is survived by his widow, parents or parents and his children, then, under Islamic law, his surviving brothers and sisters are not entitled to a share of his estate even if they are of the Islamic faith. I do so hold in this ruling."

The principle of representation in Muslim law is, thus, not universally acknowledged in all Muslim legal traditions.

A careful reading of the sources cited to the court also establish a pertinent historic principle: 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. For instance, **Asaf A. A. Fyzee**, in *Outlines of Muhammad Law* (Fourth edition, p. 446) states:

"If the widow is the sole surviving heir of the deceased, the early texts laid down that she was entitled only to her Koranic share, one-fourth, and the residue went to the state. But he cites Ameer Ali who says that the ancient doctrine is completely exploded and goes on to show that certain later jurists, in these circumstances, allowed the wife to take the residue as well. The Indian courts have adopted this humane and just cause".

This principle is reiterated by **Gray**, C.J.:

"……an equitable practice has prevailed in modern times of returning to the husband or the wife in default of sharers by blood and distant kindred". (Judgement in Saumu Binti Uledi v. Khamis bin Songora (2) (1944). 7 ZLR 126 at p. 121, cited in East African Law Reports, re Juma Sadala's Estate, Civil Case No. 1102 of 1957).

When a change in a rule of Muslim law is deemed necessary in light of radically altered social conditions from those prevailing fourteen centuries ago, then, besides the courts and jurists, the Government in a Muslim country may also lead the initiative for change in the traditional law even if this is said to be grounded in a Quranic injunction. An example is the Ordinance, passed at the instance of the Government of Pakistan, Ministry of Law, Ordinance No. VIII, of 1961 which introduced the rule of

representation in a limited way in the law of inheritance. The relevant text reads:

"Succession – in the event of the death of any son or daughter of the propositus before the opening of the succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stripes receive a share equivalent to the share which such son or daughter, as the case may be, could have received if alive."

This ordinance is said to have been enacted to redress what was seen as unfair for the orphaned grandchildren of a Muslim who, under the Hanafi law, could not inherit from their grandfather if the latter had living relations of his own at the time of his death.

The above instances are recalled here simply to illustrate that Muslim jurists and law makers follow the traditional maxim that the law is where the good lies, to ensure an outcome that is humane and just following the overarching Quranic commandment to Muslims to be just and kind (Q. 16.90).

With reference to the case before us, the appellant, Saifudean, has argued, on the basis of sources of Muslim law, that the rule of representation entitles him as a cousin, to a share of the deceased's estate that would have gone to his father had he been alive, as a brother of the deceased.

The respondent, Shehnaz, has equally cogently argued that, her late husband, the deceased was a devout Muslim who wrote his will according to the Quranic injunctions. These do not make any reference to the so-called principle of representation i.e. in the absence of brothers, uncles or aunts, their respective children take their share. The deceased was aware of the existence of his cousin when he wrote his will. As a good Muslim, we may assume, that he would have provided for his cousin if the latter were in a difficult economic situation since Quranic ethics emphasise the responsibility of care of the vulnerable, starting with the nearest of the kin. The appellant has not claimed to be in a difficult economic situation and therefore has not requested any provision for maintenance. The question that, then, arises is whether the appellant's case is a quest for justice.

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 Quaranic injunction emphasising justice and kindness - entertain such a contemplation.

Accordingly, and for reasons outlined, we have come to the conclusion that there is no merit in this appeal, and the same should be and is dismissed with costs. It is so ordered.

As we said at the beginning, this was a complex matter. We offer our gratitude to all Counsel – Mr. A. B. Shah and Mr. Vincent Omollo for the respondent, and Mr. S. Okongo for the appellant, for their industry and research. We also accept Mr. Shah's application for a certificate for two Counsel and award costs for two Counsel against the appellant herein.

Dated and delivered at Mombasa this 2nd day of December, 2011.

S. E. O. BOSIRE
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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

……..……
JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

I certify that this is atrue copy of the original.

DEPUTY REGISTRAR