



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

SUCCESSION CAUSE NO. 436 OF 2004

IN THE MATTER OF THE ESTATE OF CHUBA BAKARI HAMISI (DECEASED)

CHRISTINE KIMWANA CHUBA

CHARLES CHUBA (minors suing through their mother and next friend)

JOSEPHINE WANJIRU NJUKI.....APPLICANTS

VERSUS

ALI CHUBA

ASHA NIFUSI CHUBA.....RESPONDENTS

RULING

1. Chuba Bakari hamisi (hereafter the deceased) died intestate on 2nd August 2004. He was survived by two widows namely; Asha Chuba and Farida Chuba and several children named as; Ali, Esha, Shauriqy, Hamisi, Juma, Zuberi, Zainab, Salim, Fatma, Jarumani, Abdulrahman, Kibibi, Maimuna, Mwaka, Shulim, Najma, Mohamed, and Tima. On 3rd November 2004, Ali Chuba, Swauriqy Chuba and Asha Nifusi Chuba petitioned for a grant of representation. A grant was issued on 24th June 2005 and later confirmed on 25th July 2007 with directions that the estate to be distributed in accordance with Islamic Sharia.

2. Subsequently, Shauriqy petitioned Mombasa Kadhi's court vide Succession Cause No.82 of 2012 seeking determination of the shares of the heirs of the deceased herein pursuant to the confirmed grant. Unfortunately, on 18th December 2012, Shauriqy died before determination of the individual beneficiaries' entitlement or share in the estate according to Islamic sharia. His co-administrator Ali Chuba took over and prosecuted the case before the Kadhi.

3. From the record, Shauriqy was indicated to have been survived by a widow known as Josephine Wanjiru Njuki and two children namely; Christine Kimwana Chuba and Charles Chuba the applicants herein. In his Judgment dated 29th August 2013, the principle Kadhi held that the late Shauriqy's wife and her children born out of wedlock were not entitled to inherit the estate of the late Hamisi according to Islamic law. The kadhi however recognized that the late Shauriqy was entitled to 9.21 share out of the estate.

4. However, the applicants and their mother Josephine did not participate in this particular proceedings. Through their mother Josephine, the applicants filed an application dated 14th March 2014 before the kadhi's court seeking the court to strike out the entire case on grounds that; the judgment delivered on 29th August 2013 was an abuse of the court process as there was another case touching on the same subject matter being succession cause no 436 of 2004 pending before the high court; they were condemned

unheard and, that they(applicants) were not Muslims hence wrongly subjected to Islamic law. They also sought an injunction restraining any alienation or dealings adversely affecting the specific 9.21% share belonging to Shauriq pending hearing and determination of the application.

5. Upon hearing the application, the hon.Kadhi delivered his ruling on held on 2nd October 2014 thus holding that under Islamic law, the applicants could not inherit the late Shauriq. He however stayed further proceedings and dealings in respect of the 9.21% share belonging to the late Shauriq. He left it open to the applicants to move to the high court for determination of the issue. He also directed that the applicants were to remain in the house they were occupying until the issue was resolved by the high court.

6. On 11th March 2015, Josephine on behalf of her children, moved to the high court seeking determination of Shauriq's 9.21 share in the estate of the deceased and an injunction restraining the administrators from distributing or alienating the said share. She contended that being anon Muslim, she could not be subjected to its application or jurisdiction and that in any event, the impugned Islamic law was discriminatory hence unconstitutional. The respondents opposed the application thus supporting the Kadhi's position. Upon hearing the application, hon.lady justice Thande delivered her ruling on 15th December 2015 thus upholding the kadhi's finding hence dismissed the application.

7. Aggrieved by the said ruling, the applicants appealed against the same to the court of appeal. In its detailed judgment delivered on 26th September 2019, the court of appeal upheld the appeal thereby holding that the applicants being non-Muslims were wrongly subjected to the kadhi's court jurisdiction as they did not submit to the same and that it was the high court that was seized of jurisdiction to hear and determine the dispute under the law of succession Act. The court of appeal directed the high court to hear the matter under the law of succession Act and make a determination on any dispute that was pending or due to arise.

8. Subsequently, the matter was on 4th June 2020 placed before Thande J who recused herself on grounds that her ruling having been overturned by the court of appeal she was uncomfortable hearing the same matter. Later, the file was placed before judge Otieno pj who directed for advertisement in the daily nation of the proceedings limited to the share of Shauriq. The administrators were directed to file an affidavit within 30 days showing what they were holding on account of Shauriq. On 17th December 2020, parties agreed to proceed by way of viva voce evidence with the then pending application dated 5th January 2014 for distribution of Shauriq's share.

9. The application dated 5th January 2014 titled "summons by a dependant" was filed on 6th February 2014 seeking;

a) Spent

b) The respondents who are the administrators of the estate of the late chuba Hamisi do transfer to the applicants, through their mother Josephine Wanjiru Njuki, the assets of the Estate that fall for distribution in favour of the late Shauriqy Chuba who is the father of the applicants.

c) Pending the hearing and determination of the summons, the respondents who are the administrators of the estate of the late Chuba Bakari Hamisi do forthwith pay the tuition fees and related incidental expenses to the applicants in the sum of Kenya Shillings three Hundred and Twenty one thousand Eighty hundred and ninety seven shillings only (321,897) to cover for the period of the year 2014.

d) That pending the hearing and determination of the summons, the respondents be ordered to forthwith have the electricity supply connected to the applicants' residence formerly transmitted under the contract number 2697054-01 in the name of Shiela Dzame Nyiro, Mtwapa in Kilifi County.

e) That pending hearing and determination of this summons, the respondents who are the administrators of the estate of the late Chuba Bakari Hamisi be restrained by themselves, their agents, servants, employees or any other one working in connection with them, from interfering with the quiet enjoyment and possession of the applicant's residence situated in mtwapa in Kilifi County.

f) That costs of this application be provided for in the cause.

10. The application is anchored on the grounds set out on the face of it and averments contained in the affidavit in support sworn on

6th February 2014 by Josephine who averred that at all material times she was living with Shauriqy as husband and wife since 1992 until his death in 2012. She stated that in 1993, her father-in-law the late Chuba Bakari Hamisi gave them a house to live in. That her daughter Christine was born on 13th December 1994 and her son Charles Chuba on 8th August 2005. She contended that all along, her in-laws and more specifically Shauriqy's siblings knew her very well as a wife to their brother. She claimed that the respondents had threatened to evict her and the children from one of the estate's house in mtwapa in respect of which they had disconnected electricity and that they had refused to pay school fees totalling Kshs 321,897 for her children.

11. She averred that her late husband took care of her and their children the applicants herein until his death. She urged the court to distribute the share of her late husband to her to hold in trust for the applicants. According to her, the children in this case the applicants, cannot be victimized and suffer on account of religion.

12. In response, Ali Chuba one of the administrators and the 1st respondent filed a replying affidavit sworn on 24th February 2014 reiterating the judgment of the Kadhi's court thereby insisting that his brother the late Shauriqy was not legally married to Josephine under Islamic law and therefore the children born out of such relationship were not entitled to inherit any property.

13. As a rejoinder, the applicant filed supplementary affidavit on 7th May 2021 introducing the court of appeal's judgment which had settled the issue that the applicants were innocent children born out of a long relationship with the late Shauriqy and Josephine.

14. On 26th April 2021, parties agreed to canvass the application by way of affidavit evidence instead of viva-voce evidence. Parties also agreed to file written submissions within 14 days after the lapse of the time for exchange of pleadings. Consequently, the applicants filed theirs on 25th May 2021 through the firm of Mutisya Mwanzia and Ondeng advocates. The respondents did not file any submissions.

Applicants' submissions

15. The applicants submitted on four issues interalia; what is the applicable law in the matter; What is the share of Shauriqy Chuba Bakari in the estate of Chuba Bakari Hamisi; Who are the beneficiaries of the share of the late Shauriqy in the estate of Chuba Bakari Hamisi; whether the respondents who are the administrators of the deceased's estate should be ordered to transfer to the applicants through their mother Josephine the assets of the estate that fall for distribution in favour of the late Shauriqy Chuba.

16. Learned counsel contended that the applicants being children to Shauriqy are entitled to a share apportioned to their father from the estate of their grandfather the deceased herein. Regarding the first issue on the applicable law, counsel contended that the issue was resolved by the court of appeal which opined that the applicable law was the law of succession Act as the applicants did not profess Islamic religion nor did they submit to its jurisdiction.

17. Concerning the share of the late Shauriqy in his father's estate, counsel opined that the same is 9.21% a fact which is not in dispute hence settled in the kadhi's judgment and the distribution criteria set out by Sheik Hamad M.Kassim retired chief kadhi. Submitting on the status of beneficiaries, it was contended that the applicants are dependants to the deceased pursuant to Section 29 of the law of succession Act which recognizes wives, children, grand -children and anybody who was being maintained by the deceased immediately prior to his death as dependants.

18. It was contended that the applicants were heirs to the deceased who were entitled to a share in the estate through their father or even directly as grand children to the deceased. Further, counsel submitted that under Section 3(2) of the law of succession, the applicants were recognized as children whether born out of wedlock or not. That grandchildren can only indirectly inherit their grand -parents through their parents. To buttress this proposition, counsel placed reliance in the case of **Re estate of Wahome Njoki Wakogoto(2013)e KLR**. That upon the death of Shauriqy, his children automatically stepped into his shoes.

19. As concerns the existence of any other beneficiaries, it was contended that nobody else including Josephine has come forward to claim a share of shauriqy in the estate of Hamisi despite placing an advertisement touching on these proceedings. Touching on the issue of transfer of shares to Josephine to hold in trust for the applicants who are minors, counsel submitted that the court should order valuation of the assets in case of monetary transfer and have the same transferred to the beneficiaries.

Analysis and determination

20. I have considered the application herein, response thereto and submissions by the applicants. Issues that emerge for determination are; Which law is applicable in the distribution of the estate herein; whether the applicants are entitled to Shauriqy's share in the estate of the late Chuba Bakari Hamisi; whether the administrators can be ordered to transfer Shauriqy's share in the estate of Chuba Bakari Hamisi to the applicants through their mother Josephine.

21. For starters, the petition herein was originally filed before the high court thus giving the high court authority to apply the law of Succession Act. This position implied that the court was not strictly bound to the application of Islamic law. However, this position has since been resolved by the court of appeal which held at page 21 of its judgment delivered on 26th September 2019 in civil appeal 121 of 2018 that;

“it is common ground that the appellants do not profess the Islamic faith and have not submitted themselves to the jurisdiction of the kadhi's court. Professing the Islamic faith and voluntarily submitting to the jurisdiction of the Kadhi's court are absolute pre-conditions for application of Islamic law to the appellants”.

22. The court of appeal made a finding that the law of succession Act is applicable and consequently directed the matter to proceed before the high court and the proceedings be conducted under the law of succession Act. I have no doubt, this court is properly seized of this matter and that any dispute arising therefrom can be resolved in accordance with the law of succession bearing in mind that the applicants have not professed Islamic religion hence cannot be forced to submit to the kadhi's court jurisdiction.

23. The most critical issue here is, whether the applicants are entitled to inherit the share of Shauriqy arising from the estate of Hamisi his father. According to the applicant's mother one Josephine, she started cohabiting with the late Shauriqy in 1992. They subsequently got a baby named Christine (1st Applicant). In the year 2005, they got their son Charles. That all along, it was the late Shauriqy who was taking care of her and the children. That the late Hamisi (deceased) did provide them with a family house which they have been occupying to date. The respondents do not deny this fact save for the claim that their brother Shauriqy having not married Josephine under Islamic law, any child born out of such relationship with anon-muslim was a child born out of wedlock (illegitimate) hence lacks the legal capacity as an heir under Islamic law to inherit the deceased's estate.

24. There is no dispute that Josephine did cohabit with the deceased from 1992 and all along the respondent and their late father recognized her as a spouse to Shauriqy. According to the birth certificates of the applicants attached to the application, the father to the applicants is shown as Shauriqy. That fact has not been controverted. The fact that the applicants were brought up by the late Shauriqy while living in one of the deceased's house without any objection is also sufficient proof that the late Shauriqy and Josephine were living together as husband and wife. Under the presumption of marriage, Josephine would qualify to be a wife by virtue of long period of cohabitation. See Hortensiah Wanjiku Yawe v public trustee CA civil appeal no. 13 of 1976(UR) where the East Africa court of appeal held that a long period of cohabitation as man and wife may give rise to a presumption of marriage in favour of the party asserting it.

25. Assuming for a moment that the applicants were children born out wedlock, does that alone disentitle them their right to inherit in a situation where the late Shauriqy took and accepted them as his children over a long period of time" I do not think so. Under Section 3(2) of the law of succession, a child for purposes of succession is defined as;

“reference in this Act to a “child” or “children” shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility”

26. From the evidence presented before this court, it is clear that the late Shauriqy had assumed full parental responsibility over the applicants as his children. The fact that the two children were born during the subsistence of their cohabitation and birth certificates issued with Shauriqy as their father, the presumption is that they were sired by Shauriqy. It is immaterial whether their mother and the father had formalized their Marriage. In this case, Josephine is not claiming a share of the estate hence I need not delve so much on the nature and formalities of their marriage. Since paternity is not denied or challenged, the failure of the applicants' parents in formalizing their marriage cannot be visited on the children to deny them what they are by law entitled. See page 21 of the said court of appeal judgment in civil Appeal 121 of 2018 where the court observed that;

“...that the appellants were born out of wedlock following a prolonged and open relationship between Swauriqy and Josephine is not a fault of theirs. The fault, if it be a fault at all, falls squarely on the shoulders of Shauriqy and Josephine”

27. From the foregoing, I am convinced that the applicants were children to the late Shauriq who was a son to the deceased herein. It therefore follows that they have a stake in any property belonging to Shauriq their father. Although from the record Shauriq had no known property of his own, he has a stake in his late father's estate. There is no dispute that Shauriq was a son to the deceased Hamisi. It is also not in dispute that he was entitled to 9.21% of his father's share. This fact was confirmed in the kadhi's judgment of 29th August 2013 and ruling of 2nd October 2014.

28. Having confirmed that Shauriq is entitled to 9.21 % out of his father's estate, and further considering that the applicants are the only heirs to his estate even after advertising these proceedings, this court is bound to recognize them as the only heirs apparent to Shauriq and therefore the only beneficiaries to the estate of their father.

29. Under Section 35 of the law of succession, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to personal and household effects of the deceased and a life interest in the whole residue of the net intestate estate, provided that ,if the surviving spouse is a widow, that interest shall determine upon her death or re-marriage to any person and thereafter the property shall devolve upon the surviving child or equally among the surviving children. Similarly, under Section 38 of the law of succession Act, where an intestate has left a surviving child or children with no surviving spouse, the same shall devolve to the child if there be only one or equally divided among the surviving children.

30. In the instant case, there is a mother to the applicants whose marriage to Shauriq is contested but she is not claiming anything from the estate as a wife to Shauriq. She is however claiming to be the rightful widow to the deceased. Considering that the mother is not interested with the estate, the issue of conferring life interest is not applicable. In the circumstances, the children would be entitled to their late father's share in equal share.

31. Besides, the applicants pleaded dependency on their grandfather's estate citing Section 29 of the law of Succession Act. Under that provision, a dependant is defined as follows:

For the purposes of this Part, "dependant" means—

- a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;**
- b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and**
- c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.**

32. Under Section 29 of the law of succession, relatives under para (a) are automatic beneficiaries to the deceased's estate regardless whether they were being maintained by the deceased immediately prior to his death or not. In such scenario, the applicants herein being grandchildren to the deceased are entitled to a share courtesy of their deceased father's right to inherit. See **In re Estate of Hellen Wangari Wathiai (Deceased) [2021] eKLR** where the court stated that;

"looking at both parties' submissions, my appreciation of the matter at hand is that the Applicant herein brought this summons before court as a Beneficiary of the Estate of his late father who predeceased the deceased herein. A grandchild is a direct heir to the estate of the grandparent where the parent predeceased the grandparent. The grandchildren get into the shoes of their deceased parents and take the parent's share in the estate of the grandparents as was enunciated in the case of Re Estate of Wahome Njoki Wakagoto (2013) eKLR where it was held: -

"Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents

are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents."

33. Similar position was held in the case of **Ibrahim v Hassan and Charles Kimenyi Macharia,interested party(2019)e KLR** where the court stated that;

"the evidence on record suggest that the applicant herein brought these proceedings on behalf of his father; Abdi Abraham Hassan(deceased) who was the beneficiary to his father's estate. The applicant's interest emanates from the fact that his father was a beneficiary to the suit property, thus the applicant being dependant to his father Abdi Ibrahim Ibrahim's estate within the provisions of section 29 of the law of succession Act, he acquires an interest in his grandfather's estate; the suit property by virtue of his father's share. Therefore, in the court's view, the instant application is properly before the court"

34. In view of the wording of Section 29 above quoted, the applicants being grandchildren to the deceased are entitled to be referred to as dependants to the deceased by virtue being a grand-father hence the share of their father Shauriqy is subject to their inheritance being the only known heirs in that respect.

35. Having held as above, the question that remains is whether the applicant's mother shall hold their share in trust. By the time the application was filed, Christine was below 18years. She is now an adult hence her share will be transferred into her name. As to Charles, his share can be transferred and registered in his mother's name in trust until he attains age of majority. As administrators, the respondents are agents of the court acting as trustees hence duty bound to execute the transfer to beneficiaries. They have no choice but to deliver and execute their mandate by transferring 9.21% of the share entitled to the estate of Shauriqy from the estate of Chuba Bakari Hamisi. The 9.21% shall be for each asset as per the identification of shares by Sharefa centre adopted by the kadhi at the current value in case the respective properties are not capable of physical subdivision.

36. Regarding the prayer for payment of school fees for the applicants, the position may have changed since 2014 when this application was filed. I believe that could be the reason why counsel for the applicant did not submit on it. I will therefore not make any comment or order in vain on the same as the children may have finished school or are no longer in school.

37. For the above reasons stated, the claim by the respondents that such applicants are children born out of wed lock hence not entitled to a share is not tenable. To that extent, the application is hereby allowed with orders that';

a) The applicants are hereby declared as children to the Late Shauriqy Chuba Bakari and therefore entitled to inherit 9.21% share due to Shauriqy's estate from the estate of his father Chuba Bakari Hamisi

b) The applicants are entitled to 9.21% in respect of each asset listed in the estate of Chuba Bakari Hamisi

c) The applicants are entitled to their father's share(9.21%) in equal share

d) The share of the second applicant one Charles who is a minor shall be transferred and registered in the name of his mother Josephine Wanjiru Njuki to hold in trust and for the benefit of the said minor until he attains age of majority.

e) The administrators are directed to forthwith transfer the said shares as directed above and where it is not physically possible for any property to be so divided amongst all entitled beneficiaries, the same shall be valued by a mutually agreed valuer and then sold in a public auction and the proceeds realized therefrom be shared amongst the beneficiaries as ordered above

f) For avoidance of doubt, the applicants are entitled to 9.21% out of the estate of Chuba Bakari Hamisi in respect of the following properties Valued at kshs 176,100,000 and identified as follows;

i. Plot no.1763MN/III

ii. Plot no.1756MN/III

iii. Plot no.388,389,390 and 391MN/III

iv. Land and house plot No.1059 and 3287 MN/III

v. Plot no.Kilifi/Mtwapa 376

vi. House W/O land plots no.807,2888 and 535/III

38. Concerning the element of costs, this is a family issue hence each shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 31ST DAY OF JANUARY 2022.

J.N.ONYIEGO

JUDGE



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