REPUBLIC OF KENYA

IN THE KADHI'S COURT AT ISIOLO

SUCCESSION CASE NO. 7 OF 2019

IN THE MATTER OF THE ESTATE OF IOI.....DECEASED

HJK .....PETITONER / RESPONDENT

VERSUS

SULEIMAN OMAR IYA.....RESPONDENT / APPLICANT

RULING

Pleadings

1. The applicant through his Notice of motion dated 6th February 2019 prays for staying aside or varying the judgment and order of the court given on 26th February 2019. He states that he is a child of the late IOI and therefore entitled to inherit him but the respondent excluded him as a beneficiary in her succession petition. He annexed his birth certificate No xxxx to support his claim.

2. The respondent in reply stated she is not aware the deceased had any legal child and if the applicant can prove he is a legal child she will have no objection for him to get his inheritance share of the estate under the law.

Analysis

3. The applicant called two witnesses, ABA [RW1], his mother and HK [RW2]. RW2 refused to testify under oath. He stated that he only knows the applicant is a child of the deceased but could not confirm if he married his mother under Islamic law. His testimony is not admissible and does not disclose positive knowledge on the issue in dispute before court. Article 1699 of the Majalla [the Ottoman Courts manual] provides:

'the legal objective of evidence is to prove a right. Consequently, purely negative evidence is inadmissible..'.

4. RW1's evidence is that she was married to the late IOI under Borana customary law and not Islamic law, that they had one child, the applicant and they later divorced when he married another wife, the petitioner / respondent. She stated the deceased took care of his child with him, the applicant herein in terms of sustenance and school fees and even had him registered in his name in the birth certificate and national identity card.

5. The Birth certificate No xxxx issued on 11th February 2011 indicate Suleiman was born on 8th August 1997 at Isiolo. His parents are cited as OI and AB as informed by the mother.

6. The applicant's key witness confirms the applicant was a biological but not a legal child. He was not born in a legal wedlock solemnised under Islamic law.

7. Right to inheritance is predicated on four conditions: death of the propositus, existence of legal heirs, existence of estate and establishment of nexus between the deceased and the beneficiaries. The nexus forms a key legal basis to entitlement of inheritance. Ibn Al Juzzy in his Al Qawanyn al Fiqhia, at 569 lists these relationships as: blood ties, marriage or loyalty and *baitul mal* (treasury). Only legal marriage confers right to inheritance. Khan, in Islamic Law of Inheritance, at pp 51 states:

'The blood relationship or *nasab*, which grounds a right of inheritance must be a legal relationship, and since there is no legal tie of nasab between a putative father and his illegitimate child or between their respective 'legal' relatives, the root cause simply does not exist. Just as partners in an invalid marriage are not husband and wife, so a person and his illegitimate off springs are not 'father' and 'child' for the purpose of inheritance'

8. In **Chelanga Vs Juma, Etyang, J, KLR [2002]**the High Court held:

'An illegitimate child does not inherit the estate of his father but is permitted to inherit from his mother'.

9. *In* **re estate of CCBH (deceased) (2018) eKLR, Succession Case No. 46 of 2004, CKC & CC v ANC, M. Thande, J,** *cited with approval The principles of Mohammedan law, Dr, (Mrs.) Nishi Patel, 1995, CTS Publication, Cap XIII at pp 251, states:*

'The law of parentage which includes paternity and maternity is the result of the institution of marriage. Mohammedan marriage is a contract which confers the status of husband and wife on the parties and of legitimacy to the children..''

10. A legal marriage under Islamic law must fulfil five requirements: Husband, wife, waliyy [legal guardian], offer and acceptance and dowry. Ref: Ibn Juzzy, Al-Qawanin al Fiqhiyah (2010), 329, Ministry of endowments and Islamic Affairs Kuwait .

11. I find and hold that the respondent / applicant is not a legal heir of the late Isaya Omar Iya.

12. The concept of illegitimacy should not be construed as discriminatory. It does not offend the Constitution of Kenya (2010). It is only aimed at protection of the family unit under Islamic law. Indeed there are provisions under Islamic law to take care of welfare of such children. In **re estate of CCBH (deceased) (2018) eKLR, Succession Case No. 46 of 2004, CKC & CC v ANC, M. Thande, J,** held:

'the court appreciates the zealous submissions on behalf of the applicants. Indeed referring to any child as illegitimate in this day and age appears to be outrageous. However as long as the estate herein belongs to a deceased Muslim and as long as article 24(4) remains in our constitution and further as long as section 2(3) remains in the law of succession Act, the courts hands are tied.'

13. The court went on further to state:

'Given the foregoing provision and the provision of article 24(4) of the constitution, I do find that the exclusion of the applicants from inheriting S's share of the estate of the deceased is not inconsistent with the provisions of the constitution. Indeed to find in favour of the applicants would be to challenge article 24(4) of the injunction in article 2(3) thereof...'

14. The deceased should have provided for him through a will. Muslims are allowed to bequeath up to a third of their estates to non heirs. Musyoka in his, Law of Succession, at pp 291 - 292, states:

''will making is allowed and even encouraged under Islamic law. However, the testamentary capacity of a Muslim is subjected to two limitations namely he can only bequeath one-third of his property by will and even then, he cannot give any part of the one-third to the heirs as stated in the estate of late Suleiman Kusundwa [1995] EA 247 (Sir Ralph Windham J) NB, Keatinge V Mohamed bin Seif Salim & others [1929 - 30) 12 KLR 74 (Thomas J) and in the estate of Faiz Khan, deceased [1929 - 30] 12 KLR 74 (Thomas J).

15. Compulsory will would take care of poor and needy relatives of the deceased who could but did not provide for them through a bequeath or will. Scholars have differed whether the authorities could make a compulsory will where a person who ought to have but did not make a will. The prevailing opinion of jamhur scholars is that it is not permissible to make a compulsory will stating that

the verses (Q:2:280 and 4:7) alluding to other relatives to get inheritance shares were repealed by the verses on inheritance (Q:4:11, 12 & 176). However other scholars contend it is permissible. These include: Daud, Masruq, Tawus, Iyas, Qatada, Ibn Jubair, Ibn Hazm and Tabary. They rely on Qur'an:2:280 and 4:7.

'Prescribed for you, when death approaches [any] of you if he leaves wealth [is that he should make] a bequest for the parents and near relatives according to what is acceptable - a duty upon the righteous'. Q:2:280

'For men is a share of what the parents and close relatives leave, and for women is a share of what the parents and close relatives leave, be it little or much - an obligatory share'. Q:4:7

16. They contend the verses were are valid and not repealed. Ibn Hazm stated:

'It is obligatory for every Muslim to make a bequeath to take care of his close relatives who are not entitled to inherit because of difference in faith, rules exclusion or simply they are not entitled to inherit him / her. He should provide for him through bequeath whatever he wishes, there is no limit to that. If he does not, the executor or heirs must provide for those relatives [from the estate].

17. The prevailing opinion by *Jamhur* may be tampered by the opinion of minority scholars when the need arises. The court has discretion to apply the concept of compulsory will on a case to case basis according to the merit of the case to take care of the vulnerable relatives of the deceased not covered by bequeath or intestate succession.

18. Islam directs heirs and executors to consider the poor relatives during distribution of estates. Qur'an : 4: 8 provide:

'and when [other] relatives and orphans and the needy are present at [the time of] division, then provide for them [something] out of the estate and speak to them words of appropriate kindness'.

19. The applicant is not entitled to an inheritance share of the estate having been born out of legal wedlock. However he is a biological child of the deceased who used to care for him and is poor and needy. The heirs should give something in kindness. If they do not, the court, in my view, has discretion to apply, which I hereby do, the concept of compulsory will, in favour of the applicant to the extent of 20% of the deceased's proceeds in the bank and death gratuity with his employer.

Orders accordingly.

Dated, signed and delivered at ISIOLO on 29th March 2019.

HON. ABDULHALIM H. ATHMAN

PRINCIPAL KADHI

ISIOLO LAW COURTS

In the presence of

Mr. Guyo Adan, Court assistant

Respondent / applicant

Petitioner / respondent