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| Case Number: | Succession Cause 18 of 2019 |
| Date Delivered: | 02 Apr 2019 |
| Case Class: | Civil |
| Court: | Kadhis Court at Nairobi (Milimani Commercial Court) |
| Case Action: | Ruling |
| Judge: | A.I. HUSSEIN |
| Citation: | In re Estate of Mwangi Suleiman Kahiu (Deceased) [2019] eKLR |
| Advocates: | - |
| Case Summary: | - |
| Court Division: | Family |
| History Magistrates: | - |
| County: | Nairobi |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | - |
| History County: | - |
| Representation By Advocates: | - |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |

**THE REPUBLIC OF KENYA**

**IN THE KADHI'S COURT AT NAIROBI**

**SUCCESSION CAUSE NO. 18 OF 2019**

**IN THE MATTER OF THE ESTATE OF MWANGI SULEIMAN KAHIU (DECEASED)**

**AND**

**HALIMA MUTHONI MWANGI.....1ST PETITIONER**

**AMINA WANJIKU SULEIMAN .....2ND PETITIONER**

**RULING**

This is a Succession matter related to the estate of MWANGI SULEIMAN KAHIU who died intestate. In probate and administration cause No. 737 of 2018 the High Court in Nairobi granted letter of Administration intestate to the petitioners on 29th August 2018.

The current proceedings before this court was provoked by the event on 27th March 2019 when the matter was coming up for confirmation of the grant. The learned Hon. Lady Justice Ali-Aroni referred the matter before this court for distribution of the deceased estate in accordance with Islamic law.

**Undisputed facts…**

From the record and finding of the Court, the following facts were common ground:- The deceased was survived by a widow and (4) children (a daughter and three sons):- Halima Muthoni Mwangi (wife), Mohamed Mbugua Mwangi (son), Saumu Wangari Suleiman (Daughter), Amina Wanjiku Suleiman (Daughter) and Timina Suleiman (Daughter). The following assets were left unnumbered :- Dagoreti/Riruta/6431. The deceased, Mwangi Suleiman Kahiu ,was a practicing Muslim and died a Muslim and lastly that all the beneficiaries are agreeable that the estate be distributed and be shared equally.

I may state at the outset that the question under consideration is by no means easy of determination and can only be satisfactorily determined by taking into account the extent and the distribution mode of intestacy succession under Islamic.

Principles of intestate succession come into play when a person dies without leaving a last will. In 1990 an amendment to the law of successions Act through Statute (Miscellaneous Amendment) Act (Act No. 2 of 1990) exempted Muslims from the substantive provisions of the Law of Successions Act. Those relating to testamentary or Intestate Succession, thereby subjecting the estate of a deceased Muslim exclusively to Islamic Law of succession as provided by Sec. 2(3) and 4 of the Law of Succession Act, Cap 160, Laws of Kenya, which simply provided as follows:-

"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."

"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 Muslims dying before, on or after the 1st January 1991."

The heirs according to the Muhammadan Law are divided into three classes. The first class is called the *Dhawil-il-Furudh* or the Sharers, the second class is called the *Asabah* or residuaries or agnates and the third class is called the *Dhaw-il-Arham* or the Distant Kindred (uterine relations). Assigning these classes of heirs their respective shares, if any, is done in the following manner:

The first rule of intestate succession is that the Quranic “Sharers” must first (before all others) be assigned their Quranic shares. The Sharers, then are the most important class of heirs who take primacy in that they are entitled before all others, the shares allotted to them either by the Holy Quran, or by the traditions. As an example, reference may be made to the Holy Quran, *Surat Nisaa*, 4:11 in which it is ordained as follows:-

“God (thus) directs you

As regards your Children's

(Inheritance): to the male,

A portion equal to that

Of two females: if only

Daughters, two or more,

Their share is two-thirds

Of the inheritance;

if only one, her share

Is a half.

For parents, a sixth share

Of the inheritance to each,

If the deceased left children;

If no children, and the parents

Are the (only) heirs, the mother

Has a third; if the deceased

Left brothers (or sisters)

The mother has a sixth.....

These are

Settled portions ordained.

By God, and

God is all-knowing, All-wise.”

The second rule of intestate succession is that if any balance is left after assigning the shares of the Sharers, the residue should go to the heirs of the second class, namely the *Asabah* or Agnates, also known as the Residuaries, because they take the residue of the estate of the deceased person.

Third rule of intestate succession is that , if there are no Sharers and no Residuaries, the Distant Kindred are entitled to the deceased estate.

Based on the verses above, it can be concluded that:

1) The principle of inheritance distribution in Islam is that the portion for a brother is equivalent to two parts of the sister. It also specifies that a widow, where there are children, is entitled to one eighth of the estate.

2)The beneficiaries from *Qur'anic "sharers"* and *others* have been clearly defined along with their individual inheritance portion. Among the *Qur'anic "sharers"* beneficiaries mentioned in that verse include a daughter, mother, father, husband, wife, male siblings of the same mother, female siblings of the same mother, female siblings of the same parents and female siblings of the same father.

3) The distribution of inheritance among the beneficiaries must be made after all debts being debts and after the deceased's will is settled (if any) on a 1/3 rate from the total inheritance amount.

**Ibrahim Aboobaker and Anor. Vs. Teik Chand Dolwani and Others. Reported in to AIR 1953 SC 298; (1954) 56 BOMLR6** wherein it stated that:

“It’s well recognized proposition of law that the estate of a deceased Mohammedan devolves on his heirs in specific shares at the moment of his death…….”

Although the Islamic Inheritance Law has determined the inheritance of beneficiaries with their respective portions, the law has provided ample space to the beneficiaries to either accept the inheritance or otherwise. A beneficiary's compromise of the inheritance can be done through the *takharuj* doctrine( Conciliatory Sharing or Conditional Share Wavering). See Al mausu'a Al fiqh Al Kuwaitiyyah Vol. 11 pg 6

*Takharuj* in the Islamic Inheritance Law means a beneficiary who withdraws himself/herself from accepting the inheritance either in part or in full with one of the beneficiaries, or a few of the beneficiaries by accepting a certain payment (‘*iwad*) whether from the inherited property, or other properties, or without any payment. *Takharuj* with payment is a form of *mu’awadah* contract, which is accepted by Islamic Law if there is submission or willingness among the beneficiaries involved.

The *takharuj* doctrine is practised in inheritance distribution in various forms and with various means of payment solely to provide comfort and freedom to the beneficiaries involved. It should be done with the approval and willingness from the beneficiaries who have rights in the distribution of the inheritance, whether through individual or group beneficiaries and whether with a specific payment or without any payment.

In implementing the *takharuj* doctrine, there are three conditions that may override the execution, namely when the debt claim amount exceeds the available inheritance of the deceased. While the beneficiaries are not ready to pay the debt, then *takharuj* is considered to become null and void. Secondly, if a w ill claim arises upon the deceased; the claim may cause the actual inherited portion among the beneficiaries to change. Thirdly, when there is an unknown beneficiary before the distribution or at the time of *takharuj*, while his/her presence may cause changes in the rights and the beneficiaries" portions of the inheritance. Based on these three conditions, the *takaruj* doctrine cannot be implemented.

Thus hold that, the averments in the affidavit at paragraph 5 annexed to summons for confirmation of grant has fulfill all the requirements by which a valid contract stands.

In conclusion, the mode of distribution can either be done in lieu to the rules of intestacy/testamentary under Islamic law or in lieu to the doctrine of Takharuj (Conciliatory Sharing or Conditional Share Wavering) as such the distribution of the deceased estate be

shared equally by the beneficiaries. Parties herein are directed to appear before Hon. Lady Justice Ali-Aroni for proper direction.

**DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF APRIL 2019**

**A.I. HUSSEIN**

**SENIOR RESIDENT KADHI**

**IN THE PRESENCE OF :-**

**THE PETITIONERSBENEFICIARIES**