

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 276 OF 2021**

**REHEMA MOHAMED MABULA ..... 1<sup>ST</sup> APPLICANT**

**MAX STEVEN MABULA ..... 2<sup>ND</sup> APPLICANT**

**EDA STEVEN COLBERT ..... 3<sup>RD</sup> APPLICANT**

**VERSUS**

**MASELE MOHAMED MABULA ..... RESPONDENT**

**RULING**

20<sup>th</sup>, & 22<sup>nd</sup> July, 2022

**ISMAIL, J.**

The applicants have preferred the instant application, seeking to move the Court to grant the following orders:

- a) That the applicants are entitled to a share of the proceeds of the sale of house No. 265, located at old Kinondoni belonging to Shida Khalfan, now the deceased, by virtue of being children of Konga Mohamed Mabula, the daughter of the late Shida Khalfan;*

*b) That the Court should direct the respondent, the administratrix of the estate of Shida Khalfan to give a portion of what would be Konga Mohamed Mabula's inheritance in accordance to Islamic or general law of succession.*

The application is preferred under the provisions of rule 105 of the Probate Rules, GN. Nos. 10, 107 and 309 of 1963, and it is supported by an affidavit sworn by Max Steven Colbert, the 2<sup>nd</sup> applicant and one of the three children of the late Konga Mohamed Mabula. It sets out grounds for the prayers sought by the applicants.

The affidavit informs that, at stake in the proceedings is a slice of the proceeds of House No. 265 Old Kinondoni, Dar es Salaam, constituting the sole asset in the estate of the late Shida Khalfan, the applicant's maternal grandmother. The said property is on sale and the respondent, the administratrix of the estate has informed the applicants that they do not deserve any share in the estate, and the reason given is that their mother's demise preceded that of their grandmother, a fact that excludes them from inheriting their grandmother who passed away subsequent to the demise of their mother.

The respondent has opposed the application. Besides his counter affidavit, the respondent has also attached an affidavit of Shekhe Issa Zaidi Hassan, an Islamic scholar, who gave an expert view on the succession under the Islamic Law. In the counter-affidavit affirmed in response to the applicants' averments, the contention is that the applicants' mother, who died in 1974, was not a beneficiary of the estate of Shida Khalfan who died in 1987.

Disposal of the application was by way of written submissions that pitted Mr. Lucas Myula, learned counsel for the applicants, against Mr. Abdul Kunambi, learned counsel whose services were enlisted by the respondent.

Mr. Myula began by citing sources of Islamic law and went ahead and argued that, the settled position is that a person not professing Islam cannot inherit a property under Islamic law. He argued that the fact that the applicants are Christians cannot be the basis for denying them their rightful share of the deceased's estate. Mr. Myula argued that, in such a case the applicable law is the Indian Succession Act of 1865. He fortified his position by citing the case of ***Fr. Anisca Haruweru Silvereira v. Gerald Francis Silvera & Another***, HC-Probate and Administration Cause Nos. 23 & 24 of 2019 (unreported). Learned counsel also quoted section 33 of the Act and

held the contention that the applicants are entitled to inherit a share that their deceased mother deserved out of the estate of Shida Khalfan. They maintained that they are lineal descendants whose rights should not be allowed to be determined by Islamic or customary laws both of which they allege to be discriminatory. This informed their preference of Indian Succession Act to any of the said laws.

The respondent's submission responded to three issues. On whether the Indian Succession Act is applicable to a Muslim deceased, the answer by learned counsel is in the negative. Citing section 11 (1) (c) (ii) of the Judicature and Application of Laws, Cap. 358 R.E. 2019; the decision of the Court in ***In the Estate of Salum Omary Mkeremi*** [1973] LRT No. 80; and the book on Guiding Notes on Probate and Administration of Estates (by Hon. R. V. Makaramba, J (rtd)), learned counsel argued that the estate of Shida Khalfan would not be administered by a law that does not bind Muslims.

On whether Konga Mohamed Mabula is a legal heiress of the estate of Shida Khalfan, the contention by the respondent is that the teachings of the Holy Quran and the literature on law of succession under the Islamic rites militate against the applicants' contention. He argued that, in all of the said

teachings, the position is that Konga Mohamed would only be an heiress if she had survived her mother. In the case where Konga Mohamed died before the death of her mother, there can never be a succession that would convey the right to the applicants. The respondent took the view that the lower court was right to exclude the name of the applicants' mother.

The respondent concluded by submitting that the applicants are not entitled to any share of the deceased's estate.

The submissions by learned counsel convey one key message that can be recapped through the following statement. That the grand children of the deceased grandmother have approached the Court applying for distribution of the estate of the deceased who died a professing moslem. They are invoking the Indian succession Act to govern the matter. Apparently, their mother predeceased the grandmother from whose estate a slice is claimed. There is no evidence that the deceased grandmother denounced Islam or intended that it shall not apply to her estate. The issue is whether the applicants are the right beneficiaries of the deceased's estate.

My starting point in the determination of the matter is the quotation of section 11 (c) (ii) of the Judicature and Application of Laws Act, Cap. 358 R.E. 2019 which stipulates as follows:

*"nothing in this subsection shall preclude any court from applying the rules of Islamic law in matters of marriage, divorce, guardianship, inheritance, wakf and similar matters in relation to members of a community which follows that law."*

The foregoing provision is to be read together with the provision of section 88 (1) of the Probate and Administration of Estates Act, Cap. 352 R.E. 2019, which states in part as follows:

*"(1) The estate of every deceased person by virtue of which an order or direction under Part IX applies shall be administered according to the following provisions–*

*(a) The estate of a member of a tribe shall be administered according to the law of that tribe unless the deceased at any time professed Islam religion and the court exercising jurisdiction over his estate is satisfied from the written or oral declarations of the deceased or his acts or manner of life that the deceased intended his estate to be administered, either wholly or in part, according to Islamic law, in which case the estate shall be administered, either wholly or in part as the case may be, according to that law.*

*(b) The estate of a Swahili shall be administered according to Islamic law unless the court*

*exercising jurisdiction over his estate is satisfied from the written or oral declarations of the deceased or his acts or manner of life that he intended his estate to be administered, either wholly or in part, according to any customary law, in which case the estate shall be administered, either wholly or in part, as the case may be according to that customary law."*

The net effect of the cited provisions is to rule out the application of the Indian Succession Act, once it is established that the estate involved is that of a Swahili member or member of a tribe. In our case, it is the Mohammedan law which is applicable, since it is settled that the deceased was a Muslim. It would not matter if the beneficiaries, in this case, the applicants, were of a denomination under which the Indian Succession Act is applicable. This is in view of the fact that the law on succession is for the deceased and not for the surviving beneficiaries. It is why the test applied i.e. "**mode of life test**", targets the deceased not those who survive him or her.

Having ruled out the application of the law that suits the applicants, the next point for determination is on whether the applicants are entitled to

inherit from the deceased, based on the lineage that comes from the deceased mother.

The applicants have deponed that Konga Mohamed Mabula, their mother "*died long time ago preceeding (sic) our grandmother Shida Khalfan who died later in the year 1987.*" This means that Shida Khalfan survived her daughter Konga Mohamed Mabula. The question that follows this revelation is whether Konga Mohamed Mabula would inherit Shida Khalfan while the former died ahead of the latter.

The basic rules of intestate succession is that an heir of the deceased's estate must outlive the deceased person in respect of which the estate is due for distribution (See: *www.nolo.com*). This entails that succession is for the surviving and not for the departed. The beneficiary must be alive when the succession kicked in. It is incomprehensible that a person would stake a claim of succession through a person who is not the beneficiary of the estate as she met her demise before the owner of the estate, and before her assets became the deceased's estate. Thus, since it is a fact that Konga Mohamed Mabula, from whom the right of inheritance flows, died long before Shida Khalfan passed on, the applicants cannot be inheritors of the estate which did not fall in the hands of the late mother. She was not a surviving heir



whose interests would pass on to them. I, therefore, subscribe to the stance taken by the respondent, who described the situation as “kukimbia mirathi”, literally meaning the applicants’ mother ran away from inheritance. This position conforms to the deposition made by Shekhe Issa Zaidi Hassan who, in paragraphs 7 and 8 which state as follows:

*"7. That, the Shida Makamba, Mohamed Makamba, Maganga Makamba, Konga Makamba, Masele Makamba, Shamimu Makamba, Shabani Makamba and Malick Makamba are entitle (sic) to inherit a share of Makamba Mohamed Mabula from the estate of Shida Khalfan because Makamba Mohamed Mabula did not given (sic) his share when he was alive. Both (sic) Shida Makamba, Mohamed Makamba, Shamimu Makamba, Shabani Makamba and Malick Makamba under Islamic law, they inherit Makamba Mohamed Mabula and not Shida Khalfan.*

*8. That, under Islamic law grandson and granddaughter are allowed to inherit their grandfather or grandmother where there is no survive (sic) child of deceased. If deceased (grandfather/mother) died and leave both children and grandson/daughter, only children of deceased are entitling (sic) to inherit the estate of their parent."*

Noting that the applicants feature in none of the descriptions above, their attempt to gain entry into the estate of Shida Khalfan was justifiably headed off by the respondent.

It is in view of the foregoing, that I find that the application is misconceived, and hold that the applicants have no right of inheritance in the estate of Shida Khalfan. Accordingly, the application is dismissed in its entirety. No order as to costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 22<sup>nd</sup> day of July, 2022.



**M.K. ISMAIL**

**JUDGE**

**22.07.2022**

