

Islamic Law of Inheritance: The Case of Illegitimate Child and Possibility of Having an Assets of Deceased Father: A Tanzanian Case Study

Mzee Mustafa Mzee

Assistant Lecturer, Department of General Studies, Zanzibar Institute of Financial Administration, Advocate of the High Court of Zanzibar and its subordinates' courts

Abstract

There is a plea which suggests that, the Islamic law of inheritance is provided injustice to its followers. The reasons which are given by those who said that, is that, it gives a male child double share of a female, also among other things it excludes an illegitimate child. By doing that, it goes against the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and article 3 of African Charter on the Rights and Welfare of the Child which prohibits discrimination based on among other things sex or birth and also article 13 of the Constitution of the United Republic of Tanzania of 1977 which says all people are equal. Again, section 5 of the Child Act, 21 of 2009 prohibits any kind of discrimination based on gender, religion, birth etc. This article will address the question of inheritance according to Islamic law and the position of an illegitimate child under Islamic law. It will be argued that, the illegitimate child has no right to inheritance from his biological father, however, there is a room for them to have something which can support their life from the property of the natural deceased father, if a father wish to do so before his death.

Keywords: Islam, Inheritance, Child, Illegitimate Child, Will, Gift, Tanzania

1. Introduction

Many children are born every day in Tanzania. Some of these children are born within the legal marriage and others are born out of wedlock. It is a fact that when a child is born, he or she is supposed to have all rights as a child, these may include the right to inheritance. However, the Islamic law of inheritance has laid down that, it is only a child who is born within a lawful marriage have the right to inherit his or her father. That means, under Islamic law a child who was born out of wedlock has no right to inheritance when his or her natural father is pass away. The Probate and Administration of Estate Act¹ provides the statutory basis for the application of Islamic law of inheritance in Tanzania. The Act provides the test for the application of the Islamic law of succession, by providing that if the deceased professed Islam at any time and the Court is satisfied that from the written or oral declarations of the deceased or his acts or manner of his life, he intended his estate to be administered either wholly or in part according to Islamic Law then Islamic Law will apply.² This means that there is no direct application of Islamic law of inheritance in Tanzania as it required to be³, for Islamic law of inheritance to be applicable the test must be fulfilled. In many occasions the courts of Tanzania are following the Islamic rule which prohibit inheritance for illegitimate child. By doing that, it left many children who were born out of wedlock without having anything when their natural father pass away. The consequences of this principle is suffering and hardship to the innocent illegitimate child.

1.1 Who is a child?

Article 1 of the UN Convention on the Rights of the Child and article 2 of the African Charter on the Rights and Welfare of the Child states that, "a child means every human being below the age of 18 years. Coming to Tanzania there are various laws which define child depending on the context within which that person is referred. However the latest law which defines a child is a Child Act,⁴ which defines a child as a person below 18 years of age. But in this paper I would like to define a child as a person who is entitled to inherit the property of his or her parents, this will include even unborn child.⁵

¹ Cap 352 R.E 2001

² Section 88 (1)a-b

³ In Islamic law once when a person who profess Islam is dead , his property will be administered according to Islamic law regardless whether he left a will or his conduct was not within the Islamic teaching.

⁴ The child Act No. 21 of 2009.

⁵ According to Islamic law life begins in the womb and a child become majority of age as for a male at the first appearance of semen and a female attains majority at the first appearance of menstruation. It is generally accepted that the earliest age of puberty is for a male is 12 years and for a female is 9 years. In the event of the nonappearance of semen or menstruation of either of them, both the male and female are presumed to have attained majority at the age of 15 years.

In Islam, a child is a person who has not attained the age of puberty, classical Sharia equating puberty with the age of majority.¹ The life of the minor before he reaches the age of puberty passes through two stages: the stage before the age of discernment; and the stage at the age of discernment.²

1.2 Meaning of Inheritance

Literally inheritance means something which has endless or continuous, also it means transfer of property from one person to another whether intangible or tangible in nature. Technically it means a science that shows those people who are entitled to inheritance and how much each of them will get from the property of the deceased according to Islamic law. Inheritance is a great importance amongst Muslims. It has a religious character and indeed the law of inheritance appear as a vital aspect of religion of Islam.³

1.3 Sources of Inheritance to the child in Islamic Law

Islamic law has four primary sources; the Holy Qur'an, the Prophetic Tradition (the *Sunnah*) consensus of juristic opinion (*ijma*) and reasoning by analogy (*Qiyas*) these are the primary sources upon which all the legal rules of Islamic laws are based. However on the aspect of law of succession, the Qur'an is the principal legislation. Allah in his infinite wisdom has prescribed in a number of verses the system of inheritance in Islam. The following verses are some of the sources of law of inheritance for a child in the Quran.

- a) “ 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 ordained share (by Allah) {Quran 4 v. 7}
- b) “Allah instructs you concerning (the inheritance of) your children: a male receives a share equal to that of two females. But if they (the children) are only women, and are more than (or equal to) two, their share is two thirds of that which he (the deceased) had left. And if there is only one woman, her share is half (of the estate).
- c) And for his parents, each one's share is a sixth of that which he left if he had children. But if he had no children, and the parents inherit from him, the mother's share is one third. And if he had siblings, the mother's share is a sixth...” {Quran 4 v.12}

Apart from the Holy Quran, the sayings (*hadeeth*) of the prophet on inheritance are numerous. The prophet did not create any new rule; rather, he made expositions on the laws as revealed in the Holy Qur'an. For instance it is narrated by Ibn `Abbas: The Prophet said, "Give the *Fara'id* (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased".⁴

1.4 Position of Child before Islam

The period before Islam is usually regarded as the ignorance or better put, the dark ages. This period is characterized by many odious social practices. Generally, women are treated as property. It is not surprising that during this period, female children or women could not lay claim to inheritance because they are seen as object of inheritance (property).⁵ The main reason of the deprivation of woman and children of inheritance was the prevention of transfer of wealth from one family to another.⁶ Thus, had a daughter received an inheritance that would have meant, the transfer of property to her children, who belonged to a family unconnected with that of the deceased person. The exclusion of children from inheritance had other reason also; children were not considered useful in combat or in the defence of tribal territory and, therefore, did not enjoy the same rights of inheritance as men.⁷

1.5 Position of Inheritance for Children after Islam

After the introduction of Islam the concept of inheritance changed radically. It was reported that at one time before the law of inheritance was revealed one among the companion of the Prophet had passed away and left

¹ *Javaid Rehman*, the Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq 2007 Int. J.L.P.F., 21(1), 108-127.

² Abu al-Raysh, 1988.

³ Coulson, N.J., Succession in the Muslim family, Oxford University Press 1957.

⁴ Book of Bukhar 8.72

⁵ Schacht, J. Pre-Islamic Background and Early Development of Jurisprudence in Law in the Middle East. Washington. Anonymous Publishers. 1955. pp. 29.

⁶ This concept is still exist in some customs of Tanzania society like the Haya custom which denied women's right to inherit the clan land fearing that it will go to other clan if she is married. See also *Bernado Ephrahim vs. Holaria Pastory and Gervazi Kazirege* (PCC) Civil Appeal No.70 of 1989 (unreported)

⁷ John Makdisi, Fixed Shares in Intestate Distribution: A Comparative Analysis of Islamic and American Law, Brigham Young University Law Review [1984]267-304

behind a wife, two daughters and a brother. As a matter of practice the brother took all the properties which were left by his brother. Seeing that, the widow (wife) went to the prophet claimed for what was happened. After few days the prophet received a revelation which site a new law of inheritance for Muslim,¹ from there it was revealed that the wife should take 1/8, two daughters should take 2/3 and remains should go to brother of the deceased. Therefore Islam modified the existing customary law by adding thereto as supernumerary heirs a number of relatives who would normally have had no rights of succession under the pre Islamic customary law.² The Quran introduced a new system of inheritance which reflected a transition from tribalism to individualism with more emphasis on the right of women and children to property.³ The idea of giving women and children as we have seen early was not known before Islam, therefore, in Islamic law the distribution of the estate is determined by the law rather than by the will of the deceased. However, a person may dispose by will of one-third of his estate only, provided that no part of this one-third may be be-quested to any of the legal heirs.⁴

1.6 Grounds for inheritance for a child.

As noted earlier, there are special grounds for a person to inherit under Islamic law. The heir must have one form of nexus or the other with the deceased before he could have a right to succession. The common and acceptable grounds for a child to inherit his or her father is through lawful marriage.

1.6.1 Blood (Nasab)

According to Islamic law a child who is connected to the deceased by blood is entitled to inherit. This child must be obtained through a validly conducted Islamic marriage.⁵ In case if a child is born in waiting period whether after divorce or death, the child will still have the right to inherit, since it is presumed that the child is of a husband. Any child born within a marriage has right to inherit, but those who are born out of wedlock are not qualified as a child for the purpose of inheritance.⁶ It is immaterial whether the child is born after the marriage has been dissolved or not provided he or she was conceived during the lawful marriage is sufficient ground to inherit the father.⁷ Under Islamic law, Paternity may be established through marriage, acknowledgement, and evidence.⁸ It was advised by some Muslim scholars like Shaykh al-Amīn,⁹ that it is better to register the marriage and divorce as it is required by law in most countries like Tanzania.¹⁰ This is because marriage and divorce certificates help resolve disputes over the legitimacy of the child and protect inheritance rights. However non availability of registration form doesn't impede a child from inheritance if there are other proof like witnesses who attended the marriage between the father and mother of the child.

It was reported that, the Prophet (pbuh) have said that "If a man commits fornication with a free woman or a slave woman, the child is the product of fornication, he neither inherits nor may anyone inherit from him" [Thirmidi] this Prophetic tradition has laid down the principle that an Illegitimate child doesn't inherit from the father and the father does not inherit from the illegitimate child.

Therefore for a child to establish inheritance right he or she must connected with the father by birth in a lawfully marriage; this suggests that those child who were not born in lawfully marriage they have no right to inheritance from their biological father, however they can do so to their mother.

1.7 An Illegitimate Child and law in Tanzania

The latest law which oversees the interest of the child in Tanzania doesn't put into effect the right of an illegitimate child to inherit from his biological father especially when the alleged father is a Muslim. The law

¹ Book of Muslim, Bukhar and Muwatta

² Coulson, N. J. (1964), A History of Islamic Law, Edinburgh: University Press.

³ Wael B. Hallaq, The Origins and Evolution of Islamic Law, Cambridge University Press 2005

⁴ Mahmoud Hoballah: Marriage, Divorce and Inheritance In Islamic Law, 22 Geo. Wash. L. Rev. 24 1953-1954

⁵ In case if husband and wife married while they were non- muslims according to their previous religion, and later on converted into Islam there is no need to them to contract Islamic marriage, and therefore they will be recognized as husband and wife as per Islamic law and the children who were born will have rights of inheritance.

⁶ Legitimacy is established either by the birth of a child in a marriage which is valid (*sahih*) or irregular (*fasid*), but not one that is void (*batil*).

⁷ Paul Okhaide Itua, Legitimacy, Legitimation and Succession in Nigeria: An appraisal of Section 42(2) of the constitution of the Federal Republic of Nigeria 1999 as amended on the rights of inheritance Journal of Law and Conflict Resolution Vol. 4(3), pp. 31-44, March 2012

⁸ According to section 36 of the Child Act, the evidence of parentage are; any marriage performed in accordance with the Law of Marriage Act, the name of the parent entered in the Register of Births kept by the Registrar-General, performance of customary ceremony by the father of the child, public acknowledgment of parentage and DNA results.

⁹ Sheikh Al-Amin bin Ali, *Ndowa na Talaka Katika Sharia ya Ki-Islamu (Madh-habi ya Shafii)* ("Marriage and Divorce under Islamic Law [Shāfi'ī School]"), (Mombasa: Adam & Sons, 1974)

¹⁰ Section 43(3) of Law of Marriage Act, Cap 29 R.E 2001

provided a mandatory DNA test for an alleged father who refuse the responsibility of the fatherhood.¹ When if it is proved that the child is of the alleged father, the court may made an order on biological father to resume responsibility towards the child as if the child was born in wedlock. This child will have all rights including to be an heir, but this is subject to the religious belief of the biological father.² This is to say the issue of illegitimate child not to inherit is still persists especial when the order is given to an alleged father who is a Muslim, the child will have no right to inherit him because of the Islamic law which prohibit an illegitimate child to inherit his biological father.

The courts in Tanzania are very keen in interpreting the islamic principle which prohibit an illegitimate child to inherit his biological father, in different cases illegitimate child were deprived the right to inherit or being inherited by their biological father. In the case of *Said Aleiko (Administrator) v. Mwatatu Ibrahim*,³ the issue in this case was whether the father of a deceased child who was born out of wedlock will get a share of her estate. The father had admitted that he had not formally married her mother, but he argued that the child was legitimate because he had always accepted her, and the other offspring of this union, as his own. However, it was agreed by all parties that, in question of inheritance by parents, an illegitimate child is deemed the child of the mother only. Therefore the court held that, under Islamic law, there can be no "marriage" without the proper formalities and the children of this union were therefore illegitimate, and the father may not inherit from them. Another case which the court has denied the right of inheritance to an illegitimate child is *Amina Taratibu Mbonde v. Selemani Ahmed Mtalika*.⁴ The issue in this case was whether an illegitimate child can inherit the property of his biological father, hence the admnistrax exclude the son of the deceased husband, since he was born out of wedlock. The court upheld the distribution of estate by saying that according to Islamic law a child of out of wedlock has no right to inheritance.

2. The Opportunities to Acquire the Property of the Biological Deceased Father.

2.1 A Will (*Wassiyat*)

A will (*Wassiyat*) is a direction by which a person directs his heirs or personal representatives regarding the distribution of his death although it may include expressions or wishes as to other matters.⁵ Thus a will (*Wassiyat*) is the wealth bequeathed which becomes the property of the person in whose name it is made with the death of the person who actually makes it. The Holy Quran has given great importance to the institution of *Wassiyat*, "It is prescribed, when death approaches any if you, it he leave any goods, that he make a bequest to parent and next of kin, according to reasonable usage; this is due from the God-fearing."⁶ Again there is a prophetic tradition which support the idea of making a will, it is reported that, the Prophet has said "It is the duty of a Muslim who has anything to bequest not to let two nights pass without writing a will about it."⁷

In traditional Sunni Islamic law, the power of the testator is limited in two ways, firstly, he cannot bequest more than 1/3 of his net estate unless the other heirs consent to the bequest or there are no legal heirs at all or the only legal heir is the spouse who gets his/her legal share and the residue can be bequeathed.⁸ Secondly, the testator cannot make a will in favour of a legal heir.⁹ This position was also supported by the Court of Appeal of Tanzania between *Anwar Z. Mohammed v. Saidi Selemani Masuka*.¹⁰

¹ Section 36 of the Child Act.

² Section 36(4) of the Child Act.

³ (1967) H.C.D. No. 50

⁴ (2000) TLR 56.

⁵ Abbas Mithain, Islamic Wills, the World Federation of K.S.I. Muslim Communities Stanmore Middix 1994 at p.16

⁶ Quran 2:180

⁷ The Book of Bukhar 51:1

⁸ Narrated Sa'd ibn Abi Waqqas (RA): "I was stricken by an ailment that led me to the verge of death. The Prophet came to pay me a visit. I said, "O Allah's Apostle! I have much property and no heir except my single daughter. Shall I give two-thirds of my property in charity?" He said, "No." I said, "Half of it?" He said, "No." I said, "One-third of it?" He said, "You may do so, though one-third is also too much, for it is better for you to leave your offspring wealthy than to leave them poor, asking others for help..." The Book of Bukhar 51:7

⁹ Narrated Abu Hurayrah (RA): Allah's Prophet (SAWS) said, "Allah has appointed for everyone who has a right what is due to him, and no bequest must be made to an heir. The book of Abu Dawud 17: 2864

¹⁰ Civil Reference no.18 of 1997 (Unreported) Samatta. In this case, the Court had dismissed a caveat lodged by Anwar Z. Mohammed, the son of a deceased Muslim woman who left behind a will in which she had devised and bequeathed the whole of her estate to one Saidi Selemani Masuka, her husband for the following reasons. First, the testatrix purported, contrary to Islamic law, to bequeath more than one-third of her estate. Secondly, the respondent being one of the heirs to the testatrix, the absence of the consent of the other heirs to the bequest made the will inoperative under the Islamic law.

Thus, Islamic law encourages its followers to write a will to show to whom they want their property to be given after their death.¹ From this we can find that Islam does not prevent a person from making a will in relation to his wealth provided that a will should not exceed one-third of his/her assets. The important point here is that a will can be issued to anyone during the life time of a person.

From this explanation it is clear that there is a room for a biological father to make a will to his illegitimate child. Provided that will shouldn't exceed 1/3 of his whole estate.² This action would go some way to alleviate the hardship often facing illegitimate children; it would make easier the task of the courts in handling such cases when they go to court, and it would serve to put the conscience of the putative father at some ease.³ This was evidenced in the case of *Asha Shemzigwa v. Halima A. Shekigenda*,⁴ in this case the issue was whether can a father give a property through a will to his illegitimate child, hence the father in this case gave his illegitimate child a piece of land. The court upheld the will which was made by a father to his illegitimate child.

2.2 *The Inter Vivos Gift (Hiba).*

Hiba is defined technically as unconditional transfer of property, made immediately and without any exchange or consideration, by one person to another and accepted by or on behalf of the latter.⁵ Under the Islamic Law a gift is a transfer of property or right by one person to another in accordance with the provisions provided under Islamic law. There are of two types *Hiba* and *Aria*. *Hiba (Tamlik al ain)*, is an immediate and unconditional transfer of the ownership of some property or of some right, without any consideration or with some return (*ewaz*); and *Aria (Tamlik al manafe)* the grant of some limited interest in respect of the use or usufruct of some property or right.⁶ The important elements is delivery of possession and an acceptance of the gift by the donee. A natural father of illegitimate child may dispose of some of his property to his child in this way. Since, the inter vivos gifts may be made to anyone, including illegitimate child. A far sighted natural father who wanting to ensure sufficient resources for the future of his illegitimate child could begin transmitting property to him or her.⁷ In this way, an individual may, if he or she desired or felt it necessary, convey inter vivos gifts to illegitimate child. It is by doing this we can do better to the life of innocent child who were born out of wedlock.

3. Conclusion and Recommendation

In this paper we have discussed that the Islamic law provide a right to inheritance to a child, however it does not allow the right to inheritance to an illegitimate child. An illegitimate child is considered to be the child of its mother only, and as such it inherits from its mother and its relations, and they inherit from such child. It is through marriage whereby a child may acquire that right. However, the information which have been collected in this paper have revealed that, there are many ways for these children to be given something which can help for their life. In this paper we have seen that, under Islamic law a person is allowed to convey his estate through a will which doesn't exceed 1/3 of whole estate. Again, we have seen that Islamic law allows its followers to convey a property through a gift to anyone they wish. So by observing that, it was argued that a will and a gift can be used by a person before his death to convey some of his property to those children who have no right to inherit him. It is a time now for different institutions which deal with rights of children to educate and encourage people the option which the Islamic law provides in relation to an illegitimate child. It is only by doing this, these innocent children will have a better and assurance of their future life.

¹ Quran 2:180

² Shabnam Ishaque, Islamic Principles on Adoption 2008 IJLPF, 22(3), 393-420 p. 405

³ Bart Rwezaura, Tanzania: Building a New Family Law Out Of a Plural Legal System 33 U. Louisville J. Fam. L. 523 (1994-1995)

⁴(1998) T.L.R 254.

⁵ C. Hamilton, *The Hedaya* (1994): Commentary on the Islamic Laws, Kitab Bhavan, New Delhi

⁶ Dr. Tabrez Ahmad, Comparative study of Gift under Islamic Law and Transfer of Property Law: Indian Perspective <http://ssrn.com/abstract=1471926> accessed on 20/07/2015

⁷*ibid*