



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

SUCCESSION CAUSE NO. 315 OF 2014

RE ESTATE OF SELEMAN IBRAHIM ALIAS SULEMAN IBRAHIM (DECEASED)

SAID SULEIMAN KIRARIA.....1ST ADMINISTRATOR

VERSUS

ABDALLAH SULEMAN KIRARIA.....2ND ADMINISTRATOR

JUDGMENT

1. Seleman Ibrahim *alias* Suleman Ibrahim (hereafter *the deceased*) died intestate on 19th June 2005.
2. He was married to three wives who bore for him ten children. They are listed in the letter of the Chief, Township Location, Murang'a annexed to the affidavit of the 1st administrator sworn on 1st August 2018.
3. Some of the children are now also deceased. But all the survivors, with the exception of *Abdallah Suleiman Kiraria*, have agreed on distribution of the deceased's land known as *Loc 11/Maragi/1654*.
4. The cause was lodged on 16th May 2014. On 7th October 2015, the disputants, who are sons of the deceased, were appointed as joint administrators. On 16th June 2016, a grandson to the deceased, Swaleh Nugire, filed summons to annul the grant. However, he withdrew the summons on 3rd July 2018.
5. I heard the evidence *viva voce*. The 1st administrator (who I will henceforth refer to as *Abdallah*) relied largely on his earlier affidavit sworn on 1st August 2018.
6. The dispute can be summarized as follows: *Abdallah* stakes a claim to 0.7 acres of the parcel of land previously known as loc. 11/Maragi/899 which mutated into *Loc 11/Maragi/1654 (the suit property)* and which was originally registered in the names of the deceased and one *Joseph Nyaga Nguru*.
7. In *Abdallah's* view the remainder should be divided equally between all the ten children or their successors. To support his argument, he testified that he has put up some structures (rooms) on the 0.7 acres. He said he has lived there since the year 1981.
8. He testified that during the lifetime of the deceased, he (*Abdallah*) gave two of those rooms as dowry to his wife *Hadijah Ibrahim Ndonga*. It was his case that his late father must have acquiesced to his occupation of the disputed portion. He produced the marriage certificate (exhibit 1) showing that the deceased was one of the three witnesses to the celebration of the marriage.
9. The 2nd administrator (who I will refer to as *Said*) disputes that the protestor is in possession of the 0.7 acres. He said he is the one who put up a toilet on it which they were using with the protestor until their differences flared up. He testified that *Abdallah* abandoned the construction works on the disputed portion which is now a bushland.
10. Lastly, *Abdallah* denied that he had allocated himself one acre of the deceased's land as claimed in an earlier affidavit by Swaleh Ndugire sworn on 3rd June 2016. However, he admitted in court that he had encroached upon part of the *Said's* land. But he proposed to retain the disputed portion and surrender an equivalent portion on the other side of the property. His brother will hear none of it.
11. Both parties filed written submissions. Those by *Abdallah* were lodged on 3rd January 2019; those by *Said* were presented on 8th January 2019.
12. When the parties addressed me on 19th October 2020, they confirmed that they did not wish to highlight their written submissions.

13. The deceased was a Muslim and so are the heirs. Ideally, the dispute should have been heard at the Kadhis Court. But *Abdallah* chose the High Court and none of the disputants objected to the jurisdiction of the court. Furthermore, under the **Law of Succession Act**, this court is clothed with jurisdiction upon such election by the parties.

14. *Abdallah* freely conceded at paragraph 7 of his affidavit of 1st August 2018 that the disputed portion of 0.7 acres straddles two titles: Loc. 11/Maragi 1654 owned by his deceased father; and, Loc. 11/Maragi 1655 now registered in the name of the *Said Suleman Kiraria*.

15. *Abdallah*'s claim must fail for four main reasons. Firstly, he did not fully discharge his legal and evidential burden to prove, on a balance of probabilities, that the deceased bequeathed the disputed portion to him. See section 107 of the **Evidence Act**.

16. True, the protestor gave his new bride, *Hadijah*, two rooms on the property as dowry. The applicant retorts that since the rooms were not identified, the dowry perhaps meant the rent. I do not think that point was proved either. The fact is that the property belonged to the deceased and the protestor had no power or right to designate part of it as dowry.

17. I was not also persuaded that the deceased by simply being a witness to the celebration of the marriage of *Abdallah* acquiesced or consented to transfer of the disputed portion (or even the two rooms) to him or his new bride.

18. Secondly, and as I have mentioned earlier, the disputed portion of 0.7 acres bestrides two titles: Loc. 11/Maragi 1654 owned by his deceased father; and, Loc. 11/Maragi 1655 now registered in the name of the *Said Suleman Kiraria* (the 2nd administrator) which the latter obtained by adverse possession from Joseph Nguru by dint of the decree in *Nairobi High Court O.S. 373 of 2006*.

19. *Said* is unwilling to be compensated with another portion by *Abdallah* on the other side of the property. To the extent that Loc. 11/Maragi 1655 is in *Said*'s name, it is no longer part of the estate of the deceased and I cannot compel him to accommodate *Abdallah*.

20. Thirdly, *Abdallah* did not marshal sufficient evidence to show that he put up permanent structures. It may well be that he occupied part of the disputed portion from the year 1981. But he is a son of the deceased and was entitled to live there. At the trial, it transpired that the construction was abandoned save for the toilet that used to be a common facility. In cross examination, it emerged that the corner is now a bushland.

21. Fourthly, and more importantly, all the children of the deceased are entitled to an *equal* share of his property. The **Law of Succession Act** is express on that point. *Abdallah* had submitted that had he not "*pestered his father with going to school, may be [his siblings] couldn't have seen the inside of a classroom*". That may well be so. It may also be true that his siblings are ungrateful for his sacrifices over the years. But he failed to prove that his father allocated him the disputed land; or, that he has a right to a larger share than his siblings or their successors.

22. The upshot is that the claim or protestations by *Abdallah Suleiman Kiraria* are without merit and are *dismissed*.

23. The net intestate estate of the deceased (which seems to be only *Loc. 11/Maragi 1654*) shall be distributed *equally* between the 10 children of the deceased or their successors as follows-

i. Mariam Ramadhani (daughter, deceased)

ii. Asha M. Chengo (daughter)

iii. Amina M. Saidi (daughter)

iv. Tunu Suleiman (deceased)

v. Hassan Suleiman Mwangi (son)

vi. Said Suleiman Kiraria (son)

vii. Abdallah Suleiman Kiraria (son)

viii. Miski Suleiman (son)

ix. Zaituni Suleiman (deceased)

x. Tabu Mumbi Suleiman (daughter)

24. The grant shall be confirmed in terms of this judgment.

25. Costs follow the event and are at the discretion of the court. In the interests of justice, each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 17th day of November 2020.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

1st Administrator (in person).

Mr. Gichuki for the 2nd Administrator instructed by Waiganjo Gichuki & Co. Advocates.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.