



**Salah & 3 others v Salah & 2 others (Succession Cause 5 of 2020)
[2022] KEKC 170 (KLR) (18 March 2022) (Judgment)**

Neutral citation: [2022] KEKC 170 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT MOYALE
SUCCESSION CAUSE 5 OF 2020
AD WAKO, PK
MARCH 18, 2022**

BETWEEN

**SALIMA OMAR SALAH 1ST PETITIONER
FATUMA OMAR SALAH 2ND PETITIONER
MIRIAM OMAR SALAH 3RD PETITIONER
SADIA OMAR SALAH 4TH PETITIONER**

AND

**MOHAMED OMAR SALAH 1ST RESPONDENT
ABDIKADIR OMAR SALAH 2ND RESPONDENT
SAFIA OMAR SALAH 3RD RESPONDENT**

JUDGMENT

1. The Petitioners instituted this suit on 20th February 2020 in their capacity as rightful heirs/beneficiaries of the estate of their Deceased father the late OMAR SALAH SAID seeking for the following orders: -
 - a) That order be issued against 2nd respondent to vacate plot no.171A with immediate effect.
 - b) That order be issued against the 2nd respondent to cease collecting rent from the tenants.
 - c) That the 1st respondent to explain as when and under whose permission he has changed plot no. 304 to his name.
 - d) That the 1st and 2nd respondents to provide list of rent collection from the plot no. 171A and 304 respectively.
 - e) That the land at Gurumesa be distributed equally among the heirs.



- f) Any other relief the court deems fit.
2. The Petitioners stated that their deceased father passed away on 28th of December ,2019 after long illness.
 3. The petitioners are the daughters of the deceased from the second wife whereas the respondents are also sons and daughter of the deceased from the first wife.
 4. The petitioners stated that their late father left behind several properties including plot no. 171A registered with the name of late Omar Salah Said with total number of fifteen rental shops and five living rooms, plot no. 304 that was changed from the late Omar Salah Said to Mohamed Omar Salah without the consent of any family members, the said plot has twelve rental shops, two living rooms and Safaricom booster generating income at the end of every month.
 5. The petitioners avers that the respondents deliberately locked them out with an intention of making them not to benefit from the what was left behind by their late father.
 6. The 3rd petitioner avers that when their late father was sick she travelled all the way from Nairobi purposely to check on her ailing father however she was denied access to the plot by the 2nd respondent.
 7. The petitioners avers that the 3rd respondent in many occasions uses to insult their late mother using vulgar languages terming their late mother witchcraft.
 8. The Petitioners avers that their father own ashamba located within Gurumesa location and the portion of the said shamba was deliberately sold by 1st,2nd, and 3rd Respondents without the consent of the petitioners.
 9. The petitioners avers that the respondents transferred all what was in bank account of their late father to their personal account respectively, the petitioners also avers that they were denied to inherit the properties of their late father on tribal line.
 10. The petitioners avers that they were born and brought up in plot 171A where the respondents were born and brought up in plot no. 304 and they don't see the reason as to why specifically the 2nd respondent denied them access to the said plot leave a lone inheritance benefit.
 11. The petitioners avers that during their life time both parents then agreed that the said plot no 171A belong to petitioners in the presence of elder, which prompted the 3rd petitioner to construct some rooms within the said plot.
 12. The petitioners avers that the 2nd respondent knows nothing about any development in the said plot 171A and thus he has now decided to bar the petitioners to access where they belong.
 13. On 04th May 2020 the respondents filed replying affidavit to the petition filed by the petitioners dated 20th February 2020.
 14. That the 1st petitioner resides within Moyale sub county married but separated from her husband and rarely visited her late father even when the old man was sick.
 15. That 2nd,3rd and 4th petitioners despite being alive and healthy never had the time to visit the old man prior to his sickness and after his death they came like strangers to the father's funeral.
 16. The deceased married to two wives who are both deceased and the 1st wife name Fatuma Omar left the following children; -



- a) Halima Omar (b) Abdi Omar (Gonjo)(c) Safia Omar (d) Moahamed Omar (e) Salah Omar (f) Makay Omar (h) Madina Omar (i) Ibrahim Omar (j) Saida Omar (k) Abdikadir Omar. The second wife Kula Omar had four children namely; - 1. Salima Omar 2 Fatuma Omar 3. Mariam Omar 4. Sadia Omar.
17. That the 1st, 2nd, 3rd and 4th petitioner claims that plot no, 171A has fifteen rental rooms is not true, there are eleven rental shops of which 3 was built by the deceased, and 3 rooms was built by 1st and 2nd respondents with express permission of their late father.
 18. That out of five living rooms, two rooms were constructed by the deceased, this two 2 rooms were given to 2nd respondent to get married in that house in the presence of 4th petitioner.
 19. That plot no. 304 belong to the 1st respondent by virtue of being given authorization as even his own mother (first wife) passed on in the same plot, that with express authority from the old man the 1st respondent enter into contractual agreement with Safaricom to set up Safaricom booster in the plot.
 20. That 1st petitioner and the 3rd petitioner have been allocated plot for each of them as part of their share in presence of their deceased mother, the 1st petitioner sold her share of land at the cost of 2.2 million and manage to buy and construct rental house at sessi location.
 21. That the 3rd petitioner also got her share of land she utilized it by building five rental houses, while 1st petitioner benefited from rental proceeds of the shop in plot no,171A to educate her son and his up keep for more than two decades.
 22. That their deceased father has transferred the ownership of plot no. 171A to the 2nd respondent while he was a live.
 23. That both the petitioners and the respondents are of the same DNA children of Omar salah brothers and sisters and note our sisters(petitioners) complained of discrimination against them owing to our 2nd wife to the deceased being of Borana origin is malicious and deceitful and should not arise.
 24. That despite being next of kin 1st respondent together with 2nd and 3rd respondent they have never transferred any money to their personal account, the Oldman willed to be buried with his own halal money.
 25. That there is no evidence to justify that the petitioners were given plot no. 171A, by the parent nor any rooms constructed by the petitioner, in fact the rooms they claim, were constructed by old man with assistance of his son who is the 1st respondent.
 26. That whatever we deponed here is true to the best of our knowledge.
 27. On 23rd June 2020 pre-trial conference was conducted where the parties agreed; -
 - a) That the both wives of the late Omar salah predeceased him
 - b) That four children of deceased also predeceased him i.e Salah, Aisha, Dasoye and Yussuf.
 - c) That the deceased left two properties (2 commercial plots) plot no. 171A and 304 at manyatta Burji that generate ksh 238,000/= per month.
 - d) That no dispute was recorded on above mentioned information.
 28. On 6th July 2021 after series of adjournment matter was called for inter parties hearing where the all parties and their respective witnesses testified on oath.



Arguments by the petitioners

29. The petitioners paraded before the court a total of 9 witnesses, the PW1 Mr. Adan Bake aged about 70 years told the court that he married to the deceased daughter(Salima) from his second wife the late Kula Omar, the Deceased 's first wife (Fatuma Omar salah) up to her death lived with her children in plot no. 304 in manyatta Burji while the 2nd wife of the deceased(Kula Omar) lived until her death together with her children in plot no.171A next to Moyale market that was allocated to late Omar salah by the late chief Abdi Ibrahim. Mr. Adan Bake also testify that the 1st wife (fatuma Omar) never lived in plot no. 171A.
30. PW2 Mr. Abdi Galgalo Jillo echoed the same sentiment of PW1 that plot no. 171A belonged to Omar salah.
31. PW3 Mr. Galma Dambi Sora who is brother in law of the deceased by virtue of being a brother to late Kula Omar (the 2nd wife of the deceased) testified that the late Omar salah and his 2nd wife(Kula) were blessed with four children namely Salima,Fatuma, Mariam and Sadia, he also told the court that the plot Kula lived was given to her after getting married to Omar, he further testified that with exception of rooms built by Mariam in the said plot the other rooms were built by Omar Salah.
32. PW4 Mr. Mohamed Adan aged about 93 years told the court that he has known the late Omar salah since 1952 and at that time Omar had one wife, later married the late Kula. Mzee Mohamed also testified that plot no. 171A was allocated to the late Omar salah by one kulungu a clerk of the county council (a Rendile by tribe). He further told that the 2nd Respondent (son of the deceased) from the 1st wife (fatuma) is currently living at plot no. 171A, when the late Omar was sick Fatuma's children refused Kula's children to access him.
33. PW5 Mr. Wario Galgalo Godana stated that he is a fundi sometime in 2003 constructed the 3 rooms standing at plot no. 171A which were financed by Mariam. He also testified that he was never paid by Mohamed (the 1st respondent) or AbdiKadir (the 2nd respondent) for the said construction which took about 20days, he further told the court that none of fatuma's children was living in that said plot no.171A by then.
34. PW6 Mrs. Mariam Omar Salah (the 2nd petitioner) testified that the deceased had children from his two wives, the 1st wife late Fatuma has 10 children while the 2nd wife has 4 children.
35. It is also Mariam's testimony that her late father after the death of her mother, married again in 2014 one Buyy who is still alive, she never bore children with the deceased. Mariam told the court that she contributed Kshs 50,000/= towards burial expenses of late father. She further testified that with exception of Salima (1st petitioner) who was born at Mansile, the rest of Kula's children were born and brought up at plot 171A while the children of Fatuma Omar were born and brought up plot 304.
36. Mariam also told the court that Abdikadir (2nd Respondent) came to live in plot 171A in 2015 after the death of their mother Kula Omar salah, Mariam testified that she did construct 3 rooms at plot 171A and the remaining rooms were constructed by her late father, she stated that in 2016 the late Omar salah was ailing with a swollen tongue and could not talk well, she had information in that year her father had been taken by 2nd and 3rd respondent to the county government offices to transfer plot no. 171A ,
37. PW6 also testified that during his lifetime, her deceased father had properties, plot 171A, plot 304 and Gurumesa land, from the Gurumesa land the deceased gifted during his time plots to the salima, makai and Mariam, further 8 plots were sold at behest of the respondent, the proceeds of sales was deposited in deceased's account at KCB bank Moyale branch.



38. PW7 Mr. Adan Noor Abdulrahim testified that he is the senior chief manyatta location, he produced his latter dated 20th /2/2020 as plaintiffs exhibit 1 and confirmed that the deceased properties are two plots in manyatta location one for the 1st wife and the other one for the 2nd wife and a shamba in Gurumesa.
39. PW8. Mrs. Salima Omar Salah (1st petitioner) she is a business woman, salima stated that her deceased father had 3 wives, only the 1st and 2nd wives bore children for the deceased, the 3rd wife was married after the death of the first two wives.
40. It is the testimony of salima that she was born in 1974 at Mansile while her other siblings from her mother born and brought up at plot 171A, she further stated that as at time of death of their father plot 171A had 20 rooms including containers.
41. Salima also testified that Mohamed and Abdikadir (the 1st and 2nd respondent) have no jobs and have not been working. And Abdulkadir had been very hostile when the children of Kula visited their father.
42. PW9 Mr. Dub Kuse Happi Moyale town Administrator under the Marsabit county Government since November 2017. He also told the court that previously worked as an administrative officer with defunct Moyale county council since 2001. He did produce his undated letter that had been marked as MFI3 by defence as petitioner exhibit 3 and restated that from their records, plot 171A still belongs to Omar salah having been registered in 1971 and county fees had been paid up to year 2018 and plot 304 manyatta Burji from their records is registered as belonging to one Mohamed Omar, it was registered with defunct county council on 5/8/1989.
43. He also testified and confirmed that he did received two objections, one dated 30th /11/2018 and other one is dated 16th /12/2019 through Salima the 1st petitioner.

Defence Arguments

44. DW1 Mr. Mohamed Nur Bakata Ibrahim he is the assistant chief manyatta Burji location and that the parties to the case were his cousins, he also stated that the late Omar salah had two wives, with the respect to properties the deceased had two plots and land at Gurumesa.
45. It is the assistant chief testimony that the two wives of the deceased raised their children in their respective plots they lived in.
46. RW2 Mr. Mohamed Omar Salah (the 1st respondent) he confirmed that his late father died on 28th/12/2019 and his family comprised of the following;- the late Fatuma Omar Salah (1st wife) has 12 children 4 of them is deceased, late Kula Omar salah (2nd wife) has 4 children and Buuyy (3rd wife) not blessed with any child with the deceased.
47. The 1st Respondent also told the court that plot no. 304 was given to him and transferred to his name in 1989, he stated that the property initially belongs to his grandfather and Mzee Omar (DECEASED) inherited from his father, the plot has 10rooms whereby he is occupying 3 rooms and the rest (7) are rented out fetching approximately ksh. 55,000/- per month and Safaricom booster site therein fetches 120,000/- per annum.
48. On plot no. 171A the 1st respondent confirmed that the property is still in the name of the deceased, he testified that Mariam the 2nd petitioner built 3 rooms therein and the other rooms were constructed with funds withdrawn by deceased from his bank account at Kenya commercial Bank Moyale Branch, he further stated that 2nd respondent (Abdikadir) put up containers at the property.



49. Concerning the land at Guru mesa Mr. Mohamed told the court that this is orchard farm which is undeveloped him and Abdikadir have been cultivating, also testified that the deceased did gift during his lifetime some plots to some of his children, Salima was given 100by 70 feet, Mariam and Makay was also given 100by 70feet each. He also confirmed that during cross examination Abdikadir was given a plot but sold it. lastly the 1st respondent told the court that the farm gives an income of ksh 50,000/- per annum.
50. RW3 Mr. Abdikadir Omar salah (the 2nd respondent) told the court that he is the last from Fatuma Omar Salah and he is employed as watchman by company called Vickers on 24 hours basis at a monthly salary of ksh 8000/- to guard the Safaricom booster at plot 304.
51. Mr. Abdikadir Omar also testified that the income from the plot 171A per month is about 108,000/- and he is only beneficiary of the funds. He further stated that depending on the season the farm fetches at times between 45,000/- and ksh 200,000/- from the produce sales.
52. The rest of respondent's witness adopted their respective witness statement filed in court.
53. Having given due consideration to both oral and written submission of the parties during the trial and perusing through the documents before the court from both sides, the question which therefore, falls for my consideration is:
- a. What is the personal law of the deceased for purpose of succession?
 - b. What does estate (TARIKAH) mean in Islam?
 - c. Who are the legal heirs of the deceased?
 - d. Whether the three properties in question will form part of the deceased's estate?
55. On the first issue for consideration is personal law of the deceased, no dispute was recorded, the deceased died as Muslim therefore his personal law is Islamic personal law, I do agree with the submission of learned counsel for the petitioners.
- Section 2 (3) of law succession states; - 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.
56. On the second issue for consideration is estate (tarikah) of the deceased, the estate comprises of all property that the deceased has owned, whether his ownership of the substance or corpus of a thing, moveable and immoveable, realty or personally. In Islamic law of inheritance, it makes no difference the type of the property heritable by the heirs provided that it has monetary value and it is halal (lawful).
57. On the third issue the legal heirs of the deceased, in Islam their hierarchy of three classes of heirs, the first class often referred to as the Quranic heirs or sharers and the remaining two classes are the residuary heirs.
58. There are six heirs who will always inherit if they survive the deceased and these are; - husband/wife, son, daughter, father and the mother, in this matter the deceased Omar salah was survived by 10 daughters and 4 sons no dispute was recorded to this regard.
59. There is dispute as to whether the 3rd wife of the deceased was a widow of the deceased as at the time of his death, based on the testimony of DW2 Mr., Abdulkadir that mama Buuy went by herself and Mzee Omar was always hopeful of her return, no clear evidence was adduced before the court that



mzee Omar pronounce the Talaq of mama Buuy a part from giving her dowry. Therefore, I do find that mama Buuy a widow to the deceased and she is entitled to inheritance thus all heirs of the deceased belong to Quranic heirs or sharer.

60. The fourth issue of consideration is whether the three properties in question will form part of the estate.

Plot no. 171A

61. The PW9 Mr. Dub Kuse Happi who is the town administrator testified in court that the plot 171A belong to the deceased (Omar Salah) as per their records, the said plot was registered in 1971, still bear the name of the deceased despite attempt of transfer of ownership was made, however changes have not been effected.
62. It is also DW2 Mr. Mohamed Omar (the 2nd respondent) evidence and testimony in court that a part from the three rooms that was built by Mariam (the 2nd petitioner) the other rooms were constructed by the funds of the deceased.
63. The claim by the 2nd respondent that he built some rooms in the suit property was not substantiated in court in fact the testimony of his brother Mohamed Omar is against his claim,
(on the authority of Ibn Abass (may Allah be pleased with him) that the messenger of Allah (peace be upon him) said; were people to be given everything that they claimed, men would(unjustly) claim the wealth and lives of (other) people, but the onus of proof is upon the claimant.....) Narrated by Baihaqi
64. It is also evidence that during the pre-trial conference all parties agreed that plot 171A belongs to late Omar salah, since then no objection or contrary opinion was recorded in court.
65. The argument of will of the suit property cannot stand in sharia, I totally agree with the submission of petitioners, the Islamic sharia position on this matter is very clear,
It was narrated by Abu Hurairah in Sunan Abi Dawood 2870 (I heard the messenger of Allah say; - Allah has appointed for everyone who has aright what is due to him, and no bequest must be made to an heir)
66. Therefore based on above evidences and authorities from the Hadith of the prophet (peace be upon Him) I find that the suit property plot no. 171A will form part of the estate of the deceased thus subject to inheritance.

Guru mesa land

67. There is no dispute between the parties that the land at Guru mesa belong to the deceased (Omar Salah), also it is not in dispute that the deceased gifted out during his lifetime some plots to his children and some sold them afterwards the children are; - Mariam, Salima, Makay and Abdulkadir.
68. In Islam to consider the gift is valid three essential formalities to be fulfilled-;
- a). A declaration of gift by the donor- it simply signifies the intentions of the donor to make a gift.
 - b). Acceptance of the gift by the donee -Acceptance manifests the intention of the donee to take the property and become its new owner. Without acceptance, the gift is considered to be incomplete.
 - c). Delivery of possession by the donor and taking of possession by the donee. Under Islamic law, a gift is complete only after the delivery of possession by the donor and taking of possession



by the donee. Thus, it is obligatory that the declaration and acceptance must be accompanied by the delivery of possession of the property.

69. The gift takes effect from the date when the possession of the property is delivered to the donee and not from the date when the declaration was made by the donor. Delivery of possession is an overriding facet in Islamic law.
70. The plots gifted to Mariam, salima, Makay and Abdulkadir from the Guru mesa land are proper and fulfilled the position of Islamic shariah as far as the gifts is concerned. And the remaining portions of land at Guru mesa is hereby considered part of estate of the deceased.

Plots 304

71. From the evidence of the town administrator in court plot no. 304 was registered with the name of Mohamed Omar in 1989, in the replying affidavit jointly sworn on 6th 10/2020 paragraph 6 & 7 stated that although during case conference the parties agreed that the property belonged to the deceased Omar salah, but the 1st respondent have had its sole custody of plot no. 304. In paragraph 7 the 1st respondent state that. That unknown to the 1st respondent the deceased had long transferred the plot no.304 to the 1st respondent.
72. The 1st respondent and other beneficiaries never knew if the property was registered in name of Mr. Mohamed Omar from 1989 until this case was file in the year 2020 through the latter of town administrator, up to the pre- trail hearing all parties admitted the property belong to Mzee Omar their late father.
73. The defence witness on gifting of the property plot no. 304 to the 2nd respondent (Mohamed Omar) goes against his own admission, in Islamic jurisprudence about acknowledgment is the master of evidence it is binding in civil matter.
74. The court agreed with the submission of petitioner that in Islamic jurisprudence many legal maxims (Qawaaid Fiqhiyyah) exist relating to confessions, one of the maxims al mar mu'aakhadh bi iqraarihi (one is held responsible for one's confession) it is trite that Islamic legal maxim that al- iqraa fii huquuq laa yahtamil al ruuju (Retraction of confession is not allowed in right of person
75. Therefore the argument of gift in respect of plot 304 to 1st respondent lacks the one of three essential formalities of valid gift under Islamic shariah the "acceptance of gift" the 1st respondent made admission that during the pre-trial conference all the suit properties belong to their deceased father, is not aware that his late father transferred to his name plot 304, he only came to realize the property has his name after the case was filed in court in year 2020. Therefore, I find that the said property(plot304) will form part of estate of the deceased.
76. The rightful Islamic shares of inheritance of heirs of deceased will take following mode, the deceased was survived by 10 daughters, 4 sons and 1 widow; -
 - a) Each son of the deceased will get 9.7%
 - b) Each daughter of the deceased entitled to 4.9%
 - c) Widow will get 12.5%
77. Lastly in order to meet end of justice the court hereby ordered the 1st Respondent and 2nd respondent to avail figures to court of rent proceeds from the two properties (plot no. 171A and plot no.304) from the commencement of this case to date and henceforth the rent proceeds from the both said properties be put in joint account (between) 3rd petitioner and 1st and 2nd respondents.



78. Concerning the remaining parts of land at Guru mesa be valued and the report be avail in court, since physical division of the said portion is impractical due to the number of the beneficiaries involved. It is so ordered.

79. Matter marked for mention 23rd May 2022 for the compliance of above mention orders.

DATED AND DELIVERED 18^H DAY OF MARCH, 2022.

Hon. A. D. WAKO

PRINCIPAL KADHI.

MOYALE LAW COURTS.

