



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

SUCCESSION CAUSE NO. 910 OF 2015

IN THE MATTER OF THE ESTATE OF **THE LATE ABISALOM ADERA NYABINGE**

AND

IN THE MATTER OF AN APPLICATION BY **JECTON ODHIAMBO NYANGORO**

JUDGMENT

Following the demise of **ABISALOM ADERA NYABINGE** on 10th July 1991, these proceedings were instituted in the year 2015, with a view to addressing the succession of his estate.

1. The Petitioner was **JECTON ODHIAMBO NYANGORO**.

2. On 16th March 2016 the Court issued the Grant of Letters of Administration Intestate to the Petitioner.

3. Thereafter, on 28th November 2016 the Petitioner filed Summons for Confirmation of Grant. The said Summons was supported by the Petitioner's affidavit.

4. From the Petitioner's affidavit, two (2) properties were identified as constituting the estate of the late Abisalom Adera Nyabinge. The said properties are;

a. L.R. NO. KISUMU/DIANGA EAST/727

b. L.R. NO. KISUMU/DIANGA EAST/1543

5. The Petitioner asked the court to order that the 2 properties be transferred to him.

6. When the application for the Confirmation of the Grant came up for hearing on 30th May 2018, the Petitioner disclosed to the court that the deceased (Abisalom Adera Nyabinge) was an older brother of Eliakim Nyangoro Nyabinge, who is the Petitioner's father.

7. When the court sought to know the details of the immediate family of the deceased, the Petitioner disclosed that the deceased had begotten the following 4 children;

1. Joseph Nyabinge Odera

2. Elizabeth Otuge Odongi

3. Agwanda Orita Nyakore; and

4. Jennifer Ogidho Aganyo.

8. In the light of that revelation, the Court ordered that all the beneficiaries must attend court, when the application for confirmation of the grant was scheduled for hearing.

9. The case came up numerous times, but the daughters of the deceased were not attending the said proceedings. The Petitioner informed the Court that the married daughters of the deceased had decided not to attend Court.

10. However, the Court was adamant that unless the ladies attended the proceedings, the Court would be unable to make an informed decision on the issue concerning the distribution of the assets which the deceased had left behind.

11. Ultimately, on 21st September 2020, the following persons attended court;

a. Elizabeth Muga Odongi;

b. Peres Agwanda Orita;

c. Jenifa Anyango Aganyo; and

d. Eusevius Juma Ongole

12. Elizabeth, Peres and Jenifa told the Court that they were daughters of the deceased.

13. When the Court asked each of them how the estate was to be distributed, Elizabeth first said that Jecton could be given Parcel No. **KISUMU/DIANGA EAST/727**. However, Peres said that Jecton (the Petitioner) would not be given any portion of the properties which the deceased had left behind.

14. According to Peres, the father to Jecton had already given to him, sufficient land.

15. On his part, Jecton begun by saying that the case had already been determined in the year 2015.

16. He later said that in the year 2016 Ochieng J. presided over court proceedings, when Elizabeth told the court that the deceased had given his parcels of land to Jecton.

17. Clearly, Jecton was not speaking the truth, concerning what had allegedly transpired before, in the year 2016, as during that year, I was not based in Kisumu.

18. During the year 2016, I was based at the Commercial Division of the High Court, located at Milimani, Nairobi.

19. I most definitely did not handle this case at that time.

20. Nonetheless, to be fair to Jecton, I note that on 13th July 2020, Elizabeth told the Court that Jecton could be given Parcel Number **L.R. NO. KISUMU/DIANGA EAST/727**.

21. However, Peres categorically stated that Jecton should not get any share of the property of the deceased.

22. In a nutshell, there was inability to achieve a consensus between the potential beneficiaries about how the estate would be distributed.

23. When the Court gave an opportunity to Jecton to put forward his claim, he said the deceased had put into writing, his intention which was to give to Jecton, the property belonging to the deceased.

24. Although Jecton insisted that the intentions of the deceased were embodied in a letter which the deceased penned in the year 1988, the said Jecton failed to provide the Court with a copy of that letter.

25. When a party gives his property or part thereof to another person, during the life-time of the party, that constitutes gift inter-vivos.

26. The process of handing down the ownership of such property would be an essential part of the evidence to be tendered in court.

27. Once the property had been transferred from the name of the deceased, during his life-time, such property was no longer a part of his estate.

28. Pursuant to **Section 31** of the **Law of Succession Act**, a gift made in contemplation of death shall be valid, notwithstanding that there has been no complete transfer of legal title, provided that the qualification specified by that statutory provision have been met.

29. In this case, there is absolutely no evidence that the deceased had gifted Jecton with his parcels of land, in contemplation of his death.

30. Secondly, as the parcels of land were still in the name of the Deceased, they constitute the estate of the deceased.

31. Peter Nyangoro Nyabinge told the Court that the property of the deceased ought to be distributed between the following six persons;

1. Jecton Odhiambo Nyaranga;

2. Peter Nyangoro Nyabinge;

3. Lucas Nyabinge;

4. Henry Otieno;

5. Gordon Ouma; and

6. Christopher Bunde

32. When the Court sought to know the rationale for the contention, Peter Nyangoro Nyabinge failed to provide any justification for the proposed distribution.

33. In fact, Peter confirmed that none of the six persons were children of the deceased.

34. All the six persons were the offspring of Eliakim Nyangoro Nyabinge, who was a brother to the deceased, Abisalom Adera Nyabinge.

35. As Peter confirmed that the deceased was survived by his Daughters, Jenifa, Elizabeth and Peres, I find no basis in law, for overlooking the daughters of the deceased; and then handing over the parcels of land to the sons of the deceased's brother.

36. The children of the deceased have a greater legal entitlement to share in his property, compared to the children of the brother to the deceased.

37. As far as Jecton was concerned, the deceased had allegedly decided to give him the parcels of land because of the responsibility which Jecton had borne in respect to the home of the deceased.

38. In effect, even if it were assumed that the deceased had expressed an intention to transfer some or all the parcels of land to Jecton, such an intention was not manifested when the deceased was contemplating his death. Therefore, the alleged intention cannot trigger the legal presumption set out in **Section 31** of the **Law of Succession Act**.

39. In a nutshell, I find that Jecton and his brothers have failed to prove that they do, or any of them does, have a better claim to the estate of the deceased, compared to the daughters of the deceased.

40. I therefore reject the Summons of Confirmation of the Grant, which could have led to the transfer of the parcels of land to Jecton Odhiambo Nyangoro.

41. The estate of the deceased shall be transferred to his 3 daughters, namely;

a. Elizabeth Muga Odongi;

b. Jenifa Anyango Aganyo; and

c. Peres Agwanda Orita.

42. Before the Court can make final orders on the actual distribution, I will give the 3 ladies an opportunity to address the Court on their proposed mode of distribution.

DATED, SIGNED and DELIVERED at KISUMU This 23rd day of November 2020

FRED A. OCHIENG

J U D G E