



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE NO. 796 OF 2010
IN THE MATTER OF THE ESTATE OF
SELA ATIENO MUGA (DECEASED)

BETWEEN

ERIC ODHIAMBO NYANGURE APPLICANT

AND

ERASTO SIAJI MUGA PETITIONER/RESPONDENT

RULING

1. The matter for consideration concerns the estate of Sela Atieno Muga (“Sela”) who died on 3rd November 2010. According to the petition filed by the respondent, she died at Nyalenda but was domiciled at Nyawara in Siaya. Erasto Odhiambo Muga (“Erasto”) petitioned the court for the grant of letters of administration intestate on the ground that he was her step son. Her only known asset is a parcel of land known as **KISUMU/NYALENDA A/355**. A grant of letters of administration intestate was issued to Erasto on 18th July 2011.
2. In due course, Esther Nyangure (“Esther”) filed an application dated 20th September 2011 seeking to revoke the grant issued to Erasto. She staked her position on the ground that she was the wife to John Nyangure Oketch, the only brother to Sela. She claimed that the grant was obtained without disclosing the fact that Erasto had no interest in Sela’s estate.
3. During the pendency of proceedings, it turned out that Erasto was too old and ill to attend and was represented by his son, Henry Siaji (“Henry”). Esther also died during the proceedings and was substituted by her son, Eric Odhiambo Nyangure (“Eric”). The parties filed various applications and depositions but ultimately I heard the application by way of *viva voce* evidence. On the objectors side Eric and his sister, Alice Anyango Odhiambo (“Alice”) testified and on the petitioner’s side, Henry and his mother, Gladys Ayieko Odhiambo (“Gladys”) testified.
4. The fact that has led to this dispute is that Sela died childless and left one property was not in dispute. Likewise the Sela’s family genealogy was not contested and it is as follows. Elly Muga (“Muga”), who is deceased, married two wives. Leah Muga (“Leah”), who is also deceased, had 9 children. The only surviving child of Muga and Leah is Erasto. Sela had one brother, John Nyangure, who is deceased. John Nyangure’s wife, Esther, who initially lodged the objection passed away and was substituted with their son Erick.

5. According to Eric and Alice, the deceased was residing at Nyalenda, Kisumu at the time of her death. They stated that she faced hostility from Gem where she was married due to her childlessness and decided to return to her ancestral home in the mid 1950's where she remained until her death. When she returned to Nyalenda, her brother, John allocated to her part of the ancestral land where he built for her a house. Eric told the court that when the land was adjudicated, part of it was registered in her name.
6. Henry told the court that Erasto is the only surviving son of Muga and as such he is entitled to administer the estate. He testified that the claim is founded on the fact that Sela was Muga's second wife and that Muga established a home for her at Nyalenda. He contended that under Luo custom, every woman is buried in her home and Sela was no exception hence when she died their family could not take her body and bury her in Gem. In cross-examination Henry told the court that the property was purchased by Elly on behalf of Sela. Agnes testified that Sela lived with Muga upto the time of his death and they had no problems although she admitted the first wife, Leah, was jealous and hostile to her. She insisted that the property in Nyalenda belonged to Elly.
7. Since the deceased died after the law of **Law of Succession Act (Chapter 160 of the Laws of Kenya)** came into force on 1st July 1981, the administration and distribution of the estate is governed by the **Act** by virtue of **section 2(2)** of thereof. The operative provision applying to these proceedings is **section 39(1)** of the **Act** which states as follows;

39 (1) Where an intestate has left no surviving spouse or children, the net estate shall devolve upon kindred of the intestate in the following order of priority-

 - (a) father, or if dead*
 - (b) mother, or if dead*
 - (c) brother and sisters, and any children of the deceased brothers and sisters in equal shares; or if none*
 - (d) half-brothers and half sisters and any child or children of deceased half brother and half sisters in equal shares; or if none*
 - (e) the relatives who are in the nearest degrees of consanguinity upto and including the sixth degree in equal shares*
8. As I stated, customary law was not applicable but even if it were, I would not consider the Erasto entitled to the property. Sela was married in Gem, Siaya yet she settled and lived in Nyalenda, Kisumu. The testimony of Eric and Alice that Sela left Gem and came back home was confirmed by Gladys who stated that Sela faced hostility from Leah. In fact she told that court that when she was married in the family, there was house for Sela but she never lived there. I reject any suggestion that Muga purchased for her land in Nyalenda as no proof was shown of the said purchase. I believe both Eric and Alice who stated that Nyalenda was the ancestral home of Sela's family and when she returned, her brother gave her a portion of the whole ancestral land in Nyalenda when she lived for the rest of her lifetime and was buried.
9. Erasto is not a son to the deceased and as such does not fall within the provisions of **section 39(1)(c)** of the **Act**. He is thus not entitled to administer the estate of the deceased. This responsibility falls to the children of the deceased's brother. They are the persons with priority to administer the estate under **section 66** of the **Act**.

10. I therefore allow the application dated 20th September 2011 and revoke the grant issued to Erasto Odhiambo Muga. A grant is now issued to Eric Odhiambo Nyangure and Alice Anyango

Odhiambo. They shall apply for confirmation within 30 days.

11. There shall be no order as to costs.

DATED and DELIVERED at KISUMU this 30th day of June 2016.

D.S. MAJANJA

JUDGE