



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE NO. 597 OF 2015
IN THE MATTER OF THE ESTATE OF
CALEB OBIERO AOL (DECEASED)

BETWEEN

HENRY ODHIAMBO AOLPETITIONER/APPLICANT

AND

WILLIAM AWUONDA AOLOBJECTOR/RESPONDENT

RULING

1. The late Shadrack Aol Agalo of Nyalunya in Kisumu County had four sons with his wife Dorca Achieng Aol; Killion Ouko Aol, Caleb Obiero Aol (“the deceased”), Henry Odhiambo Aol (“Odhiambo”) and William Awuonda Aol (“Awuonda”).
2. The deceased died on 16th July 1985 without issue. He left behind one property, KISUMU/NYALUNYA/2363 (“Plot 2363”), which the subject of these proceedings. Odhiambo applied for grant of letters of administration intestate and the grant was issued to him on 10th August 2015.
3. After the grant was issued Awuonda objected to the grant. In the intervening period, Odhiambo filed summons for confirmation of grant dated 18th February 2016 in which he sought to be given the whole of Plot 2363. The application was opposed by Awuonda on grounds that the initial grant was obtained by material non-disclosure, in that Odhiambo did not disclose that he was a beneficiary of the deceased’s estate.
4. To resolve this matter, I directed the parties to give *viva-voce* evidence. The issue for determination that emerged is whether Odhiambo was entitled to Plot 2363. It was common ground that the Shadrack Aol had given each of his sons their respective parcels to settle on. Odhiambo was given Plot 2383 while Awuonda was given Plot 2382. The deceased was allocated Plot 2363.
5. Awuonda’s position is that as a brother of the deceased he was entitled to half share of the property. His position is supported by **section 39(1)** of the *Law of Succession Act (Chapter 160 of the Laws of Kenya)* which states that;

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; of if none

(d) half-brothers and half sisters and any child or children of deceased half brothers 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. [My Emphasis]

6. Odhiambo's position was that he was entitled to the entire plot as he had given his Plot to Awuonda in exchange for his interest in the deceased's plot. Charles Odhiambo (DW 2), a step brother of the deceased, confirmed that their father had given each son his own parcel of land. Awuonda was given Plot.2382 which he sold to Naftali Mboo Andrea Sule in 1991 thus rendering him landless. Odhiambo then agreed to give him his Plot 2383 in exchange for his interest in the deceased's plot. Odhiambo then proceeded to occupy Plot 2363.

7. The Chief of Kolwa Central Location, Elijah Otieno Omumbo (DW 1), testified that Odhiambo came to see him to seek his authority to commence succession proceedings. After he had ascertained the fact that Odhiambo was occupying the plot, he wrote the letter dated 16th February 2012 with which Odhiambo commenced the succession proceedings.

8. In my view, it was Odhiambo's burden to show, on the balance of probabilities, that he was entitled to his brother's parcel of land contrary to **section 39(1)** of the **Law of Succession Act**. The evidence in the case is proves that Awuonda had constructively renounced his right to claim his share of the deceased's property when he accepted Odhiambo's land in exchange. First, there is clear evidence that Odhiambo is in occupation of the land and had been in occupation for a considerable period. Second, there is evidence from the Green Card for Plot 2383, which originally belonged to Odhiambo, that Awuonda's son, Emmanuel Onyango Awuonda, lodged a caution claiming beneficial interest. The fact that Awuonda son lodged a caution of Plot 2383 confirms that the land had been given to Awuonda by Odhiambo otherwise Awuonda's son would not have any claim on the said land. Third, the fact that Awuonda sold his Plot 2382 in 1991 rendered him landless hence giving credence to the contention that Odhiambo gave him Plot 2383 to settle on. Although the land was still registered in Odhiambo's name, both Charles and Odhiambo confirmed they facilitate the sale of Plot 2383 to Edward Orodli Liya. Awuonda vehemently denied that there such an agreement but I am inclined to believe Charles and Odhiambo who struck me as honest witnesses.

9. Following the evidence, I find and hold that Odhiambo was entitled to apply for letters of administration. He disclosed that Awuonda was a beneficiary in the petition. I also find that Odhiambo is entitled to the whole of Plot 2363 for the reasons I have set out above. The truth of the matter is that Awuonda, having squandered his inheritance, cannot turn around and demand his brother's entitlement. I dismiss his objection, which was nonetheless lodged out of time.

10. The summons for confirmation dated 10th February 2016 is allowed as prayed.

DATED and DELIVERED at KISUMU this 31st day of October, 2016

D. S. MAJANJA

JUDGE

Mr Omondi Okoyo, Advocate instructed by the applicant.

Respondent in person.