



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KAKAMEGA**

**SUCCESSION CAUSE NO: 692 OF 1994**

IN THE MATTER OF THE ESTATE OF NERIMA MUYA  
MASANGA .....DECEASED

**AND**

DANIEL OMUKA MALALA.....PETITIONER

VERSUS

JOSEPH OWANGE NERIMA.....OBJECTOR

AND

BENARD MUYA NELIMA..... 1<sup>ST</sup> APPLICANT

ASMIN NANZALA OWANG' .....2<sup>ND</sup> APPLICANT

**JUDGEMENT**

The deceased, Nelima Muya Masanga, died on 3/2/1983. Daniel Omuka Malala filed this succession cause indicating that he is a nephew to the deceased. He was issued with a grant of letters of administration intestate on 14/6/1996. On 1/9/1999, Joseph Owangi Nerima files summons seeking to have the grant that had not been confirmed revoked.

The matter proceeded by way of oral evidence. Joseph Owangi Nerima who is now deceased testified as PW1. His evidence is that his late father owned plot number **N/WANGA/INDANGALASIA/458** measuring 43 acres. The deceased left six sons namely Morris, Peter, Silvanus, Benard, Stephen and Joseph.

PW1's father was from a family of five sons namely Malala, Hassan, Damiano, Opuba and Nerima. Each of the five sons were given their own land. The petitioner, Daniel, is a son of Malala; His father was given land. The plot was later taken by the clan. The petitioner's mother left with the petitioner and got remarried. The petitioner came back in 1990 and the elders allowed him and the elders allowed him back. The petitioner was given six acres of land. The petitioner's father was not buried on the suit land but on the plot taken by the clan. PW1 testified that his family is willing to give the petitioner six (6) acres. According to PW2, the land was sub-divided in 1990. The petitioner's father died before PW1 was born. The plot given to the petitioner father is about one kilometer from the suit land.

PW2, **Rebecca Rachama** is the deceased's widow. She has six sons with the deceased. Her evidence is that her father in law had two wives. Her husband was given the suit land by his father. Her brother in

law, Malala Muya was given his share of the land. Malala Muya was older than Nerima Muya when the petitioner's father died the petitioner was not present. According to PW2, the land was sub-divided and the petitioner was given a plot as he had nowhere to live. Malala Muya was not buried on the suit land. The two brothers, Malala and Nerima did not live together.

Each has his own land. The other children of PW2's father in law were given their land. When Malala died the petitioner's mother left with the petitioner and when the petitioner came back, he found his father's land had been invaded.

PW3, **Lawrence Aura** testified that he knew the deceased. He is a neighbour. He came to know the petitioner in 1990 when he was invited by Nerima's family. PW3 was present when the petitioner was given a plot of land. The petitioner did not object.

On his part, the petitioner DANIEL OKUMA MALALA testified that the deceased was his uncle. The suit land belonged to the deceased and the petitioner's father jointly. He has two sisters and no brother the petitioner would like to have the and divided equally so that he can get 21 ½ acres. The plot is currently registered in the names of Daniel Omukamani but it used to be in the names of Nerima Muya. The petitioner was born in 1954. His father died in 1959 and was buried on the suit land. The objectors have divided the land into seven (7) portions. The petitioners denied that his father was given his land elsewhere.

DW2, **Peter Onyongo Echesa** knew the deceased. His evidence is that the deceased had a brother, Malala Muya. The mother to the two brothers was given 43 acres of land. DW2 was once a village elder of the area. The petitioner's father was buried on the suit land. DW3, **Shaban Baraza** testified that the petitioner is his neighbour. Malala Muya was the elder brother to the deceased. The mother to the two brothers was given 43 acres. The deceased encroached on the portion of Malala after the death of Malala Muya and his wife. Currently, the land is sub-divided into several portions.

Parties filed written submissions that are largely in line with the evidence on record. The main issue for determination is whether the deceased held plot number **N.WANGA/INDANGALASIA/458** for his brother Malala Muya and whether the petitioner should get 21 ½ acres of the suit land.

Whereas the objector contend that the suit land belonged to the deceased and that the petitioner's father was given his own land, the petitioner maintains that his father was entitled to half of the suit land. The evidence on record shows that the suit land was registered in the names of Nelima Muya on 27/12/1967. The petitioner filed an application dated 21/12/1998 seeking to have the grant confirmed. He proposed to divide the land equally between himself and PW2, the deceased's widow.

It is clear from the evidence that when the land was registered in 1967, the petitioner's father was deceased. Inferences were made that the deceased herein used to live in Uganda but PW2 denied those allegations. There is no evidence that the father to Malala and Nerima had three other sons. Both parties are in agreement that the other three sons of Muya were given their own land. Although it is common for a brother to have been registered as a proprietor of land in trust with his other brother or brothers, in the current case, Malala was deceased by the time Nerima was registered in 1967. According to the petitioner, Malala died in 1959.

The petitioner was born in 1954. When registration was done in 1967 he was still young. It's not clear why upto 1983 when the deceased died, by which time the petitioner was 29 years old, there has been no claim of the half share of the land by the petitioner or his mother. According to the objectors, the petitioner was not present when his father died. He came back in 1990 when he was invited. By the time, the petitioner was 36 years old. This cause was filed in 1998. This was eleven years after the deceased's death. Both parties are in agreement that the land is now sub-divided into seven portions. The petitioners would like to get 21 ½ acres. The survey report indicate that the petitioner is occupying 2.40 hectares and that is the portion the objectors would like to give the petitioner.

From the evidence on record, I do find that the suit and, plot N. WANGA/INDANGALASIA/458

belonged to the deceased, Nerima Muya Masanga. The deceased had six sons who are entitled to inherit their father's land. Nerima Muya was not holding the land in trust for his brother Malala Muya. By 1967 when Nerima was registered, Malala was already deceased. Since the children of Nerima are willing to give their cousin, the petitioner, 2.40 ha. I do hold that the deceased's estate, plot number **N.WANGA/INDANGALASIA/458** shall be distributed as follows:-

1. MAURICE ODUORI NERIMA 2.55 HA.
2. SILVANUS OTSIENO MUYA 2.50 HA.
3. JOSEPH OWANGE NERIMA 2.65 HA.
4. STEPHEN CHESA MUYA 2.39 HA.
5. BENARD MUYA NERIMA 2.40 HA.
6. PETER OPUBA NERIMA 2.30 HA.
7. DANIEL OМУКА MALALA 2.40 HA.

A confirmed certificate of grant to be issued to PW2, Rebecca Rachama. Each party to meet his/her own costs.

Dated, signed and Delivered at Kakamega this 27<sup>th</sup> day of February 2014.

**SAID J. CHITEMBWE**

**JUDGE**