



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

SUCCESSION CAUSE NO. 223 OF 2012

IN THE MATTER OF THE ESTATE OF THE LATE MELKSADEK NINDO NYANGAGA A.K.A. MELKAZEDEK NINDO NYANGAGA A.K.A. ROSELIDA WAMBWAYA A.K.A. NDARA OJODE (DECEASED)

AND

IN THE MATTER OF AN APPLICATION FOR A GRANT OF LETTERS OF ADMINISTRATION INTESTATE BY FLORENCE APIYO OTIENO

BETWEEN

OSIO ELEKIA NINDOADMINISTRATOR/ APPLICANT

AND

FLORENCE APIYO OTIENO NINDO....PETITIONER/PROTESTOR

RULING

The beneficiaries of the Estate of the late **MELKSADEK NINDO NYANGAGA** have successfully negotiated how to distribute the properties which the deceased left behind.

1. However, there is one property, **L.R. NO. KISUMU/RATTA.2752**, which they have been unable to agree upon.
2. **FLORENCE APIYO OTIENO NINDO** claims that the said property belonged to her late husband, **SAMSON OTIENO NINDO**.
3. It is her case that that property was purchased by Samson during his lifetime. Therefore, Florence stated that that parcel of land was not a part of the Estate of the late Melkesadek Nindo Nyangaga.
4. On the other hand, the Petitioner, **OSIO ELEKIA NINDO**, insists that the property in question was definitely a part of the Estate.
5. Osio Elekia Nindo testified that the land **L.R. NO. KISUMU/RATTA/2752** was registered in the name of the deceased.
6. Florence Apiyo confirmed that the property in issue was originally registered in the name of the deceased.
7. A Green-Card produced by the Administrator showed that as at 31st May 1982, the registered proprietor was Melkazedek Nindo Nyangaga.
8. Notwithstanding that documentary evidence, Florence insisted that it is Samson Otiemo who had bought the land, and who had got the title registered in the name of his father, Melkasadek.
9. The Green-Card shows that on 12th November 2013, Florence was registered as the proprietor of the property, pursuant to the Orders made in this Succession Cause.
10. Florence confirmed that she became the registered proprietor of that parcel of land through this Succession Cause.
11. It is common ground that the Petition herein was lodged in court by Florence.

12. When she was being cross-examined, Florence said that the Chief's letter which was filed together with the Petition had expressly stated that the deceased, Melkasedek, had only one wife.
13. However, it is common ground that the deceased had seven (7) wives.
14. The Chief's letter also said that the deceased was only survived by one widow and one son.
15. That statement was very obviously false, as twenty-eight out of the forty-four children of the deceased, were still alive by the time he died.
16. The Administrator and some of the children of the deceased had lodged complaints with the police, asserting that the Chief's letter was full of falsehood.
17. During cross-examination, Florence said that she was now aware of the reasons why complaints had been lodged with the police.
18. At the time when Florence lodged the Petition she stated that the deceased had left behind only one property, **L.R. NO. KISUMU/RATTA/2752**.
19. However, the truth was that the deceased left behind seventeen (17) properties which were registered in his name.
20. The explanation given by Florence, for having said that the deceased had only left behind one property was that she only had an interest in that one property.
21. Florence testified that her husband, Samson, had bought **Parcel No. 2752** from **ENOS PANDE AMOLO (PW2)**.
22. Enos testified that he sold that parcel of land to Samson in the 1960s. The parcel of land which he sold was almost an acre in size.
23. However, during cross-examination, **PW2** said that the land which he had sold to Samson belonged to his father. Therefore, Enos did not even know what the purchase price was.
24. Furthermore, Enos said that it is his father who used to send him to collect money from Samson, indicating that the money so collected was part of the purchase price for Parcel No. **2752**.
25. The foregoing evidence was given when Enos was giving his evidence- in-chief.
26. In other words, even before Enos was tested through cross-examination, his own testimony was not wholly consistent.
27. During cross-examination, Enos confirmed that Melkazedek had installed a posho-mill on Parcel No. **2752** in the 1940s.
28. Although Enos did not know when Samson was born, he testified that Samson was working at the posho-mill when the father of Enos used to send the son to collect money from Samson.
29. In my considered opinion, the evidence of Enos is completely incoherent. I so find because it is inexplicable how Melkazedek had already built a posho-mill on the parcel of land in the 1940s, yet it was not until the 1960s when the land was sold to his son, Samson.
30. It is noted that Florence testified that she got married to Samson in 1969.
31. She said that Samson was 24 years old when he married her. Therefore, it would follow that Samson was born in 1925.
32. By 1940, Samson would have been 15 years old; and by 1950, he would have been 25 years old.
33. That would imply that the posho-mill was built by Melkazedek when his son, Samson was less than 25 years old.
34. I find it highly unlikely that Samson, who was even employed at the posho-mill after he had left school, could have purchased the land upon which the posho-mill was put-up.
35. It was the evidence of Florence that when Samson married her in 1969, he had just finished school.
36. Therefore, as Samson was in school until 1969 when he married Florence, I find that he could not have had financial ability to purchase the parcel of land either in the 1940s, the 1960s or at all.
37. That explains why Florence had, in her Petition, indicated that the parcel of land in issue belonged to Melkazedek.
38. Indeed, if the said parcel of land belonged to Samson, it cannot or ought not to have been the subject matter in the Estate of Melkazedek.

39. It was not until 1982 that the parcel of land was first registered, and it was so registered to Melkazedek Nindo Nyangaga.

40. By the year 1982, Samson would have been 57 years old.

41. The widow of Samson has failed to produce any evidence to demonstrate that Melkazedek was registered as the proprietor of **Parcel No. 2752**, to hold in trust for Samson. There is no basis in fact or in law for the contention that there was a constructive trust based on any common intention.

42. In the final analysis I hold that **L.R. NO. KISUMU/RATTA/2752** belonged to Melkazedek Nindo Nyangaga; and that therefore, it is a part of his Estate.

DATED, SIGNED and DELIVERED at KISUMU This 12th day of **June** 2019

FRED A. OCHIENG

J U D G E