



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 851 OF 2012

IN THE MATTER OF THE ESTATE OF ALWOCH OBARA ALIAS ALWOCHI UBALA (DECEASED)

ABISALOM KAYERE MISIGOPETITIONER

VERSUS

TOM WILLIAM ONGUKAPROTESTOR

JUDGMENT

1. The petitioner herein has filed summons for confirmation of grant dated 20th February, 2015 seeking that the grant of letters of administration issued to him on the 9th October, 2012 be confirmed. The grounds in support of the application are that the petitioner is the son of the third wife of the deceased herein, **Alwoch Obara**, who at the time of his demise on 12th May, 1975 was the registered proprietor of land parcel No. **Kakamega/Lusiola/1096**. That before the deceased died he had distributed his property to his other sons, William Onguka Alwoch, John Erotso Ubala and Meshack Ubala thereby leaving the suit land for the petitioner.

2. The summons were opposed by Tom William Nguka (herein referred to as the protestor) vide a protest dated 18th May, 2015 on the grounds that the petitioner is not a son to the deceased. That the deceased had only one wife, Naomi Sagina, with whom he was blessed with three children – William Nguka Alwoch, John Erotso and Zipporah Kanaiza Ayiende. That the protestor is a son to the late William Nguka Alwoch. He is seeking that the estate of the deceased be distributed to the beneficiaries of the deceased in accordance with paragraph 4 of his protest, that is to:-

- (a) Zipporah Ubala
- (b) John Erotso Ubala
- (c) Tom William Onguka
- (d) Dishon Ababu
- (e) Fred Aluoch
- (f) Edward Ndeda

3. The summons and the protest were heard by way of *viva voce* evidence. The protestor testified as PW1 in the case and called two witnesses – his sister Zipporah Kanaiza Ayiende PW2 and one Abraham Mutimuli PW3 whose father was a cousin to the deceased.

4. The petitioner testified as DW1 in the case and called one witness, his brother Meshak Obala Misigo DW2.

Case for the Protestor -

5. In his evidence the protestor stated that the deceased herein was his grandfather, him being a son to the deceased's son William Onguka. That his siblings are Fred, Edward and Dishon. That the deceased had three children namely, his father William Onguka, John Erotso Ubala and Zipporah Ubala. That the deceased had a brother called Misigo who was the father to the petitioner. That the deceased died in 1975 and was buried on the suitland.

6. The evidence of the protestor was supported by his sister, Zipporah PW2, who testified that her father, the deceased had one wife, Naomi Sagina. That her siblings were William Nguka Alwoch and a step-brother John Erotso Alwochi. That they were born and brought up on the suitland. That the petitioner is a son of her uncle who was called Misigo. That the petitioner does not reside on the said land but the protestor resides on the land and has no other land. That her father was buried on the suitland. That John Erotso resides on the land and has no other land.

7. Abraham Mutimuli PW3 told the court that the deceased was a clansmate. That the deceased had one wife, Naomi Sagina. That they had three children – William Nguka Alwoch, John Erotso Alwoch and Zipporah Kanaiza Ayiende. That the protestor herein is a son to William Nguka who and his siblings reside on the suitland that belonged to their grandfather. That the petitioner is a son of the brother of the deceased called Misigo and resides on a parcel of land given to him by his father prior to his death. That the deceased and his brother Misigo had inherited land from their father which they shared out among themselves.

Case for Petitioner –

8. The petitioner testified that he is a son to the deceased herein. That his father had three wives – Naomi Sagina who was the mother to William Nguka, Jackline Kavumbwi who was mother to John Erotso and Rose Mbone who was his mother. That his father gave William Nguka and John Erotso parcels of land. William was given land parcel Kakamega/Lusiola/1099. John was also given his portion which he sold. That the petitioner was working in Nairobi when his father distributed the land. His father registered his (petitioner's) portion under his name which is the suitland herein.

9. The witness stated in cross-examination that he migrated to Migori in 1980 and left the protestor's mother cultivating the suitland. That when she died he went back and demanded for the land. The protestor refused with it.

10. He further said that his mother was a wife to the deceased's brother called Misigo. That after Misigo died his mother was inherited by the deceased. He was then fathered by the deceased. Therefore that he is a son to the deceased.

11. The witness admitted that on 7/7/2010 he had the suitland registered in his name. The protestor produced a search certificate indicating that the petitioner had been issued with a title deed for the said parcel of land on 20/7/2010 but thereafter the land registrar reverted the land to the name of the deceased.

12. The petitioner's brother from his mother DW2 testified that the deceased was his uncle. That the deceased had 3 sons – William Nguka, John Mguke and the petitioner. That during land registration the deceased gave land to William and Mguke but reserved the petitioner's portion under his name because the petitioner was not there during land registration. That the protestor is a son to William Nguka and that his share fell on the portion given to his father. That John Erotso's portion is No. 1100.

13. The protestor denied that his father was given land parcel Kakamega/Lesola/1099 by his father. He said that his father bought the said parcel. That he was born after his father bought the land. He said he lives on portion No. Kakamega/Lusiola/1099 while John Erotso lives on 1096. PW3 on his part said that the deceased bought the portion of land where he is buried. He said that John Erotso migrated to South Nyanza. Zipporah PW2 in her evidence denied that her father took care of the children of Misigo after the death of Misigo.

Analysis and Determination –

14. The questions for determination are:-

- (1) whether the petitioner is a son to the deceased herein.
- (2) whether the petitioner is entitled to inherit the land of the deceased.

15. The petitioner alleges that he was fathered by the deceased after his mother was inherited by the deceased upon the death of his mother's husband. He alleges that the suitland was reserved for him by the deceased when the deceased gave land to the protestor's father and John Erotso land. He says that the deceased is the one who brought him up and presided over his circumcision. That when he was ready to marry the deceased gave him a cow to marry. These actions manifested that the deceased recognized him as his son. The above notwithstanding, the petitioner admitted in cross-examination that his advocate wrote a demand letter to the protestor demanding that the protestor vacates the suitland because he, the petitioner, had bought it from the deceased.

16. The petitioner stated that the name in his identity card is Abisalom Kayere Misigo. There is nothing placed before the court to prove that the petitioner is a son to the deceased. The petitioner said that he was born in 1943. He is therefore making allegations on matters that took place more than 70 years ago. The allegations are just the word of the petitioner and his brother DW2 on one hand and the protestor and his witnesses, PW2 and PW3 on the other hand. The burden of proof is always on the person who alleges. The petitioner did not discharge that burden to prove that he is a son of the deceased.

17. The deceased died in 1975. The petitioner did not demand any land from the deceased before the deceased died. He is making the claim over the land after the death of the deceased. There is nothing in the title deed to show that the deceased had retained the land in his name in trust for the petitioner. The land was therefore the free property of the deceased at the time of his death for which the petitioner had no interest.

18. In **re Estate of Patrick Mwangi Wathiga – deceased, Nyeri H.C. Succession Cause No. 343 of 2005 (2015) eKLR** where the claimant emerged after the death of the deceased to make a claim on the estate, Justice J. M. Mativo observed that:-

“In my view, the practice of persons emerging after the demise of a dead person purely to claim a share of properties of the dead person should be discouraged unless the alleged claimant can demonstrate that there were attempts to have him or her recognized as a beneficiary/member of the family during the deceased’s life time or the deceased left clear instructions to that effect, or his claim can be reasonably inferred from the express or implied circumstances of the case including the conduct of the deceased or from such reasonable or probable circumstances that can be proved by way of evidence. Alternatively, such a claim can also be admitted if the claimant demonstrates that he was prevented from associating with the deceased during the deceased’s life time by either infirmity of body or mind or both or any other reasonable circumstances. In my view, where someone remains delinked from a family or the person he claims to be a parent for 24 years and only emerges after his/death, the burden lies on him/her to establish his claim to the deceased’s estate and to tender such evidence as may be necessary to establish his claim”

The petitioner was aged about 32 years at the time when the deceased died. He has not explained why at that age he had not laid any claim on the land against the deceased.

19. The petitioner attempted to evict the protestor from the suitland on grounds that he had bought the land from the deceased. Is the petitioner then claiming the land on the basis that he bought it from the deceased or is it because he is a son to the deceased?

20. The petitioner migrated to Migori in 1980. This was 5 years after the death of the deceased. He came back to claim the land from the protestor in 2012 which was 32 years later after his migration to Migori. He said that it is the protestor’s mother who was at the time utilizing the land. Why would he have stayed away from the land for 32 years and come back to stake his claim on the land?

21. The petitioner has admitted that his mother was a wife to a brother to the deceased called Misigo. The petitioner’s surname as per his identity card is Misigo. He did not assume the name of the deceased Alwoch Obara when he registered for an identity card. He instead assumed the name of Misigo. That is *prima facie* evidence that he is a son to Misigo who must have been his father.

22. The petitioner has failed to prove that he is a son to the deceased. I find that the petitioner is a son to the late Misigo who was a brother to the deceased herein. The late Misigo was given land by his father. The share of land for the petitioner lies with what was given to his father, Misigo.

23. It is admitted that the protestor is a grandson to the deceased herein. I find that it is the protestor and his siblings and the siblings and the heirs to his uncle and aunt, i.e., John Erotso and Zipporah Kanaiza, who are the rightful heirs of the deceased in this succession cause. The court thereby makes the following orders:-

1. The summons for confirmation of grant by the petitioner dated 20th February, 2015 have no merit and are thereby dismissed.
2. The grant of letters of administration issued to the petitioner on the 9th October, 2012 is hereby revoked.
3. A fresh grant of letters of administration is hereby ordered to issue in the name of the protestor, Tom William Onguka.
4. The suitland Kakamega/Lusiola/1096 is to be distributed in accordance with paragraph 4 of the affidavit of protest dated 18th May, 2015, that is to:-

- (a) Zipporah Ubala
- (b) John Erotso Ubala
- (c) Tom William Onguka
- (d) Dishon Ababu
- (e) Fred Aluoch
- (f) Edward Ndeda

5. Each party to bear its own costs.

Delivered, dated and signed in open court at Kakamega this 9th day of October, 2019.

J. NJAGI

JUDGE

In the presence of:

Mr. Mbaka holding brief for Oonge for the Petitioner

Parties: Petitioner - absent

Protestor – present in person

Court Assistant - George

30 days right of appeal.