



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2332 OF 2009

IN THE MATTER OF THE ESTATE OF WILLIAM NDONJI OGONYO (DECEASED)

JUDGMENT

1. The deceased herein died on 18th August 2007. According to a letter dated 3rd July 2009 from the Assistant Chief of Siranga Sub-Location, Siaya County, the deceased was not survived by a spouse, children, or parents, except for a sister. The letter identified a nephew, James Ochieng Odero, and a sister, Kalara Ajuang Odero, as the sole survivors. Representation to his estate was sought by James Ochieng Odero, in his alleged capacity as nephew, in a petition filed herein on 2nd November 2009. In the petition, the deceased alleged to have been survived by his nephew and sister, James Ochieng Odero and Kalara Ajuang Odero. He was allegedly possessed of Kisumu/Manyatta 'A'/70, Plots Nos. 208 and 330 of LR No 21695, Plot No. A5-134 Kayole site and service scheme, 3309 shares in Kengen, Westlands Triangle Curio Market on LR No. 1870/IX/528 – Stall No. 075, Kibera Market Stall No. 272 and Housing Finance A/C No. SA 200-0012710 as at the date of his death. A grant of letters of administration intestate was made to James Ochieng Odero on 19th September 2010.

2. The administrator filed a summons for confirmation of grant on 24th August 2010. He proposed that the entire estate devolves upon him. There is a further affidavit by the Kalara Ajuang Odero sworn on 20th August 2010, consenting that the entire devolve upon the administrator.

3. To that application, Charles Odhiambo Odek, who had filed a caveat on 29th June 2010, filed an affidavit of protest on 17th March 2011, sworn on 17th March 2011. He is a cousin of the deceased, for their mothers were sisters. He states that the deceased was an uncle of the administrator. He claims that the deceased used to live in a house at Komarock Estate alone until he fell ill in 2003 when he began to take care of him until he died sometime in 2009. He alleges that in October 2007 the deceased gave him his property known as Plot No. A5-134 Kayole site and service scheme, complete with all the documents relating to the said property, but it was unfortunate that transfer had not been effected before the deceased died. He claims that he did some development on the property before the deceased died. He claims that the administrator and others sold Kibera Market Stall No. 272 to a Zacharus Ongeye, allegedly he help defray medical expenses. The expenses where in fact paid, and he argues that it is hypocritical for the administrator to seek to have Kibera Market Stall No. 272 devolve upon him. He pleads that Plot No. A5-134 Kayole should be given to him, and Kibera Market Stall No. 272 to Zacharus Ongeye, the alleged purchaser thereof. He says the only witness to the transaction between him and the deceased was the administrator's brother, called David Owino.

4. The administrator swore an affidavit on 25th March 2011. He asserts that the mothers of the protestor and the deceased were not sisters, and therefore the two were not cousins. He further asserts that the protestor never lived with the deceased at all, and that in fact it was the administrator who lived throughout with the deceased. He states that the deceased had not given his property to anyone, including the protestor. He asserts that Plot No. A5-134 Kayole had not been given to the protestor by the deceased

neither had he developed the said property. He states that the deceased had put a foundation on the disputed plot. He states too that the deceased's stall at Kibera had not been sold to Mr. Ongeye for the deceased's hospital, mortuary and funeral bills were paid by the Wasuku Welfare Association in conjunction with his family. He asserts that no one had any authority to dispose of the deceased's property at the time. He concludes that the protestor has not established his relationship with the deceased, nor established that he was justified to oppose the confirmation application.

5. Directions were not given on the disposal of the confirmation application and the protest, but the same was nevertheless disposed of by way of oral evidence. The hearing was commenced before Mugo J. and I concluded the same.

6. The hearing opened on 5th June 2012. The first on the stand was the protestor, Charles Odhiambo Odero. He testified that he was a cousin of the deceased by dint of their mothers having been sisters. The administrator was described as a nephew by virtue of being a child of a sister of the deceased. The said sister was said to be alive, and her name was given as Kalara Ajuang Odero. She is named in the pleadings as such, and the witness described her as his cousin. He explained that the reason for his filing the claim was because the deceased had given him the Kayole plot. He stated that the deceased lived there alone, and when he started ailing, the witness moved in with him so as to nurse him and to be taking him to hospital. After he was showed the plot the two of them developed the same, by putting up a foundation on it. He alleged that he financed the operation by buying the hardcore and all the materials for the foundation. He explained that the deceased died before he could have the plot transferred to his name. He stated that there was no written memorandum of the transaction or agreement or promise or gift. He said the property was given to him orally. He said that the property had no title, and he did not know where the transfer thereof could be effected. He said he had no receipts for the materials he bought for the building of the foundation.

7. The protestor called Farajah Malit as his witness. He was a welder friend of the protestor. He testified that the deceased lived in the Kayole property alone. He stated that the deceased gave the protestor some documents relating to the property. The said documents were said to have been originals. It was his evidence that the deceased gave the Kayole property to the protestor. He said that he did not come from the same county with the deceased and the protestor, for while they came from Siaya County, he was from Homa Bay. He testified further that it was the deceased who did the foundation on the land.

8. The administrator's case opened on 2nd November 2015. He reiterated that the deceased and the protestor were not cousins as their mothers were not siblings. He asserted that the deceased had been survived by his sister, the administrator's, mother. He said the deceased was not married, his sisters were dead and he did not have a brother. He stated that the deceased did not distribute his property during his lifetime and therefore he could not have given any property to the protestor. He asserted that he was the one in possession of the original documents relating to the Kayole property. He testified that it was him and his brother, David Owino Odero who used to care for the deceased. He stated that the Kayole property had a foundation done on it by the deceased. He alleged that the deceased sold another property at Komarock so as to raise money to put up the foundation on the Kayole property. Part of the sale money was spent on the foundation, and the rest on the deceased's medical bills. He explained that the deceased was his maternal uncle, and that the deceased had a sister but no brothers. He alleged that it was he and his brother, Owino, who took to the deceased to hospital before he died.

9. The administrator called his brother, David Owino Odero as a witness. He described himself as a carpenter at Embakasi. He said the deceased was his uncle, being his mother's brother. He testified that the protestor used to be his friend. He said the deceased was not a cousin of the deceased, and that they were not related. He said that it was actually through him that the deceased got to know the protestor. He said that he lived with the deceased after he fell ill. He explained that the deceased sold his Komarock property to raise the money to build the foundation for the property at Kayole.

10. The matter before me turns on two points - whether both the administrator and the protestor were related to the deceased and whether the deceased had given the protestor the Kayole property.

11. It is common ground that the deceased and the administrator were related. The administrator's mother and the deceased were siblings, she being a sister of the deceased. That the protestor does not contest, in fact he concedes the same. The letter from the Assistant Chief of Siranga Sub-Location, Siaya County, confirms that fact. The position of the protestor is, however, contested. He asserts that he is a cousin of the deceased, as their mothers were siblings. The administrator asserts that is not true, as the two were not related in any way. The protestor called a witness who described the deceased and the protestor as cousins and friends, but who said that he and the two did not come from the same county. If the protestor were a relative of the deceased, the administrator and his witness would have known that fact and acknowledged it. The only person he called as a witness, who claims to know them as cousins, did not come from the same area with them. I doubt whether he would know better than the deceased's acknowledged nephews. The protestor was obliged to call concrete evidence to support the assertion that he was a cousin of the deceased. He could have called the local administrator of the area they came from. I am not satisfied that he was related to the deceased in any way, least of all as his first maternal cousin.

12. He alleges that the deceased had, during his lifetime, gifted him with the Kayole property. He did not produce any document as proof thereof, yet trite law is that transaction relating to land must be evidenced by a memorandum in writing. No such evidence was produced, and the oral evidence of the protestor does not suffice. He alleged that after the said property was given to him, he developed the same, by building a foundation on it. Curiously, he did not provide any proof of the alleged development. No receipts were produced to support the alleged expense on the foundation. More crucially, the person he called as a witness did not support his claim that he developed the foundation. The witness asserted that it was the deceased who put up the foundation. He contradicted his witness with respect to whether any documents were exchanged between him and the deceased on the property.

13. So who should inherit the estate of the deceased herein? The deceased died after the Law of Succession Act, Cap 160, Laws of Kenya came into force. He died intestate, so Part V thereof ought to govern distribution of the said estate. The deceased was not survived by a spouse, or children, or parents. The nearest in line is said to be a sister, Kalara Ajuang Odero, the mother of the administrator and his brother, who testified as his witness in these proceedings. The provision relevant to distribution of his estate must therefore be section 39(1)(c) of the Act.

14. The entire provision in section 39(1) says as follows -

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

(a) father; or if dead;

(b) mother; or if dead;

(c) brothers and sisters, and any child or 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 the deceased half-brothers and half-sisters, in equal shares, or if none;

(e) The relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal share.'

15. Going by the above provision, it is plain that in the absence of spouse, children and parents, Kalara Ajuang Odero, a sister of the deceased, was the next in line. The administrator, being a nephew, did not have priority over the sister of the deceased. The protestor claims to be a cousin of the deceased. I have already made a finding that there is no proof thereof. Even if, however, he were a legitimate cousin of the deceased, he would still not rank equal to a sibling of the deceased or even the nephews of the deceased. His claim to the estate of the deceased would rank lower than that of the administrator and his mother.

16. I have found above that the nearest relative of the deceased in consanguinity was his sister, Kalara Ajuang Odera. In the scheme of things, she should have a superior right to inheritance from the deceased's estate to that of her son, the administrator herein.

17. I note from the record that the sister is disclosed in the petition as a survivor of the deceased. Being the sole sibling of the deceased, she was entitled to the entire estate of the deceased. However, as things stand she executed a consent to have the estate devolve upon her son herein, who is the administrator. Ideally, upon her giving up her rights to inheritance, it is expected that all her children would be entitled to share equally what was due to her from the deceased's estate. No evidence was led as to how many children she has. She never testified. The only children of hers that the court is aware of are the administrator and David Owino Odera, who testified in these proceedings. David Owino Odera did not appear to oppose the proposal to have the estate devolve wholly upon his brother, the administrator herein. I suppose that he has no objection to the proposed distribution. In any event, once the person entitles consents to it, then no one else can come forward to lay claim to it.

18. I am satisfied that the protest before me is not merited for the reasons given above. I shall allow the confirmation application before me dated 20th August 2010. The grant on record shall accordingly be confirmed in the terms proposed. A certificate of confirmation of grant to issue accordingly. The administrator shall have the costs of the application.

DATED and SIGNED at NAIROBI this 3RD DAY OF MAY, 2017.

W. MUSYOKA

JUDGE

DELIVERED and SIGNED this 5TH DAY OF MAY, 2017.

M. MUIGAI

JUDGE