



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 448 OF 2011

IN THE MATTER OF THE ESTATE OF OKEMWA KIRIAGO (DECEASED)

BETWEEN

HENRY NYAKOE NYANCHOKA.....PETITIONER/RESPONDENT

AND

JOEL OMANGA OKEMWA.....)

PRESTOR OKEMWA.....) OBJECTORS/APPLICANTS

RULING

1. This matter concerns the estate of **OKEMWA KIRIAGO** (“deceased”) of Nyataaro, South Mugirango, Kisii County who died on 18th August 1987. His estate comprises one property SOUTH MUGIRANGO/NYATAARO/1853 (“Plot 1853”).

It is not in dispute that he had two sons JOEL OMANGA OKEMWA and PRESTOR OKEMWA. After his death, Joel applied for grant of letters of administration at the Rongo Law Court (PM Succession Cause No. 172 of 2013). The grant was confirmed in his favour.

2. In the meantime, Henry Nyakoe Nyanchoka, a nephew of the deceased by being a son to his brother Nyanchoka Kiriago, had filed a petition in this court or had obtained a grant. In due course, the court revoked the grant issued by the Court in Rongo on 27th January 2016.

3. Subsequently, Henry Nyanchoka filed the summons dated 18th November 2016 seeking to confirm the grant issued to himself, Joel and Prestor in this matter. He proposed that Plot 1853 be divided amongst the sons of the deceased and Nyanchoka Kiriago.

4. That summons for confirmation was opposed and I heard viva voce testimony from Joel (PW 1), Christopher Okindo Omete (PW 2), David Omambia (PW 3) and James Nyabuto Miguna (PW 4) from the protestor’s side and Henry Nyakoe Nyanchoka (DW 1) in support of the summons.

5. It is common ground that Nyanchoka Kiriago and the deceased were brothers. It is also not in dispute that at the time of his death Okemwa was residing on Plot 1853 while Nyanchoka was residing with his family at SOUTH MUGIRANGO/BOIKANGA/1296 (“Plot 1296”). The issue in dispute is whether Okemwa was holding parcel 1853 in trust for his brother Nyanchoka.

6. I have heard the testimony of the parties and I am not convinced that the land was being held in trust for several reasons. First, Nyanchoka had his own land being Plot 1296 on which he was buried. The evidence from PW 1, PW 2 and DW 1 is that he lived there until his death. DW 1 also told the court that he and his brothers reside on the said property. If Nyanchoka had any claim to Plot 1853, the larger family intervened and supported his claim.

7. I am inclined to believe the testimony of PW 2 who was a relative to the deceased and a son to the grandfather. His testimony was indeed confirmed by DW 1. He gave a testimony of how the family were originally from Boikanga and some of the sons moved to where they have now settled Nyataaro. It is curious that no other relatives have made a claim to Plot 1853 apart from DW 1. DW 1 admitted that his father Nyanchoka did not purchase Plot 1296 hence I find that the said land was ancestral land from which he benefitted.

8. The totality of the evidence is that I find and hold that Plot 1853 is not ancestral land and that it was not held in trust. Accordingly, I order as follows:-

(1) The grant issued to Henry Nyakoe Nyanchoka, Joel Omanga Okemwa and Prestor Okemwa is hereby revoked.

(2) The grant is re-issued to Joel Omanga Okemwa and Prestor Okemwa.

(3) It is confirmed on terms that South Mugirango/Nyataaro/1853 shall be divided between Joel Omanga Okemwa and Prestor Okemwa in equal shares.

(4) There shall be no orders as to costs.

D.S MAJANJA

JUDGE

25/6/2018

[Ruling read and delivered in open Court]

D.S MAJANJA

JUDGE

25/6/2018