

REPUBLIC OF KENYA

High Court at Kakamega

Succession Cause 634 of 2005

**IN THE MATTER OF THE ESTATE OF ASMAN NETIA SAKWA NYANGWESO ..
DECEASED**

KASSIM JOGINDER NYANGWESO PETITIONER

V E R S U S

JULIUS MUSINDALO MURAMBA OBJECTOR

R U L I N G

The late **ASMAN NETIA SAKWA NYANGWESO** died on the 8.4.2001. His brother **KASSIM JOGINDER NYANGWESO** petitioned this court for grant of letters of administration intestate. The objector's father **JULIUS MUSINDALO MURAMBA** filed a petition by way of cross petition and objected to the appointment of the petitioner as the administrator of the deceased. Julius Musindalo passed on on 25.3.2007 and his son **FREDRICK WANZETSE MUSINDALO** took over the objection proceedings. The matter proceeded by way of oral evidence.

Fredrick Wanzetse Musindalo testified that there is plot number **S/WANGA/EKERO/267** which used to belong to the late **AKELO PENDO**. The deceased herein **ASMAN NETIA SAKWA** had himself registered as the owner of the land without the objector's family knowledge. Akelo Penda was an uncle to his father Julius Musindalo. Akelo Penda had six brothers and one of the brothers was the father of the late Julius Musindalo. Akel Penda died in 1976 and had no child. In essence Akelo Penda is a brother to PW1's grandfather. However, PW1's grandfather was a step brother to Akelo Penda. Akelo Penda's brother from same parents was called **OTARI OTENYO**. Otari married **MWANAISHA OTEYA** and they had a daughter by the name **MWANAJUMA PAMBA NYANGWESO**. Otari died in 1967 and his wife inherited his land. The suit land was at one time contracted to Mumias Sugar Company. His late father did not utilize the suit land. Mwanaisha was the one using the land and nobody stopped her from utilizing it. The late Asman Netia used to live with Mwanaisha Oteya as he was a grandchild to Mwanaisha. Mwanaisha's daughter, Mwajuma was not the child of OtariOtenyo. Mwajuma is the mother of Asman Netia and Kassim Joginder, the petitioner herein. Asman filed a succession cause and inherited the suit land from Akelo Penda. He did not involve the objector's family.

PW2, JOSPHINE MAKOKHA MUSINDALO, is the objector's mother and the wife of the late Julius Musindalo. Her evidence is similar to that of PW1. She testified that Mwajuma Pamba was sthe daughter of Mwanaisha Oteya. Asman Netia was the son of Mwajuma Pamba but used to live with his grandmother Mwanaisha Oteya. Mwanaisha was married to the brother of PW2's husband by the name Otari. Asman Netia claimed to have been the son of **ALI AKELO** but that was not true as Akelo did not have children. When she was married in 1960 to Julius Musindalo, Otari was already dead. Akelo inherited Mwanaisha after the death of Otari. Mwanaisha died in 2003. The suit land was registered in 1967 in the name of Akelo Penda also known as ALI. Her husband Julius, had his own land.

PW3, FRANCIS JUMA MUNYENYA, is a neighbor. His evidence was that Mwanaisha was married to Otari Penda. There is no building on the suit land. The land used to belong to the late Akelo. Akelo did not have children and Julius was following the land. According to PW3 Akelo was raised by ISAYA MUKERI who was the father of Julius Musindalo. Akelo and Otari were brothers. Mwanaisha Oteya used to plant sugarcane on the land and no one stopped her. Kasim Joginder and Asman Netia are the grandchildren of Mwanaisha Oteya. PW3 denied that Mwaniasha was inherited by Akelo.

On his part the petitioner called two witnesses. He testified that the deceased Asman Netia was his elder brother and he left three children namely Zuhra Ngashira Sakwa, Abubakar Maloba Sakwa and Iddris Makokha Sakwa. The deceased had succeeded the suit land plot number **S.WANGA/EKERO/267**. The land initially belonged to Akelo Openda who their grandfather. The mother is Mwajuma Pamba Nyangweso who the daughter of Mwanaisha Oteya. Mwanaisha was the wife of Akelo Openda. Mwanaisha died in 2003. Akelo had inherited her from Said Otari who was a brother to Akelo Openda. Their mother Mwajuma died in 1995. When their grandmother was alive she allowed Asman to file succession and inherit the land from the late Akelo Openda. The late Julius Musindalo and his family have never utilized the land and at one time their cows grazed Mwanisha's crops and she sued them. Julius's family has no relationship with the late Akelo Openda. When Mwanaisha died she was buried under Muslim Law and nobody came forward during the burial to claim the land. Similarly when his brother Asman Netia died nobody came forward during the burial to claim the land. He filed this petition so that he can pass over the land to the children of his brother. Only one of the children is above 18 years. Julius was only a neighbor to his grandmother and they have no relationship. Mwanaisha Oteya had her own land being number **S.WANGA/EKERO/255** and she was buried on that land. That land used to belong to her first husband Otari but it was registered in her name.

DW2, KORNELI WAKHULUNYA WANGATIA, testified that he used to be the assistant chief of Ekeru sub-location. He knew the late Akelo Penda and his wife Mwanaisha Oteya. Mwanaisha had a daughter by the name Pamba (Mwajuma). Mwajuma Pamba had children namely – **ALI, ASMAN SAKWA, KASIM JOGINDER** and other daughters. Akelo inherited Mwanaisha from his brother Otari. Mwajuma Pamba was the daughter of Otari and Mwanaisha. Akelo died in 1976 and Mwanaisha catered for the burial expenses. The suit land belonged to Akelo Penda and when he died he was buried under Muslim rites. The Imam for the Muslims asked those who were in attendance during the burial three times whether there was anybody claiming anything from Akelo. Nobody claimed anything. In 1991 Asman Sakwa did succession for the suit land and PW2 called the elders who confirmed that Asman was the best person to inherit the land. No one objected to the late Asman inheriting the land. The land stayed with Asman from 1991 until 8.4.2001 when Asman died. PW2 is also a neighbor and he went for the burial of Sakwa. Once again the Muslim Imam asked those in attendance if anyone was claiming anything from Asman Sakwa and nobody went forward.

According to DW2, Julius's family neighbours the suit land and they have a common boundary. Mwanaisha Oteya died on 3.6.2003 and DW2 attended the burial. Once again the Muslim Imam inquired about her debts and no one came forward. It is DW2's evidence that **FREDRICK WANZETSE** has no relationship with Akelo Penda. The village elders did confirm to DW2 that Asman was the one to inherit the land and it was upon that confirmation that he wrote a letter authorizing Asman to file the succession. Josephine (PW2) was present when DW2 gave the letter to Asman and she did not raise any objection. According to DW1 Josephine was one of the village elders. DW2's further evidence is that Asman has a daughter and two sons and they are the ones to inherit the land. Otari had his own land but by the time registration was being done he had already died. That was in 1949 and Mwanaisha got herself registered as the proprietor. Mwanaisha and Otari were buried on the same plot. When Akelo died Mwanaisha Oteya could have inherited the land but she allowed her grandchild Asman to inherit it. It is DW2's evidence that the late Julius Musindalo's father was called Isaya Musindalo and he was not a brother to Akelo Penda. Julius's family has no relationship with Akelo and they are just neighbours.

The main issue for determination is who should succeed the deceased who the registered owner of the suit land plot number **S. WANGA/EKERO/267**. The official search for the suit land shows that Asman Sakwa Nyangweso was registered as the proprietor on 20.11.1990. The plot is about 1.1 hectares. Asman was issued with a title deed on the 9.4.1991. He was registered as the proprietor as an administrator through succession cause number 352 of 1989. The original registration of the suit land was done on the 21.4.1967 and it was registered in the names of Akelo Penda. A death certificate that is on record shows that Akelo Penda died on 18.2.1976. The record shows that Asman Netia Sakwa Nyangweso filed a succession cause before the Kakamega High Court and was issued with a grant which enabled him to succeed Akelo Penda. The dispute herein is that Asman was not the best person to inherit the land. The objector's contention is that Akelo Penda was a brother to Isaya who was the objector's grandfather. Isaya was a step brother to Akelo Penda according to the objector. The objector does confirm that Isaya had his

own land and Julius, his son benefited from that land.

It is not in dispute that Mwanaisha Oteya was the one who used to cultivate the land. She was the wife of Otari who was a brother to Akelo Penda. Although Josephine (PW2) denied that Mwanaisha was inherited by Akelo it is the evidence of DW2 and the petitioner that she was inherited by Akelo. The evidence on record also shows that when Akelo died Mwanaisha Oteya was the one to inherit the land but she allowed the deceased herein to do so. The objector has not explained as to why his father did not file succession when Akelo Penda died. The former assistant chief, DW2 testified that Isaya who was Julius's father was not a brother to Akelo Penda. I do find that even if the two were brothers there would have been no reason as to why Julius should pursue the suit land. Julius inherited land from his father Isaya. The relationship between Julius Musindalo and Akelo Penda is not proved. Akelo Penda according to the objector had six other brothers. None of those brothers or their children have claimed the land. Akelo Penda lived with Mwanaisha and according to DW2 Mwanaisha is the one who took care of his burial. The evidence shows that PW2 was a village elder and she did not object to the deceased Asman Netia inheriting the land from Akelo Penda.

The court visited the suit property and there is no house built there on. It is an empty plot which is used for cultivation of crops. During the site visit I noted that Julius Musindalo's family are neighbours to the suit land. Since Mwanaisha was the one to inherit the land and she allowed her grandson Asman Netia Nyangweso to do so I do find that the objection herein is not merited and the same is dismissed. Kasim Joginder Nyangweso being a brother to the deceased Asman Netia Nyangweso is better placed to file succession for the estate of his late brother. Asman Netia lawfully succeeded the suit land and Kasim Joginder is the proper person to file this succession.

The upshot is that the objection is dismissed with no orders as to costs. A grant of letters of administration to be issued to the petitioner herein.

Delivered, dated and signed at Kakamega this 7th day of February, 2013

**SAID J. CHITEMBWE
J U D G E**