



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

SUCCESSION CAUSE NO.50 OF 2001

**In the matter of the Estate of NAKITARE WEKESA
NJURUKANIDECEASED**

~VRS~

**WAFULA WEKESA NAKITARE1ST
PETITIONER**

**JULIUS MUNANDA NAKITARE2ND
PETITIONER**

**ISAIAH WEKESA3RD
PETITIONER**

**WILBERFORCE WEKESA.....4TH
PETITIONER**

AND

KENNEDY

WEKESA.....PROTESTER

JUDGMENT

This petition in the estate of the deceased Nakitare Wekesa Njurukani was filed on 27/04/2001. The Petitioners Wafula Wekesa, Julius Munanda, Isaiah Wekesa and Jackson Wekesa are all sons of the deceased. The application for grant was published on the 24th September 2004 and one George Ellam Wekesa the eldest son of the deceased filed an objection on 22/10/2004. The Objector stated that he was appointed to represent the deceased through a power of attorney to administer the estate upon his death. The 1st Petitioner Wafula Wekesa had mismanaged the deceased's assets. The Objector felt he ought to have been involved in administration of the estate of the deceased. The Objector died on 26/7/2006 before his objection was heard. Letters of administration intestate were issued to the Petitioners on 06/12/2004 on grounds that a letter withdrawing the objection was received in court.

The protester herein Kennedy Wekesa is a grandson of the deceased and a son to the deceased objector George Ellam Wekesa. He filed his affidavit in protest of confirmation on 03/10/2007 claiming parcel number NDIVISI/MAKUSELWA/298 which he depones that had been given to his late father by the deceased based on consideration that his father bore a greater financial burden in the family of the deceased.

Decisions were taken in this cause on the 14/05/2009. The Petitioners did not attend the hearing of this case despite being served with the hearing notices.

The protester testified that he is the son of the late George Ellam Wekesa, the eldest son of the deceased in this cause. His father was the objector in this cause and that a letter not signed by his father was presented to court to withdraw the objection. This led to the court issuing the grant to the Petitioners unopposed. The protester is the personal representative of his late father's estate appointed on 03/03/2007. The Petitioners are the step-brothers of the protester's late father. It is the protester's case that the deceased in this cause was ailing for sometime before his death. His late son George Ellam Wekesa stayed with the deceased and paid all hospital bills for him. The deceased also acknowledged the fact that George Ellam Wekesa had paid for the education of the deceased's younger children. George was a university graduate and had a good job and was financially able. In the presence of the protester, the deceased bequeathed his land parcel number NDIVISI/MAKUSELWA/298 measuring 6.0 acres to George for the reasons that George took care of the deceased in his old age and educated deceased's children. George also fenced the parcel of land in issue with the consent of the deceased and was planning to build a home on the land before he died. The deceased gave a power of attorney to George in respect of the same parcel of land.

The protester further testified that when the deceased died, a ceremony called "**kimikoye**" was performed where the property of the deceased was shared in presence of the clan and all the family members. The debts of the deceased were also discussed in the same ceremony. The deceased was a Bukusu by tribe and had subjected himself to Bukusu Customary Law. During the ceremony which is normally held about two years after burial, the father of the protester George Ellam Wekesa was allocated parcel no. NDIVISI/MAKUSELWA/298 in accordance with the wishes of the deceased. The Petitioners and other children of the deceased were allocated shares in the other three parcels of deceased namely NDIVISI/MAKUSELWA/303, 304 and 226 all put together measures 47.5 acres. The deceased had 15 sons from his four (4) wives. Later on the protester came to learn that the sons of the deceased had altered the "**kimikoye**" agreement on sharing of the deceased's property without notifying him. It is the protester's case that such an agreement could not be changed without all the interested parties being involved.

The counsel for the protester Mumalasi & Co. Advocate filed written submissions in which the evidence of the protester was highlighted. The counsel argued that the protester has stepped in the shoes of his late father George Ellam Wekesa who had objected to the grant of the letters of administration to the Petitioners. He denies that his father signed the letter withdrawing the grant. However, the grant was made to the Petitioners in 2004 to which the protester is not challenging. His claim is in regard to the share of his late father in the estate of the deceased. The wishes of the deceased was to give George Ellam Wekesa the whole parcel no.298 which measures six (6) acres. In execution of his wishes, the deceased gave power of attorney to the protester's father in 1977 which was two years before the deceased died. It is not in dispute that the deceased was a Bukusu by tribe and that he was subject to Bukusu law and custom. The holding of the "**kimikoye**" ceremony supports the protester's case as regards to which law is applicable.

In the affidavit of the 1st Petitioner, Wafula Wekesa Nakitare, and in answer to the protest against

confirmation, the holding of the **“kimikoye”** ceremony on 15/01/1983 and the resolutions thereof are admitted. The Petitioners’ case is that on 27/05/2001 another meeting was held to change the original agreement as to distribution of the property. George Ellam Wekesa’s share changed from the six acre parcel NDIVISI/MAKUSELWA/298 to 9.0 acres for his mother Diana Nakitare’s house. Three sons of Diana were to share the land equally with each taking three (3) acres. The share of George Ellam Wekesa translates to 3 acres out of parcel number 303.

Pw2 is a member of the Bamisomi clan to which the deceased belonged. The Petitioners and the late George Ellam Wekesa are cousins to PW2. The father of PW2 was a brother to the deceased. PW2 took the minutes of the **“kimikoye”** meeting held on 15/01/1983. It was PW2’s evidence that a **“kimikoye”** meeting must consist of the children and widows of deceased, brothers of deceased, clan elders and village elders. The first meeting of 15/01/1983 was properly constituted according to the protester while the second one was not. The son of deceased George and his son Kennedy the protester were not present. The meeting was purposely convened to reduce the share of the two absentees. There was no evidence to show that the two were invited and failed to attend. PW2 who took minutes in the first meeting was not invited either and was not aware that such a meeting was being held. The meeting was attended by ten (10) people including the four Petitioners. The names of the people present are those of ten (10) of the deceased’s sons as named in P&A form. The other five (5) sons of the deceased including the protester’s father were absent. The clan elders, village elders and the brothers of deceased were absent. It follows that the meeting was not properly constituted and was incapable of altering the deliberations of the **“kimikoye”** meeting which distributed the estate of the deceased. Failure to object to the distribution during the **“kimikoye”** meeting renders the protester’s latter action an afterthought.

The protester’s evidence as to the wishes of the deceased was unchallenged. He and his witness, PW2 were present in different forums when the deceased said that he was to give parcel number NDIVISI/MAKUSELWA/298 to his eldest son George Ellam Wekesa. The reasons given were that George carried a heavy financial burden in the family of educating deceased’s children, taking care of his aged and ailing father among other responsibilities. This evidence remains uncontroverted even in the affidavit of the first Petitioner in answer to the protest against confirmation.

There is no evidence that the deceased intended to sell his land NDIVISI/MAKUSELWA/298. The fact that he gave a power of attorney to the father of the protester is a confirmation that he had given all his legal interest and power of control to the holder of the instrument.

The property of the deceased was distributed during the **“kimikoye”** ceremony in accordance to Bukusu Customary Law. The wishes of the deceased were taken into consideration. The elder sons George Ellam Wekesa and Jackson Mikhaso were given bigger shares in accordance with Bukusu Customary Law. The **“kimikoye”** ceremony’s resolutions are still valid and would not have been changed by a meeting of some of the beneficiaries of the estate.

It is my finding that the protester has proved his case on the balance of probabilities that he is entitled to inherit the share of his late father George Ellam Wekesa being NDIVISI/MAKUSELWA/298.

I enter judgment in his favour and order that the grant be and is hereby confirmed in terms of the affidavit of the protester and the minutes of the **“kimikoye”** ceremony held on 15/01/1983. Each party to meet their own costs of this cause.

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F. N. MUCHEMI

JUDGE

Judgment dated and delivered on the 7th day of March, 2011 in the presence of Ms Mumalasi for the Objector.

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F. N. MUCHEMI

JUDGE