



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUNGOMA

Prob & Admin 167 of 1996

1 WACHIYE NDIEMA KISEMBE

2 WANYONYI NDIEMA KISEMBE

3 NANGONI NDIEMA KISEMBE

4 NASI NDIEMA

5 KAMUKETI

NDIEMA.....DECEASED

VS

RICHARD NANGAKI

NDIEMA.....PETITIONER

PATRICK

NDIEMA.....OBJECTOR

RULING

This ruling is the upshot of an objection raised by Patrick Ndiema, hereinafter referred to as the objector. The objection is expressed in the Summons for Revocation of Grant filed on 22nd July 1997 plus the supporting affidavit sworn by Patrick Ndiema on the 23rd day of July 1997. Basically, the objector claims that he is entitled to benefit from the share due to the Estate of his deceased mother, Makoni, wife of Ndiema alias Nang'oni Ndiema as opposed to Kennedy Ndiema.

The dispute came up for hearing whereby the parties gave oral testimonies. Patrick Ndiema (P.W.1) was the first to testify. He said his father, Ndiema Kiseembe, died in 1964 before Land Registration begun. He told this court that when the Land Registration exercise kicked off, his father's land was registered in the names of his widows and sons of the deceased widows in trust for their respective houses. He further told this court that L.R. NO.EAST BUKUSU/WEST SANG'ALO/891 was registered in the following names:

- (i) Wachiye Ndiema Kiseembe in place of his deceased mother.
- (ii) Wanyonyi Ndiema in place of his deceased mother.

- (iii) Makoni W/O Ndiema.
- (iv) Nasi W/O Ndiema.
- (v) Kamuket W/O Ndiema.

P.W.1 said he was the first born son of Makoni wife of Ndiema also known as Nang'oni Ndiema, deceased. He said, he was given L.R. NO.EAST BUKUSU/NORTH SANG'ALO/889 by his uncle Kiboi Kitembe in 1966 who then left to settle in Trans Nzoia. He said that the land did not form part of the land owned by his late father. He claimed that he is entitled to claim his father's land registered in the name of Makoni W/O Kitembe. He said he had a brother called Eliud Ndiema who passed away in 1998 leaving behind two widows namely Florence Chemayek and Florence Nekesa. He said he resides on his father's land. This assertion contradicted that of his key witness Wycliffe Kiboi (P.W.2) who said Patrick Ndiema lived with his uncle Kiboi Kitembe before the later left to settle in Kitale. P.W.1 claimed he was not given land from the estate of his father which share was registered in the name of his late mother Nang'oni W/O Kitembe in trust for him and his late brother, Eliud Ndiema. He now wants the same to be given to him. P.W.2, confirmed that P.W.1 was not given land from his father's Estate and that the land P.W.1 now occupies is the one given to him by Kiboi Kitembe. P.W.1's evidence is corroborated by P.W.3, Samson Kiboi Kitembe who said that P.W.1 has never been given a share of his father's land.

On his part, Richard Nang'ati Ndiema (D.W.1), the Respondent herein accused the objector of lying. He claimed that P.W.1 was given land by his father in 1958 with the assistance of clan elders hence the land registered in the name of Nang'oni Ndiema (deceased) is held in trust for the Estate of P.W.1's brother Eliud Ndiema (deceased). This assertion is confirmed by the evidence of Jestimore Kiboi Kituyi (D.W.1). He said, P.W.1 was given land in 1958 by his late father and that the boundaries were fixed with sisal plants. He said the remaining portion was registered in the name of Nang'oni Ndiema in trust for Eliud Ndiema who was still a minor by then. D. W.2 said Kiboi Kitembe had sold his land and moved to live in Trans Nzoia. Similar evidence was also tendered by Kundubuki Furaji Kane (D.W.3), a former village elder. D.W.3 said he was part of the elders who witnessed land being given to P.W.1 by his deceased father which land is adjacent to that of Kiboi Kitembe.

After receiving the evidence for and against the objection the advocates to the parties gave detailed submissions in support of the positions. I have considered the evidence and submissions made. The main issue which I should determine is whether or not Patrick Ndiema, the Objector (P.W.1), is entitled to share the land due to the Estate of Ndiema Kitembe, deceased as held by the late Makoni W/O Ndiema. I have observed the demeanor of Patrick Ndiema (P.W.1) and noted that he was evasive and appeared to be telling lies. He claimed he lived with his father yet the evidence of P.W.2 was of the view that he lived on the land of Kiboi Kitembe. I also observed the demeanor of P.W.2, Wycliffe Kiboi, and he impressed me to be a false witness. He was very evasive and at times refused to answer valid questions directed upon him on cross-examination. On the other hand, D.W.1, Richard Nang'ati Ndiema appeared to be a witness of doubtful integrity by being evasive. The sum total of the evidence tendered is that the witnesses overdramatised their testimonies. They attempted to outwit each other in the game of telling lies save for D.W.3, Kundukubi Furaji Kane. In the circumstances, I have been forced to peruse the affidavits and annexures filed in this succession cause. I believed the evidence tendered by Kundukubi Furaji Kane. He told the truth. I am satisfied that Patrick Ndiema was given his share of land in 1958 by his father with the assistance of clan elders. I am also convinced that he was given land by his uncle Kiboi Kitembe (deceased). I can only infer that when land Registration exercise took place Patrick Ndiema consolidated what he was given by his late father and his late uncle and registered the same in his name. Whatever remained and registered in the name of his late mother Makoni W/O Kitembe alias Nang'oni Kitembe is the share for P.W.1's late brother Eliud Ndiema. I am fortified by the fact that the land registered in the name of Patrick Ndiema i.e East Bukusu/North Sang'alo/889 measures 29 acres whereas the land available for distribution for the entire estate of Ndiema Kitembe (deceased) comprising of 5 houses only measures 56 acres. That land is known as EAST BUKUSU/NORTH SANG'ALO/891.

In the end, I am satisfied that Patrick Ndiema, though a beneficiary to the Estate of Makoni W/O Ndiema Kitembe, deceased, he is not entitled to any land registered in Makoni's name because he has already

been given his share. Whatever is in the name of Makoni is held in trust of the Estate of Eliud Ndiema, deceased. Consequently, the application or objection raised by Patrick Ndiema is dismissed. Each party to bear his or her own costs.

Dated and delivered this 7th day of July 2006.

J. K. SERGON

JUDGE

In open court in the presence of the objector and Petitioner.

N/A Lucy Nanzushi for the petitioner.

N/A for Omukunda for the objector.