



REPUBLIC OF KENYA



In re Estate of Wanjala Namaswa Kasikasi (Deceased) (Succession Cause 165 of 1999) [2023] KEHC 421 (KLR) (20 January 2023) (Judgment)

Neutral citation: [2023] KEHC 421 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 165 OF 1999
DK KEMEL, J
JANUARY 20, 2023
IN THE MATTER OF THE LATE WANJALA NAMASWA
KASIKASI (DECEASED)**

BETWEEN

FRANCIS SIMIYU NAMASWA PETITIONER

AND

CHRISTOPHER WAFULA WANJALA OBJECTOR

JUDGMENT

1. The Petitioner herein, Francis Simiyu Namaswa, filed summons for confirmation of grant dated October 13, 2004. In support of the said summons is an affidavit indicating: the requisite six months had lapsed with no objection filed; the names of the beneficiaries of the estate of the deceased and that the deceased left land parcel No. E. Bukusu/S. Nalondo/2547 as his asset. He proposed the mode of distribution as follows:
 - a. Ezekiel Sikuku Wanjala -12 Acres
 - b. Christopher Wafula Wanjala-6 Acres
 - c. Benjamin Wanjala-5.5 Acres
 - d. Geoffrey N. Namaswa-5 Acres
 - e. Francis S. Namaswa-4.5 Acres
2. *Vide* a letter dated July 18, 2006 addressed to the Deputy Registrar High Court Bungoma, the beneficiaries of the deceased in exclusion of the Petitioner indicated that they had selected the Objector as the legal family representative and administrator and thus discredited the Petitioner.



3. *Vide* an application dated November 10, 2009 the Objector filed grounds of objection to confirmation of grant dated October 13, 2004 alleging inter alia; that the Petitioner had filed the application without informing other beneficiaries; that the mode of distribution was made by himself secretly. He requested the court to refer the same to be discussed at home for a method of sharing land as per the attached letter from the area chief and clan chairman.
4. On September 28, 2009 the matter was placed before Justice D. Onyancha and it was subsequently stood over generally. The same was listed for mention on February 23, 2011 and the Judge proceeded to order the Objector to file and serve witness evidence affidavits within 30 days while the Petitioner was to follow suit within 30 days.
5. On April 14, 2014 in the High Court Registry Bungoma by a consent letter dated March 26, 2014 duly signed by both advocates, it was ordered that the registration of land parcel No. E. Bukusu/S. Nalondo/3963, 3964, 3965, 3966 be cancelled and revert to the original land parcel No. E. Bukusu/S. Nalondo/2547 to facilitate the distribution and that the Objector was directed to file an affidavit in protest to the confirmation of grant dated February 12, 2004.

Affidavit of protest

6. The Objector herein, Christopher Wafula Wanjala, filed an affidavit of protest sworn on April 10, 2014 against confirmation of grant dated February 12, 2004 under Rule 40(6) of the [Probate and Administration Rules](#).
7. The specific averments as contained in the affidavit in protest are that the deceased, prior to his demise, had given him authority to be an administrator over his estate. He averred that the deceased also sold a portion of E. Bukusu/South Nalondo/2547 measuring three acres to one John Maunya Maelo. He also averred that prior to his death the deceased had allocated portions to all beneficiaries as follows:
 - a. Ezekiel Sikuku Wanjala -7 Acres
 - b. Christopher Wafula Wanjala-7 Acres
 - c. Benjamin Wanjala-7 Acres
 - d. Geoffrey N. Namaswa-7 Acres
 - e. Francis S. Namaswa-7 Acres
 - f. Antonina N. Lukoye-½ Acres
 - g. Namachanja N. Mulubi-½ AcresHe wished for the allocations by the deceased to be confirmed as stipulated above.
8. *Vide* a further affidavit sworn on November 23, 2018, the Petitioner averred that on October 13, 2014 he filed an application for confirmation of a grant with a mode of distribution of the estate of the deceased. He averred inter alia; that the said mode of distribution was based on the estimate given by the deceased prior to his demise; that he was able to conduct a survey to verify the acreage of each individual portion each beneficiary occupies and the sharing of land parcel No. East Bukusu/South Nalondo/2547 be as follows:
 - a. Francis Simiyu Kenyatta-9 Acres
 - b. Benjamin N. Wanjala-7 Acres
 - c. Christopher W. Wanjala-6 Acres



d. Geoffrey N. Wanjala-6 Acres

e. Ezekiel S. Wanjala-6 Acres

He based the distribution according to the existing boundaries of the beneficiaries portions as per the survey (However, a perusal of the court record does not show the official search of the land as well as the survey referred to).

9. On November 2, 2020 the Objector filed an affidavit of proposed mode of distribution indicating that prior to the demise of the deceased, he had allocated portions to all beneficiaries as follows:

a. Ezekiel Sikuku Wanjala -7 Acres

b. Christopher Wafula Wanjala-7 Acres

c. Benjamin Wanjala-7 Acres

d. Geoffrey N. Namaswa-7 Acres

e. Francis S. Namaswa-7 Acres

f. Antonina N. Lukoye-½ Acres

g. Namachanja N. Mulubi-½ Acres

10. On September 21, 2021, the Petitioner filed his proposed mode of distribution as follows:

a. Francis Simiyu Kenyatta-9 Acres

b. Benjamin N. Wanjala-7 Acres

c. Christopher W. Wanjala-6 Acres

d. Geoffrey N. Wanjala-6 Acres

e. Ezekiel S. Wanjala-6 Acres

f. Antonina Lukoye-0 Acres

g. Everlyne Namachanja Mulubi (deceased)-0 Acres

11. Vide directions dated November 16, 2021 the summons for confirmation of grant dated December 13, 2004 and the subsequent objection and protest sworn on April 10, 2014 be canvassed by way of *viva voce* evidence.

Objector's case

12. According to OB. PW1, Christopher Wafula, he recalled that on November 30, 2021 he filed his statement that he wished to be adopted as his evidence in chief. He stated that the deceased died on February 11, 1994 and was survived by seven children comprising of five sons and two daughters. He stated that Namachanja N. Mulubi died in 1990 but she is survived by five children. He stated that prior to the deceased's demise, he had expressed his wishes on how he intended his estate L.R No. E. Bukusu/South Nalondo/2547 approximately 36 acres to be distributed as follows:

a. Ezekiel Sikuku Wanjala-7 Acres

b. Christopher Wafula Wanjala-7 Acres

c. Benjamin Wanjala-7 Acres



- d. Geoffrey N. Namaswa-7 Acres
- e. Francis S. Namaswa- 7 Acres
- f. Antonina N. Lukoye-½ Acres
- g. Namachanja N. Mulubi-½ Acres

He stated that prior to the deceased's demise he was given authority by him to be the administrator over his estate and that the clan members Vincent Wasike and David Wakhungu plus all the five sons were present.

He stated that majority of the beneficiaries are in support of his mode of distribution in exclusion of the Petitioner who, according to his mode of distribution, allocated himself the largest share. He opposed the Petitioner's mode of distribution dated March 3, 2021 and filed in court on September 21, 2021.

13. On cross-examination, he told the court that he is the third son of the deceased. He stated that prior to the demise of the deceased, he had shown each one of them their respective portions of land to occupy and that they went ahead to fix boundaries. He told the court that they have never engaged any surveyor to confirm the boundaries and that the deceased had told them to do so so that each one of them can get equal shares but there are no family minutes taken over the deceased's directive. He noted that he is currently occupying a portion measuring five acres and that he expects to get seven acres.
14. On re-examination, he told the court that the deceased died in 1994 and that the land measures 36 acres and that each of the seven children is supposed to get equal portions and were surprised that the Petitioner had lodged this cause and proceeded to allocate himself twelve acres. He told the court that the Petitioner seemed to have brought surveyors at night as he did not see them.
15. OB. PW2, Geoffrey Namaswa Wanjala, told the court that he recalled on November 29, 2021 he filed his statement that he wished to be adopted as his evidence in chief. He stated that the deceased died on February 11, 1994 and was survived by seven children comprising of five sons and two daughters. He stated that Namachanja N. Mulubi died in 1990 but she is survived by five children. He stated that prior to the deceased's demise, he had expressed his wishes on how he intended his estate L.R NO. E. Bukusu/South Nalondo/2547 approximately 36 acres to be distributed as follows:
 - a. Ezekiel Sikuku Wanjala-7 Acres
 - b. Christopher Wafula Wanjala-7 Acres
 - c. Benjamin Wanjala-7 Acres
 - d. Geoffrey N. Namaswa-7 Acres
 - e. Francis S. Namaswa- 7 Acres
 - f. Antonina N. Lukoye-½ Acres
 - g. Namachanja N. Mulubi-½ Acres

He stated that prior to the deceased's demise, he was given authority by him to be the administrator over his estate and that the clan members namely Vincent Wasike and David Wakhungu plus all the five sons were present.

He stated that majority of the beneficiaries are in support of his mode of distribution in exclusion of the Petitioner who, according to his mode of distribution, allocated himself the largest share. He opposed



the Petitioner's mode of distribution dated March 3, 2021 and filed in court on September 21, 2021. He wished the Objector's mode of distribution be adopted.

16. On cross examination, he told the court that he resides on parcel 2547 and prior to the demise of the deceased he had showed everyone their respective portions of land to occupy and that they had not yet d showed everyone their respective portions of land to occupy and that they had not taken surveyors to the portions to establish the boundaries. He told the court that he occupies a parcel not exceeding five acres. He stated that he has since sold a part of his portion and that his sibling who pre-deceased the deceased, his late father had directed that she should be given a portion of the land and that one of his late sister's children lives with them while the other four live with their father.
17. On re-examination, he told the court that the deceased had directed that they share the land equally and that they should consider their sisters also. He stated that all of them have sold portions of their land with exception of Benjamin Wanjala. He confirmed that he has both the lower and upper portion of the land
18. OB. PW3, Benjamin N. Wanjala, told the court that he recalled on November 29, 2021 he filed his statement that he wished to be adopted as his evidence in chief. He stated that the deceased died on February 11, 1994 and was survived by seven children comprising of five sons and two daughters. He stated that Namachanja N. Mulubi died in 1990 but she is survived by five children. He stated that prior to the deceased's demise, he had expressed his wishes on how he intended his estate L.R No. E. Bukusu/South Nalondo/2547 approximately 36 acres to be distributed as follows:
 - a. Ezekiel Sikuku Wanjala-7 Acres
 - b. Christopher Wafula Wanjala-7 Acres
 - c. Benjamin Wanjala-7 Acres
 - d. Geoffrey N. Namaswa-7 Acres
 - e. Francis S. Namaswa- 7 Acres
 - f. Antonina N. Lukoye-½ Acres
 - g. Namachanja N. Mulubi-½ Acres

He stated that prior to the deceased's demise, he gave authority to the objector herein to be the administrator over his estate and the clan members Vincent Wasike and David Wakhungu plus all the five sons were present.

He stated that majority of the beneficiaries are in support of his mode of distribution in exclusion of the Petitioner who, according to his mode of distribution, allocated himself the largest share. He opposed the Petitioner's mode of distribution dated March 3, 2021 and filed in court on September 21, 2021.

19. On cross examination, he told the court that he resides on parcel 2547 and that the deceased showed him the boundaries and that each one of them knew their boundaries. He told the court that he has since sold one acre of his portion and that he has both the lower and upper portion of the land but he is yet to know his exact acreage. He told the court that his father directed that they should all share the land equally.
20. On re-examination, he told the court that he wished they get equal shares and that the deceased had directed that his sisters should be given half an acre each.



Petitioners case

21. PET. PW1, Francis Simiyu Namaswa, told the court that he recalled on November 29, 2021 he filed his affidavit that he wished to be adopted as his evidence in chief. He averred that his father died on February 11, 1994 and his sister, Namachanja, died on January 5, 1994 and not 1990 as alleged by the Objector. He averred that there was no meeting at anytime that the deceased conducted but on December 26, 1989 the deceased called them and gave them shares. That the two clan members, Vincent Wasike and David Wakhungu could be summoned by the court to give evidence on whether land was given or promised to be given to the Objector and the other beneficiaries. He averred that the Objector and other beneficiaries should state where the two sisters were shown land shares and that the statement is full of malice. He averred that his sibling, Antonia Naliaka Lukoye, was summoned by this court and that she confirmed that she did not have any interest in the land of the deceased. He averred that their clan chairman can attest that the deceased established boundaries to his five sons before his death. He averred that after a survey, the shares allocated to each brother was 9, 7, 6, 6, 6 which totals to 34 acres from the land parcel No. East Bukusu/South Nalondo/2547.
22. On cross-examination, he told the court that the land parcel No. East Bukusu/South Nalondo/2547 measures 34 acres and that the deceased showed the five sons boundaries prior to his death. He stated that he does not have any minutes over the deceased's instructions and that the deceased did not provide for the female children. He stated that there is a surveyor's report on the demarcation but that he did not avail the same in court. He stated that his sister Namachanja pre-deceased his father and that she was survived by five children but that the same children ought to be taken care of by their father and that the children were alive when his father divided the land. He averred that it is not true that female children are entitled to inherit property of their parents and that nothing was provided for to his two sisters. He added that he has nine acres while his other brothers have lesser shares.
23. On re-examination, he stated that he is occupying the land given to him by the deceased as his brothers and that the boundaries that were set by the deceased are still in existence with the exception on the swampy area.
24. PET. PW2, Dismus Kimasere Museba, testified that he recalled on November 29, 2021 he filed his affidavit which he wished to be adopted as his evidence in chief. He stated that the Petitioner and Objector are his cousins and that the deceased was survived by seven children. He stated that the deceased did not allocate the land parcel No. 2547 to the Objector as alleged.
25. On cross-examination, he stated that he is aware of this case but is not a beneficiary. The deceased distributed the land to his sons and he was present together with Daniel Wanyonyi in 1989 and that he can confirm the brother to the deceased, one Vincent, can confirm the same as he was also present and that minutes were prepared but which were not shown to him. He stated that the Petitioner's land is bigger than that of his brothers and that the same is fair.
26. On re-examination, he stated that he was present when the deceased subdivided his land and that the other sons were also present.
27. At the close of the hearing of both parties' cases, the court directed that parties file and exchange submissions. Both parties duly complied.

Objector's Submissions

28. Vide submissions dated on September 8, 2022, the Objector submits that the Petitioner's mode of distribution is simply unfair and discriminative to the other beneficiaries of the estate of the



deceased. The deceased died intestate and his property ought to pass through the rules of intestacy. The beneficiaries are therefore entitled to equal shares.

29. It was submitted that the deceased did express his wishes with regard to parcel No. 2547 measuring approximately 36 acres and as per the meeting which was attended by all the beneficiaries, it was decided by the deceased that the sons will get seven acres while the daughter were to get 0.5 acres each. The same ought to be adopted by this court as it is fair and equitable as per the provisions of section 38 and 42 of Law of Succession Act.
30. It was submitted that the land parcel No. 2547 measures 36 acres and not 34 acres as alleged by the Petitioner and that they base their information from the title deed. The sisters of the Objector as per the deceased were to be apportioned 0.5 acres and that this court should take note that Antonina had previously informed the court that she relinquished her share to her brothers and that she appeared in this court on November 26, 2018 where she relinquished her share. He submitted that each of the surviving five sons to get seven acres each.

Petitioner's submissions

31. Vide submissions dated September 26, 2022, the Petitioner submitted that on May, 2019 Antonina Naliaka Lukoye was summoned by the court and that she relinquished her share in the estate of the deceased. That there is no dispute that the deceased had shown every beneficiary his share before he died and that the land in question is 34 acres and not 36 acres as alleged. It was also submitted that a survey had been conducted by the petitioner wherein the shares of each beneficiary was indicated as follows:

- a) Ezekiel Sikuku Wanjala-6 acres
- b) Christopher K Wanjala- 6 acres
- c) Benjamin Wanjala- 7 acres
- d) Geoffrey K Namaswa- 6 acres
- e) Francis Namaswa- 9 acres
- f) Antonina N Lukoye- Nil

TOTAL.....34 acres

Learned counsel for the petitioner submitted that the court should uphold the mode of distribution by the petitioner as it represents what was shared on the ground as per the acreage and title deed.

Issues, Analysis and Determination

32. I have considered the evidence adduced and submissions filed by parties herein. The issue which this court has to determine is the mode of distribution of the estate. The Petitioner and the Objector plus their siblings are the beneficiaries entitled to a share of the estate. In Re- Estate of G.K.K (deceased) (2017 eKLR it was stated that –

“The primary function of a probate and administration court is distribution of the estate of the dead person.”

33. The Law of Succession Act is a self-contained law with provisions and rules governing the administration of estates. In its pre-ambule, it states in part that it is the ‘law relating to intestate and testamentary succession and the administration of the estate of deceased persons’.



34. The record and the evidence as a whole demonstrate that the deceased died intestate in that he left no will for the distribution of his property.
35. Section 34 of the *Law of Succession Act* provides: -
- “A person is deemed to die intestate in respect of all his life property of which he has not made any will which is capable of taking effect”
36. Having died intestate in 2011, the *Law of Succession Act* Cap 160 which came into force in 1981 applies to the distribution of the deceased’s property herein.
37. The Act has provided for the mode of distribution where an intestate has died and is survived by children only. Section 38 of the *Act* provides that’
- “where an intestate has left a surviving child or children but no spouse, the net intestate estate shall subject to the provision of Sections 41 & 42 devolve upon the surviving child if there be only one, or be equally sub-divided among the surviving children.”
38. Rule 40(6) of the *Probate and Administration Rules* provides that a person seeking to object to confirmation of a grant is required to file an affidavit of protest as follows:
- Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 10 against such confirmation stating the grounds of his objection.
39. The Protestor/Objector, being unhappy with the Petitioner’s proposed mode of distribution has filed his affidavit of protest to object to the same, stating his grounds of objection. The court notes that the proposal by the Protestor/Objector was objected to by only the Petitioner while the other beneficiaries (three sons), who are all adults were in support of the same.
40. It is noted that both the Petitioner and the Protestor/Objector explain that the rationale of the distribution was subject to the wishes of the deceased, which are clearly different, based on the evidence by each respective party. I note that both parties in their submissions have raised the issue of Antonina N. Lukoye appearing before this court on different dates as per their submissions relinquishing her rights to the estate of the deceased. This is a new issue raised in submissions and is not supported by evidence. The court record for May, 2019 does not indicate anywhere that the said Antonina Lukoye stated to the court that she had relinquished her interest in the estate. The Coram for the date in question only indicates the presence of the said beneficiary and nothing more. It would have been prudent for the said beneficiary to swear an affidavit deposing on the issue. It is well established that new issues cannot be raised in submissions and any issues so raised, are best ignored. This was well articulated by Korir, J. in *Republic v Chairman Public Procurement Administrative Review Board & another Ex-Parte Zapkass Consulting and Training Limited & another* [2014] eKLR where he stated:
- “The Applicant, the respondents and the Interested Party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored.”
41. In the present case, not all beneficiaries have signed the consent and an affidavit of protest has been filed. The law requires that in such circumstances, the affidavit of protest shall be heard. Rule 40(8) of the *Probate and Administration Rules* requires that:



Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the applicant, the protester and to such other persons as the court thinks fit.

42. Article 27 of the Constitution outlaw's discrimination in every aspect of life.
43. I am of the considered view that the children of the deceased ought to share the assets equally as provided by the constitution and by Section 38 of the Law of Succession Act.
44. From the evidence adduced by both the Petitioner and Objector, the land parcel No. E. Bukusu/S. Nalondo/2547 measures 34 acres and 36 acres respectively. No current official search or surveyor's report was attached and as such, the difference in sizes is negligible. Both parties agreed that the deceased showed each beneficiaries their portions with the Objector testifying that he directed that each of the sisters get 0.5 acres while the Petitioner testified that while the deceased was subdividing the property, it was not true that the sisters were entitled to portions from their parents. He claimed that he had conducted a survey on the land parcel but failed to avail the requisite report and both parties failed to avail minutes from the sub-division/allocation of parcels exercise that the deceased conducted prior to his demise.
45. Both parties testified that they reside on the respective land parcels and that the other beneficiaries did not dispute the said occupation as they all reside on land parcel 2547. Although the Petitioner claimed that the land measuring 9 acres was given to him by the deceased, no evidence in form of minutes of the family meeting was availed in court and if that was the case, then this court still finds the same to be contrary to law on distribution.
46. It is also important to note that no other beneficiary claims more than one parcel of the E. Bukusu/S. Nalondo/2547. Article 27 of the Constitution outlaw's discrimination and section 38 of the Act provides for the manner in which distribution ought to be done in a case like this one. Section 38 of the Act provides that the estate has to be distributed equally among the children of the deceased where there is no spouse surviving. It would appear to me that the failure by both the petitioner and objector to present a mode of distribution that shares the estate equally among the beneficiaries calls in the provision of section 38 of the Law of Succession Act to come into force.
47. Having considered the entire evidence tendered during trial, the rival submissions of both counsel in the light of the issues for determination, I find that the evidence tendered by the parties through their respective witnesses did not meet the threshold under section 107 (1) of the Evidence Act, Cap 80 Laws of Kenya which provides that:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
48. Neither did the same assertions meet the threshold under sections 109 and 112 of the same Act as follows:
 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.
 112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.



49. The two provisions were dealt with in *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

50. It is noted that there is a contention on the exact size of the land parcel No. 2547 as the Petitioner alleges that the same is 34 acres whilst the Objector alleges it is measuring 36 acres. None of them availed copies of search certificates for the court’s perusal. None of them convinced the court that indeed the deceased had given instructions over the sharing of the land prior to his demise. Nevertheless, this court shall proceed to distribute the estate of the deceased. As noted, the proposed modes of distributions by the Petitioner and Objector are skewed and not a fair distribution of the estate of the deceased among the beneficiaries. I find that an order that the estate be shared equally among the seven children of the deceased will be appropriate. As none of the female children of the deceased or their children turned up in court or swore affidavits renouncing a claim to the estate, then the estate must be shared equally and that the said female children or their families shall be at liberty to waive claims on the estate in which case the shares of the male children will equally increase.

51. In view of the foregoing observations, I proceed to make the following orders:

- a. The estate of the deceased comprised in LR No. E.Bukusu/S. Nalondo/2547 shall be shared amongst the seven children of the deceased in equal shares.
- b. The administrator is hereby ordered to have a survey done on L.R No. E. Bukusu/S. Nalondo/2547 to ascertain the share of each beneficiary.
- c. Subject to the exercise of the surveyor, the female beneficiaries shall be at liberty to officially relinquish or waive their shares in the estate.
- d. The cost of survey exercise to be shared equally among the beneficiaries.
- e. The grant issued on the February 11, 2004 ^{is} is hereby confirmed in the above terms.
- f. No order as to costs as this is a family matter.

Dated and delivered at Bungoma this 20th day of January, 2023.

D. Kemei

Judge

In the presence of:

No appearance for Situma for Petitioner

Miss Were for Masiga for Objector

Kizito Court Assistant

