



REPUBLIC OF KENYA



**Silicho v Wotia & 2 others (Civil Appeal 4 of 2020)
[2023] KEHC 3627 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3627 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL 4 OF 2020
JRA WANANDA, J
APRIL 28, 2023**

BETWEEN

GEORGE WANYONYI SILICHO APPELLANT

AND

RICHARD WOTIA 1ST RESPONDENT

LIVINGSTONE SITATI 2ND RESPONDENT

STEPHEN WEPUKHULU 3RD RESPONDENT

JUDGMENT

1. One Simon Wanyonyi Wotia a resident of Toloso location, Bungoma died on 31st July 1980 at the age of 74 years. He died intestate.
2. By the Petition filed on 29th January 2018 at the Sirisia SRM Court as Succession Cause No. 3 of 2018, the Appellant herein, as a son to the deceased, petitioned the Court for issuance of a Grant of Letters of Administration Intestate for the estate of the deceased.
3. To the Petition was attached the letter dated 3rd January 2018 from the Chief, Toloso Location. The letter listed as survivors of the deceased, 2 sons who were also listed as the 2 sole beneficiaries. The 2 were the Appellant and the late Moses Wachanga Wepukhulu.
4. The letter also stated that the said Moses Wachanga Wepukhulu had left behind a widow, Esther Ayeko Wakhungu. The widow signed a consent to the Petition.
5. It was stated in the Petition that at the time of his death, the deceased Simon Wanyonyi Wotia had one property registered in his name, namely, South Malakisi/South Namwela/119 valued at a sum of approximately Kshs 5,000,000/- (hereinafter referred to as “the property”).



6. Also attached to the Petition was a Search Report from the Bungoma District Land Registry for the said property. From the search, the size of the property was indicated as 7.8 hectares. (I note that converted accordingly, this size is equivalent to approximately 19.3 acres).
7. The Notice of the filing of the Application for Grant was then published in the Kenya Gazette edition of 23rd March 2018.
8. However, on 16th April 2018, the 3 Respondents herein filed objections to making of the Grant. They described themselves as 1 son and 2 grandsons of the deceased and attached their own version of the list of survivors. Their list had 7 survivors, 5 more than the 2 that the Appellant had supplied initially.
9. The 1st Respondent (1st Objector) is the elder brother of the Appellant and the 2nd and 3rd Respondents (2nd and 3rd Objectors) are the sons of the Appellant's respective brothers (Appellant's nephews).
10. The Respondents (Objectors) accused the Appellant of excluding other rightful beneficiaries and survivors and secretly appointing himself Administrator of the estate without involving other family members and without obtaining their consents.
11. On 14th May 2018 the Appellant filed a Replying Affidavit to the Objection. He deponed that his late father had a total of 7 children, namely, 5 sons and 2 daughters, that the 2 daughters had voluntarily forfeited their rights to inherit and that among the 5 sons, 3 were deceased. He stated that himself and the 1st Objector were the only 2 surviving sons.
12. He deponed further that their father, during his lifetime, had already allocated other properties to the 1st Respondent and the fathers of the 2nd and 3rd Respondents. He added that the 3 obtained even title deeds for those other properties, built their homes thereon and the 2 that died were buried on those other properties.
13. He named those other properties allocated to the 3 brothers and attached Ownership Search Reports as follows:

<i>Richard Wotia Wepukhulu</i> (1 st Respondent)	South Malakisi/South Namwela 827	3.8 Ha (9.4 Acres)
<i>Richard Wotia Wepukhulu</i> (1 st Respondent)	South Malakisi/South Namwela 828	0.8 Ha (2 Acres)
Charles Sitati Wepukhulu (father to 2 nd Respondent)	South Malakisi/South Namwela 533	2.2 Ha (5.4 Acres)
John Wanjala Wepukhulu (father to 3 rd Respondent)	South Malakisi/South Namwela 534	2.6 Ha (6.4 Acres)

14. Regarding the two properties above attributed to the 1st Respondent (Richard Wotia), i.e., South Malakisi/South Namwela/827 and South Malakisi/South Namwela/828, the Appellant stated that initially they comprised one property, known as South Malakisi/South Namwela/535 and the same was sub-divided into the two present properties because the 1st Respondent sold South Malakisi/South Namwela/828 to a third party.
15. According to him therefore, the 3 Respondents were already catered for and the remaining property, South Malakisi/South Namwela/119 was left only for him (Appellant) and his younger brother (the



late Moses Wakhungu) to share because the father died before allocating land to the two of them. He added that since his said younger brother Moses Wakhungu also later died, his widow, the said Esther Ayeko Wakhungu should receive the share meant for her husband.

16. He further deponed that it is because of this understanding that he listed only himself and his said younger brother's widow, the said Esther Ayeko Wakhungu as the only 2 survivors-beneficiaries. He therefore denied the allegation that he had handled the Succession process in secrecy.
17. According to him therefore, the Respondents had no claim to South Malakisi/South Namwela/119 since their shares were in the pieces of land that had already been allocated to them and/or their fathers elsewhere.
18. On 29th May 2018, the firm of J.W. Sichangi & Co. Advocates came on record for the Appellant and on 26th June 2018, the firm of J.B. Otsiula & Associates Advocates came on record for the 3 Respondents-Objectors.
19. After several further Affidavits and counter-Affidavits were filed, the parties opted to negotiate and eventually agreed that the Grant be issued in the names of the Appellant and the 1st Respondent as joint Administrators.
20. Accordingly, the Appellant filed a fresh list of Survivors naming 7 survivors as was listed by the Respondents in their Affidavits in support of the Objection. Eventually, the Grant was issued on 13th February 2019 in the names of the Appellant and the 1st Respondent as joint Administrators.
21. What was remaining now was confirmation of the Grant.
22. The parties were however unable to agree on the distribution of the asset and on 13th March 2019, the 1st Respondent filed Summons seeking Confirmation of the Grant. He submitted a proposed distribution mode of the 19-acre South Malakisi/South Namwela/119 property, as follows:

<i>Livingstone Wafula Sitati, (2nd Respondent)</i>	Son to Charles Sitati	3 Acres
Richard Wotia Wepukhulu (1 st Respondent)	Son to deceased	1 Acre
<i>Stephen Wepukhulu Wanjala (3rd Respondent)</i>	Son to John Wanjala	1 Acre
<i>George Wanyonyi Silicho (Appellant)</i>	Son to deceased	7 Acres
<i>Esther Ayeko Silicho</i>	Widow to Moses Wakhungu	7 Acres
Total acreage	****	19 Acres

23. As expected, the Appellant declined the above proposal. With the Court's concurrence, the parties discussed the matter further and agreed that the dispute be placed before the Deputy District Commissioner (DCC) for mediation.



24. Accordingly, the matter was placed before the DCC who after convening several sessions with the parties and other stakeholders submitted a Report dated 2nd June 2019 to the Court. The proposal given in the Report was in the same terms as the one that had been earlier submitted by the Respondents.
25. Again, as expected, the Appellant declined the DCC's proposal. In the circumstances, the matter proceeded to viva voce hearing.
26. In the viva voce hearing, the Appellant testified for himself while the 2nd Respondent testified on behalf of the Respondents. They more or less reiterated the matters already referred to.
27. The Appellant in expounding his case, stated that their father Simon Wanyonyi Wotia in 1969 gave respective pieces of other land elsewhere to the Appellant's 3 elder brothers who were already married at that time. These 3 were Charles Sitati (father to 2nd Respondent), Richard Wotia (1st Respondent) and John Wanjala (father to 3rd Respondent).
28. He stated that himself and the younger brother, Moses Wakhungu, were still in school at that time and were not therefore given any land.
29. He argued that the remaining piece of land, South Malakisi/South Namwela/119 was to therefore be shared equally between himself and his younger brother, Moses Wakhungu. He stated that if the property is 19 Acres, then his ½ share should be 9.5 Acres.
30. He claimed that the sons of his said elder brothers, instead of looking up to getting their inheritance from the land earlier given to their fathers, had invaded South Malakisi/South Namwela/119 and begun ploughing on portions thereof.
31. He admitted that he was in occupation of 7 acres of the property. He denied that it is his father who sub-divided the property and allowed his 3 brothers to occupy portions thereof or that it is his father who allocated portions of the property to his 3 brothers now being claimed by their sons.
32. He admitted that the 2nd Respondent lives on a portion of the property and has even built his home there. He however argued that the 2nd Respondent's action was wrong and that he should therefore vacate.
33. He reiterated that although he is in occupation of 7 acres, he is entitled to a total share of 9.5 acres being ½ of the property. He also reiterated that the other 9.5 acres should go to Esther Ayeko, the widow to his late younger brother, Moses Wakhungu.
34. He confirmed that the 2nd Respondent is the son to his late brother Charles Sitati, that the 2nd Respondent built a home on the property in the year 1992, that he did not understand why the 2nd Respondent left his father's home and instead decided to come and build on the property. He stated that the area occupied by the 2nd Respondent was 3 acres.
35. On his part, the 2nd Respondent who as aforesaid testified on behalf of the other Respondents confirmed that he was in occupation of 3 acres of the property, that the same was given to him by his father, that the 1st Respondent was also in occupation of 1 acre which he ploughs and that the 3rd Respondent also occupies 1 acre, that he was in agreement with the DCC's proposal, that he has occupied the 3 acres since 2002 and that the Appellant occupies 7 acres.
36. He admitted that when his late father Charles Sitati died in year 2022, he was buried in the piece of land that was allocated to him elsewhere by their grandfather, namely, South Malakisi/South Namwela/533 where he had built a home.



37. He also confirmed that the 1st Respondent resides in the piece of land that was allocated to him by their grandfather, namely, South Malakisi/South Namwela/827.
38. He also admitted that the 3rd Respondent's father, the late John Wanjala, occupied the piece of land that was allocated to him by their grandfather, namely, South Malakisi/South Namwela/534 and that is where he was buried.
39. He further admitted that the Appellant lives on a portion of the property South Malakisi/South Namwela/119 and also that his father's other brother, the late Moses Wakhungu also resided on another portion in the same property and was buried there when he died and that his widow is Esther Ayeko.
40. He stated that his late father used to plant coffee on the portion of the property that he currently occupies and that his father then allocated that portion to him.
41. He stated that in 1993 the clan divided the property, South Malakisi/South Namwela/119 into 5 portions, a portion each for the 5 sons and that it is after that action that the 1st Respondent started using the property. He however admitted that he did not have the minutes for the meeting. He further testified that it is their grandfather who settled his father on the property and that they did not simply invade it.
42. After the close of the viva voce hearing, the parties filed written Submissions. Both sets of Submissions reiterated more or less the same matters already highlighted above. The Court then delivered its Ruling on 11th December 2019.
43. By the said Ruling, the Court found that the distribution mode proposed by the Objectors was the fair and equitable one and accordingly accepted it.
44. Being dissatisfied with the Ruling, the Appellant lodged this appeal on 9th January 2020 citing 3 grounds as follows:
 - i. The decision is contrary to the preponderance of evidence adduced by the parties.
 - ii. The 1st Objector/Respondent was not entitled to any share of the deceased's estate as he had already been given his own land by the deceased.
 - iii. The 2nd and 3rd Objectors/Respondents are grandsons of the deceased and were not entitled to any share of the deceased's estate since their parents had already been given their own land.
45. The Appeal has been canvassed by way of written Submissions which both parties have filed. The Appellant filed on 16th January 2023 and the Respondent filed on 19th January 2023.
46. Again, both sets of Submissions reiterated more or less the same matters already highlighted above. In the circumstances, I will not again recount the same.

Analysis and determination

47. I have considered the appeal and submissions by both parties. I have also read the record of the trial court and the impugned Judgment.
48. As a first appellate Court, this Court has the duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The Court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand.



49. The above duty was reiterated by the Court of Appeal in the case of Peter M. Kariuki v Attorney General [2014] eKLR where it stated as follows:

“We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and reevaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence (see *Ngui v Republic* (1984) KLR 729 and *Susan Munyi v Keshar Shiani*, Civil Appeal No. 38 of 2002 (unreported).”

50. This duty is also expressed in Section 78 of the [Civil Procedure Act](#) which requires a first appellate Court to: ‘..... re-evaluate, reassess and re-analyze the extracts of the record and draw its own conclusions.’”

51. Before I proceed to interrogate the issues, I note that the Learned trial Magistrate in her Ruling made the following observation:

“The parties have not talked about their mother (i.e., wife to the deceased) because ideally then she should be the first beneficiary in this Estate. The deceased’s spouse is therefore not mentioned”.

52. This Court too notes the conspicuous silence on the rights, status, or whereabouts of the spouse to the deceased (mother to the Appellant and the 1st Respondent and grandmother to the 2nd and 3rd Respondents).

53. However, since the letter from the Chief which was supplied by the Appellant in support of the Petition did not mention the mother (or grandmother as the case may apply) as one of the survivors, this Court will presume that either she is not alive but if she is alive, then she is not making any claim herein. This presumption is buttressed by the fact that even when the Respondents challenged the list of survivors supplied by the Chief and added 5 more people to that initial list, the mother (or grandmother) still did not feature as one of the survivors.

Issues for determination

54. In my view, the one broad issue that arises for determination in this appeal is the following;
How should the estate be shared or distributed among the beneficiaries/survivors?

55. In analyzing and answering the said issue, my first port of call is inevitably Section 34 of the [Law of Succession Act](#) which provides as follows:

“A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect.”

56. Therefore, insofar as the deceased did not make or write a Will, he is said to have died intestate.

57. It is clear that the Appellant’s case is based on the argument that the deceased having already allocated other pieces of land elsewhere to the Respondents and/or their fathers, the remaining property, South Malakisi/South Namwela/119 measuring 19 acres was to be exclusively shared only between the 2 sons who had not yet been allocated their own pieces of land.

58. This argument, though persuasive, is fraught with danger because it is based on a mere assumption, speculation and guesswork on the intentions of the deceased. The Appellant did not produce any evidence to prove that it was the intention of the deceased that the remaining property be shared only by the 2 sons who had not yet been allocated land.



59. The Appellant is assuming that every parent will always automatically give inheritance to all his children. The fact of the matter is that a parent has the exclusive right to choose whether to give inheritance or not to any of his children. Indeed, there are many instances where parents have given inheritance to some of their children and disinherited others. As long as the deceased did not during his lifetime make a Will or declare his intentions on how the property was to be shared, the Appellant cannot bestow upon himself any knowledge of how the deceased intended to distribute the property.
60. If indeed the deceased intended that the property be shared exclusively by only the 2 younger sons, what would have stopped him from expressly making such declaration?
61. While it is true that during his lifetime the deceased allocated pieces of land to his 3 eldest sons who even obtained title deeds for those properties, no one knows why he did not similarly also allocate land to the 2 younger sons. Although the Appellant has stated that the 2 younger sons were not allocated land because they were still young and were not yet married, this is mere speculation.
62. No one therefore knows how the deceased intended to share out the one remaining property, South Malakisi/South Namwela/119. No evidence was produced in answer to this puzzle.
63. I therefore find that the Appellant has failed to prove that the deceased intended that the remaining property, South Malakisi/South Namwela/119 was to be shared only by the 2 younger sons who had not yet been allocated land, namely, the Appellant and the said Moses Wakhungu.
64. In the circumstances, the property has to be shared out only in accordance with the rules of intestacy set out under the *Law of Succession Act*, Cap. 160.
65. The provisions that come into play are Section 38 and 41 which provide as follows:
- Section 38
- “Where an intestate has left a surviving child or children but no spouse the net estate shall subject to the provisions of Section 41 and 42 devolve upon the surviving child, if there be only one or shall be equally divided among the surviving children.”
- Section 41
- “Where reference is made in this Act to the “net intestate estate”, or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate”.
66. From the foregoing, it is clear that under Section 38 the Appellant and the 1st Respondent as children of the deceased are prima facie entitled to share in the distribution of the estate. As for the other son, the late Moses Wakhungu, his widow Esther Ayeko is also entitled to inherit the share which her deceased husband would have inherited.
67. Finally, for the other sons, the late Charles Sitati and the late John Wanjala, their own children, the 2nd and 3rd Respondents are also entitled to inherit the share which their deceased parents would have inherited.
68. The above principle on inheritance by grandchildren is recognized under Section 41 of the *Law of Succession Act*. The Section provides that where the child or children of a deceased person were themselves deceased but had left children, these children stand in place of their deceased parents and



are entitled to the share their parent was entitled to. On this point, in his decision in *The Estate of Joseph Gichuki Riunge (Deceased)* [2016] eKLR, Musyoka J stated as follows:

“...should the child be survived by their own children, who would then be grandchildren of the dead parent, then it should be the children of the dead child, the grandchildren of the dead parent, who would be considered as the survivors of the parent of their own parent. That is the effect of section 41 of the *Law of Succession Act*. It is called the principle of representation: the surviving child of a dead child taking the share of their dead parent from estate of the dead child’s parent”.

69. Once more, Judge Musyoka in the case of *Estate of Veronica Njoki Wakagoto (deceased)* [2013] eKLR stated as follows:

“..... grandchildren can only inherit their grandparents indirectly through their own parents, the children of the deceased. The children inherit first and thereafter the grand children inherit from the parents. The only time grandchildren inherit directly from their grand parents is when the grandchildren’s own parents are dead. The grand children step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”

70. However, here comes Section 42 of the Act which throws a spanner into the works. The Section provides as follows:

“Where-

- a) an intestate has, during lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
- b) property has been appointed or awarded to any child or grandchild under the provisions of Section 26 or Section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”

71. It is therefore clear that Section 42 requires the taking into account during distribution, of gifts made to beneficiaries by the Deceased during his lifetime. Therefore, determination must first be made of the total amount of land that the deceased owned and which was available for distribution. In doing so, consideration has to be made of the following pieces of land that the deceased had already allocated to the other survivors as follows:



Richard Wotia Wepukhulu (1 st Respondent)	South Malakisi/South Namwela 827	3.8 Ha (9.4 Acres)
Richard Wotia Wepukhulu (1 st Respondent)	South Malakisi/South Namwela 828	0.8 Ha (2 Acres)
Charles Sitati Wepukhulu (father to 2 nd Respondent)	South Malakisi/South Namwela 533	2.2 Ha (5.4 Acres)
<i>John Wanjala Wepukhulu</i> (father to 3 rd Respondent)	South Malakisi/South Namwela 534	2.6 Ha (6.4 Acres)
Total	****	23.2 Acres

72. The above information was supplied by the Appellant complete with Search Reports from the Bungoma District Lands Registry. I note that the Respondents did not challenge the same. I therefore take it as the true position.
73. The Learned trial Magistrate, in her decision adopted the proposal submitted by the Respondents for distribution of the remaining property, South Malakisi/South Namwela/119, as follows:

<i>George Wanyonyi Silicho</i> (Appellant)	Son to deceased	7 Acres
<i>Esther Ayeko Wakhungu</i>	Widow to Moses Wakhungu	7 Acres
Livingstone Wafula Sitati, (2 nd Respondent)	Son to Charles Sitati	3 Acres
Stephen Wepukhulu Wanjala (3 rd Respondent)	Son to John Wanjala	1 Acre
<i>Richard Wotia Wepukhulu</i> (1 st Respondent)	1 st Respondent	1 Acre
Total	****	19 Acres

74. If the 2 lists above are merged, then it means that the present full inheritance of the total 42.2 acres originally owned by the deceased stands as follows:



Beneficiary	Land Inherited	Total Acreage
Richard Wotia Wepukhulu (1 st Respondent)	9.4 Acres in <i>South Malakisi/South Namwela 827</i> , 2 Acres in South Malakisi/South Namwela 828 and 1 Acre in South Malakisi/ South Namwela 119	12.4 Acres
2 nd Respondent (son to Charles Sitati Wepukhulu)	5.4 Acres in South Malakisi/ South Namwela 533 and 3 Acre in South Malakisi/ South Namwela 119	8.4 Acres
3 rd Respondent (son to John Wanjala Wepukhulu)	6.4 Acres in South Malakisi/ South Namwela 534 and 1 Acre in South Malakisi/ South Namwela/119	7.4 Acres
George Wanyonyi Silicho (Appellant)	7 Acres in South Malakisi/ South Namwela/119	7 Acres
<i>Esther Ayeko (widow to Moses Wakhungu)</i>	7 Acres South Malakisi/South Namwela/119	7 Acres
****	****	42.2 Acres

75. Right away, it can be seen how skewed the inheritance is in favour of the 1st and 2nd Respondents. This is definitely in breach of the provisions of Section 38 of the Act which provides that the estate “shall be equally divided among the surviving children”. This principle was stressed in the case of the Estate of John Musambayi Katumanga – Deceased [2014] eKLR held as follows:

“The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is ‘equally’ as opposed to ‘equitably’. This is the plain language of the provisions. The provisions are in mandatory terms – the property “shall ... be equally divided among the surviving children.” Equal distribution is envisaged regardless of the ages, gender and financial status of the children.”

76. I have carefully perused the Respondent’s Submissions filed before this Court and those filed before the trial Court and even their Affidavits with a view to finding out what their comments are regarding the application of Section 42 of the Act. Needless to state, that Section requires that where an intestate has, during lifetime given any property to or for the benefit of a child, grandchild or house, then that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.



77. I needed to hear the Respondent's thinking on why, in spite of the clear provisions of Section 42, they are still demanding for more land when they had already inherited enough land elsewhere from the father? I note however with curiosity that instead, the Respondents opted to maintain a conspicuous silence on the application of Section 42. My bet is that they chose to remain silent because they are aware that the Section 42 is against them. Even the DCC's Report did not at all make any reference to the principle that any earlier allocated properties ought to be taken into account.
78. I therefore find that the Learned trial Magistrate erred and misdirected herself when she treated the dispute before her as simply a matter of choosing between the proposal presented by the Appellant and the one presented by the Respondent. She appears to have treated the matter as if "her hands were tied" to the two choices. She seems to have felt that she was bound by the DCC's Report and the proposal given therein. Alternatively, she appears to have been greatly influenced by the Report.
79. With all respect, what the Learned Magistrate was required to do was to determine the distribution that would come nearest to the principle of "equality" of shares as demanded by Section 38 of the Act, not to feel bound or limited to the two choices.
80. For the said reasons, I am constrained to find that the 1st Respondent, Richard Wotia should not be considered in the inheritance of South Malakisi/South Namwela/119. This is because he had already been sufficiently catered for by being allocated a total of 12.4 acres of other pieces of land, 2 acres of which he even sold to a third party. He cannot sell part of his inheritance and then come back to demand a further share of the limited remaining land. To allow this will be to condone an injustice on the rest of the beneficiaries.
81. Although exclusion of the 1st Respondent from inheriting South Malakisi/South Namwela/199 will still not strictly achieve the "equality" demanded under Section 38 since he will still in the long run have remained with a much larger cumulative share than each one of the rest of the beneficiaries, only such exclusion can create some semblance of "equality" and "fairness".
82. This Court cannot do further since it will not be right to order for taking back of a portion of the land that had already been given to the 1st Respondent by his father. Further, the 1st Respondent has already built his home on South Malakisi/South Namwela/827 and has lived there for a considerable period of time and has sold South Malakisi/South Namwela/828 to a third party. I will not therefore disrupt his and his family's occupation thereof.
83. Having excluded the 1st Respondent from the sharing of South Malakisi/South Namwela/ 119, and with a view to trying as much as possible to achieve "equality", the final total distribution of the entire 42.2 acres initially owned by the deceased should attempt to bring out a final outcome to be reflected as follows:



Beneficiary	Land Inherited	Total Acreage Benefited
Richard Wotia Wepukhulu (1 st Respondent)	9.4 Acres in South Malakisi/ South Namwela/827 and 2 Acres in South Malakisi/South Namwela/828	11.4 Acres
2 nd Respondent (son to Charles Sitati Wepukhulu)	5.4 Acres in South Malakisi/ South Namwela/533 and <u>2.3 Acres in South Malakisi/ South Namwela/119</u>	7.7 Acres
3 rd Respondent (son to John Wanjala Wepukhulu)	6.4 Acres in South Malakisi/ South Namwela/534 and <u>1.3 Acres in South Malakisi/ South Namwela/119</u>	7.7 Acres
George Wanyonyi Silicho (Appellant)	<u>7.7 Acres in South Malakisi/ South Namwela/119</u>	7.7 Acres
Esther Ayeko (widow to Moses Wakhungu Wepukhulu)	<u>7.7 Acres South Malakisi/ South Namwela/119</u>	7.7 Acres
****	****	42.2 Acres

84. Considering South Malakisi/South Namwela/119 alone in isolation therefore, the above distribution is reflected as follows:

South Malakisi/South Namwela/119		
George Wanyonyi Silicho (Appellant)	Son to deceased	7.7 Acres
Esther Ayeko Wakhungu	Widow to Moses Wakhungu	7.7 Acres
Livingstone Wafula Sitati, (2 nd Respondent)	Son to Charles Sitati	2.3 Acres
Stephen Wepukhulu Wanjala (3 rd Respondent)	Son to John Wanjala	1.3 Acres
Total	****	19 Acres

Final orders

85. In view of the foregoing, this Court makes the following orders:



- i. Having already benefited by having been allocated sufficient separate land by the deceased during the deceased's lifetime, by virtue of Section 42 of the Law of Succession Act, Cap. 160, the 1st Respondent (Richard Wotia) will not be again considered in the distribution of the property known as South Malakisi/South Namwela/119. The 1 Acre share awarded to him by the trial Court shall therefore be re-distributed and re-allocated among the other survivors.
 - ii. Having also already marginally benefited by having been allocated a separate piece of land by the deceased during the deceased's lifetime, by virtue of Section 42 of the Law of Succession Act, Cap. 160, the 2nd Respondent's (Livingstone Sitatia) 3 acres share awarded by the trial Court in South Malakisi/South Namwela/119 shall be reduced to 2.3 acres.
 - iii. Despite having also already benefited by having been allocated a separate piece of land by the deceased during the deceased's lifetime, by virtue of Section 42 of the Law of Succession Act, Cap. 160, the 3rd Respondent's (Stephen Wepukhulu Wanjala) 1 Acre share awarded by the trial Court in South Malakisi/South Namwela/119 is still below his rightful entitlement and the same shall be increased to 1.3 acres.
 - iv. Having not benefited from any previous allocation of land, the Appellant's (George Wanyonyi Silicho) 7 Acres share awarded by the trial Court in South Malakisi/South Namwela/119 is below his rightful entitlement and the same shall be increased to 7.7 acres.
 - v. Having not benefited from any previous allocation of land from the deceased, the 7 Acres share awarded by the trial Court in South Malakisi/South Namwela/119 to Esther Ayeko, the widow to Moses Wakhungu is below her rightful entitlement and the same shall be increased to 7.7 acres.
86. The upshot of the foregoing is that I set aside the order of the trial Court on distribution, inheritance or sharing out of South Malakisi/South Namwela/119 and substitute it with the order directing that the property known as South Malakisi/South Namwela/119 be distributed as follows.

George Wanyonyi Silicho (Appellant)	Son to deceased	7.7 Acres
Esther Ayeko Wakhungu	Widow to Moses Wakhungu	7.7 Acres
Livingstone Wafula Sitati, (2 nd Respondent)	Son to Charles Sitati	2.3 Acres
Stephen Wepukhulu Wanjala (3 rd Respondent)	Son to John Wanjala	1.3 Acres
Total	****	19 Acres

DELIVERED VIRTUALLY, DATED AND SIGNED AT ELDORET THIS 28TH DAY OF APRIL 2023

.....
JOHN R. ANURO WANANDA
JUDGE

