



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Succession Cause 51 of 2001**

**IN THE MATTER OF THE ESTATE OF JEREMIAH RUPIA WAKWANALO .....  
DECEASED**

**PHILIP WAKWANALO RUPIA ..... 1<sup>ST</sup>  
PETITIONER**

**MOSES WAKWANALO RUPIA ..... 2<sup>ND</sup>  
PETITIONER**

**V E R S U S**

**CHRISPUS KEYA RUPIA .....  
OBJECTOR**

**R U L I N G**

The late **JEREMIAH RUPIA WAKWANALO** died on the 5.8.1987. He was survived by five sons from the same mother namely:

1. Moses Mukonza Rupia
2. Chrispus Keya Rupia
3. Aggrey Murunga Rupia
4. Peter Wakungu Rupia (deceased)
5. Philip Wakwanalo Rupia

His two sons Philip Wakwanalo Rupia and Moses Rupia petitioned this court for grant of letters of administration intestate and were issued with a grant on the 10.5.2001. The Objector herein, Chrispus Keya Rupia filed an application dated 8.1.2003 seeking to have the grant issued to the petitioners revoked. Parties agreed to proceed by way of affidavit evidence but the court directed that oral evidence be taken. By the time Justice Lenaola gave those directions the objector had closed his case and two witnesses had testified for the defence. Parties agreed that the matter proceed from where it had reached.

The objector's case is that he is the deceased's son and was left out in the petition. The deceased left land plot number **S/WANGA/BUCHIFI/288** measuring 23 acres, a posho mill, shop and six heads of cattle. The deceased had not distributed his land to his children. The objector was registered as the proprietor of plot number **S/WANGA/BUCHIFI/964** in 1966 and that was not part of the deceased's

estate. His brother **WAKUNGU RUPIA** was registered as the owner of plot number **965**. The graves of his parents are on his plot number **964**. He contends that he is entitled to inherit the deceased's land. his proposed mode of distribution as per his affidavit sworn on the 16.7.2010 is that the first born Moses take 5 acres while the other 4 children take equal shares of 4 ½ acres.

The petitioners on their part testified and called two more witnesses. Moses Mukonzo Rupia testified that he is the first born. Their father died in 1987 and their mother died in 1998. During his lifetime the deceased distributed his land. he gave the objector plot number **S/WANGA/BUCHIFI/964** measuring 14 acres, and he was registered in 1966 during the adjudication. Similarly plot number **S/WANGA/BUCHIFI/278** measuring 10 ½ acres was registered in the names of his brother Aggrey Murunga Rupia during the adjudication. The deceased also gave his son Peter Wakungu Rupia plot number **S/WANGA/BUCHIFI/965** measuring 9 ½ acres. The deceased also gave Philip Wakwanalo Rupia, the 1<sup>st</sup> petitioner, plot number **S/WANGA/BUCHIFI/963** measuring 3 acres. DW1 was not given any land and he was working that time. The deceased retained plot number 288 measuring 23 acres. Before he died he called his family and told them that he was going to give his first born son (PW1) 17 acres out of plot number 288 and the remaining 6 acres were to be to Philip Rupia who had only been given 3 acres. The land was divided and boundaries were fixed. When they filed the succession they did not include the other three sons as they were ones to benefit from the remaining land. The other properties that is to say three cows were given to their mother. The posho mill is under the management of the objector. There was KShs.125,000/= and it was divided equally amongst the five children. Their brother Peter Wakungu died in 2002. According to him the plot number 288 should be divided between the two petitioners as per the wishes of the deceased.

**DW2, PHILIP WAKWANALO RUPIA**, is the 1<sup>st</sup> petitioner and the last born of the deceased. He is in agreement with the testimony of his brother Moses (DW1). **DW3, CHARLES WETA WANDENGU**, testified that he used to be senior chief of the area. He knew the deceased and his children. In 1987 the deceased called him and told him that he was sick and wanted to divide his land plot number 288. He told him that he had 23 acres of land and his eldest son Moses was to get 17 acres and the younger son to get 6 acres. The deceased's wife was present. When the petitioners wanted to file the succession cause he gave them the letter to do so.

**DW4**, is **AGGREY MURUNGA RUPIA**. He is the deceased's son and a brother to the parties. His evidence is that the deceased distributed his land. He gave the objector plot number **964** measuring **14 acres**. He himself was given plot number **278** measuring **10 ½ acres** and his other brother Peter who is now deceased was given plot number **965** measuring **9 ½ acres**. Philip was given plot number **963**. The deceased told him that he wanted to give Moses his eldest son **17 acres** and the last born **6 acres** from plot number **288**. According to him, the objector is not entitled to inherit plot number **288** as he had already been given his land. At the time the deceased distributed his land Moses was working. The deceased retained plot number **288** and he used to cultivate it and it enabled him to pay school fees for Philip and himself. Chrispus the objector was also in school at Mumias. Their father told them in 1985 that he was giving plot number **288** to Moses and Philip so that the remaining **23 acres** would be completed. The objector is using his own land and should not get extra land.

The main issue for determination is how plot number **S/WANGA/BUCHIFI/288** measuring **23 acres** should be distributed. It is in agreement that the deceased left five sons and the list of beneficiaries is not in dispute. The extracts of all the plots mentioned in this cause indicate the following:-

<b>PLOT NO.</b>	<b>DATE OF OPENING</b>	<b>REGISTERED OWNER</b>	<b>ACREAGE</b>
964	16.11.1966	CHRISPUS KEYA	14 ACRES
963	21.4.1967	PHILIPO WAKWANALO	3 ACRES
278	21.4.1967	MURUNGA RUPIA	10.5 ACRES
965	21.4.1967	PETER WAKHUNGU	9.5 ACRES
288	21.4.1967	JEREMIAH RUPIA	23 ACRES

The objector maintains that plot number **964** is his as he was registered during adjudication. His other brothers were also registered during adjudication. On their part the petitioners maintain that the entire land belonged to the deceased and he is the one who gave it to his sons. During adjudication Moses was the only one working and the objector was in school at Mumias. Given the fact that all the plots were almost registered during the same time and the evidence on record shows that they are located at the same place, I do find that the entire belonged to the deceased. There was no reason for the deceased to have allowed his younger children including Philip to get land while the first born was not given. The deceased knew that he was going to leave plot number 288 for his first born son. The last born was only given 3 acres that time and the deceased felt that that was not sufficient and decided to add him an extra 6 acres. DW3, who the area chief did confirm that it was the deceased's wish that plot number 288 be divided into two and 17 acres be given to Moses and 6 acres to Philip. The parties' brother Aggrey did corroborate the objector's contention that the deceased had distributed his land. Aggrey got 10 ½ acres while the objector got 14 acres. It is clear from the evidence on record that the deceased had distributed his estate and I do agree with the contentions of the objectors.

**Section 42** of the Law of Succession Act Cap 160 states as follows:-

**42. "Where -**

**a) an intestate has, during his 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 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."**

I do find that the deceased gave some of his sons their land during his lifetime. The law allows property given during the lifetime of the deceased to be taken into account. The deceased's wishes was to give his first born son 17 acres, second born (objector) 14 acres, third born Aggrey 10 ½ acre, fourth born Peter (deceased) 9 ½ acres and Philip (last born) 9 acres. I do find that the deceased's wishes were reasonable and I have no reason to disturb it. The objector was given his own land and he should be satisfied.

In the end, I do find that the objection is not merited and the same is disallowed with no orders as to costs. The grant is hereby confirmed and shall be issued to the two petitioners. The deceased's remaining estate, comprising plot number **S/WANGA/BUCHIFI/288** shall be distributed as follows:-

- 1. Moses MukonzoRupia - 17 acres**
- 2. Philip Wakwanalo Rupia - 6 acres**

*Delivered, dated and signed at Kakamega this 7<sup>th</sup> day of February, 2013*

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