



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT BUNGOMA**

**P&A NO.93 OF 2002**

**In the matter of the late MAROMBO WANYONG'O.....DECEASED**

**AND**

**In the matter of title No.EAST BUKUSU/SOUTH NALONDO/422**

**AND**

**In the matter of section 76 (B) (C) & (D) II, III OF THE LAWS OF SUCCESSION ACT CAP 160  
LAWS OF KENYA**

**JULIUS MACHABE MAROMBO.....APPLICANT**

**~VRS~**

**AUGUSTINE WANJALA MAROMBO.....PETITIONER/RESPONDENT**

**JUDGMENT**

The deceased Marombi Wayongo died intestate on the 4<sup>th</sup> January 1973. He was survived by four (4) sons including the Petitioner and the Objector in this cause. The cause was filed by Augustine Wanjala Marombo herein referred to as the Petitioner. The grant was issued to Petitioner on 22/03/2004 and confirmed on 22/06/2005 in terms of the Petitioner's affidavit sworn on 1/11/2004. The only asset of the deceased was land reference number EAST BUKUSU/SOUTH NALONDO/422 measuring 5.6 hectares. It was to be shared among the four sons and two buyers as follows:

<b>S/NOS.</b>	<b>NAME</b>	<b>NO. OF ACRES</b>
<b>1.</b>	<b>JULIUS MACHABE MAROMBO</b>	<b>4 ½ ACRES</b>
<b>2.</b>	<b>JOSEPH SIKUKU MAROMBO</b>	<b>2 ½ ACRES</b>
<b>3.</b>	<b>THOMAS WEKESA MAROMBO</b>	<b>2 ½ ACRES</b>
<b>4.</b>	<b>AUGUSTINE WANJALA MAROMBO</b>	<b>1 ½ ACRES</b>

<b>5.</b>	<b>BEN WASWA</b>	<b>2 ACRES</b>
<b>6.</b>	<b>PETER KISUYA WANYAMA</b>	<b>1 ACRE</b>

The Objector Julius Machabe Marombo was aggrieved by the mode of sharing and also alleged that the Petitioner did not inform him and the rest of the family that he had filed this cause on behalf of the survivors of the deceased.

The objector therefore filed summons for revocation of grant dated 16/05/2005 but filed on 8/11/2005. Directions were given on the 14/02/2008. The case of the objector is that the Petitioner is the Objector's half – brother by the same mother but sired by one Paulo Khisia a step – brother to their deceased father. In that regard the Petitioner has no right to inherit from the deceased but from his biological father. The Petitioner was born after the death of the deceased and has been bought land elsewhere by his father. The Objector argues that being the surviving elder son, he is the right person to administer the deceased's estate. The objector also alleged that he was not informed by the Petitioner that this cause had been filed. He called his brother Thomas Wekesa Marombo (PW2) as his witness. PW2 testified that he is the son of the 4<sup>th</sup> wife and he follows the objector in the line-up of four (4) sons. Their brother is Joseph Sikuku while the Petitioner is a half brother born by their mother after death of the deceased. The biological father of the Petitioner has bought him land. PW2 did not support the objector's proposed mode of sharing but proposed that the grant be revoked and parties go home to deliberate on the sharing of land.

The Petitioner (DW1) testified that he is a son to the deceased by his fourth wife. He is a child of the deceased just like his elder brothers the Objectors, Thomas Wekesa and Joseph Sikuku. He said that he filed this cause on behalf of all the survivors of the deceased. This was after the clan of his father met and deliberated on the rightful heirs to the estate and their respective shares. DW 1 told the court that the objector was entitled to 6½ acres but had since the death of the deceased sold two acres to one Ben Waswa whom the Petitioner included among the beneficiaries. The Objector's share is now 4½ acres which the Petitioner gave him during distribution. He gave Joseph Sikuku 2½ acres and Thomas Wekesa (PW2) 2½ acres also. The Petitioner gave himself the smallest share of 1½ acres. At the time of filing the cause, the eldest son of the deceased Protus Khisa Marombo drew the list of distribution of the land according to the agreement of the clan elders. This proposed mode of distribution was the one followed by the Petitioner. Protus died in 2009 before this case was heard. During the meeting of the clan all the sons of the deceased were present and so was the 4<sup>th</sup> wife of the deceased, Marita Marombo and mother to the parties. Marita died in the year 2002 the same year that this cause was filed. The Petitioner denied that he is the son of one Paulo Khisia, the step brother of the deceased. He said he stays on the deceased's land he has no other land bought for him by Paulo Khisia. He uses the deceased's name as his 3<sup>rd</sup> name in his national identity card.

DW2 was the chairman of the clan who supported the Petitioner's evidence in every aspect as to Petitioner's blood relationship with the deceased, the clan's proposal of distribution of the estate and of the rightful heirs of the deceased. He produced the clan elders agreement in evidence and confirmed that all the sons of the deceased including the objector attended the meeting. Their mother Marita was also in attendance as the only surviving widow then.

Mr. Onchiri for the petitioner filed written submissions arguing that the Petitioner has proved his case and that the summons for revocation do not meet the requirement of section 76 of the Law of Succession Act.

There is no dispute that the objector, the Petitioner, Joseph Sikuku and Thomas Wekesa (PW2) are sons of the 4<sup>th</sup> wife of the deceased who died in 2002. The only dispute is that the Petitioner was fathered by another man other than the deceased. The issues for determination are two fold:

- a) **whether the Petitioner is a son of the deceased;**
- b) **whether the Petitioner is qualified to be appointed the administrator of the deceased's estate and;**
- c) **whether the grant should be revoked and the objector be appointed to replace the Petitioner;**
- d) **whether the Petitioner is a beneficiary to deceased's estate.**

It was the evidence of the Objector and his witness DW2 that the Petitioner's biological father is one Paulo Khisia. This allegation was opposed by the Petitioner and his witness DW2. The Objector did not give the necessary details on how Paul Khisia became the father of the Petitioner. Did Paulo Khisia inherit the mother of the objector or marry her after the deceased's death? Did Paulo and the surviving widow of the deceased cohabit together in a relationship where the Petitioner was born. When and where was the Petitioner born and where does he live? The Objector was legally bound to prove the allegations he made and which he was aware were denied. It is not enough to make an allegation without availing evidence in support. It was in cross-examination that the Objector said that the Petitioner was born in 1977 while the deceased died in 1973. The Petitioner denied this in his evidence and no proof of the year of birth was tendered.

From the land distribution agreement drawn by the elder son of the deceased pursuant to the resolutions of the clan, the widow of the deceased Marita was present. She participated in the discussions of distribution of her late husband's estate. If she was married to another man as alleged, the clan and her children including the objector would have protested. DW2 said the Objector and his brothers DW2 and Joseph Sikuku were present and did not object to the proposals. They were in fact part of the resolutions made by the meeting. The Petitioner uses the names Augustine Wanjala Marombo in his identity card. If the Petitioner was the son of Paulo Khisia, he would be using the names of Khisia as his official names.

Although the Objector said that their uncle Paulo had bought land for the Petitioner elsewhere, the land reference number, the location of the land or other details were not given in evidence. This was a very crucial issue to the Objector's case and it ought to have been addressed in his testimony. In his petition for letters of administration intestate (form P&A 80) the chief of Sirare Location, Bungoma District endorsed the petition for the Petitioner as the son of the deceased. In form P&A 5, the Petitioner's names all the four (4) sons of the deceased including himself as the survivors in order of seniority (in age). This is evident that the Petitioner had no intention whatsoever to disinherit his brothers. On confirmation of the grant, the Petitioner gave his brothers, the shares agreed on by the clan and family.

I find that the Objector has failed to prove that the Petitioner is not the son of the deceased and that he is the son of one Paulo Khisia. The court believed the evidence of the Petitioner and his witness that the Petitioner is the son of the deceased Marombo Wayong'o and that the succession cause was instituted for the benefit of all the surviving sons of the deceased who all got their respective shares. Being a son of the deceased, the Petitioner is entitled to petition for letters of administration intestate and is a beneficiary in that estate.

The summons for revocation of grant are supported by the affidavit of the Objector in which he alleges fraud in obtaining the grant. As I have explained above, there was no evidence of fraud adduced by the objector to support his case. In the absence of fraud, mistake or misrepresentation, the objector cannot sustain an application for revocation of grant.

Every beneficiary of the estate including buyers were catered for. The Petitioner indeed got the smallest share among the four sons of deceased. No beneficiary was disinherited.

It is my finding that the Objector has failed to prove his case on the balance of probabilities. The summons for revocation/annulment of the grant has no merit and is therefore dismissed. This being a succession cause involving members of one family, I find it not appropriate to award costs. Each party to meet their own costs.

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**F. N. MUCHEMI**

**JUDGE**

Judgment dated and delivered on the 7<sup>th</sup> day of March, 2011 in the presence of Mr. Onchiri for Petitioner for Were for Objector.

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**F. N. MUCHEMI**

**JUDGE**