



REPUBLIC OF KENYA



**In re Estate of Philip Wanjusi Waliaula (Deceased) (Succession Cause
104 of 2007) [2023] KEHC 20780 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20780 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 104 OF 2007**

DK KEMEL, J

JULY 21, 2023

IN THE MATTER OF THE ESTATE OF PHILIP WANJUSI WALIAULA - DECEASED

BETWEEN

FRANCIS KAMULI WANJUSI PETITIONER

AND

DAVID MARUTI KAMULI 1ST OBJECTOR

MARTIN SIANGI WANJUSI 2ND OBJECTOR

JUDGMENT

1. The late Philip Wanjusi Waliaula died on the April 11, 1989. The petitioner applied for and was issued with a grant of representation by this court on January 31, 2008. The petitioner then applied for confirmation of the grant by summons dated December 2, 2015. Upon the filing of the said summons for confirmation, the objectors filed affidavits in protest sworn on April 5, 2022.
2. The gist of their protest is that the deceased herein was survived by two widows; Dinah Khalunda and Salome Nabalayo both of whom are deceased whereas the objectors are Salome's sons.
3. They depone that the deceased left behind two parcels of land known as South Malakisi/North Namwela/569 and 574 out of which the deceased, prior to his death, transferred land parcel South Malakisi/North Namwela/569 to Dinah Khalunda and her two sons namely Peter Wanyonyi Wanjusi and Richard Wanyonyi Wanjusi wherein the said Richard, his wife and Dinah Khalunda were buried thereon.
4. They depone that their step brother one Nathan Waliaula was allocated by their deceased father 1½ acres out of land parcel South Malakisi/North Namwela/574 and the remainder was allocated to their mother and her three sons each getting 1 ½ acres.



5. They further depone that the petitioner who is their younger brother secretly took out letters of administration and has continuously managed the initial boundaries occasionally trespassing into their portions with the intention of disinherit them.
6. The petitioner on his part stated that their father had 16 children who comprised of six children with Dinah and 10 children with Salome. He admits that the deceased had two parcels which he bequeathed namely South Malakisi/North Namwela/569 to Dinah's house and the other portion was bequeathed to Salome's house.
7. He stated that their brother Nathan Waliaula was allocated land out of South Malakisi/North Namwela/569 together with his brothers Peter Wanyonyi and Richard Wanyonyi while David was given land in 1972 in Kolongolo by his mother Salome and therefore deserves no portion in South Malakisi/North Namwela/574 which ought to be shared between himself and the second objector.
8. The protest was canvassed by way of *viva voce* evidence. David Maruti testified as OB-PW-1. He adopted his witness statement dated April 5, 2022 and affidavit sworn on April 19, 2022 as his evidence in chief. His statement and affidavit is as reproduced above.
9. On cross examination, he stated that the bone of contention is in relation to land parcel South Malakisi/North Namwela/574. That the 1st house was catered for by the deceased prior to his death and that land parcel number South Malakisi/North Namwela/574 is supposed to be shared out between the petitioner and the objectors. He admitted that he lives in Kolongolo in Trans Nzoia County.
10. OB-PW-2 Martin Siangi adopted his statement dated 5/4/2022 as his evidence in chief which is a replica of the above summary.
11. On cross examination, he stated that he comes from the 2nd house. He admitted that the land in Kolongolo does not belong to the deceased and that both the objectors have land in Kolongolo which they bought. He admitted that the deceased hived out a portion from land parcel belonging to the 2nd house to cater for one son from the 1st house and the portion is occupied by his step brother's son.
12. OB-PW-3, Ruth Nakhungu adopted her statement dated April 5, 2022 as her evidence in chief. She states that she is the deceased's daughter and that her mother is Salome while the petitioner is her younger brother. She stated that her late father left behind parcel number South Malakisi/North Namwela/574 to be shared out among her brothers; Nathan Waliaula, David Maruti, Martin Wanjusi and Francis Kanui each getting 1½ acres. She stated that she had been summoned severally by the objectors over attempts by the petitioner to disinherit them.
13. On cross examination, she stated that the land in Kolongolo was bought by her brothers and not Salome. She stated that land parcel South Malakisi/North Namwela/574 can be shared out between her three brothers.
14. OB-PW-4 Mary Naliaka adopted her statement dated 5/4/2022 in which she states that she is the daughter of Salome. She reiterated that the land parcel ought to be shared out between her three brothers. She stated that she had been summoned by her brothers the objectors over attempts by the petitioner to disinherit them.
15. On cross examination, she stated that the 1st house was given land parcel number South Malakisi/North Namwela/569 while the 2nd house was given South Malakisi/North Namwela/574 which should be shared out between the three brothers.
16. For the petitioner, Francis Kamuli Wanjusi testified as PET-PW-1 and he reiterated the above stated summary as his evidence in chief.



17. On cross examination, he stated that land South Malakisi/North Namwela/569 was given to the 1st house while parcel No 574 was given to the second house. He averred that the deceased gave his brother Nathan two acres out of land parcel 574 while the 1st objector was given land in Kolongolo by their mother. He stated that the objectors are the ones in occupation of land parcel South Malakisi/North Namwela/574 as himself.
18. The parties were ordered to file their written submissions but only the objectors complied. Their submissions dated April 25, 2023.

Analysis and Determination.

19. I have given due consideration to the evidence tendered and the submission filed. The deceased herein was polygamous with two wives and several children. The fact that the deceased owned two parcels of land is also not in dispute. What remains for determination herein is the distribution of the estate. Two of the deceased's daughters OB-PW-3 and OB-PW-4 appeared in court and renounced their interest in the estate. They also told the court that their other sisters were married elsewhere and had no interest in the estate.
20. It also came out that there is a portion of land in Kolongolo in Trans Nzoia County which is owned and occupied by the 1st objector. There is however no evidence showing that the parcel was bought and or owned by the deceased. The petitioner indeed admits that the same was bought by Salome. My finding on this parcel is that whichever way, the parcel does not form part of the deceased's estate.
21. Regarding the two parcels; that is South Malakisi/North Namwela/569 and 574, the parties agree that the parcels measure 8 and 6 acres respectively.
22. The objectors assert that in land parcel South Malakisi/North Namwela/574, the deceased allocated his son Nathan 1 ½ acres and the other 4½ acres was shared out between the objectors and the petitioner each getting 1½ Acres.
23. The petitioner asserts that land parcel 569 was allocated to the 1st house (Dinah's) and that parcel No 574 was allocated to the 2nd house. That in land parcel 574, Nathan was given 2 acres and is now being occupied by Nathan's son. He proposes that land parcel 574 be shared out between himself and the 2nd objector.
24. With this mind, I gather that the objectors have taken issue with the fact that the petitioner does not want the 1st Objector to benefit from land parcel South Malakisi/North Namwela/574 for the reason that he has another parcel elsewhere. However, due to my finding that the parcel in Kolongolo does not form part of the estate, I hold that land parcel South Malakisi/North Namwela/574 ought to be shared out among the three brothers in addition to Nathan who has a portion therein.
25. Going by the evidence on record, I am satisfied that Nathan (deceased) settled on his portion by reason of occupation by his son. For the other brothers herein; the objectors and the petitioner, I find that the proposal that each of the three brothers each gets 1 ½ acres is sound and fair. It even establishes the deceased's wishes by settling Nathan thereon so as to achieve fairness.
26. In the circumstances, I find and hold that as relating to and portion South Malakisi/ North Namwela/574 be shared out in a manner that the objectors and the petitioner each gets the 1 ½ acres each and that Nathan's son who is in occupation of the 1 ½ acres also be given the portion.



27. As relates to land parcel South Malakisi/North Namwela/569, the same be shared out between Peter Wanyonyi Wanjusi and Richard Wanyonyi Wanjusi or whoever is in occupation if the deceased's son has died.
28. In view of the foregoing observations, I find merit in the protest by the Objectors. The grant issued on the 14/5/2009 is hereby confirmed on the foregoing terms and that the estate shall be distributed as captured vide paragraphs 26 and 27 above. As this is a family matter, there will be no order as to costs.

DATED AND DELIVERED AT BUNGOMA THIS 21ST DAY OF JULY 2023

D.KEMEI

JUDGE

In the presence of :

No appearance for Objectors

No appearance for Masiga for Petitioner

