



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 124 OF 1986**

**IN THE MATTER OF THE ESTATE OF WEPUKHULU WANAMBISI MAUNDENDE (DECEASED)**

**RULING**

1. I delivered a judgment herein on 26<sup>th</sup> June, 2020, wherein I required the administrators to do several things, to assist me distribute the estate of the deceased herein. They were to file a further affidavit, detailing the names of the wives of the deceased, indicating whether the said wives were alive or dead; the names of the children of each of the wives, indicating whether the children were alive or dead, and whether the children are male or female, whether married or unmarried; and, lastly, where any of the children of the deceased were themselves dead, list all the children of such dead children of the deceased, who would be grandchildren of the deceased, indicating whether they were male or female.

2. The two administrators, David Wafula Wepukhulu and Moses Maundende Wepukhulu, complied with the said orders of this court, by filing separate further affidavits, sworn 2<sup>nd</sup> September 2020 and 18<sup>th</sup> September 2020, respectively, outlining the survivors of the deceased. The survivors are identified as listed below: -

1<sup>st</sup> House

- i) Susan Nabalayo Wepukhulu      widow      deceased
- ii) Evanson Wafula Wepukhulu      son      deceased

He is survived by:-

- Christine Wafula Wepukhulu      daughter-in-Law      alive
- Everlyne Tawayi Wafula      granddaughter      alive
- Carolyn Wafula      granddaughter      alive
- Ceasor Wafula      grandson      alive
- Jesse Wafula      grandson      alive
- Brian Wafula      grandson      alive
- Abraham Wafula      grandson      alive
- Susan Wafula      granddaughter      alive
- Brenda Wafula      granddaughter      alive
- Angela Wafula      granddaughter      alive
- Lilian Wafula      granddaughter      deceased

iii) Mary Nabwile

Survived by one daughter (deceased)

Aggripina Nafuna Ochuna granddaughter alive

iv) Wilberforce Mutambo Malotelo Son alive

v) Risper Nasibwondi daughter deceased

Survived by:-

Rose Nanjala granddaughter alive

Beatrice Nasimiyu granddaughter alive

Christine Naliali granddaughter alive

Judith Nakitang'a granddaughter alive

Musa Sifuna grandson alive

vi) Teresina Nekesa Kachina daughter alive

vii) Joseph Wanambisi Wepukhulu son alive

2<sup>nd</sup> House

i) Bricor Nakhanu Wepukhulu widow alive

ii) Emily Lumonya Wepukhulu daughter alive

iii) Everline Ateya daughter alive

iv) Wilkister Nanjala daughter deceased

She is survived by:-

Tobia Simiyu grandson alive

Amos Nyongesa grandson alive

Kevin Barasa grandson alive

Claudio Sikuku grandson alive

Pamenous Simiyu grandson alive

Emmanuel Simiyu grandson alive

Tabitha Mukhwana granddaughter alive

v) Albert Ngutuku Wepukhulu son alive

vi) Favour Muchuma daughter alive

vii) Amos Wanambisi Wepukhulu son deceased

Survived by:-

Florina Nekesa Masinde daughter-in-law alive

Ruth Nekesa granddaughter alive

Bramwel Barasa grandson alive

Miriam Nafula	granddaughter	alive
Purity Nerima	granddaughter	alive
viii) David Wafula Wepukhulu	son	alive
ix) Rose Nanjala Richard	daughter	alive

3<sup>rd</sup> House

i) Beatrice Nanyama Wepukhulu	widow	alive
ii) Moses Maundende Wepukhulu	son	alive
iii) Fredrick Nyongesa Wepukhulu	son	alive
iv) Francis Muindi Wepukhulu	son	alive
v) Glanet Nakhumicha	daughter	deceased

She is survived by:-

Evergast Wambeye	grandson	alive
Masinde Khakula	grandson	alive
Joseph Khakula	grandson	alive
Elam Khakula	grandson	alive
Junior Khakula	granddaughter	alive
vi) Everlyne Nasimiyu Barasa	daughter	alive

3. The administrators have substantially complied with order relating to survivors of the deceased, save that they have not indicated the marital statuses of the survivors, although that may be of little consequence.

4. I had further directed that the administrators ensure that all persons beneficially entitled to the estate of the deceased sign a consent in Form 37, as required by Rule 40(8) of the Probate and Administration Rules, affirming the mode of distribution. A consent on distribution has been filed in court. It has been signed by Beatrice Nakhanu Wepukhulu, Christine Wafula Wepukhulu, Wilberforce Mutambo Malotelo, Joseph Wanambisi Wepukhulu, Moses Maundende Wepukhulu, Fredrick Nyongesa Wepukhulu, Francis Muindi Wepukhulu, Agglipina Nafuna Ochuma, Rose Nanjala, Evergast Wambeye, Everline Nasimiyu Barasa and Teresina Nekesa Kachila. The affidavits on the survivors of the deceased, as filed by the administrators, show 48 persons, as enumerated in paragraph 2, of this ruling. The consent is, however, signed by 12 persons. No affidavits have been placed on record by the remaining 36 survivors, to express their views on the distribution of the estate. Without the said affidavits, and in absence of consent by the 36, I shall take it that they opted leave the matter to the court, to distribute the estate strictly in accordance with the law.

5. The administrators were also directed to deliberate and give their final position on the alleged purchasers of some of the assets of the estate of the deceased. The alleged purchasers are Fred Wafula Ngichabe, Peter Khisa Wamukota, Bartholomew Juma Wafula, Eliud Makokha Bwile(Deceased), Wanambisi Stephen Juma, Benedict Wafula Kokonya, Amos Kunikina Marani, Petronila Khakasa Wati, Reuben Makokha Barasa, Mary Nelima Wanyama, George Makinda Nyongesa, Daniel Kweyu Maili, David Biketi Wati, Carolyne Naliaka Njalale/Allan Wafula Mabuka, Christine Naswa Sifuna, Fred Wamalwa Nyongesa, Concepta Naliaka Juma and Wickliffe Malaa Wakhungu. In his affidavit, David Wafula Wepukhulu offers no land to Fred Wafula Ngichabe, Peter Khisa Wamukota, Bartholomew Juma Wafula and Petronila Nafula, the wife of Elius Makokha Bwile. They agree to distribute to the rest of the purchasers. How the distribution will be made to these purchases, has, however, not been disclosed.

6. The court had also directed the administrators to state the law they would wish to apply in the distribution of the estate of the deceased. In his affidavit of David Wafula Wepukhulu, states that the deceased was from the Luhya community, Bukusu sub-tribe, and that he hailed from the Bakangala Clan. The administrator further indicates that they would wish for the customs of the Luhya Community, particularly the Bukusu sub-tribe to apply in the distribution of the deceased's estate. I note though that the administrators have not addressed me on the substance of the Bukusu customs on intestate distribution. It would appear that they are leaving it to the court to ascertain the said customs. Customs are a matter of fact, and I cannot ascertain the same in the absence of evidence being adduced. In the absence of that, I shall revert to Part V of the Law of Succession Act.

7. With the above in mind, I shall proceed to dispose of the estate of the deceased, guided by section 40 of the Law of Succession Act. The deceased died a polygamist. His household comprises of three houses, and, therefore, I shall distribute his estate according to the three houses, by taking into account the number of children in that house, adding any surviving widow in each house as an additional unit. After

allocating each house its portion based on the number of children in each house, each house shall thereafter share out its entitlement in terms of sections 35 to 38 of the Law of Succession Act.

8. The widow in the 1<sup>st</sup> house died. She had 6 children. 3 of the 6 children are also deceased, but they were survived by children. The 1<sup>st</sup> house, therefore, comprises of 6 units. The widow in the 2<sup>nd</sup> house is alive, and she had 8 children, 2 of who are dead, but were survived by children. That would mean that the 2<sup>nd</sup> house is comprised of 9 units. The widow in the 3<sup>rd</sup> house is also alive. She had 5 children, 1 of whom is deceased, but is survived by a child. The 3<sup>rd</sup> house, therefore, comprises of 6 units. The total units come to 21 units. The total estate, being East Bukusu/North Sang'alo/661, shall be divided into 21 units, which shall thereafter be shared out between the 3 houses, in the ratio of 6:9:6 or 2:3:2.

9. With regard to the purchasers, the position should be that the sales that were not upheld by the court in Kakamega HCCA No. 133 of 1989, remain invalid. It shall be up to the administrators to settle them, if they are inclined to, from the shares allocated to each of the houses, subject to consents from members of the houses. Where the purchasers bought land from the sons of the deceased, after the demise of the deceased, they should look up to the sons who sold the land to them.

10. The final orders, in the circumstances, are:

- (a) That the administrators are hereby confirmed to finalize distribution of the estate;**
- (b) That East Bukusu/North Sang'alo/661 shall be shared out in the manner set out in paragraph 8 of this ruling;**
- (c) That after the 1<sup>st</sup> house gets its share, the property shall thereafter be distributed amongst the children of the deceased equally, and where any of the children is dead, their children shall take their share and divided it equally amongst themselves;**
- (d) That after the 2<sup>nd</sup> and 3<sup>rd</sup> houses get their share, the same shall devolve upon the surviving spouse in each house during life interest, and thereafter, should the life interest determine, to the children equally, and if any of the children are dead, then the share accruing to the dead child shall devolve upon their children equally;**
- (e) That a certificate of confirmation of grant shall issue to the administrators in those terms;**
- (f) That each party shall bear their own costs; and**
- (g) That any party aggrieved by the orders made above, has leave of 28 days, to move the Court of Appeal, appropriately.**

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18<sup>th</sup> DAY OF June 2021**

**W. MUSYOKA**

**JUDGE**