



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**P & A NO. 36 OF 2009**

**IN THE MATTER OF THE ESTATE OF WANYONYI KISIANG'ANI**

**CHEKULO alias ENOCK WANYONYI KISIANG'ANI -DECEASED**

DAVID WANYONYI KHATETE.....1<sup>ST</sup> PETITIONER

JAMES WANYONYI SIMIYU KISUYA.....2<sup>ND</sup> PETITIONER

VERSUS

MELLAP WALELA.....1<sup>ST</sup> OBJECTOR

KESIAH NAMUBUYA NYONGESA.....2<sup>ND</sup> OBJECTOR

RACHAEL NAMIKOYE.....3<sup>RD</sup> OBJECTOR

HADIJAH NAKHANU.....4<sup>TH</sup> OBJECTOR

MARGARET NANJEKHO.....5<sup>TH</sup> OBJECTOR

AND

URSULLA NAMUSIA WAFULA.....1<sup>ST</sup> INTERESTED PARTY

MARY ROSOA WANGILA.....2<sup>ND</sup> INTERESTED PARTY

EMILY NEKOYE WANYONYI.....3<sup>RD</sup> INTERESTED PARTY

JANE KISIANG'ANI.....4<sup>TH</sup> INTERESTED PARTY

**JUDGEMENT**

The deceased Wanyonyi Kisiang'ani Chekulo alias Enock Wanyonyi Kisiang'ani died on 13<sup>th</sup> March of 2002. At the time of his death, he left 4 wives namely; Selina Naecho, Kellani Wanyonyi, Sarah Nanyama and Bilha Mideva. 15 sons and 9 daughters. He also left behind the following properties;

1. Kimilili/Kibingei/725
2. Kimilili/Kibingei/737
3. Kimilili/Kibingei/1193
4. Kimilili/Kibingei/759

The petitioners moved court for grant of representation to the estate. A grant was issued to them on 23/7/2009 and filed their summons for confirmation on 31/5/2011. In the summons for confirmation, they listed the following as the beneficiaries and or dependants of the

deceased.

1. David Wanyonyi Khatete
2. James Wanyonyi Simiyu Kisuya
3. Nathan Barasa
4. Edward Kisiang'ani
5. Evans Wanyonyi
6. Patrick Masika
7. Samson Wafula
8. Solomon Rocho
9. Edward Wekesa Lusweti
10. Andrew Nyaoke Kisiang'ani
11. Martin Kisianga'ani
12. Sabuni Wanyonyi
13. Anthony Savuni Kisiang'ani
14. Kennedy Khisa
15. Francis Nyongesa Wafula.

They also listed the deceased properties for distribution as follows;

**KIMILILI/KIBINGEI/1193**

1. David Wanyonyi Kibingei-----1.821 Ha
2. James Wanyonyi Simiyu-----1.821 Ha
3. Nathan Karasa-----1.416 Ha
4. Edward Kisianga'ani-----1.416 Ha
5. Evans Wanyonyi-----1.416 Ha
6. Patrick Masika-----1.416 Ha
7. Samson Wafula-----1.416 Ha
8. Solomon Rocho-----1.416 Ha

**KIMILILI/KIBINGEI/737**

1. Wekesa Lusweti to hold in trust for himself and family----1.82 Ha
2. Andrew N. Kisiangani to hold in trust for himself and family----1.82 Ha.
3. Martin Kisiang'ani-----1.416 Ha
4. Sabuni wanyonyi-----1.416 Ha
5. Anthony S. Kisiang'ani to hold in trust for himself and family----- 1.544 Ha

6. Kennedy Khisa-----1.416 Ha.

**KIMILILI/KIBINGEI/759**

Francis Nyongesa Wafula to hold in trust for himself and other family members.

Upon filing the summons as aforesaid, the objectors filed their separate affidavits objecting to the confirmation of grant. The basis of their objection is that the petitioners have left out other dependants of the estate. They depone that the daughters of the deceased have been left out. A letter from the area chief dated 15/3/2012 has been annexed showing that the deceased was survived by the following daughters;

1. Keziah Wanyonyi
2. Hadija Nakhanu Wanyonyi.
3. Recho Wanyonyi
4. Salome Nekesa Wanyonyi
5. Johness Wafula Wanyonyi
6. Grace Nanjekho Wanyonyi
7. Margaret Nanjekho Wanyonyi
8. Mellap Waleli Wanyonyi
9. Recho Namkoye Wanyonyi.

The letter further states that the deceased left a parcel of land known as Kimilili/Kibingei/725. This parcel is missing from the petitioners' list of assets constituting the estate.

On her part, Hadija Nakhanu filed an affidavit in protest to the confirmation stating that her late husband, Hatibu Rashid had bought a portion measuring 5 Acres out of land parcel Kimilili/Kibingei/1193 from the deceased herein. That her husband passed on before the title could be transferred to his name. She states that they have been living in the portion since 1966. That the petitioners have not disclosed that she has a claim on the parcel.

The interested parties on their part claim and interest on the estate on behalf of their late husbands who were sons to the deceased. They support the objector's case.

By directions of this court, parties filed their respective proposals on the mode of distribution. The objectors' filed their list as follows;

**KIMILILI/KIBINGEI/737-----9.4 HA**

1. Estate of Guy Joseph Lusweti-son (deceased)
  - a) Emily Lusweti----- 1. Acre
  - b) Edward Wekesa Lusweti----1. 5 Acres
  - c) Wycliffe Simiyu Lusweti-----1.5 Acres
2. Estate of Peterkin Kisiang'ani
  - a) Mary Wangila Kising'ani----1.0 Acre
  - b) Levi Kisiang'ani-----1. 0 Acre
  - c) Jaffer Kisiang'ani-----1. 0 Acres
3. Estate of Eliud Wanjala.  
Andrew Nyaoke Kisiang'ani----- 4.0 Acres
4. Martin Kisiang'ani---3.0 acres

5. Samuel Sabuni Enoch---3.0 Acres
6. Keziah Namubuya-----1.0 Acre
7. Hadija Nakhanu-----1.0 Acre
8. Margaret Wakhungu-----1.0 Acre
9. Melap Walela---1.0 Acre
10. Rachael Wakhungu---1.0 Acre
11. Anthony Welamondi Mulati (for Grace Nanjekhu)-----1.0 acre.

**KIMILILI/KIBINGEI/759-----2.2 HA**

1. Estate of Samson wafula-Deceased  
Ursulla Namusia Wafula—4.6 Acres
2. Salvation Army Church-----0.4 Acres

**KIMILILI/KIBINGEI/1193-----12.8181 HA**

1. As per the petitioners and their siblings' wish---27 Acres.
2. Buge Hatibu Wasioya-----1 Acre

**KIMILILI/KIBINGEI/725-----0.47 HA**

1. Buge Hatibu Wasioya---1.0 Acres

The petitioners filed their amended mode as follows;

**KIMILILI/KIBINGEI/737**

1. Estate of Guy Joseph Lusweti-4.5 Acres
  - a) Wekesa Lusweti-----2.25 Acres
  - b) Wycliffe Mocho-----2.25 Acres
2. Estate of Eliud Wanjala---4.5 Acres
  - a) Andrew Nyaoke Kisiang'ani---2,25 Acres
  - b) Sabuni Wanjala---2.25 Acres
3. Martin Kisiang'ani-----3.5 Acres
4. Samuel Sabuni-----3.5 acres
5. Estate of Peter Kisiang'ani---3.5 acres
  - a) Anthony Savuni—0.5 Acres
  - b) Levy Simiyu Kisiang'ani---0.5 Acres
  - c) Jaffer Mocho---0.5 Acres
  - d) Edwin Bisuche-----0.4 Acres
  - e) Benjamin Wamalwa---0.4 Acres

- f) Chrispinus Lusweti---0.4 Acres
- g) Godfrey Mukhwana---0.4 Acres
- h) Humprey Wanjala---0.4 Acres

6. Kennedy Khisa---3.5 Acres

**KIMILILI/KIBINGEI/759**

1. Estate of Samson Wafula Kasawa---5.4 Acres

- a) Patrice Wafula---1.4 Acres
- b) Paul Wafula-----1.3 Acres
- c) Francis Wafula---1.3 Acres
- d) Gabriel Milimo---1.3 Acres

2. Nasianda Salvation Army Church---0.4 Acres

**KIMILILI/KIBINGEI/1193.**

- 1. David Wanyonyi Khatete---4.5 Acres
- 2. James Wanyonyi Simiyu Kisuya---4.5 Acres
- 3. Nathan Barasa---3.5 Acres
- 4. Edward Kisiang'ani-----3.5 Acres
- 5. Evans Wanyonyi Kisiang'ani---3.5 Acres
- 6. Estate of Patrick Masika Wanyonyi---3.5 Acres
  - a) Michael Mocho-----0.875 Acres
  - b) Dan Masika-----0.875 Acres
  - c) Ronny Mukhwana---0.875 Acres
  - d) Joshua Khisa-----0.875 Acres

7. Samson Wafula-----3,5 Acres

8. Solomon Rocho---3.5 Acres

9. Estate of Hatibu Rashid

- a) Hadija Nakhanu----- 2 Acres

**KIMILILI/KIBINGEI/725.**

1. Eninga Enterprises-Namawanga-----1.1 acres

After careful scrutiny of the evidence, the followings facts emerge as being undisputed;

- 1. The deceased had 4 wives who are all deceased; Selina Naecho, Kellani Wanyonyi, Sarah Nanyama and Bilha Mideva.
- 2. The petitioners left out their sisters out of the succession proceedings leading to the issuance of the grant. Their consent was neither sought nor obtained.
- 3. The petitioners left out parcel number Kimilili/Kibingei/725 from the list of assets forming the estate.

4. Some of the dependants/sons of the deceased have since died and the respective portions are being allotted to their widows and or children.
5. Hatibu Rashid bought a portion of land from the deceased and both parties have ceded provision for his dependants.
6. The deceased had donated a portion measuring 0.4 Acres out of land parcel Kimilili/Kibingei/759 to Nasianda Salvation Army Church.

After careful perusal of the evidence, the following issues emerge for determination; whether the deceased's married off daughters ought to inherit from the father's estate and secondly; how the estate ought to be distributed.

On the first issue, it is not disputed that the objectors are the deceased's daughters. The law of succession act under section 29 defines a dependant as;

***(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;***

In *Mwongera Mugambi Runturi & Another -V- Josephine Kaarika & 2 others (2015) eKLR* held:

***“With the greatest respect, such full throttled patriarchy that flies in the face of current conceptions of what is fair and reasonable cannot stand scrutiny not least because it is plainly discriminatory of itself and in its effect. It is anachronistic and misplaced notwithstanding that it was (once) the norm for a vast majority of Kenya's communities. This Court has long accepted that a child is a child none being lesser on account of gender or the circumstances of his or her birth. Each has a share without shame or fear in the parents' inheritance and may boldly approach to claim it. What Rono -V- Rono (2005 IEA 363 decided about the prohibition of discrimination on grounds of sex under the retired Constitution applies with yet greater force under the current progressive Constitution of Kenya 2010.***

The contention by the petitioners that married-off daughters are not entitled to benefit from their father's estate is misplaced and is not tenable in the current constitutional dispensation which prohibits discrimination on the basis of gender. The daughters are equally entitled as their brothers and the petitioners' failure to include them in the process or obtain their consent is unlawful.

It is therefore the finding of the court that the objectors are equally entitled to inherit from their deceased father's estate.

On the issue of distribution, the relevant law on the distribution of a polygamous estate is contained in Sections 35-38 of the Law of Succession Act. Under Section 40, it is provided;

***1. Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.***

***2. The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.***

In *Mary Rono v Jane Rono & another [2005] eKLR*, it was held:

***My understanding of that section is that while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution still has a discretion to take into account or consider the number of children in each house. If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account.***

It is a finding of the court that the deceased having been polygamous, the estate should be distributed according to the houses. It is not clear though how many children each of the widows had. The list provided by the either parties is not helpful since each party gave a different number of children. It is not possible for the court to determine with certainty how many children the deceased left. Some of the deceased sons have passed on leaving widows and children surviving them. It is noted that the parties have made an allowance for this fact.

Similarly, it is a finding of the court that the deceased had sold a portion of land out of Kimilili/Kibingei/1193 to Hatibu Rashid. It is contested by the petitioners that the said Hatibu did not complete paying for the entire portion of 5 Acres and that he only paid for 2 Acres. The sale agreement shows that the said Hatibu paid only 3 Acres. As such, doing the best for the parties, the court holds that the estate of the said Hatibu Rashid be given 3 Acres out of land parcel Kimilili/Kibingei/1193.

The distribution of the deceased estate therefore shall be equally among the houses of;

- a) Selina Naecho
- b) Kelani Wanyonyi
- c) Sarah Nanyama

d) Bilha Mideva

**1. Kimilili/Kibingei/725-0.47 HA**

This parcel shall be distributed equally among the four houses.

**2. Kimilili/Kibingei/737-9.4 HA**

The parcel shall be distributed equally among the four households.

**3. Kimilili/Kibingei/1193-12.8181 HA**

a) Estate of Hatibu Rashid----- 3 Acres

b) The remainder shall be distributed equally among the four households

**4. Kimilili/Kibingei/759-2.2 HA**

a) Salvation Army church----0.4 Acres

b) The remainder shall be distributed equally among the four households.

For the avoidance of doubt, the widows whose husbands have since died ought to be given the share equivalent to what their husbands in the respective houses could have been given. Each party to bear their own costs.

**DATED AT BUNGOMA THIS 16<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**S.N. RIECHI**

**JUDGE**