



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

SUCCESSION CAUSE NO. 10 OF 1990

IN THE MATTER OF THE ESTATE OF THE LATE LASI WANJALA - (DECEASED)

JULIUS KUNDU WANJALA.....1ST PETITIONER

CHARLES WANYONYI SAENYI.....2ND PETITIONER

JUDGEMENT

1. The deceased herein died on the 17th September 1986 intestate. He was a polygamous man with 5 wives and several children.
2. Vide the objection proceedings dated 19th August, 1996 the objector **DIANA NASENYA WANJALA** filed her objection claiming that she was one of the widows of the deceased and had been left out of the Estate as well as the proceedings despite ranking above the Applicants who were essentially her step children.
3. She deponed that the Applicants had allocated themselves part of the deceased's Estate and had obtained title deeds in their names. The contentious parcels were **Bungoma /Ndalu/50 , 52, 60, 61, 64 and Bungoma /Soysambu/357**.
4. After a long and protracted time characterised by numerous applications and various counsels and judicial officers the matter was heard by way of viva voce evidence. Prior to these the following were jointly appointed as administrators:
 - a). **Julius Kundu Wanjala**
 - b). **Bernard Bifwoli Wanjala**
 - c). **Joseph Kwoba Tabuka**
 - d). **Francis Tala Wanjala**
5. They then proceeded to offer their evidence whose summary is as follows:
 6. **PW1 Dinah Nanjala Wanjala** testified that she was the surviving widow of the deceased. Her substantive contention was that Land Parcel Number. **Bungoma/Soysambu/357** was in the name of Julius Kundu Wanjala who according to her was holding it in trust for the rest of the family and in particular the deceased as he did not purchase it.
 7. She stated that **Land Parcel No. Kakamega / Moisbridge /61** was in the name of one Joseph Nakitare. That Parcel at Moisbridge should be in the name of Benedict. She said that she did not attend the elders meeting for she was not invited.
 8. **PW2 MACHANGA WABOBA** testified that he was a retired tractor driver and he knew the deceased who was equally a tractor driver for a European settler. That he was married to 5 wives and he purchased 5 pieces of land in 1967 and he had them registered in the names of his sons since the government did not allow one to own more than one piece of land.
 9. **PW3 CYRUS RICHARD BIFWOLI** testified that he resided in Parcel number 52 at Moisbridge and the objector was his mother. He said that his late father's wives were **TERESIA, LUKELESIA, REPAH, DINAH** and **SALOME**.
 10. He said that the deceased had **Plots Nos. 50, 60, 52, 61,64, and 357**. Plot number 50 measures 27 acres, Plot number 60 measures 27 acres , Plot No. 57 measures 70 acres , Plot No. 61 measures 27 acres, Plot No. 64 measures 27 acres and Plot No. 357 measures 15 acres.

11. He said that although he was allotted 18 acres out of land parcel number 52 her mother the objector should be given 27 acres like the rest of his brothers. He denied that he was privy to the meeting of 1997 where he was allotted 7 acres. According to him their house should be given 30 acres out of Parcel No. 52.

12. On cross examination he said that his father purchased the plots and not his brothers despite having the same registered in their names.

13. **PW5 FRANCIS TALA WANJALA**, who is one of the administrators and from the 4th house, testified that his mother was not involved in the administration of the estate as some of the properties were not included. These included **Parcels numbers 50, 61, 64 and 357** earlier mentioned. There was as well commercial properties left by his father which included **Plots numbers 7 and 8 at Makutano and Ndalul markets** respectively. He said that the deceased was a farm manager and purchased the properties in 1966 and that he used his sons names to have the properties registered since it was not allowed to have more than one parcel of land those days.

14. He contended that the deceased paid the loan as his brothers were young and school going and did not have any means of income. Although he died intestate he had settled his wives including his mother.

15. During cross examination he conceded that his elder step brothers by the year 1966 were of age namely above 18 years old. He said that he doesn't recall the deceased taking his brothers to Settlement Fund Trustee but that every property had a history of how it was purchased.

16. After closing their case it was the turn of the defence in which **DW1 LULAN KUNDU WANJALA** testified that he was born in the year 1938. That he schooled up to class 4 and began working for the white settler in 1954 where he was paid monthly salary of Ksh.30. He said that he purchased Land Parcel No. 50 as well as Parcel No. 357 which belonged to a Pokot man called **Karatum Techo**. He stated that he undertook Succession proceedings in respect to Parcel No. 357 since the owner died and he had left no known relatives. He said that the money for the purchase of plot 357 was nonetheless his despite the name in the register being that of Techo.

17. He produced the title deeds for the two parcels which were in his names. He denied the assertion that the parcels belonged to their deceased father. He stated that the objectors as well as their mother did not attend the family meeting called by the deceased on 18.1.1986 despite the invitation.

18. He stated that Parcel No. 52 was registered in the name of one **Karori Nachereti** who left it to the deceased.

19. On being cross examined he said that the deceased wanted to give the objectors their share in parcel No. 52 as they had caused him a lot of trouble including assaulting him.

20. **DW2 BENEDICT WANJALA** is deceased son from the 3rd house and he said Plot No. 52 though in the name of Nachareti belonged to the deceased. He said that in the year 1971 he went with the said Nachereti to the Settlement office where the land was changed to his name. He said that his interest is only by virtue of Succession proceedings otherwise he has no other interest in the land.

21. According to him the only plot purchased by his father was number 60 other than that his brothers were of age and they purchased their parcels.

22. **DW3 BERNARD BIFWOLI WANJALA** is a son of the deceased from the 3rd house who was born in 1942. He studied up to form 4 in Uganda where he completed in 1965 and was employed in the Ministry of Finance as a clerk. He said that when he came back to Kenya his father told him to buy land which he did by going through a vetting process at the District Commissioner's Office where he was given Parcel number 64. He paid a total purchase consideration of Ksh. 527. He also paid some loan and was eventually given the title deed in 1986 which he produced as part of the evidence.

23. He further testified that parcel number 61 was allotted to Joseph Nakitare from the 1st house. He said that they were schooling together in Uganda. He had been employed at Ndalat Scheme as a clerk. He was also among the people vetted at the District commissioner's office. He produced a copy of the title deed.

24. Concerning **Plots No. 7 at Ndalul market** and **Number 8 at Makutano market** he stated that the same belonged to the deceased although Number 7 has been taken over by the County Government.

ANALYSIS AND DETERMINATION

25. The court has heard the parties as well as perused the submissions from both sides. It is not in dispute that the deceased was a polygamous man and worked for the European settler. The issues that deserves determination is whether in the light of the evidence as presented one can say that the parcels of land which are already registered in the names of the deceased's son can be said that they belonged to the estate and thus they are holding them in trust.

26. Secondly, can it be said that pursuant to the family meeting held in the year 1986 in the presence of the deceased and in the absence of the objector, the deceased shared out his estate?

27. The court has perused the exhibits and copies of titles for **Land Parcel Number Kakamega / Moisbridge/50 and Kakamega/Moisbridge/61** in the names of **Joseph Nakitare** issued on 19th May, 1986, **Kakamega/Moisbridge/64** in the names of **Bernard Bifwoli** issued on 30th April 1986, and **Bungoma/Soysambu/357** in the names of **Julius Kundu Wanjala** issued on 8th October 2002. From the paper trail and the evidence placed before the court I am satisfied that the same does not form part of the estate herein. The above conclusion is reached based on the fact that the holders of the titles were already adults by the time they obtained and were at least

earning their own income. Each were able to demonstrate that out of their various sources of income they purchased the parcels.

28. It would, I suppose not been very difficult for the deceased if indeed he had bought or had been allotted the parcels not to have allowed his sons to have them transferred in their various names. By the time he died except for one parcel namely number 357, the rest were already in the names of his sons.

29. Apparently the paper trail especially from the settlement office clearly shows the names of the allottees as well as how the payments were done. It is equally interesting to note that the respondents or the registered owners have been in occupation of the parcels before and after the demise of their father without any let or hindrance from the objectors or the rest of the deceased family.

30. This court finds and concludes that parcels numbers **Kakamega/Moisbridge/61, Kakamega/Moisbridge /64 and Bungoma/Soysambu/357** does not form part of the deceased estate and thus incapable of being litigated in this cause. The claim against them is hereby disallowed.

31. Turning now to parcel number 52 Moisesbridge scheme, it was generally agreed that the same was in the name of the deceased. From the family meetings minutes of 18 January, 1986 and which was done in the presence of the deceased the same was shared out and the objectors given about 18 acres or thereabouts. Although the objectors claimed that they did not attend the meeting and that the deceased was ailing I do not agree with that line of argument for the simple reason that there were other senior members of the family who in my view would not have signed the minutes or the outcome of the meeting.

32. There followed another family meeting on 20th September, 1997 which distributed Parcels Numbers 52 and 60 respectively. A closer reading of the minutes of that date mirrors those of January 1986 especially the shares due to the objectors.

33. A report on record by the District Surveyor Bungoma District dated 1/11/2012 shows the actual ground situation of Parcels Numbers 52 and 60. It actually reflects the status of occupation by various family members which demonstrates that the objectors are on the portions as allotted to them by their father through the 1986 minutes.

34. Consequently and based on the evidence on board and taking into consideration the wishes of the deceased as expressed in the meeting of January 1986 earlier stated, I think it will not be in the interest of this court to reinvent the wheel. The deceased had a larger estate and dependants and he seemed to have directed his affairs early even at old age. He did so in the presence of his brother who chaired the meeting. Whether the objectors attended or not or whether they were invited in my view was the sole discretion of the deceased.

35. In light of the above observations I hold that the parcel of land namely Moisesbridge Scheme be shared out as follows;

A.) Parcel No. 52 A

- a. Fred Kundu.....2.1 acres**
- b. Julius Kundu.....6.1 acres**
- c. Nicholas Saenyi.....4.1 acres**
- d. Joseph Nakitare.....6.1 acres**
- e. Salome Wanjala.....1.6 acres**
- f. Lukelesia Wanjala.....4.1 acres**
- g. Benedict Elima.....8.1 acres**
- h. Patrick Saenyi.....6.1 acres**
- I. Repah Wanjala.....1.6 acres**
- j. Bernard Bifwoli.....6.1 acres**
- k. Dinah Nanjala.....3.1 acres**
- l. 6 acres.....to be sold**

36. The above land was to be sold for purposes of settling various loans to the estate and particularly those affecting Parcel Numbers 52 and 60 below. If the same still subsist then the deceased wishes be honoured.

B.) Parcel No. 52 B

- a. Richard Bifwoli.....7 acres**

b. *Albert Saenyi*.....5.5 acres

c. *Francis Mangara*.....6.5 acres

C) Parcel Number 60 Moisbridge Scheme be distributed as follows:

a. *Alfred Matandiko*.....6.7 acres

b. *Martin Saenyi*.....5.7 acres

c. *Wycliffe Bifwoli*.....5.7 acres

d. *Milimo William*.....5.7 acres

e. *Mark Barasa*.....6.7 acres

37. There was uncertainty regarding the two commercial plots and from the evidence on board it seems that the County Government Bungoma had taken one of them as a public utility. There was no evidence as such and I propose that the same be dealt with as per the minutes of 20th September 1997.

38. Plot Number 8 Ndalun market as hereunder

a. The developed side to be sold and the proceeds be shared out between the 4 houses.

b. The undeveloped portion be given to Joseph Nakitare.

39. **Plot Number 6 Brigadier (Mitua) market** to be shared out in equal shares among **Julius Kundu Wanjala, Richard (Cyrus) Wafula Wanjala** and **Alfred Matandiko Wanjala** in equal shares.

40. The court takes judicial notice of the fact that the beneficiaries may have over the years developed the portions as shown by the deceased. Care should therefore be taken such that at the sub division level of the above parcels it should be as proximate as possible to the developed portion of each one of them.

41. Further it is possible that some of the beneficiaries may have died in the process of this cause which has span over 20 years. The respective heirs or successors of those estates should be allowed to benefit and or inherit the respective shares directly.

42. Being a family dispute each party shall meet its respective costs.

Dated, signed and delivered this 13th day of May, 2019.

H.K CHEMITEI

JUDGE

13/5/19

In the presence of:

Chebii for the Objector/Respondent

No appearance for Karani for the Applicants

Court Assistant – Kirong

Judgment read in open court.