



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**SUCCESSION CAUSE NO. 21 OF 2015**  
**IN THE MATTER OF THE ESTATE OF MUNJI WASAKHA (DECEASED)**

**RULING**

1. The deceased herein, Munji Wasakha, died on 8<sup>th</sup> February 1970. A letter from the Chief of Likuyani Location, dated 15<sup>th</sup> September 2014, indicates that he had married four times the late Fridah Nelima, the late Juliana Namute, Elizabeth Munji and Alice Nakhanu. He was survived by two widows, Elizabeth Munji and Alice Nakhanu. He had twenty-two children. Those alive as at the date of the letter were listed as Daniel Wakhungu, Morris Wawire, Rosina Namalwa, Johnstone Otina, Cosmas Wanyonyi, Wilson Wasakha, Emily Masiaki, Joice Nafula, Steven Wanjala, Francis Wasakha, Peter Barasa, Rafael Wekesa, Joseph Wangila, Judith Mamaemba, Frankline Juma, Cleophas Simali, Samuel Wasakha, Jane Nasimiyu, Susan Muyoka and Thomas Wekesa. Those who had passed on were stated to be Ibrahim Mangemi and Nicholas Wekhichu. The deceased was said to have died possessed of a property known as Kakamega/Sergoit/123.
2. Representation to the estate was sought in this cause by the two surviving widows, Elizabeth and Alice. The deceased was stated to have been survived and the other persons listed in the letter from the Chief, referred to in paragraph 1 of this ruling, and to have had died possessed of the asset mentioned in that letter. Letters of administration intestate were made to the two widows on 14<sup>th</sup> March 2016, and a grant was issued to them on the same date.
3. A summons for confirmation of the said grant was lodged herein on 5<sup>th</sup> July 2016, dated 29<sup>th</sup> June 2016. It proposed distribution of the estate to Elizabeth Munji, Alice Munji, Daniel Wakhungu, Morris Wawire, Rosina Namalwa, Johnstone Otina, Cosmas Wanyonyi, Wilson Wasakha, Emily Masiaki, Joice Nafula, Steven Wanjala, Francis Wasakha, Peter Barasa, Rafael Wekesa, Joseph Wangila, Judith Mamaemba, Frankline Juma, Cleophas Simali, Samuel Wasakha, Jane Nasimiyu, Susan Muyoka, Thomas Wekesa, Ibrahim Mangemi and Nicholas Wekhichu. That would mean to all the persons mentioned in the Chief's letter, save the two wives of the deceased who were deceased. It was proposed that the property, Kakamega/Sergoit/123, be shared out equally at the rate of three (3) acres to each of the survivors listed, save for Cleophas Simali who was allocated two acres, Jane Nasimiyu was given four acres and Susan Muyoka was allocated 2 acres.
4. The administrators swore another affidavit on some unknown date, which was filed herein on 20<sup>th</sup> March 2017. It is headed affidavit of confirmation. They propose a distribution different from what they had proposed in the affidavit sworn on 25<sup>th</sup> June 2016. There are two parcels proposed for distribution here, Kakamega/Sergoit/123 and Plot No. 683 Namirama Scheme. They have attached a handwritten document in Kiswahili, which is not accompanied by an English translation, which states that there was a meeting on an undisclosed date in the presence of the Assistant Chief for Kongoni, a Mr. Moses

Mang'eni, where an agreement on settlement was reached. There is also an undated consent document signed by seventeen individuals, being Fridah Nelima, Juliana Namute Munji, Elizabeth Munji, Alice Nakhanu Munji, Daniel Munji, Abram Mang'eni, Maurice Wawire Munji, Johnstone Munji, Cosmas Munji, Franco Wasakha, Peter Munji, Raphael Wekesa Munji, Joseph Wanjala Munji, Wanjala Stephen Munji, Nicholas Munji, Frankline Munji, Samuel Munji and Thomas Munji. Although the names of Wilson Munji and Cleophas Munji are on the list, the two of them did not sign the same. I note that the names of some of the children of the deceased are not in the list at all. These are Rosina Namalwa, Emily Masiaki, Joice Nafula, Judith Mamaemba, Jane Nasimiyu and Susan Muyoka.

5. The proposal in the said affidavit, which purports to override the earlier proposal, proposes distribution of the two parcels of land as between the four houses of the deceased. So that out of Kakamega/Sergoit/123, the first house takes 13.5 acres shared out equally between Daniel Munji, Maurice Wawire and Abraham Mangeni. The second house takes 14.98 acres shared out unevenly between four sons in the house so that Johnstone Munji gets 3.4 acres, Cosmas Munji 3.22 acres, Wilson Wasakha Munji 4.3 acres and Tom Wekesa Minji 4.06 acres. The third house takes 19 acres shared out equally between Stephen Wanjala Minji, Francis Wasakha, Peter Munji, Raphael Wekesa and Joseph Wangila Munji. The fourth house is allocated 14.8 acres shared out unequally between four sons in that house, so that Nicholas Munji takes 7 acres, Frankline Juma 6.00 acres, Cleophas Munji 1.4 acres and Samwel Munji 1.4 acres. Plot No. 683 Namirama Scheme is also proposed to be distributed as between the four houses so that the first house got 5.4 acres, the second house 5.899 acres, third house 5.3 acres and fourth house 5.37 acres. The allocation to the first house is shared out between Daniel Munji 2 acres, Maurice Munji 1.9 acres and Abraham Munji 1.9 acres. The share for the second house is divided between Johnstone Munji 2.8 acres and Cosmas Munji, Wilson Munji and Thomas Munji 1 acre each. The share for the third hues is divided, Stephen Wanjala and Francis Wasakha get 1.15 acres each, while Peter Munji, Raphael Wekesa Munji and Joseph Wangila Munji get 1 acre each. The fourth house's share is distributed between Nicholas Sifuna Munji and Frankline Juma so that they get 2.5 acres each.

6. Another document was lodged in the cause on 16th July 2018 headed 'The Distribution of Bunyala/Namirama/683. It is a consent form for distribution of 8.4 hectares or 21.04 acres to Daniel, Maurice, Felistas Mangeni, Wilson, Cosmas, Johnstone, Francis, Stanley Were Onyimbo and Frankline Juma Wasakha. The shares are uneven.

7. The matter came up for hearing several times. In those occasions not all the survivors of the deceased attended court, and the court adjourned the matter to facilitate their attendance. That was on 11<sup>th</sup> October 2016, 26<sup>th</sup> October 2016, 24<sup>th</sup> November 2016, 14<sup>th</sup> March 2017, 25<sup>th</sup> April 2017, 16<sup>th</sup> July 2018 and 23<sup>rd</sup> October 2018. When I eventually reserved the matter for ruling at the hearing on 17<sup>th</sup> December 2018 only thirteen (13) survivors out of twenty-six (26) were in attendance. Out of the thirteen only three daughters were in attendance. The daughters had not been provided for in any of the proposed modes of distribution. The three daughters present addressed the court. Joyce Nafula Munji spoke as if she was the spokesperson for the six daughters of the deceased. She stated that the brothers were offering the daughters one acre each out of Kakamega/Sergoit/123. She said that the daughters were not interested in a share in Bunyala/Namirama/683, where the ancestral home is situated. Her position was unclear as to whether the daughters were claiming one acre or three acres each out of Kakamega/Sergoit/123. Jane Munji stated that she supported the proposals, but was unclear as to what exactly it was that she was supporting, whether the distribution as it appeared on a paper, or the proposal to give the daughters an acre each out of Kakamega/Sergoit/123. Two sons addressed the court, Wilson Munji and Daniel Munji. They said that they, and the surviving widows, sat down the daughters and offered them an acre each out of Kakamega/Sergoit/123, and the daughters agreed to that proposal.

8. The deceased herein died sometime in 1970. That was long before the Law of Succession Act, Cap 160, Laws of Kenya, came into force. Under section 2(2) of the Act, the substantive provisions of the Act do not apply to the estate of a person dying before the Act came into force, and that the law to apply to the estates of such persons was the law in force then. The deceased died during the period the subject of section 2(2) of the Act, and therefore the law to apply to the distribution of the estate is the law that governed the estates of a deceased African at that time. The deceased apparently died intestate, and therefore African customary law should apply.

9. The parties did not articulate to the court the particular African customary law that ought to govern the estate herein, neither was any attempt made to talk about the content of that law. African customary law of the various communities in Kenya is notorious. It is patrilineal, save for the Digo and the Duruma. The property of an intestate is shared out amongst the sons, daughters have no stake, save, in some communities, where they were unmarried and had had sons. Where the intestate had more than one wife, the general position is that the property would be shared out equally between the houses, after which the property would be distributed in each house amongst the sons in the house.

10. It will be noted that that law is discriminatory against the daughters. They have no claim to the estate. The assumption is that they play their role on the other side that is in the families into which they are married. See *Wambugi w/o Gatimu vs. Stephen Nyaga Kimani* (1992) 2 KAR 292, *Kanyi vs. Muthiora* (1984) KLR 712, among others). It is on that basis that the unmarried daughters would be considered to get a share in their parent's estate, but not the married daughters.

11. Kenya enacted a Constitution in 2010. Article 27 of that Constitution is on equality and freedom from discrimination. It states as follows –

*'(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.*

*(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.*

*(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.*

*(4) The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.*

*(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).*

*(6) ...'*

12. It may be argued that the law in section 2(2) of the Law of Succession Act allows application of African customary law which is discriminatory in its distribution of property as between the male and the female children of an intestate. The retired Constitution sanctioned such discrimination, however the clear language of the new Constitution outlaws such discrimination. I shall therefore hold that the estate herein is not available for distribution under Africa customary law as the same offends Article 27, and for that reason the same shall be distributed in a manner that gives effect to Article 27.

13. The question to ask at this stage should be whether the provisions of the Law of Succession Act on intestate succession are in accord with Article 27 of the Constitution.

14. Intestate succession is covered by Part V of the Act. Distribution of property amongst the children of an intestate is provided for under sections 35 and 38 of the Act. The two provisions state as follows -

*'35(1) ...*

*(2) ...*

*(3) ...*

*(4) ...*

*(5). Subject to the provisions of sections 41 and 42 and subject to any appointment or award made*

*under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, remarriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or equally divided among the surviving children.*

36 ...

37 ...

*38 Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.'*

15. The deceased herein was a polygamist, having married more than one wife under a system of law that allowed polygamy. Section 40 of the Law of Succession Act caters for the distribution of the estate of an intestate polygamist. Those provisions need to be considered alongside the provisions in sections 35 and 38 of the Act. Section 40 provides as follows –

*'(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.'*

16. Having considered these provisions as against the provisions of Article 27 of the Constitution, I hold that the three provisions accord with the constitutional provisions for they refer to distribution of estate property as between the children of the deceased, without making any distinction as between the male and female children of the deceased. I have perused through the definitions sections of the Act, and especially section 4 thereof, and I have not found any distinction made in there as between male and female children. The distribution provided for in Part V of the Act does not discriminate against the children, for it provides for equal distribution as between the male and female children of the deceased.

17. I have noted the pitch by the sons herein, that they sat with the daughters, and the surviving widows, and that they had offered the daughters an acre each out of the entire estate where ninety-four (94) acres were up for grabs. It must be stated Kenya is in a new constitutional dispensation. The male children of a deceased person do not have a superior claim to the estate of a deceased parent over the daughters. The property is therefore not available for the sons to dole out to the daughters as they please. Under the Constitution, 2010, men and women have equal rights. Men and women, in the context of Article 27 of the Constitution, as read together with Part V of the Law of Succession Act, should be read to include sons and daughters, when applied to matters of succession. That would mean that sons and daughters are entitled to share the estate of their departed parent equally.

18. I have come across three written proposals on the distribution of the estate of the deceased herein by the administrators. None of them have taken the rights of the daughters into account. All three proposals did not provide for any of the daughters. Indeed, the picture created is that the deceased did not have any daughters, or, if he had any, they did not matter, or count as survivors of the deceased. That clearly violates Article 27 of the Constitution.

19. I shall hold that the daughters of the deceased, the six of them, are entitled to equal share in the estate of the deceased with the sons of the deceased, to the two assets that he died possessed of. The application before me is brought under section 71 of the Law of Succession Act. Under that law I am empowered to postpone confirmation of the grant and to give further directions on the matter. This is an ideal case for doing that.

20. I shall dispose of the said application in the following terms -

- (a) That I hereby declare that the daughters of the deceased are entitled to equal share of the assets that comprise the estate of the deceased with the sons of the deceased;
- (b) That as a consequence of (a) above, I hereby postpone confirmation of the grant herein, and direct the administrators to revise the distribution proposed to accord with (a) above;
- (c) That to comply with (b) above I direct that the administrators shall file a further affidavit with proposals which cater for all the daughters of the deceased;
- (d) That the daughters not interested in a share of the estate shall file affidavits in which they shall renounce their entitlements;
- (e) That orders in (b) and (d) above shall be complied with within thirty (30) days of the delivery of this ruling;
- (f) That I shall only finalize confirmation upon compliance with the orders above, and the matter shall be mentioned after thirty (30) days to confirm the compliance;
- (g) That the mention date shall be given in open court at the delivery of this ruling;
- (h) That each party shall bear their own costs; and
- (i) That any party aggrieved by the orders that I have made herein above shall be at liberty to move the Court of Appeal appropriately within twenty-eight (28) days.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 14<sup>th</sup> DAY OF June 2019**

**W. MUSYOKA**

**JUDGE**

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