



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

**P & A CAUSE NO 86 of 2000**

**IN THE MATTER OF THE ESTATE OF THE LATE JUSTUS MUNYOLE NAKITARE**

**WILLIAM WANJALA MUNYOLE..... PETITIONER**

**VERUS**

**GRACE NAMAROME MUNYOLE.....OBJECTOR**

**JUDGMENT**

**BACKGROUND**

1.The deceased herein Justus Munyole died on the 6<sup>th</sup> of June 1983 at Sikuku village, Chwele, in Bungoma county (as is now known). During his lifetime he married two wives namely Susan Munyole as his first wife and Grace Munyole as his second wife. In a letter dated 23<sup>rd</sup> October 2010 the assistant chief of Chwele gave names of beneficiaries of the estate as follows;-

**1<sup>st</sup> house**

1. *Susan Nekesa Munyole – Widow*
2. *William Wanjala Munyole - Son*
3. *James Lubekho Munyole – Son*
4. *Charles Lubekho Munyole – Son*
5. *Wycliffe Sawenja Munyole – Son*
6. *Aggrey Wanyonyi Munyole – Son*
7. *Stephen Wakhungu Munyole – Son*
8. *Kennedy Sitati Munyole – Son*
9. *Alex Masika Munyole – Son*
10. *Priscilla Nasimiyu Wafula – Daughter*
11. *Jane Nafula Odipo – Daughter*

12. *Dorcas Nelima Barasa – Daughter*

13. *Mary Naliaka Wekesa – Daughter*

14. *Godwin Walela Munyole – Grand Son*

## **2<sup>nd</sup> House**

1. *Grace Namarome Munyole – Widow*

2. *Edward Mathani Munyole – Son*

3. *Stanley Kibichori Munyole – Son*

4. *Juliet Nangila Khisa – Daughter*

5. *Alice Musundi Munyole – Daughter*

6. *Juliet Nafula Munyole – Daughter*

7. *Ruth Matecho Munyole – Daughter*

2. The parties are in Agreement that all the above are beneficiaries save for Godwin Walela Munyole who the objector has taken issue with as he is a grandson.

3. The deceased died intestate and his estate comprises of properties; **Bokoli/Chwele/892** measuring 10.46 hectares which the first house occupies and **Bokoli/Chwele/1065** measuring 12.33 hectares being Occupied by the 2<sup>nd</sup> house.

4. Initially both widows lived on property L.R. Bokoli/Chwele/892 until a serious altercation occurred between the two, this both widows admit. As a result the deceased moved his 2<sup>nd</sup> wife to live in town and thereafter purchased Bokoli/Chwele/1065 where he settled her. Over time each widow occupied their portion till his death with their children and this has continued to date.

5. After the demise of the deceased, his eldest son from his first wife **William Wanjala Munyole** petitioned the Senior Resident Magistrate's court in Bungoma P & A Cause Number 5 of 1994 for a grant of letters of administration. He named his brothers from both homes and a grandson as beneficiaries. The widows and daughters were excluded.

6. Subsequently a grant was issued on 3<sup>rd</sup> November, 1994 and confirmed on the 2<sup>nd</sup> December, 1994 where all the two parcels were transferred to the said administrator.

7. The above triggered a flurry of cases and counter applications culminating in the matter before this court.

8. Armed with the confirmed grant dated 22.12.1994 the petitioner proceeded to obtain consent and caused to be subdivided the two parcels of land. The objector on the other hand lodged a caution against property **Bokoli/Chwele/1065** leading to an intervention by the clan. Sometime in 1996 she filed a claim with the Land Disputes Tribunal Case Number 6 of 1996 claiming the said land. In its award the tribunal found in favour of the Objector. The said award was subsequently adopted by court in Misc. Application No. 130 of 1996.

9. The petitioner being dissatisfied with the award appealed against the decision in Kakamega Appeals Committee in Appeal Case No. 11 of 1997.

10. In the meantime, the objector using the award in her favour registered herself as owner of the piece of land in contention and obtained a title on 18.6.1999. On 23.9.2000 the Appeals Court affirmed the award to the 2<sup>nd</sup> widow.

11. Despite events at the Land Dispute Tribunal the Petitioner sought by an application, dated 16<sup>th</sup> June 2000, for equal distribution of the estate among the sons and a grandson. Although the objector's counsel filed an appointment and a preliminary objection in succession cause no. 50 of 1996 the record is not cleared of what became of the application. As the high court was thereafter moved in unclear circumstances either by way of transfer of the matter or by consent of the parties.

11. At the first appearance before this court on 23<sup>rd</sup> January 2001 the advocate for the objector indicated that the objector to the issuance of the grant. On 5<sup>th</sup> October 2001, Ang'awa Judge struck out of the application for confirmation for failure to comply section 44 (3) and form P & A 68, 8,9, & 37 of probate and administration rules and the applicant was directed to file a fresh application.

12. Pursuant to the above order the administrator filed a fresh application for confirmation on 23<sup>rd</sup> September 2002 and in this instance he gave names of sons, daughters, a grand son and two

13. On the date set down for highlighting of submissions only counsel for the petitioner was in court. None the less the court has considered submissions by both sides which may be summarized as follows;

### **18. Objector's submission**

Parties are the son of the 1<sup>st</sup> widow (petitioner) and the 2<sup>nd</sup> widow (objector) and the issue for determination is whether the parties continue ought to occupying portions in their possession since time immemorial or should the court redistribute amongst the beneficiaries in proportions suggested by the petitioner.

The objector argues further that the issue in dispute has been resolved by the Nalondo Land Disputes tribunal, the Kakamega land Appeals committee and the clan who all were for status quo.

### **19. Petitioner's submissions**

On his part the petitioner submits that, in his application for confirmation now pending, he listed all the children of the deceased, one grandchild and 2 widows for purposes of distribution of the two parcels of land yet the objector only listed her family, proposing that her 3 sons get more acreage of land from the estate and her 4 daughters 1 each whereas in his proposals the sons were to get equal shares one unmarried daughter 1.5 and the objector 2.

According to the petitioner the issues for determination are; - what was the intention of the deceased? And what is the applicable law.

It is argued for the petitioner that the intention of the deceased is not known. He left two parcels of land measuring 26 & 30 acres. The first family comprises 12 children and a grandchild and the second 6 children, and therefore the intention of the deceased could not be that the first house should be confined to the 26 acres they occupy and the second with 6 to 30 acres. Occupation was coincidental. Further this court must be guided by Section 40 of the Law of Succession Act and the properties distributed based on the number of children in the two homes.

20. Having considered the pleadings, submissions by counsel representing the parties, it is evident the parties are in agreement on the following:-

- a. The deceased had two wives. The first house with 12 children and the second with 6.
- b. The deceased settled the first family on L.R No. Bolkoli/Chwele/892 measuring 28 acres and the

second on L.R NO. Bokoli/Chwele /1025 measuring 30 acres.

c. The deceased died intestate on the 6<sup>th</sup> of June 1983 and despite several suits the families occupy the portions where the deceased left them.

d. The deceased had not settled any of his children.

21. The issues therefore for determination is how the estate should be distributed, whether the could should sustain the arrangement of the widows and their children on respective parcels or not, and the applicable law.

Since the deceased died intestate the applicable law is the law of Succession Act Chapter 160 of the laws of Kenya. No will was left behind and the court cannot speculate what the intentions of the deceased were. None of the beneficiaries have renounced their interest in the estate and therefore the court proposes to consider all of them as beneficiaries of the estate.

22. The applicable law in regard to distribution of the estate polygamously deceased is Section 40 of the law of Succession Act which provides;

**“where an intestate has married more than once under any system 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...”**

23. It therefore follows that all the children of the deceased including daughters and the widows are entitled to inherit the Estate as equally as provided by the law. The court however takes note of the averment by the petitioner that his mother the first widow is 90 years and lays no claim over the Estate. The court also takes note that although this dispute has been protracted and has persisted for long none of the daughters have come forth to lay claim except one unmarried daughter in the second house. This can only mean that the other daughters are content where married and have no claim over the Estate. As for the grand son it was not established why he should inherit from his grand father as his interest ought to be captured through his parent who ought to be a beneficiary. The court was not informed who his parent is.

24. The objector in her case pursues the argument that her deceased had given her the land because he bought and settled her there. Is this the position?

**In Dan Ouya Kodwar versus Samuel Otieno Odwar and another SUCC.NO. 142 of 2015**  
Mrima J stated *inter alia*;

**“There are only two types of gifts in law. There are those gifts between living persons (*gift inter vivos*) and those in contemplation of death (*gift mortis causa*)”**

**In Re Estate of the Late Gedion Manthi Nzioka 2015 eKLR** P.Nyamweya J also considered the subject.

She held that Section 31 of the law of succession dealt with gift in contemplation of death. And in considering this type of gift the court is obligated to consider provisions of Section 31(a) & (f). The gift would only arise where the death of the donor was contemplated.

For gift *inter vivos* she stated

**“the requirements of the law are that the gift may be granted by deed, an instrument in writing, by way of a declaration of trust by the donor or by way of resulting trust or presumption of. Gifts of land must be by way of transfer, or if the land is not registered it must be in writing or by declaration of trust in writing. Gifts *inter vivos* must be complete for the same to be valid....”**

25. It emerges therefore that during his life time the deceased herein did not distribute or gift any of his properties either to his children or the wives as no evidence to that effect was placed before court and therefore both properties are available for distribution under Section 40 of the law of succession, which section further requires equitable distribution of the property taking into consideration circumstances surrounding the case.

**Rono versus Rono Civil Appeal No. 66 Of 2002** in an Estate intestate Waki JA stated;

***“ I think, in the circumstances of this case there is considerable force in the argument by Mr. Gicheru that the Estate of the deceased ought to have been distributed more equitably taking into account all relevant factors and the available legal provisions....”***

While agreeing with Waki JA, Omolo JA in clarifying the law stated;

***“.. while agreeing broadly with that judgment, I nevertheless wish to point out that I do not understand the Learned Judge to be laying down any principle of law that the law of Succession Act, Cap 160 of the Laws of Kenya lays down as a requirement that heirs to a deceased person must inherit equal portions of the estate where a deceased dies intestate and that a judge has no discretion but to apply the principle of equality as was submitted before us...”***

***“My understanding of that section is that while the net estate is to be distributed according to houses, each house being treated as a unit, yet the judge doing the distribution still has discretion to take into account the number of children in each house.....”***

***Nor do I see any provision that each child must receive the same or equal portion...”***

24. Guided accordingly and putting all factors together and in the circumstances of this case I am of the view that the most equitable way of distributing the property would be to consider both properties for distribution to the heirs as a whole, the same being available to all but maintaining the heirs where they currently are located as much as possible as follows:-

### **1<sup>st</sup> House**

1. William Wanjala Munyole Bokoli/Chwele/892 5 acres
2. James L. Munyole Bokoli/Chwele/892 ) 2.28 acres Bokoli/Chwele/1065 ) 2.8 acres
3. Aggrey W. Munyole Bokoli/Chwele/892 4.8 acres
4. Patrick N. Munyole Bokoli/Chwele/892 4.8 acres
5. Estate of Alex M. Munyole Bokoli/Chwele/892 4.72 acres
6. Estate of Wycliffe Munyole Bokoli/Chwele/1065 4.72 acres
7. Stephene W. Munyole Bokoli/Chwele/1065 4.72 acres
8. Kennedy S. Munyole Bokoli/Chwele/892 4.8 acres

### **2<sup>nd</sup> House**

1. Grace Namarome Munyole Bokoli/Chwele/1025 2 acres
2. Estate of Hannington Munyole Bokoli/Chwele/1025 4.72 acres
3. Estate of Edward Munyole Bokoli/Chwele/1025 4.72 acres

4. Stanley Munyole Bokoli/Chwele/1025 4.8 acres

5. Juliet A. Munyole Bokoli/Chwele/1025 2. acres

25. This being a matter involving a family I will order that each party bears their own costs

**DATED** and **Delivered** in **Bungoma** this 20<sup>th</sup> day of January 2017

**ALI-ARONI**

**JUDGE**