



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

**SUCCESSION CAUSE NO.43 OF 2002**

**IN THE MATTER OF THE ESTATE OF:**

**NOAH WANJALA KIMAWACHI.....DECEASED**

**ABRAHAM WANJALA MURUMBA .....PETITIONER/RESPONDENT**

**VRS**

**1. TIMOTHY SIMIYU WAKAPISI WANJALA)**

**2. PATRICK WAFULA WANJALA )**

**3. GEORGE MULONGO WANJALA )**

**4. JOSEPH MASETE WANJALA)**

**.....OBJECTORS/RESPONDENTS**

**AND**

**1. JOHN WACHANA WANJALA KIMAWACHI)**

**2. JACKSON WANYONYI WANJALA )**

**3. STEPHEN NABIE**

**WANJALA )**

**4. DAVID WAMUKOTA WANJALA)**

**.....BENEFICIARIES/APPLICANTS**

**JUDGMENT**

1. Noah Wanjala Kamwachi (hereinafter “*the Deceased*”) died intestate on 9<sup>th</sup> May, 1998 at Chwele, Bungoma. He left behind eleven (11) sons as beneficiaries and a property known as Title No. Bokoli/Chwele/327. According to the record, the beneficiaries of the estate were:-

- a. Peter Wanyama Wanjala
- b. Timothy Simiyu Wakapisi Wanjala
- c. George Mulongo Situma Wanjala
- d. Jackson Wanyonyi Wanjala
- e. Abraham Murumba N. Wanjala

- f. Joseph Masete Wanjala
- g. John Wachana Kimawachi Wanjala
- h. David Wamukota Wanjala
- i. Stephen Nabie Wanjala
- j. Jacob Wataka Wanjala
- k. Patrick Wafula Wanjala

2. The deceased had three houses (wives). Initially, the Petitioner was Abraham Murumba N. Wanjala who however passed on before the Succession Cause was concluded. Accordingly, for equitable representation, the Court asked each house to appoint or elect a representative to act as the administrators. On the proposal by each house, on 1<sup>st</sup> April, 2014, the Court appointed the following as the administrators. On the proposal by each house, on 1<sup>st</sup> April, 2014, the Court appointed the following as the administrators of the estate of the deceased:-

- a. Timothy Wakabisi Wanjala                      -1<sup>st</sup> house
- b. Jackson Wanyonyi Wanjala                      -2<sup>nd</sup> house
- c. John Wachana Wanjala                              -3<sup>rd</sup> house

3. At the hearing of the objection proceedings, the court heard testimonies from six (6) witnesses. PW1, Timothy Wanjala was the administrator representing the 1<sup>st</sup> house. He told the court that the only asset comprising the estate was the property known as Title No. Bokoli/Chwele/327 (hereinafter "*the suit property*"). That the same measured approximately 30 acres. That on 8<sup>th</sup> January, 1995, the deceased did divide his land amongst 10 of his sons giving each 2 acres. 10 acres were left because the deceased wanted to use the same for himself, his wives and cows. That since 2000, one of the beneficiaries John Wachana Wanjala has been using five (5) acres left behind by the deceased after his demise in 1998. He admitted that after the division of 08/1/1995, all the beneficiaries signed a distribution agreement whereby each of them continued to use his portion until the deceased passed on. Accordingly to him he was opposed to John Wachana Wanjala inheriting the entire five (5) acres left behind by the deceased.

4. PW3 was Jackson Wanyonyi representing house No.2. he testified that during the distribution of 8/1/95, conducted in the presence of the clan members whilst all the other beneficiaries got 2 acres each, John Wachana Wanjala was given five (5) acres. All the beneficiaries signed the distribution list. A year later however, the deceased called the clan members and added him 1 acre to make a total of 3 acres. According to him, the suit property measured 27 acres. He urged the court to retain the distribution as undertaken by the deceased.

5. John Wachana Kimawachi Wanjala PW3 told the court that under instructions and direction of the deceased, on 8/1/95, over 40 elders from the Baliuli clan to which the deceased belonged supervised the division of the suit property. Each beneficiary was given 2 acres whilst the deceased left 5 acres for the deceased use, his wives and cows. That a distribution list was prepared and all the beneficiaries executed. That the deceased indicated he, John Kimawachi was to take the share of the deceased as shown in the distribution list. He confirmed that later on, one more acre was allocated to PW2 when it was found that the five (5) acres left for PW3 were actually six (6). He told the court that all the beneficiaries continued to occupy and use their portions as identified by the deceased until after his demise when the disputes arose. He complained that PW1 and Patrick Wafula's children were now interfering with the portion given to him. He referred the court to land tribunal proceedings that had ordered that the deceased direction on distribution be respected.

6. PW4, John Wasige Wachana Nabibia told the Court that he was the Chairman of the Waliuli clan form which the deceased belonged to. That on 8/1/95 the deceased called elders to his home whereby he, PW4, chaired the distribution of the deceased's land whereby each of the ten (10) sons of the deceased got 2 acres each. The deceased directed that the remaining five (5) acres remained for him, his wives and John Wachana. That the distribution was under the authority and direction of the deceased. That a year later the deceased once again summoned the Waliuli Elders and added one (1) acre to PW2. That one of

the deceased's children Peter Wanjala who had never been seen for a long time and who was believed to have gone to Uganda also got 2 acres.

7. OW1 Joseph Masete Wanjala was a son of the deceased from the 3<sup>rd</sup> house. Whilst he admitted the distribution of 8/1/95 was done; the deceased was seriously ill and did not know what he was doing. That the division was undertaken by the clan members and not the deceased. He produced medical reports Dexh1 and 2 to show that the deceased had been taken ill in 1993. That the extra one (1) acre given to PW2 was as a result of PW2 bribing PW4 with some goats. According to him the distribution was a result of inter house rivalry. He called two witnesses OW2 and OW3.

8. OW2, Henry Wafula Munyole the Chief of Chwele Location told the Court that he was an Assistant Chief in 1995 when the distribution took place. That the deceased was in his right mind, health and was the one who directed the distribution. That all the beneficiaries agreed to and signed a distribution agreement that was before court and he had referred his letter of 22/4/2012. According to him, disagreements started after the demise of the deceased. OW3, Zacharia Nyongesa Msembe related what the rest of the witnesses had told the Court about the distribution. He however, explained that the deceased added PW2 one (1) extra acre because the 1<sup>st</sup> house had taken 8 acres. That the 2<sup>nd</sup> house represented by PW2 had only received 2 acres.

9. That was the evidence of the parties at the trial. Counsels asked the Court to write the judgment based on the evidence presented. After considering and evaluating the evidence, I consider the following to be the issues for determination:

- a) Was there distribution of the estate of the deceased before his demise; if so how was it undertaken?
- b) Should that distribution stand or the same should be set aside?
- c) What should be done to the share of Peter Wanjala?

10. As early as 17<sup>th</sup> April, 2002, (DExh3) Henry W. Munyole, Chief Chwele Location wrote to the Deputy registrar of this Court, *inter alia*, that:-

***“I confirm further that the deceased prior to his death, he invited his clans' relative at his home on 08/01/95 and demarcated his land to his heirs (See the attached photocopy of the demarcation process). All the deceased's heirs were given lunch.”***

11. When he testified before me on the 07<sup>th</sup> April, 2014 as OW2, Mr. Munyole recalled that, on 08/01/95, then an Assistant Chief in the area where the deceased hailed from, he was among those elders who oversaw the deceased divide the suit property amongst all his sons. Mr Munyole further identified the distribution list that was prepared by the elders and signed by all the sons/beneficiaries of the deceased. This evidence was echoed by all those who testified in this matter. All were agreed that the suit property was divided amongst the beneficiaries by the deceased himself with the assistance of his clan elders. Some of those elders from the Baliuli clan appeared and testified to that fact. These were Mr. John Wasige Nabibia (PW4) the Chairman of the Baliuli clan and Zacharia Nyongosa Msembe (OW3).

12. All the witnesses were in agreement that after the division of the suit property, all the sons of the deceased were agreeable with the same and signed the distribution list. The witnesses were also in agreement that before the deceased died three (3) years after the said division, none of the sons complained about the said division, none of the sons complained about the said division and that disputes only arose after the demise of the deceased. In the circumstances, I find that the deceased had divided and/or distributed his estate before his demise.

13. As regards the nature of distribution, all the witnesses were in agreement that on the said 08/1/95, each of the 10 sons of the deceased was allocated two (2) acres. That one of the children, John Wachana Kimawachi Wanjala (PW3) was not allocated but that the five (5) acres meant for us by himself would be

reserved for PW3. The Court was shown the distribution list dated 8<sup>th</sup> January, 1995. The same had twelve names being eleven (11) sons of the deceased and the deceased himself. It was for division of title Plot No. 327/Chwele/Bokoli/Bungoma. It was shown to be 27 acres.

14. That document which was produced in the Affidavit of evidence of PW3 showed that 10 of the deceased's children were to get two (2) acres each. The deceased was allocated 5 acres. On entry No. 9 for PW3, it was indicated "see No. 1", meaning the entry for the deceased. The witnesses told the court that it meant that his share was that of the deceased. All the children signed against their respective shares. PW3 signed against his and the deceased's shares. The document was witnessed by the Chairman of the meeting PW4, the Secretary and the deceased himself.

15. There was also evidence that a year after the distribution of 08/01/95, the deceased once again called yet another meeting of the elders and his sons and allocated one (1) more acre to PW2. According to OW3, this was necessitated by the fact that what was thought to be five (5) acres reserved for the deceased turned out to be more by one (1) acre. That since the 1<sup>st</sup> house had received 8 acres and the 3<sup>rd</sup> house 12 acres, the deceased felt that PW2 should have one (1) extra acre to make three (3) acres for the 2<sup>nd</sup> house.

16. Despite all the evidence, OW1 Joseph Masete Wanjala told the court that at the time the suit property was being divided, the deceased was very sick; that he could not talk and was only communicating by signs, that the five (5) acres he had reserved for himself was meant for redistribution to all the sons; that the one (1) acre added to PW2 was by PW4 after having been induced by PW2 who used three (3) goats for that matter. He produced O.Exh. 1 and 2 being treatment notes for the deceased for the year 1993 to support that the distribution undertaken in 1995 by the deceased could not stand. I think the objector would like a redistribution part of because it turned out that he has already sold part of his portion and sees the same to be small.

17. I have considered and evaluated the evidence of all the witnesses. I was not satisfied that the deceased was too ill on 8<sup>th</sup> January, 1995 as to know what was going on. The medical documents produced did not disclose the nature of the sickness. Those present at the meeting including PW4, OW2 and OW3 were categorical that the meeting and exercise of the 8<sup>th</sup> January, 1995 as to know what was going on. The medical documents produced did not disclose the nature of the sickness. Those present at the meeting including PW4, OW2 and OW3 were categorical that the meeting and exercise of the 8<sup>th</sup> January, 1995 was undertaken by and at the direction of the deceased. I believe the evidence of these independent witnesses. I did not believe the evidence of DW1 because he was not only evasive but he told lies when he indicated that the deceased was too ill to talk and that only he was communicating in signs. He also contended that the deceased was forced to thumb print the distribution list. He painted a picture of the deceased being a complete wreck and helpless during the exercise. This could not be so as he himself testified that he had spoken to the deceased who had agreed to the division of the property amongst his children.

18. There was also evidence on record that in September, 2008, the Chwele Land Dispute Tribunal did sit and from the evidence tendered before it, which is similar to the one before this court that the deceased had divided the suit property amongst his sons, concluded that what the deceased had undertaken should not be disturbed.

19. Accordingly, I am satisfied and hold that, Noah Wanjala Kimwachi did subdivide his property known as Bokoli/Chwele/327 amongst his children. That he settled all his children before he died. That it was his wish and intention that John Wachana Kimwachi Wanjala gets five (5) acres and Jackson Wanyonyi gets three (3) acres. It was the deceased's intention that the rest of his sons get two (2) acres each or equal shares of the remaining portion.

20. From the evidence on record, one issue is clear. One Peter Wanjala is said to have gone to Uganda since 1960s. His portion of two (2) acres was signed for by his late mother. The witnesses agreed that no one knows his whereabouts. Neither has anyone ever heard from him. They wished that his portion

bedivided amongst them equally. There was testimony that even seven (7) years before the distribution of the property in 1995, no one had heard from him. The witnesses seemed to presume his death but no order to such effect has been made.

21. In my view, having not been heard since he disappeared to Uganda; having in mind that even after the demise of his father and mother approximately 14 years ago, it can be safely be presumed that he might not return to claim the portion left behind by his father. Those around should be left to utilise the same profitably.

22. Further, there seemed to be a conflict as to the actual acreage of the suit property. Some of the witnesses said the property was approximately 30 acres, other 28 acres while others 27 acres. The official search that was issued on 17/4/2002 and fled with the petition showed that the property measured 30 acres. In view thereof, I am of the view and so hold that it is imperative that the actual area be ascertained before the shares due to the 9 beneficiaries is identified. However, the share due to John Wachana Kimawachi Wanjala and Jackson Wanyonyi is already ascertained at five (5) acres and three (3) acres respectively.

23. Section 42 of the Law of Succession Act provides:-

**“42. Where-**

***(a) an intestate has, during his lifetime or by will paid, given or settled any property for or the benefit of a child, grandchild or house; or taken had he not predeceased the intestate.***

***That property shall be taken into account in determining the share of the set intestate estate finally, accruing to the child grandchild or house.”***

In my view this Section of the law sought to protect, respect and preserve the wishes and acts executed and undertaken by deceased persons during their lifetime. Such acts or settlements effected are not subject to disruption, change or frustration. There are to be honoured and effected.

24. Accordingly, this court will not disrupt the settlement of the deceased that PW2 and PW3 get 3 acres and 5 acres each while the rest of the beneficiaries divide the balance of the property equally.

25. In this regard, I make the following findings:-

a) The District County Land Registrar and Surveyor to visit the suit land within 60 days to ascertain the acreage.

b) Upon such ascertainment, the Land Registrar to demarcate on the ground as follows:-

i) John Wachana Kimawachi Wanjala – five (5) acres

ii) Jackson Wanyonyi – three (3) acres

iii) The rest of the beneficiaries to share the balance therefor in equal shares.

It is so decreed.

**DATED and DELIVERED at Bungoma this 3<sup>rd</sup> day of June, 2014.**

**A. MABEYA**

**JUDGE**