



**REPUBLIC OF KENYA.**

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

**SUCCESSION CAUSE NO. 91 OF 2006.**

**IN THE MATTER OF THE ESTATE OF**

**JOHN WAMALWA MUTORO.....DECEASED**

**AND.**

**MARY NASIPWONDI WAMALWA.....PETITIONER**

**VERSUS.**

**MARGARET NAFULA WAMALWA.....RESPONDENT**

**JUDGMENT.**

The deceased **JOHN WAMALWA MUTORO** died on 18<sup>th</sup> September 2002. At time of death the deceased was married to two wives. Mary Nasipwondi Wamalwa (1<sup>st</sup> wife) and Margaret Walota Wesonga (2<sup>nd</sup> wife). Both wives had each several children. At time the deceased who was a Mechanic had Assets of 2 parcels of Land in his name namely;

- 1. Bokoli/Kituni/594      Measuring      - 5 Acres**
- 2. Ndivisi/Muchi/1560      Measuring      - 50ft x 200ft**

He also had a liability of Kshs.320,000/= to Eric Mudeny.

Mary Nasipwondi Wamalwa the 1<sup>st</sup> wife filed this Succession Cause and was issued with grant. Following an objection raised by the 2<sup>nd</sup> wife Margaret, on 9.3.2017 Aroni J made the following order;

- 1. That the 2 widows of the deceased MARY NASIPWONDI WAMALWA and MARGARET NAFULA WAMALWA be and are hereby made co-administrators of the estate by Consent.*
- 2. That Mr. Amona Wasike be removed as a respondent in the matter.*
- 3. That parties to conclude distribution of Plot No. NDIVISI/MUCHI/1560.*
- 4. That Mention be on 3/8/2017.*

An application for confirmation was filed and both administrators and beneficiaries would not agree on a common mode of distribution. This Court by order made on 4.1.2018 directed that each of the administrators to file their respective mode of distribution signed by the beneficiaries who agreed to their mode of distribution.

The 1<sup>st</sup> widow – MARY NASIPWONDI WAMALWA duly filed her distribution mode as hereunder;

1. The identification and shares of all persons beneficially entitled to the said estate have been ascertained and determined as follows:-

**Name:**

**Property:**

**Share:**

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

1. (a) MARY NASIPWONDI WAMALWA	NDIVISI/MUCHI/1560	WHOLE
(b) MARY NASIPWONDI WAMALWA	BOKOLI/KITUNI/594	0.5 ACRES
2) JANET NASIMIYU WAMALWA	BOKOLI/KITUNI/594	0.5 ACRES
3) DENSON MUTORO WAMALWA	BOKOLI/KITUNI/594	0.5 ACRES
4) MONICA NALIAKA WAMALWA	BOKOLI/KITUNI/594	0.5 ACRES
5) ENES NAFULA WAMALWA	BOKOLI/KITUNI/594	0.5 ACRES
6) BRIAN MEULE WAMALWA	BOKOLI/KITUNI/594	0.5 ACRES
7) CAROLYN NASABA WAMALWA	BOKOLI/KITUNI/594	0.5 ACRES
8) ALEX WANJALA WAMALWA	BOKOLI/KITUNI/594	0.5 ACRES
9) DORIS KHALAYI WAMALWA	BOKOLI/KITUNI/594	0.5 ACRES
10) LUCY NANJALA WAMALW	BOKOLI/KITUNI/594	0.5 ACRES

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

1. MARGARET NAFULA WAMALWA	E. BUKUSU/E. SANG'ALO/1446	1.0 ACRES
2. NAMWEYA WAMALWA	E. BUKUSU/E. SANG'ALO/1446	0.9 ACRES
3. MOSES WAMALWA	E. BUKUSU/E. SANG'ALO/1446	0.9 ACRES
4. MUTORO WAMALWA	E. BUKUSU/E. SANG'ALO/1446	0.9 ACRES

The 2<sup>nd</sup> widow – MARGARET NAFULA WAMALWA filed her mode of distribution dated 19.9.2018 as hereunder;

**PROPOSED DISTRIBUTION OF DECEASED'S LAND PARCEL NO. NDIVISI/MUCHI/1560 & BOKOLI/KITUNI/ 594.**

**NDIVISI/MUCHI/1560:**

<b>Name:</b>	<b>Share:</b>
1. MARY NASIPWONDI WAMALWA	NIL

2. MOSES WAMALWA	WHOLE
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**BOKOLI KITUNI/594**

<b>Name:</b>	<b>Share:</b>
3. MARY NASIPWONDI WAMALWA	0.5 ACRES
4. JANET NASIMIYU WAMALWA	0.5 ACRES
5. DENSON MUTORO WAMALWA	0.5 ACRES
6. MONICA NALIAKA WAMALWA	0.5 ACRES
7. ENES NAFUNA WAMALWA	0.5 ACRES
8. BRIAN MEULE WAMALWA	0.5 ACRES
9. CAROLYN NASABA WAMALWA	0.5 ACRES
10. ALEX WANJALA WAMALWA	0.5 ACRES

11. DORIS KHALAYI WAMALWA	0.5 ACRES
12. LUCY NANJALA WAMALWA	0.5 ACRES
13. SUSY NAMWEYA WAMALWA	0.5 ACRES
14. MOSES WAMALWA	NIL
15. MUTORO WAMALWA	0.5 ACRES
16. MARGARET WALULU WESONGA	0.5 ACRES

From the distribution the 1<sup>st</sup> Widow Mary Nasipwondi distributed 3 Parcels of Land;

1) *Ndivisi/Muchi/ 1560*

2) *Bokoli/Kituni/564*

3) *E. Bukusu/Sang'alo/1446.*

The 2<sup>nd</sup> Widow Margaret distributed;

1) *Ndivisi/Muchi/1560*

2) *Bokoli/Kituni/594*

From their respective mode of distributions, the Court determined that the main issue and substance of the objection is in relation to Parcel No. E. Bukusu/E. Sang'alo/1446. This Court directed that viva voce evidence be led by parties in respect to whether Parcel No. E. Bukusu/E. Sang'alo/1446 was part of the estate of the deceased. Margaret Wafula testified that she is the 2<sup>nd</sup> widow of the deceased and was married in 1983. She was working with Nzoia Sugar Company as a teacher and that on 5.11.1986 she bought the land E. Bukusu/1446 measuring 1.51HA from Zakayo Musee Sangura at Kshs.32,000/=. She paid cash and entered into a land sale agreement which she produced as exhibit. In 2005 the seller transferred the land to her name and she is therefore the owner of the land and does not form part of the estate of the deceased.

Ow2 Zakayo Sangura Musee testified that he sold the land to Margaret measuring 4 acres at a purchase price of Kshs.32,000/=. He signed an agreement where there were witnesses. He transferred the land in 2005 to Margaret. He explains that the delay in transfer for 29 years was due to delay by Margaret. He testified that at that time Margaret did not tell him she was married. Ow3 Fernandis Nyongesa Barasa testified he was the one who wrote town the agreement and he signed the agreement. Upon Cross-examination by Khakula Advocate he confirmed that the agreement that is exhibit in court is not the same as the one he wrote as the name of John Mutoro has been added.

Mary Nasipwondi Wamalwa the 1<sup>st</sup> widow testified and her witness statement dated 28.2.2018 adopted in her evidence. She stated that the deceased had 2 wives herself and Margaret. She had 9 children and Margaret had 3 children. The deceased at the time of death had parcels of land Bokoli/Kituni/594 measuring 5 acres which was ancestral and on which deceased set for her, her home, Plot No. Ndivisi/Muchi/1560 Measuring 50 x 200ft a Plot at Webuye Town; and E. Bukusu/E. Sang'alo/1446 measuring 3.7 acres where he established a home for Margaret the 2<sup>nd</sup> Widow.

Pw2 Jairus Talula Wekesa he testified that the deceased was his cousin. He testified that the land at Sang'alo belonged to the deceased who setup a home for 2<sup>nd</sup> Widow and is therefore part of the estate. Pw3 Peter Wamalwa Mutoro the brother of the deceased testified that the deceased had bought the land at Sang'alo and settled Margaret on that land. He testified that during the "Lufu" Meeting the deceased 3 properties were identified and beneficiaries noted.

From the evidence I find that it is not in dispute that the deceased had 2 wives. Mary and Margaret. There is no dispute that Mary has 9 children and Margaret 3 children. It is also not in dispute that the deceased's ancestral land is Bokoli/Kituni/1446 and that he purchased plot at Webuye Town measuring 50ft x 200ft known as Ndivisi/Muchi/1560. Margaret (2<sup>nd</sup> Widow) testified that the land E. Bukusu/Sang'alo/1446 is her sole property and does not form part of the estate. In support of her contention she produced a sale agreement dated 5.11.1996. The agreement shows that buyer as Margaret Wafula Wesonga and the Seller as Sangura Musee Zakayo and witnesses as Jane Machuma who signed together with Identity Number indicated. John Wamalwa Mutoro whose Identity is given but has not signed and Maurice Mafura Kisaka whose Identity Number is indicated and Signed. The clerk Fernandis Nyongesa Barasa who has also signed. On being shown the agreement produced, Fernandis Ow3 testified that all the people had signed in the agreement and John Mutoro was not indicated in the agreement he prepared and that his name has been added later. He confirmed that the agreement produced by the 2<sup>nd</sup> Widow is not the same as the one he drew. In short he disowned the agreement produced as a genuine document he drew and was signed on 5.11.2986.

This therefore brings into question the genuineness of the sale agreement produced by 2<sup>nd</sup> Widow. It is also noted that she was already married in 1986 but the seller informed the court that he did not know that she was married, which is curious because in her agreement the name of the deceased is indicated as a witness but was never signed.

The alleged transfer of the land parcel No. E. Bukusu/E. Sang'alo/1446 was done in 2005. The deceased died in 2002. There is no dispute that he had set a home for 2<sup>nd</sup> Widow on that parcel of land, as at time of deceased's death, I am satisfied that he had 3 parcels of land, the ancestral land Bokoli/Kituni/594 where he had built for and settled the 1<sup>st</sup> Widow Mary; E. Bukusu/Sang'alo/1446 where he had built for and settled the 2<sup>nd</sup> Widow Margaret, but title had not been obtained and plot in Webuye Ndivisi/Muchi/1560. It is my finding that the assertion by the 2<sup>nd</sup> Widow Margaret that Sang'alo property was hers is an afterthought and the documents relied on for her claim not genuine.

I therefore find that at the time of death the deceased John Mutor had the following assets which form his estate;

1. Bokoli/Kituni/594 (Namukenge Village) - 5 Acres
2. Ndivisi/Muchi/1560 (Webuye Town) - 50ft x 200ft
2. E. Bukusu/E. Sang'alo/1446 (Mwibale Sang'alo) - 3.7 Acres

I have considered the mode of distribution filed by the 1<sup>st</sup> Widow and 2<sup>nd</sup> Widow;

I hereby confirm the grant on the following mode of distribution;

#### **1. Ndivisi/Muchi/1560**

The Plot at Webuye Town to be divided equally between the 1<sup>st</sup> Widow Mary Nasipwondi Wamalwa and 2<sup>nd</sup> Widow Margaret Wafula Wamalwa for and on behalf of their respective children.

##### **1<sup>ST</sup> HOUSE:**

##### **Bokoli/Kituni/594**

- |                            |                   |           |
|----------------------------|-------------------|-----------|
| 1. MARY NASIPWONDI WAMALWA | BOKOLI/KITUNI/594 | 0.5 ACRES |
| 2. JANET NASIMIYU WAMALWA  | BOKOLI/KITUNI/594 | 0.5 ACRES |
| 3. DENSON MUTORO WAMALWA   | BOKOLI/KITUNI/594 | 0.5 ACRES |
| 5. MONICA NALIKA WAMALWA   | BOKOLI/KITUNI/594 | 0.5 ACRES |
| 6. ENES NAFULA WAMALWA     | BOKOLI/KITUNI/594 | 0.5 ACRES |
| 7. BRIAN MEULE WAMALWA     | BOKOLI/KITUNI/594 | 0.5 ACRES |
| 8. CAROLYN NASABA WAMALWA  | BOKOLI/KITUNI/594 | 0.5 ACRES |
| 9. ALEX WANJALA WAMALWA    | BOKOLI/KITUNI/594 | 0.5 ACRES |
| 10. DORIS KHALAYI WAMALWA  | BOKOLI/KITUNI/594 | 0.5 ACRES |
| 11. LUCY NANJALA WAMALWA   | BOKOLI/KITUNI/594 | 0.5 ACRES |

##### **2<sup>ND</sup> HOUSE:**

##### **3. E. Bukusu/E. Sang'alo/1446**

- |                           |                            |            |
|---------------------------|----------------------------|------------|
| 1. MARGARET NAFULA WAFULA | E. BUKUSU/E. SANG'ALO/1446 | 1.0 ACRES  |
| 2. NAMWEYA WAMALWA        | E. BUKUSU/E. SANG'ALO/1446 | 0.9 ACRES  |
| 3. MOSES WAMALWA          | E. BUKUSU/E. SANG'ALO/1446 | 0.9 ACRES  |
| 4. MUTORO WAMALWA         | E. BUKUSU/E. SANG'ALO/1446 | 0.09 ACRES |

Any title transferred made on the property of the deceased before confirmation of the grant by any person cannot be anything but illegal and therefore such transfer are null and void.

**Dated at Bungoma this 24<sup>th</sup> day of September, 2019.**

**S.N. RIECHI**

**JUDGE.**