



**Juma & another v Ochieng (Civil Appeal E025 of 2022)
[2023] KEHC 2410 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2410 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E025 OF 2022**

**KW KIARIE, J
MARCH 28, 2023**

BETWEEN

HELLEN ADHIAMBO JUMA APPELLANT

AND

CAREN AUMA ATUNDO APPLICANT

AND

ROSELINE ACHIENG OCHIENG RESPONDENT

*(Being an appeal from the Ruling and Order in Homa Bay Chief Magistrate's
Court Succession Cause No. 12 of 2019 by J.M Nang'ea- Chief Magistrate.)*

JUDGMENT

1. On the March 31, 2022 the trial court delivered the impugned ruling whereby the grant to the appellants was revoked and a new grant was issued to them jointly with the respondent. In the ruling, there was an order that land parcel number Gem/Kowuor/Kotieno/51 be shared equally by the objector, the respondent herein, the Caren Auma Atundo and Bernard Juma. The appellants were dissatisfied and filed this appeal through the firm of Ako Advocates LLP. They raised the following grounds of appeal:
 - a) The honorable court was based and made a decision which was not only bad in law but also misguided in fact.
 - b) The learned trial magistrate failed to appreciate the law regarding who the beneficiaries are supposed to be and the manner in which an estate of the deceased ought to have been distributed.



- c) The honorable trial magistrate erred in fact by holding that adults could hold the estate in trust of other adult beneficiaries who had presented themselves before the court for their own individual shares of the estate.
 - d) The honorable trial magistrate misdirected himself when he introduced strangers to be part of the beneficiaries to the estate without taking their evidence or getting any evidence to support their claim.
 - e) The honorable trial magistrate denied the daughters of the deceased their inheritance and instead dispossessed the said daughters in favour of strangers whose claim to the estate was established by evidence.
2. The appeal was opposed by the respondent who was represented by the firm of Obwanda & Company Advocates. The respondent contended that the decision of the trial magistrate cannot be faulted.
 3. This court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanour. I will be guided by the pronouncements in the case of *Selle v Associated Motor Boat Co Ltd* [1965] EA 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
 4. Four issues for determination emerge from this appeal as follows:
 - a) Who are the rightful beneficiaries of the estate of the Samuel Onyuna Amollo;
 - b) Whether it was in order for the learned magistrate to order adults to hold the estate in trust of other adults;
 - c) Whether the learned trial magistrate introduced strangers to the estate; and
 - d) Whether the daughters of the deceased were denied inheritance.
 5. Samuel Onyuna Amollo the deceased herein was polygamous and died intestate. The distribution of his estate therefore is governed by section 40 of the [Law of Succession Act](#) which provides:
 - 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.
 6. Benard Juma one of the beneficiaries according to the impugned ruling, is described as the son of Wilson Ogwang and a cousin of the deceased. He does not therefore qualify to be a beneficiary in the estate of the deceased.
 7. Unless by agreement, an adult cannot be appointed to hold another's share of estate in trust. This may only happen in exceptional cases of some disability. Each beneficiary is expected to have own share and deal with it as he/she may deem fit. I have checked the record and I do not see any application to that effect. It was erroneous for the learned magistrate to appoint some adults to hold shares of the estate in trust of others.



8. It has been claimed that Margaret Akoth, Anyango Onyuna and Augo Onyuna were daughters of the deceased but were not provided for. This contravenes section 40 of the *Law of Succession Act*. The section is blind to the sex of the child and also to the fact whether he/she is married.
9. If any of the beneficiaries benefited by receiving part of the property of the deceased during his lifetime, such ought to be dealt with as provided under section 42 of the *Law of Succession Act* which provides:
Where—
 - (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
 - (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.
10. It is important to ensure that all the property of the deceased's estate has been identified and that all beneficiaries have been catered for, before confirming a grant. I therefore set aside the order of the trial magistrate and direct that before the distribution and confirmation of the grant, the property forming the estate of the deceased be identified and that all beneficiaries be listed as envisaged in form P & A 5.
11. Each party will bear own costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 28TH DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE.

