



In re Estate of John Akuong'a Mbarari alias Akuong'a Mbarari (Civil Appeal 10 of 2022) [2023] KEHC 2406 (KLR) (28 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2406 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL 10 OF 2022
KW KIARIE, J
MARCH 28, 2023**

BETWEEN

**KEVIN ODIWUOR AKUONG'A 1ST APPELLANT
ROSE AKINYI AKUONG'A 2ND APPELLANT
JULIUS OTIENO AKUONG'A 3RD APPELLANT
LEONARD OLUOCH AKUONG'A 4TH APPELLANT
EMILY ACHIENG AKUONG'A 5TH APPELLANT
JOAN AUMA AKUONG'A 6TH APPELLANT**

AND

EMMANUEL OBECH AKUONG'A RESPONDENT

(Being an Appeal from the ruling and order in Homa Bay Chief Magistrate's Succession Cause No.42 of 2020 by Hon. Tom Mark Olando –Senior Resident Magistrate)

JUDGMENT

1. On October 6, 2021 Hon. Tom Mark Olando delivered a ruling on the mode of distribution of the estate of John Akuong'a Mbarari alias Akuong'a Mbarari. The appellants were aggrieved by the said ruling and filed this appeal. They were represented by the firm of Aluoch Odera & Nyauke Advocates. They raised the following grounds of appeal:
 - a) The honorable learned magistrate misdirected himself in fact and in law and arrived at a highly inequitable mode of distribution of the deceased estate.
 - b) The ruling is thus oppressive and unjust.



2. The respondents opposed the appeal through the firm of Quinter Adoyo & Company Advocates. They filed the following grounds of opposition:
- a) That the trial magistrate was right in law and in fact in finding that the mode of distribution as proposed by the respondent was more reasonable, economical and largely acceptable by most of the beneficiaries.
 - b) That the ruling delivered by the trial magistrate was fair and just and duly considered the interest of all the dependents.
 - c) That the true state of facts is that the mode of distribution that was proposed by the respondent herein and affirmed by the trial court in its ruling was the reflection of the wishes of the deceased.
 - d) That at the subordinate court, the appellant herein did not give a reason for his proposed mode of distribution. An attempt to give the reasons here amounts to propounding new evidence at the appeal stage which should not be allowed.
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 demeanor. 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. The deceased herein was polygamous. His estate was therefore to be distributed under section 40 (1) of the *Law of Succession Act*. It states:
- 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.
5. The grant that was confirmed by the learned trial magistrate did not adhere to the provisions of section 40 of the Act. I therefore set it aside and order that the parties to present themselves before the Chief Magistrate's court and apply for a fresh confirmation of grant. If the parties fail to agree on the mode of distribution, then the trial court has to apply section 40 (1) of the *Law of Succession Act*.
6. I noticed that the learned trial magistrate ordered the file closed after confirmation. This was premature. Section 83 (g) of the *Law of Succession Act* provides for the rendering of accounts in the following terms:
- g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;
- It is only after the accounts have been rendered to the satisfaction of the court, the file can be closed.
7. The appellants will have costs of this appeal.

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

KIARIE WAWERU KIARIE

JUDGE

