



REPUBLIC OF KENYA



**Olang & another v Ojany & 4 others (Succession Appeal E002 of 2020)
[2023] KEHC 26820 (KLR) (21 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26820 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION APPEAL E002 OF 2020
RE ABURILI, J
DECEMBER 21, 2023**

BETWEEN

GEORGE ODHIAMBO OLANG 1ST APPELLANT

BENARD OMONDI OLANG 2ND APPELLANT

AND

SAMUEL JUMA OJANY 1ST RESPONDENT

DORIS OPERE OBIERO 2ND RESPONDENT

ROSELIDA ACHIENG OJANY 3RD RESPONDENT

ELENA MARY OTIENO OJANY 4TH RESPONDENT

JULIANA NYUMBA ONINGU 5TH RESPONDENT

(Being an appeal from the Ruling of the Honourable L. Akoth delivered on the 30th September 2019 in the Chief Magistrates Court at Kisumu in Succession Cause No. 695 of 2018)

JUDGMENT

1. The appellants were granted letters of administration for the estate of Silvanus Odoyo Oguta alias Odoyo Oguta on the 3rd December 2018 and were due for confirmation on the 3rd June 2019.
2. The 1st respondent herein filed and served an affidavit in protest of the mode of distribution on the grounds that he too was a beneficiary of the deceased's estate on the ground that he was a nephew to the deceased just like the appellants. The 1st respondent averred that the 2nd to the 5th respondents were his sisters and thus equal beneficiaries to the deceased's estate.
3. The trial court in its ruling found merit in the respondents' protest on the mode of distribution on the ground that all the objectors were the nephew and nieces of the deceased and thus had equal share as



the brother of the deceased and his children. The trial court further found that the suit property KSM/CHIGAA/489 would thus be distributed in equal shares amongst the surviving sibling of Sylvanus Odoyo (deceased), the respondents herein as well as the appellant.

4. Aggrieved by the aforementioned ruling, the appellants preferred this appeal vide their memorandum of appeal dated 14th October 2020 and filed on the even date. The said appeal raises the following grounds:

- i. That the learned magistrate misdirected herself in finding that the objectors were half-brothers of the petitioners when there was no evidence to prove the same.
- ii. That the learned magistrate erred in law and in fact in finding that objectors were close relatives of the deceased herein hence forming part of the beneficiaries of the deceased's estate.
- iii. That the learned magistrate erred in law and in fact disregarding the evidence of the petitioners and their witnesses to prove that the appellants were the only beneficiaries entitled to succeed the deceased estate herein.
- iv. That the learned trial magistrate failed to find that by the appellant's father forfeiting his right to succeed his deceased brother's estate in favour of the appellant then any other beneficiaries was entitled to share and or succeed in the deceased person's estate.
- v. That the learned magistrate misdirected herself hence erred in law and in fact in disregarding the evidence of the appellants on record resulting to a wrong decision.
- vi. That the learned trial magistrate erred in law and in fact by finding that the respondents number 4 and 6 were entitled to share and or benefit in the deceased person's estate when their relation and or interest in the same was never proved.
- vii. That the trial magistrate erred in law and in fact by overly relying upon the evidence of the respondents which was not proved.

5. The parties filed submissions to canvass the appeal.

The Appellants' Submissions

6. It was submitted that it was a mistake of facts when the Trial Court arrived at a conclusion that Joel Manyala had 3 sons being Sylvanus Odoyo (deceased), James Olang and Nelson Ojany whereas he had only one son, that is Nelson Ojany. It was submitted that Joel Manyala was only a cousin of both Sylvanus Odoyo (deceased) and James Olang who remained the only surviving sibling.
7. It was submitted that the 1st to 5th Respondents being the children of Nelson Ojany cannot be nieces and nephews of Sylvanus Odoyo (deceased) since it was their grandfather, one Joel Manyala (deceased) who was cousins with Sylvanus Odoyo(deceased).
8. The appellants submitted that the Trial Magistrate applied the Right legal provision being Section 39 of the Law of Succession Act but, to wrong facts i.e. that the 1st to 5th Respondents, being children of Nelson Ojany, were nieces and nephews of Sylvanus Odoyo (deceased).



9. It was submitted that the right persons entitled to share of the subject land parcel was James Olang being the only surviving brother to Sylvanus Odoyo (deceased) and the Appellants being the children of James Olang's hence nephews to Sylvanus Odoyo (deceased).
10. On the issue of Sylvanus Odoyo (deceased) having held the subject land parcel No. KISUMU/CHIGA/489 in trust for any family, it was submitted that this was a misconception of facts and law as a trust is created by an instrument and thus Sylvanus Odoyo held the suit property as the registered owner.
11. On costs, the appellants submitted that each party ought to bear their own costs.

The Respondents' Submissions

12. It was submitted that the Appellants appeared to suggest that Joel Manyala (deceased), Silvanus Odoyo Oguta (deceased) and James Ojany Mosi were brothers/cousins in order to distance them from the succession proceedings and thus the respondents would be grand-nephews and nieces. The respondents submitted that however, the appellants failed to demonstrate who their father or grandfather was, or why they purportedly inherited property from their cousin, Joel Manyala.
13. The respondents submitted that Sylvanus Odoyo Oguta died without a wife or children., that James Olang Mosi who was his half-brother and father to the appellants herein waived his inheritance, which is now to be inherited by his sons, the Appellants herein, who are half nephews to the deceased. It was submitted that Sylvanus Odoyo Oguta (Deceased) was also the Cousin to Nelson Ojany Manyala (deceased), the father to the Objectors, who are also his nephews and nieces.
14. It was submitted that both the respondents and the appellants had been bequeathed their patriarch's ancestral property, Titles 894 and 895 respectively but that Sylvanus Odoyo Oguta (Deceased) who had neither wife nor children, could only have inherited Title No. 489 for himself during his lifetime, and in trust for his nearest kith and kin, the respondents and the two Appellants as rightfully held by the trial court.
15. The respondents submitted that consequently, the Appellants are estopped from denying or distancing them from inheriting from their uncle, the deceased herein, just as the Appellants, who are entitled to inherit pursuant to section 39 of the *Law of Succession Act* Cap 160 as rightfully held by the Trial Court. Further to this, it was submitted that the appellants are also estopped from denying the Trust that the subject property and Estate had been subject to since they had asserted that Trust through the Area Chief's letter that they had used to support their Petition for Letters of Grant Intestate.

Analysis and Determination

16. I have considered the issues raised before this court in this appeal and the submissions of the parties' counsel
17. A brief history of this matter is that the appellants were granted letters of administration for the estate of Silvanus Odoyo Oguta alias Odoyo Oguta on the 3rd December 2018 and were due for confirmation on the 3rd June 2019 but before confirmation, the respondents filed an affidavit in protest seeking to be considered as beneficiaries of the deceased's estate on the ground that they were nephews and nieces to the deceased just like the appellants.
18. The oral evidence presented before the trial court by the 1st respondent herein was that they were grandchildren of Joel Manyala(deceased) who was the father of Sylvanus Odoyo (deceased), the registered owner of the suit property, KSM/CHIGAA/489. The respondents testified before the trial



court that despite the suit property being registered in the name of the deceased, he held it in trust for the entire family.

19. I however note that one Kesia Adoyo Akello, who was the 5th objector in the trial court and a sister in law to the respondents herein, and who has not been included in this appeal testified that the suit property belonged to the deceased herein, Sylvanus Odoyo and that she did not want anything to do with it. It was her testimony that that each of the siblings of the deceased herein had been given their own property.
20. In support of their case, the appellants called one James Olany Mosi as their witness. He testified that he was the only remaining brother of the deceased herein and that he had no problem with the appellants who were his sons being administrators over the suit land. He testified that the respondents' grandfather Manyala was his cousin. However, he could not explain how, if this was so, how Manyala's son, Nelson Ojany, himself and the deceased herein inherited land from the same father, Joel Manyala.
21. From the evidence above it is clear that the deceased herein, Sylvanus Odoyo, Nelson Ojany (father of the respondents) and James Olany (father of the appellants) were all brothers. That makes the appellants herein and respondents cousins.
22. It is also clear from the evidence herein and before the trial court that the three brothers were all registered owners over their individual parcels of land as follows and none of them held any parcel in trust for the other: Sylvanus Odoyo KSM/Chigaa/489; Nelson Ojany KSM/Chigaa/894; and James Olang KSM/Chigaa/893.
23. Sylvanus Odoyo, the deceased herein died without marrying or having children. His surviving brother, James Olang, waived his right to petition and inherit from his estate. Dying a bachelor and with no child does not make you a trustee of land owned by you. It is not children or wives that make you an absolute owner of property or land, for that matter.
24. Where an intestate, for Sylvanus Odoyo was one, is not survived by a spouse or children, or parents – but by nieces and half-siblings, the law that governs distribution to such person's estate would be Section 39(1) and (d) of the [Law of Succession Act](#). The said provision provides as follows: -
“
“39(1). Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority –
Father, or if dead
Mother, or if dead
Brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares, or if none
Half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares...”
25. From the scheme of distribution envisaged in Section 39 (1) (c) (d) of the [Law of Succession Act](#), the children of the full biological siblings of the deceased have a superior right to inherit the estate of their deceased aunt or uncle than the deceased person's half siblings. The nephew and nieces of the deceased are in the category in Section 39(1)(c)



26. The respondents herein raised the issue of the deceased herein holding the suit property in trust for the whole family. No evidence was adduced before the trial court or this court to demonstrate the creation of the said trust. The suit property was registered in the name of the deceased herein, Sylvanus Odoyo. I thus agree with the trial court that the issue of trust did not arise in this case.
27. Taking all the aforementioned into account, I thus find that the appellants and respondents are entitled equally to the deceased's estate being land parcel No. KSM/CHIGAA/489. I thus uphold the trial court's ruling on the same.
28. The upshot of the above is that the instant appeal is found to be devoid of any merit and is hereby dismissed. Parties shall bear their own costs as this is a family matter.
29. This file is closed.
30. The lower court file to be returned with a copy of this judgment.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF DECEMBER, 2023.

R.E. ABURILI

JUDGE

