



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT HOMA BAY**

**CIVIL APPEAL NO. E4 OF 2020**

**BETWEEN**

**DOMINIC ASIAGO AGIA.....1<sup>ST</sup> APPELLANT**

**BONFAS AGIA ODORO.....2<sup>ND</sup> APPELLANT**

**AND**

**SAMUEL KASERA.....RESPONDENT**

*(Being an Appeal from the judgment in Ndhiwa Senior Resident Magistrate's SRM*

*Succession Cause No. 29 of 2016 by Hon. Mary A. Ochieng – Principal Magistrate).*

**JUDGMENT**

1. Dominic Asiago Agia and Bonfas Agia Odoro, the appellants herein, were the petitioners in Ndhiwa Senior Resident Magistrate's SRM Succession Cause No. 29 of 2016. The appellants filed the succession cause in their capacity as brothers of the deceased though in Form P & A. 5 they had described themselves as wife and sons of the deceased. In a judgment dated 17<sup>th</sup> October, 2019 the learned trial magistrate gave the petitioners 0.8 ha from land parcel number Kabuoch/Konyango/ Kabonyo/ Karita/296 the estate of the deceased Eliakim Kasera Agia while the rest was given to Samuel Kasera Agia.

2. The appellants were aggrieved by the said judgment and filed this appeal. They raised eight grounds of appeal as follows:

a) The learned trial magistrate misdirected herself on several matters of the law and fact.

b) The learned trial magistrate erred in law and fact by misdirected herself that the appellants are just entitled to a smaller portion of estate of the deceased against the respondent.

c) The learned trial magistrate erred in law and fact by failing to put I to consideration that the respondent though was enjoined as a co-petitioner with the appellants, is in the verge of wasting the estate and therefore was not entitled to the portion he was apportioned by the first trial court.

d) The learned trial magistrate erred in law and fact by not putting into consideration that who are/is entitled to be allowed to administrate a larger portion of the estate of the deceased.

e) The learned trial magistrate erred in law and fact misdirecting herself by failing to find that the appellants standing for several beneficiaries while the respondent had his own interest over others.

f) The learned trial magistrate erred in law and fact by not considering the weight of the evidence in record produced by the appellants.

g) The learned trial magistrate erred in law and facts by deciding against the water tight evidence produced by the appellants and failed to note that since the deceased died, the appellants have been taking care of the estate while the respondents resurfaced recently and has visited the said estate with several buyers to waste the estate and the mode of distribution was reached after the family had considered all the beneficiaries.

h) The learned trial magistrate erred in law and facts by failing to consider that the appellants were supposed to get 3.8 hectares and the respondent get 0.8 hectares of land parcel No. Kabuoch/Konyango/Kobonyo/Karita/296 from the estate of the deceased.

i) The learned trial magistrate erred in law and procedure in failing to admit that the appellants had left out other beneficiaries such as Caroline Akoth Polo 2<sup>nd</sup> wife and Charles Owuor Nyalienga purchaser who were mentioned by the appellants that were entitled to the estate of the deceased while put into consideration that Abigael Ndiege who had been married to another person to benefit from the estate of the deceased she had already left.

3. The respondent was represented by the firm of Ongoso & Company, Advocates. He opposed the appeal and urged the court to dismiss it.

4. 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 vs. Associated Motor Boat Co. Ltd. [1965] E.A. 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.

5. In a letter dated 28<sup>th</sup> February 2018, Dominic Asiago Agia has acknowledged that Samuel Kasera Agia the respondent herein is the son of the deceased herein. The appellants would only have laid a claim if the deceased did not leave any spouse or child. The appellants have equally acknowledged that the deceased was survived by his spouse Abigael Ndiege.

6. Eliakim Kasera Agia the deceased herein died intestate. He was survived by a spouse and a child. His estate is therefore governed by the provisions of section 35 of the law of Succession Act. Subsection 5 provides:

**Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.**

7. Brothers of a deceased person in such a scenario are not entitled to the estate unless they were dependents of the deceased or under some special circumstances recognized by the law. The appellants herein were not dependents of the deceased and there did not exist any special circumstances. They were therefore not entitled to inherit from the estate of the deceased herein. Since the respondent did not challenge what the court gave them, the distribution as ordered by the court will not be interfered with.

8. The upshot of the foregoing is that the appeal cannot stand. The same is dismissed with costs.

**DELIVERED and SIGNED at HOMA BAY this 28<sup>th</sup> day of February, 2022**

**KIARIE WAWERU KIARIE**

**JUDGE**