



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL APPEAL NO. E008 OF 2020

IN THE MATTER OF THE ESTATE OF: HELLEN MIKUWA OLOO-DECEASED

BETWEEN

ANNA ADHIAMBO OGWANO.....APPELLANT

VERSUS

DOMITILLA ORAWO ADEDE.....RESPONDENT

(Being an appeal from the Judgment and Order in Oyugis Principal Magistrate's Court

Succession Cause No. 184 of 2018 by B.O Omwansa- Principal Magistrate.)

JUDGMENT

1. On the 26th October, 2020 the trial court delivered a judgment in favour of the respondent. The appellant was dissatisfied and filed this appeal through the firm of W.O. Ochuka & Company Advocates. She raised the following grounds of appeal:

- a) The learned trial magistrate erred in law and in fact in failing to find that all the surviving children of the deceased are entitled to equal share of the deceased's intestate estate.
- b) The learned trial magistrate misdirected himself in finding that the suit property was transmitted to the deceased by virtue of the first relationship without any evidence to support the finding.
- c) The learned trial magistrate misdirected himself in finding that the property was bequeathed to the deceased by Oloo Nyagiendo, without any basis and or evidence to that effect.
- d) That the learned trial magistrate erred in law and in fact in making a finding that the appellant and other children of the deceased will benefit twice if allowed to inherit the suit property.
- e) That learned magistrate erred in law and in fact by failing to find that the respondent was an adopted child of Reuben Odhengo.
- f) That learned trial magistrate erred in law and in fact in view of the fact that the decision to transmit the property to the respondent amounts to discrimination against the appellant and all other surviving children of the deceased.

2. The appeal was opposed by the respondents who was represented by the firm of Odongo Awino & Company Advocates.

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 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.

4. There were two issues for determination before the trial court. The learned trial magistrate framed the issues for determination correctly but arrived at wrong conclusions.

5. From the record, Oloo Nyagiendo died in 1953. Hellen Mikuwa Oloo was subsequently inherited by Reuben Odongo. The parcel of land number Kabondo/Kodhoch East/481 registered in the name of the deceased herein in 1966. Reuben Odongo died in 1998. This therefore means that he was not the source of the parcel of land number Kabondo/Kodhoch East/481. If he was, the natural customary African way would have been to register the parcel in the name of Hellen Mikuwa Oloo after his death.

6. At the time of her death, Hellen Mikuwa Oloo, was the sole proprietor of land number Kabondo/Kodhoch East/481.

7. The learned trial magistrate erred in relying on **Silas Murindu Ithinji v Fredrick Kaumbu M'ithinji [2017] eKLR**. This was Meru High Court Succession Cause No. 308 of 2011. This decision is not of universal application but only applied to the Ameru community.

8. The evidence on record is clear that land parcel number Kabondo/Kodhoch East/481 was free property of Hellen Mikuwa Oloo, the deceased herein. All her children irrespective who sired them are entitled to inherit from her under the provisions of section 38 of the Law of Succession Act which provides as follows:

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

9. I accordingly set aside the judgment and orders of the trial court and substitute it with a judgment for all issues of Hellen Mikuwa Oloo to inherit equally from her estate. This being a family matter, each party to bear own costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 28TH DAY OF FEBRUARY, 2022

KIARIE WAWERU KIARIE

JUDGE.