



REPUBLIC OF KENYA



KENYA LAW
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**Migwambo v Ogenda (Civil Appeal E055 of 2021)
[2022] KEHC 12009 (KLR) (22 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 12009 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E055 OF 2021**

**KW KIARIE, J
JUNE 22, 2022**

BETWEEN

MARTHA AKINYI MIGWAMBO APPELLANT

AND

SUSAN ONGORO OGENDA RESPONDENT

*(Being an Appeal from the judgment and decree in Oyugis Senior Principal Magistrate's
SPMC Succession Cause No. 286 of 2019 by Hon. C. Okore –Principal Magistrate)*

JUDGMENT

1. Martha Akinyi Migwambo, the appellant herein, was the objector/applicant in Oyugis Senior Principal Magistrate's SPM Succession Cause No. 286 of 2019. She had claimed that she had been left out of distribution amongst other complaints. The learned magistrate delivered her ruling on the matter on 31st May, 2021.
2. The appellant was dissatisfied and filed this appeal. She was represented by the firm of G.S. Okoth & Company Advocates. She raised grounds of appeal as follows:
 - a. The learned trial magistrate misdirected herself on several matters on law and fact concerning the law of succession.
 - b. The learned trial magistrate erred in law in failing to note that the portion of land parcel number West/Konuanga/676 measuring 7.5 hectares which was given to the late Elkana Ochieng Migwambo, the husband of the appellant by the deceased Japheth Ogenda Migwambo, thereby became a demonstrative legacy and not the estate or free property of the deceased in terms of The Law of Succession Act and ought to have been taken in account as such.



- c. The learned trial magistrate erred in law in holding that the property of the deceased was to be divided equally among his children “living or dead” contrary to the provisions of Section 29 and 35 of the *law of Succession Act*.
 - d. The learned trial magistrate erred in law in apportioning to the widow/administrator 2.5 hectares as free hold title whereas she was only entitled to a life interest in her share of the estate in accordance with Section 35(1) (b) of the *Law of Succession Act*.
 - e. The learned trial magistrate erred in law of procedure and practice in admitting a fresh succession cause to be filed whereas a grant of letters of administration interstate to the estate of Japheth Ogenda Migwambo had been issued to Elkana Migwambo Ogenda on the 22nd day May 2017 in Succession cause No.119 of 2016 in the High Court of Kenya at Homa Bay.
 - f. The learned trial magistrate erred in law in distributing the estate to eleven (11) persons as beneficiaries or dependents when some of the deceased daughters may have predeceased their father, Japheth Ogenda Migwambo, whereas the beneficiaries of the estate are those surviving the deceased who are only the widow and three daughters and the widows of the deceased sons.
 - g. The learned trial magistrate erred in the law of evidence in failing to note that Caren Anyango Ogenda, Lona Atieno Ogenda and Sara Akoth Ogenda deliberately concealed material facts of evidence to the court such as the fact that the appellant was one of the beneficiaries of the said estate and therefore although Susan Ongoro Ogenda is properly an appointed administrator of her husband’s estate, her eldest son Elkana Migwambo Ogenda, having obtained the grant of letters of administration, the appellant should have been allowed to be a joint administrator.
 - h. The learned trail magistrate erred in law of succession and procedure in admitting the defective letter from the chief which named dead persons as heirs to the deceased’s estate and thereby misled the court to make a defective distribution.
 - i. The learned trial magistrate erred in law in limiting the time for appeal to 21 days whereas the same is stipulated in Section 79(g) of the *Civil Procedure Act*.
3. The respondent was represented by the firm of Mwirigi & Nzomo Company Advocates. She opposed the appeal on the following grounds:
- a. That the appellant lacked locus standi.
 - b. That equal distribution of property was not erroneous.
 - c. That the appeal has been overtaken by events.
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. The issue of locus standi was not raised at the trial court. It cannot therefore be raised on appeal.
6. Succession matters are in a class of their own and the respondent cannot be heard to say that since the 31st May, 2021 has been executed, this appeal has been rendered nugatory. Section 76 of the *Law of Succession Act* gives court wide powers to revoke a grant and it gives instances when this can be done. It states:



A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

Should I find merit in the appeal, I will proceed to give the necessary orders the averment that the impugned ruling has been executed notwithstanding.

7. Section 79G of the *Civil Procedure Act* provides:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

The learned trial magistrate erred in reducing the time within which to appeal.

8. In the course of hearing, the appellant contended that her deceased husband had been given land parcel number West/Konuanga/676 measuring 7.5 hectares by his father, whose estate is the subject of this appeal. This is what the respondent said during cross examination:

I do not object to the objector being given the portion where her home is currently constructed together with the 7.5 that was given to her by the deceased.

Earlier on in her evidence in chief in reference to the appellant she had said:

My list of distribution does not include Martha, objector. I called a surveyor to give her a portion but she ran away. Let her be added to the list. She was given 7.5 hectares. She said she was shown her portion when my husband was alive.

9. I find that the issue of the share of the appellant had been conclusively addressed in the evidence. The learned magistrate therefore erred when she reduced her portion to 2.5 hectares. Land parcel number West/Konuanga/676 measuring 7.5 hectares was not available for distribution.

10. Section 42 of the *Law of Succession Act* 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.

In the instant case, the appellant could only benefit from the estate if the other beneficiaries were to get more than 7.5 hectares

11. The distribution of the estate of a deceased person is to the survivors. This is the law. However, it should not be lost that most heirs who had passed on, had children who were residing on the land parcels of the deceased herein. The correct procedure is for them to take out letters of administration in respect of their parents' estate so as to stake a claim in the estate of the deceased herein. This was not done by all including the appellant herein. Since they were comfortable with this arrangement, the appellant cannot be allowed to capitalize on this legal requirement where she also has not complied.



12. The administrator is therefore required to file a fresh list of distribution within 30 days of this judgment at Oyugis court and which will take into account Land parcel number West/Konuanga/676 measuring 7.5 in respect of the appellant.
13. The upshot of the foregoing, is that the appeal succeeds in terms of the findings I have made in the body of my judgment. This being a family dispute, each party will shoulder own costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 22ND DAY OF JUNE, 2022

KIARIE WAWERU KIARIE

JUDGE

