



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CIVIL APPEAL NO. 88 OF 2019**

**BETWEEN**

**GEORGE OTIENO DOLA.....APPELLANT**

**AND**

**MERESA ADOYO AYUGI.....RESPONDENT**

*(Being an Appeal from the judgment and decree in Oyugis Senior Principal Magistrate's SPMCC No. 90 of 2017 by Hon. J.P. Nandi – Principal Magistrate).*

**JUDGMENT**

1. George Otieno Dola, the appellant herein, had raised an objection in respect of the distribution of the estate Simeon Randa and in particular land parcel number Kasipul/Kakelo Dudi /109 from which he was claiming a portion. His contention was he had been given the portion he was claiming by his grandfather as a gift. The trial court ruled against his claim.
2. The appellant was aggrieved by the said judgment and filed this appeal through the firm of Amos O. Oyuko & Company Advocates. Four grounds of appeal were raised as follows:
  - a) That the learned trial magistrate erred in law and in fact in finding that the appellant had not established his claim in respect of land parcel number Kasipul/Kakelo Dudi /109.
  - b) That the learned trial magistrate erred in law and in fact in holding that the appellant failed to establish gift in contemplation of death when the gift in respect of the said land parcel land parcel number Kasipul/Kakelo Dudi/109 was not given in contemplation of death.
  - c) That the learned trial magistrate erred in law and in fact in disregarding the appellant's submissions and evidence.
  - d) That the learned trial magistrate erred in law and in fact in proceeding on the wrong principles and thereby arriving at a wrong decision.
3. The appeal was opposed by the respondent through the firm of S.M. Onyango & Associate Advocates. The respondent contended that:
  - a) The appellant had no capacity to be appointed an administrator.
  - b) The respondent did not prove the claim of gift.
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 learned trial magistrate was alive to the legal requirements of proving a gift in contemplation of death. He therefore concluded that the deceased did not make a gift to the appellant in contemplation of death. The appellant agrees with this finding.
6. Was there a gift made to the appellant by the deceased? The appellant stated that the deceased made the gift to him in the presence of Miriam Aroko Randa, Samson Oyieko Randa and Abisai Obonyo Osuo. He indicated that the first two are deceased. He did not call Abisai Obonyo Osuo as a witness. He therefore did not prove his contention that he was given a portion of land parcel number Kasipul/Kakelo Dudi /109.

7. From the foregoing analysis of the evidence on record, I find that the appeal lacks merit. The same is dismissed with costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 29TH DAY OF JUNE, 2021**

**KIARIE WAWERU KIARIE**

**JUDGE**