



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of John Muruka Asindi (Deceased) (Succession Appeal
E006 of 2023) [2025] KEHC 419 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 419 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
SUCCESSION APPEAL E006 OF 2023**

DK KEMEL, J

JANUARY 23, 2025

IN THE MATTER OF THE ESTATE OF JOHN MURUKA ASINDI (DECEASED)

BETWEEN

HAGGAI ASINDI AGOLA APPELLANT

AND

PAULINE AUMA OLOO RESPONDENT

*(Being an appeal against the ruling and order of Hon. M. O. Wambani,
CM delivered on 13/04/2023 in CM Succession Cause No. 61 of 2016)*

JUDGMENT

1. Vide Siaya High Court succession Cause Number 42 of 2015, a grant of letters of administration to the estate of John Muruka Asindi were issued to Haggai Asindi Agola, the Appellant herein on the 4th March 2016. The same was confirmed on 5th October 2016.
2. As a result of the said grant, the Appellant herein went ahead and registered himself as proprietor of land parcel numbers East Alego/Masumbi/1733 and East Alego/Masumbi/1161 which were initial properties of the deceased.
3. The above cause was later transferred to the lower court and which was given the number CM Succession Cause No. 61 of 2016.
4. On learning about the actions of the Appellant/Petitioner, the Respondent herein filed an application for revocation of grant dated 19/4/2017 in the CM's court. The Appellant herein filed a response vehemently opposing the same. The same was heard by the lower court and that the learned Chief Magistrate found merit in the Respondent's application vide the impugned ruling dated 13/4/2023 wherein she held that the Respondent is either a child of the deceased or an adopted child of the deceased



5. Aggrieved by the decision of the trial court, the Appellant herein Haggai Asindi Agola has filed a memorandum of appeal dated 31st May 2023 against the ruling and orders of the learned trial Magistrate wherein he outlined the following grounds of appeal:

- a. That the trial magistrate erred in law and in fact by finding that the Respondent is the adopted daughter of the deceased John Mruka Asindi when there is no sufficient evidence in support of the same.
- b. That the trial magistrate erred in law and in fact by failing to appreciate that the appellant was the rightful beneficiary of the deceased John Mruka Asindi
- c. That the trial magistrate misdirected herself by relying on the contradictory evidence by the Respondent in making her ruling.

Reasons wherefore he prayed that the appeal be allowed.

The Appellant therefore prayed that the appeal be allowed and that the orders of the trial court dated 13/4/2023 be set aside or varied and that the costs of the appeal be borne by the Respondent.

6. This being a first appeal, the duty of this court is well settled namely, to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at its own independent conclusions. See *Selle Vs Associated Motor Boat Co Ltd* [1968] EA 123). I am alive to the fact that I must respect the factual findings of the trial court out of an appreciation that it had the advantage, which I do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the magistrate failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong.

7. The parties had taken directions to the effect that the summons for revocation of grant be canvassed by way of viva voce evidence.

8. OB.W1 Pauline Auma Oloo testified that she is a Kenyan citizen and availed her ID card No. 24XXXXXX which was produced as P exhibit 1. That her mother was Margaret Ratuoro who died in 2002 as per the copy of death certificate produced as P exhibit 2. That she was buried at Masumbi Alego, the objector's place of birth. That her father was John Mruka Asindi who also died in August 1984. That she was born in January 1984 and that she was six years old when her father died. She has two sisters Grace and Caroline Adhiambo. That she was informed that she was the only child of her father. That her uncles informed her about the same before the chief Mr. Booker Nyare) She stated further that her father John had land parcel No. 1161 and 1733 as per the certificate of search she conducted in 2013. Based on the same, the chief gave her a letter dated 5/4/2017 –marked PMFI -3 for purposes of succession and that the chief would come to testify before court. That the Appellant/Petitioner is her uncle, brother to her father and that she used to refer her as father. She added that the Appellant/Petitioner gave her his National ID card to enable her apply for her own national ID card. That he brought her up as a daughter and that her dowry was paid to the Petitioner and his younger wife. She stated that she later found out that her father's estate had been succeeded by the Appellant/Petitioner. That she discovered much later vide Kenya Gazette of 4/12/2015 which had the Cause No. 42 of 2015 which she produced as P exhibit 4. She produced the grant that was issued on 4/3/2016 as P exhibit 5 and which showed that the land was given 100% to the Appellant/Petitioner as listed on 5/10/2016 and produced as P exhibit 6. That the Appellant/Petitioner quickly transferred the land to his name. That he did not seek any consent from anybody. That her brother John Maganga Asindi lodged a caution on parcel No. 1161 and that the caution was produced as P exhibit 7. That she seeks for the grant to be revoked and that she be given her father's land. She was later recalled and she testified



further that John Miruka is her father. That she is not the Appellant/Petitioner's child. That she is not the one who made the affidavit.

On cross-examination, she stated that John Miruka Asindi was her father. That she was left at six weeks. That she did not swear the affidavit of 16/4/2012.

9. OB.W2 John Maganga Asindi testified that he lodged a caution on parcel No. 1161 because he had heard that his uncle who is the Petitioner herein wanted to sell the land. He produced the green card as exhibit 8. That the two parcels belonging to the deceased are No. 1161 and 1733.

On cross examination, he stated that John Miruka is his father and that he was born in 1987 and he died in 1983. That according to Luo culture, his mother was inherited and thus he belongs to the family of John Miruka Asindi. That Odera had fathered him. That he is concerned with parcels 1161 and 1733.

10. OB.W3 Booker Nyaoro Okumu adopted his statement as evidence in chief. That he knows Pauline Auma Oloo. That her biological father was John Miruka Asindi. He stated that Pauline is niece to the Appellant/Petitioner herein who has denied Respondent and her brother from getting land parcel belonging to their late father on the ground that they are not John's children. That Pauline had been born before the deceased died. That one Odera inherited Pauline's mother under Luo customs and sired John Onyiko and two other children.

On cross examination, he stated that inherited wife stays at the home of the deceased husband. That Margaret (Pauline's mother) stayed at the deceased's home after being inherited. That Pauline is a biological child of John Miruka Asindi. That the village elder intervened when Haggai (the Petitioner chased Pauline (the objector).

11. OB.W 4 James Obilo Ojwang, testified that he was retired Senior Chief of South East Alego and that he is also a farmer and businessman. That he was a chief between 1988 to 2018. That he wrote a letter for Pauline when she wanted to do succession (P exh 3). That the late John Muruka had a wife called Margaret Atieno Muruka, mother to Pauline Auma Oloo. That the Petitioner (Haggai) is a brother to John Muruka. That Pauline was six years old when her father John Muruka died. That the Appellant/Petitioner took her to school and took care of her.

On cross examination he stated that in 1975 the Appellant/Petitioner was a teacher. That the mother to Pauline is Margaret and that Jared Oloo is husband to Pauline Atieno Oloo. He stated further that he summoned the Appellant and the family including the Appellant/Petitioner's brothers. That it was resolved that he takes the dowry of Pauline upon marriage. That it is the Appellant/Petitioner who brought a man to inherit Margaret the mother to Pauline. That the Appellant/Petitioner lied to the court and to the Assistant chief that John Muruka died while unmarried.

On re-examination, he reiterated that Pauline is the daughter to John Muruka and Margaret. Haggai, the Petitioner is a brother to the deceased. That the Appellant/Petitioner lied to him and the court that the deceased John Muruka died while unmarried. That the Appellant/Petitioner chased Objector's brother John when he erected a structure on the land.

12. That marked the close of the Objector's/Respondent's case.

13. PET.W1 Haggai Asindi Ogola stated that Pauline is not a biological daughter of John Muruka Asindi, his elder brother. That he is the only surviving brother of the deceased. That the deceased died on 25/12/1983 as per the death certificate produced as D exhibit 1. That Pauline's ID shows that she was born on 1/11/1984. That his brother took Pauline's mother on 20/10/1982 and that he is the one who welcomed her home. That Margaret had three other children from her first marriage. That his brother died on 25/12/1983 and not 1984. That he applied for death certificate which was endorsed by assistant chief. That John Muruka lived with Margaret as husband and wife. That he did not take



care of Pauline Aloo after the death of her parents. That John Onyango Asindi was not sired by his brother but by one Odera from Uganda. That the said John Onyango Asindi took his ID card and referred to him as his father while applying for his ID card. That the summons for revocation of grant should be dismissed. That he seeks to produce the Respondent's affidavit dated 15/4/2012.

On cross-examination, he stated inter alia; that he has not availed the burial permit over the death of the deceased; that he knows Booker Nyaoro Okumu who hails from his village; that the mother of the Respondent had already left when the deceased died; that the Respondent and Booker lied to the court that he had built a home for deceased's wife; that he did not receive the Respondent's dowry; that she did not include the name of his only surviving sister Joyce Sane in the succession proceedings and who did not give her consent. That the deceased did not sire children as he was a sick man and that he broke up with Margaret over the issue of inability to sire children; that the Respondent swore an affidavit dated 16/4/2012 in which she had claimed that he was her father.

14. The appeal was canvassed by way of written submissions. It was the Appellant's submission that the objector/Respondent was not a child of the deceased. It was submitted that the Respondent did not produce a birth certificate to ascertain her date of birth.
15. He submitted that the deceased died on 25/12/1983 and not in 1984 as alleged by the Respondent. That the Respondent was neither a child of the deceased nor adopted by the deceased as alleged and further that the Respondent failed to prove the fact of dependency. That the appeal be allowed and the lower court ruling set aside and that the grant already issue to him to remain valid.
16. On the other hand, the Respondent submitted that she was a biological child of the deceased as stated in her affidavit in support of her objection application. It was submitted that her evidence was corroborated by the evidence of OB.W2, and OB.W3. The Respondent likewise submitted that OB.W4 and the Respondent's exhibit 3 also confirm that she is a child of the deceased.
17. The Respondent relied on sections 101 and section 102 of the *Evidence Act* cap 80 Laws of Kenya, stating that the Appellant who alleged that the deceased could not sire children ought to have adduced evidence to confirm the said assertion.
18. It was the Respondent's further submissions that according to the Appellant's supporting affidavit, he stated that the Respondent's mother came to live with the deceased in October 1982 and that they lived together for 1 ½ years before the deceased died and that the objector was nine months at the time of the death of the deceased. This therefore confirmed that the objector lived with the deceased and her mother prior to the death of the deceased.
19. The Respondent submitted under section 118 of cap 80 on the principle of legitimacy to wit that:
 118. Conclusive proof of legitimacy.

The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.
20. The Respondent likewise submitted that OB.W3 testified that the Appellant was in the team from Siaya that travelled to pay dowry for the Respondent's late mother in Karachuonyo after the deceased had died. This signified that the Respondent's mother was validly married to the deceased under the Luo customary law. And I agree.



21. It was the Responden’s submissions under section 51(2)(g) of cap 160 that an application for grant shall include in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or heirs then deceased.
22. Finally, under this head, the Respondent submitted that as a child of the deceased, whether biological or adopted, the Respondent ranked higher than the Appellant in order of preference under section 66 of cap 160, yet the Appellant concealed from the trial court the material fact that the deceased had a child whether biological or adopted.
23. I have duly considered the record of appeal and the submissions filed and find that the only one issue for determination is whether the Objector/ Respondent is a child of the deceased and thus a dependent for purposes of the *Law of Succession Act*.
24. In the case of Re Estate of Cecilia Wanjiku Ndungu where the court appreciated that a child may be adopted formally or informally with informal adoption being proved by sufficient evidence.
25. It is my considered opinion based on the evidence on record and common sense that the children of a woman legally married to the man, all belong to the man, provided that the woman is not remarried. It was the evidence of the Appellant that his brother (deceased) married his wife Margaret and that he is the one who welcomed her to the home. If the deceased did not discriminate these children and even went further to pay dowry for their mother, it simply meant that he was ready and indeed adopted all the children of Margaret as his own. On this, i agree with the trial court that Pauline Auma Oloo is a biological or adopted daughter of the deceased.
26. Section 66 of the *law of succession Act* stipulates thus:

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

 - (a) surviving spouse or spouses, with or without association of other beneficiaries;
 - (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
 - (c) the Public Trustee; and
 - (d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.
27. Section 38 of the *law of succession Act* stipulates thus:

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.
28. Based on the foregoing, I am in agreement with the decision by Aluoch J in Re Isaac Kireru Njuguna [2002]eKLR when she held ‘...where the deceased has left children surviving him or her, where does the brother come in?’



In the present circumstances, it has emerged that the deceased left behind dependants who include the Respondent herein and who must rank high in the family tree as provided by section 66 of the [Law of Succession Act](#). It transpired from the entire evidence that the Appellant was out to disinherit the dependants of the deceased. Indeed, the Appellant confirmed in his evidence that he had educated the Respondent as she was his brother's child and even received the dowry during her marriage. The Appellant then later on, without batting an eyelid, denied ever taking care of the Respondent during her youthful years. The Appellant also admitted that he did not include or secure consent from his surviving sister Joyce Sande when he filed the succession cause. The Appellant came out as untruthful in that OB.W3 stated that the Appellant was part of the team who went to Rachuonyo to pay dowry for the Respondent's late mother and hence, Margaret Ratuoro was the wife of the deceased. This is contrary to the Appellant's claim that the deceased died while unmarried. The Appellant also admitted that the Respondent's mother lived with the deceased for one and half years before he died. Further, the Respondent's witnesses OB.W2, OB.W3 and OB.W4 confirmed that the Appellant had recognized the Respondent and her mother as deceased's family members and that he built a house for the Respondent's mother who lived until her demise in 2002 and thereafter he took up the Respondent and her siblings and treated them as his own children. It was therefore quite strange for the Appellant to later turn around and disown his late brother's family. The Appellant literally threw them under the bus.

29. It is thus my considered view that the Respondent accurately demonstrated that she is indeed a child of the deceased either biological or adopted and thus ranked higher as a dependent of the estate of John Muruka Asindi and as such, the Appellant ought to have sought her consent. I find that the Respondent was entitled to approach the trial court pursuant to the provisions of section 76 of the [Law of Succession Act](#) in order to challenge the Appellant in the manner in which he secretly filed the succession proceedings without consulting the Respondent. It is clear that the Appellant obtained the grant fraudulently by the making of a false statement or by the concealment from the court of something material to the case. Consequently, the finding by the learned trial magistrate was proper and must be upheld.
30. In view of the foregoing observations, it is my finding that the Appellant's appeal lacks merit. The Respondent's summons for revocation of grant dated 19/4/2017 are allowed in the following terms:
- a. The grant issued to Haggai Asindi Agola on 4/3/2016 is hereby revoked.
 - b. A fresh grant be and is hereby issued to Pauline Auma Oloo.
 - c. The certificate of confirmation of grant issued to Haggai Asindi Agola on 5/10/2016 is hereby cancelled.
 - d. The registration of titles to land parcels numbers East Alego/Masumbi/1161 and East Alego/Masumbi/1733 in the name of Haggai Asindi Agola is hereby cancelled and that the same shall revert in the name of the deceased John Mruka Asindi for purposes of distribution among the beneficiaries.
 - e. The new petitioner is hereby ordered to file fresh summons for confirmation of grant within fourteen (14) days of issuance of the fresh grant.
 - f. Matter to be mentioned before the Chief Magistrate on 12/2/2025 to confirm compliance and for further directions.
 - g. Each party to bear their own costs.

Orders accordingly.



DATED, DELIVERED AND SIGNED AT SLAYA THIS 23RD DAY OF JANUARY, 2025

D. KEMEI

JUDGE

In the presence of:

Haggai Asindi Agola.....Appellant

Okello.....for Respondent

Ogendo.....Court Assistant

