



In re Estate of Paul Ogutu Ayimba alias Paulo Ogutu alias Ogutu Ayimba (Deceased) (Civil Appeal E002 & E015 of 2024 (Consolidated)) [2025] KEHC 351 (KLR) (23 January 2025) (Judgment)

Neutral citation: [2025] KEHC 351 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E002 & E015 OF 2024 (CONSOLIDATED)**

DK KEMEL, J

JANUARY 23, 2025

**IN THE MATTER OF THE ESTATE OF PAUL OGUTU AYIMBA
ALIAS PAULO OGUTU ALIAS OGUTU AYIMBA (DECEASED)**

BETWEEN

MARY AYIMBA 1ST APPELLANT

MICHAEL ODHIAMBO AYIMBA 2ND APPELLANT

RAPHAEL OBONG'O OGUTU 3RD APPELLANT

AND

PETER OTIENO OGUTU 1ST RESPONDENT

ALOICE AYIMBA OGUTU 2ND RESPONDENT

*(An appeal arising from the ruling and order of Hon. B. Limo (P.M)
delivered on 2nd April 2024 in Misc. Succession. No. 9 of 2018)*

JUDGMENT

1. The appeal herein arises from the ruling of the learned trial magistrate (Hon. B. Limo) rendered on 2/4/2024 wherein he distributed the estate of the deceased as follows:
 - a. LR. Siaya/Karapul-Ramba/335 shall be divided into three portions to allow each house to have a share of the said parcel of land since this is where all or largely where all family members from the three houses reside.
 - b. LR.Siaya/Karapul/Ramba/308 be divided on a 50:50 basis between the 1st and 3rd families since they have been using it.
 - c. LR. Siaya/Karapul/Ramba/446 be shared or granted to the 2nd family as it has been cultivating it and that the two beneficiaries from that family shall share it equally.



- d. LR. Siaya/Karapul/2083 to be divided on a 50:50 basis between as between the 1st and 3rd family.
 - e. That the District Surveyor Siaya is hereby ordered to demarcate the parcels of land as per the directions of the court to allow beneficiaries to get their portions.
 - f. The OCS Siaya is hereby ordered to provide security to the surveyors during the exercise.
 - g. That any aggrieved party by the orders of the court to appeal in the High Court within 14 days of the date of delivery of the ruling.
2. Dissatisfied by the said decision, the three Appellants lodged their appeals to this court. The 1st and 2nd Appellants filed their Memorandum of Appeal dated 9/4/2024 wherein they raised the following grounds of appeal:

- i. That the trial magistrate erred in law and fact in failing to take into account the factual circumstances of the deceased's dependents and properties that were relevant in ensuring equitable and fair distribution of the deceased's estate.
- ii. That the trial magistrate erred in fact and in law when he ordered a 50:50 distribution of land parcel No. Siaya/ Karapul/Ramba/ 308 between the 1st and 3rd families when no one from the 3rd family had been allocated by the deceased prior to his death nor lived or utilized any portion of the said parcel of land.
- iii. The trial magistrate erred in law and in fact when he failed to appreciate that the estate parcel number Siaya/Karapul/Ramba/ /2083 was land apportioned by the deceased to and occupied solely by members of the 1st family while Siaya/Karapul/Ramba//466 was land apportioned by the deceased to and occupied by members of 3rd family only.
- iv. That the trial magistrate erred by failing to consider in totality all the evidence adduced before reaching his decision.

The Appellants therefore sought for the setting aside of the orders and direct that the distribution of the estate be done in a manner that takes into account the manner and extent of occupation of the land parcel numbers Siaya/Karapul/308, 466 and 2083 by the dependants as was previously allocated to them by the deceased prior to his death. They also prayed for costs of the appeal.

3. The 3rd Appellant filed his Memorandum of Appeal dated 11/4/2024 wherein he raised the following grounds of appeal:
- a. That the learned trial magistrate erred when he failed to find that the vital information regarding the parcels of land Siaya/Karapul/Ramba/308, 466, 2083 and 1730 had been concealed by the Respondents.
 - b. That in paragraph 9(a) of the Ruling, Siaya /Karapul/Ramba/ 335 is the home where all family members lived. That it should be taken into account that the 3rd family had sold a portion of the home.
 - c. That in paragraph 9(b) of the Ruling, Siaya /Karapul/Ramba/ 308 has never been used by the 3rd family but rather for a very long time been utilized by the 1st and 2nd family.
 - d. That members of all households have since intermeddled with the estate thus, Peter Otieno (1st Respondent) and his brothers Wayodi and Ayimba sold portions of 1730 and 335; Alloys



Ayimba (2nd Respondent) and Nyapola from the 2nd family also sold portion of 466 and the whole of 2083; while Raphael Obongo and Michael Odhiambo from 1st family intermeddled by building their homes there.

- e. That the learned magistrate failed to consider in totality all the evidence adduced before reaching his decision.

The 3rd Appellant prayed that the matter be referred back to the Environment and Land Court and further, that court trustees be sent to the ground to ascertain how much land is available for distribution. He also prayed for costs of the appeal.

4. This being a first appeal, the duty of this court is well settled namely, to re-evaluate, analyze and to subject the entire evidence to a fresh and exhaustive examination so as to arrive at its own independent conclusion. See *Selle Vs Associated Motor Boat Co Ltd* [1968] EA 123. I must give due respect to the factual findings of the trial court out of an appreciation that it had the advantage 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 learned magistrate failed to take any particular circumstance into account or that they were based on no evidence or were otherwise plainly wrong.

5. OB. W1 Mary Ayimba testified that the deceased is her father in law and that her husband Michael Odhiambo Ayimba is the eldest son to the deceased. That she filed an affidavit on 16/8/2021 in protest. That Peter Ogutu filed a proposed mode of distribution. That the deceased divided the land in 1981 before he died in 1983. That the deceased had three wives namely; Marcella Adero, Elizabeth Akongo and Peter's mum (the 3rd wife). That the current occupation is the distribution made by the deceased.

On cross examination by Counsel for the Respondents, she stated that in the proposed distribution, she was given parcel No. 308 together with Consolata. That 466 and 2083 were given to her husband and that parcel 335 is where they reside. That all the properties are part of the estate. That she personally occupies parcel No. 335 with Alloys Ayimba and Edwin Ogutu Oganga lived there and was buried there on 14/1/2023. That the children of Vitalis Nyapola are also on 355. That there are other beneficiaries not on 355. That Peter Otieno lives on 1730 and 1694 and that they have no share on 355. That according to her, all beneficiaries are catered for. That the deceased had apportioned land and even given the 3rd house a bigger portion. That the proposal by Peter is not consistent with how the deceased who was his father had distributed because Peter omitted parcel No. 1730 and 1694. That Parcel No. 335 was also left out.

6. PW2 Michael Odhiambo Ayimba testified that he was the son of Michael Patrick Ayimba Ogutu who was the eldest son to the deceased Paul Ogutu Ayimba. That PW1 is his mother. That he swore an affidavit on 18/10/2021 which he adopted as evidence in chief in protest to the mode of distribution. He went on to state that he is also an administrator and that he protests the distribution because the same will be unfair to the 1st and 2nd houses. That the estate was already intermeddled by the Respondent (Peter) who sold parcel No. 1730. That No. 1730 was in the name of Lucas Wayodi who was a minor. The registration was legitimately done by Paul Ogutu Ayimba. That the land was sold illegitimately because he was a minor. Land parcel No. 335 was sold by Peter and late George (3rd house). That a portion was sold and the rest transferred to George.

That proposal by Peter shows that the deceased never distributed his land but long ago distribution meant that you were shown a parcel awaiting registration.

That they agreed to relinquish the portions given to his mum and Raphael out of parcel No. 466 to Peter. On parcel No. 355 (The Homestead) was redistributed and each house knew their boundary. That he prays that the court considers the structural development in each parcel. Parcel No. 466



is undeveloped, while parcel No.308 was completely done in 1984, one year after the death of the deceased. That parcel No. 2083 has rental houses for his mother which were done by his father in 1977 before the death of the deceased. The same property also contains business premises and home for Raphael. That he has come with clean hands not hiding anything. That it is Peter who has refused to agree. That he prays that the status quo be maintained. They (his mother and himself) are willing to relinquish their portions in parcel No. 466 and 355 so that the issues are resolved.

On cross examination, he stated that part of 355(the homestead) was sold by Peter and George (deceased), and that the green cards if they had been filed would show the said sale. That 355 was excluded in the proceedings because it is in the name of George. That he has begun construction on parcel No. 308. That the proposed distribution contradicts what is on the ground. That currently the occupants are four. That he does not object that the 308 is shared to all persons listed, they are 10; he objects to Edwin Ogutu and Anna Anyango because these are people born later. That the proposed distribution of parcel No. 308 caters for three households.

That he objects the sharing of 308 in three portions. That parcel 308 only has one home for Consolata. Raphael and Alloys were farming. Before issues started and that 1st and 2nd houses were using parcel 308.

7. The petitioners relied on their proposed distribution while the objectors were also directed by the court to file their proposed distributions which they did.
8. The chronology of events is that matter had emanated from a summons for confirmation of grant dated 14/07/2021. The said application was objected to by Mary Ayimba and Michael Odhiambo Ayimba who filed affidavits of protest to that effect. The protestors averred that the estate had been intermeddled with and others transferred to other beneficiaries thus the proposed distribution on the application for confirmation was unfair and unequitable.
9. On 9th February 2024 parties agreed to compromise their objection /protest and allow the court to distribute the estate. The parties agreed to file their respective proposals on distribution which they did.
10. This appeal was canvassed by way of written submissions. The parties duly filed and exchanged submissions.
11. The Appellants submitted that the ruling of the subordinate court dated 2nd April 2024 went against the provisions of section 71(1) of the Law of Succession Act and rule 40(1) of the Probate and Administration Rules. That it was the administrators' duty to render accounts as per section 83 of the Law of Succession Act which they did not do.
12. It was submitted that since none of the properties vests in any single administrator, he cannot propose its distribution and even if confirmation was granted in his favor, he does not have the power under section 82 of the Law of Succession Act to transmit it to other beneficiaries without involving the other administrators.
13. It was further submitted that the trial magistrate erred in law and in fact when he failed to appreciate that the land parcel No. SIAYA/KARAPUL/ 2083 was land apportioned by the deceased solely for members of the first family only. While parcel No. 466 was apportioned by the deceased for members of the 3rd family only.
14. The 1st appellant submitted that her late husband was gifted a portion of Siaya /Karapul/ 2083 in which he constructed rental houses where she collects rent to date. That the said portion measuring approximately 0.050 HA should be retained by her, and that she is ready to relinquish other entitlements to another beneficiary in order to retain that portion. That the trial magistrate ignored this fact in his ruling.



15. It was submitted that the trial magistrate in his ruling overlooked the evidence on record that showed that there were beneficiaries whom the deceased had gifted portions of land prior to his demise who include Consolata Adhiambo who was gifted a portion on parcel No. 308 wherein she has constructed a permanent house. Michael Ayimba Ogutu (deceased-now occupied by his son Michael Odhiambo Ayimba) has a house under construction and that Raphael Ogutu (3rd Appellant) has a portion in the same parcel Siaya/Karapul/Ramba/308.
16. It was also submitted that it was necessary for the trial court to call for additional evidence and obtain a site plan of the properties and ascertain the current use and development by beneficiaries and the extent of intermeddling before a final distribution of the net intestate is embarked on. Learned counsel urged the court to rely on Rule 73 of the Probate and Administration Rules and make the appropriate orders.
17. It was finally submitted that the matter had earlier landed in this court and that it was ordered that the trial court do the correct thing but the same has not been done since the orders issued by the trial court are likely to cause massive disruptions and displacement of beneficiaries.
18. The Respondents on their part have submitted that the 3rd Appellant intermeddled with the estate and transferred to himself the entire SIAYA/KARAPUL/RAMBA /2083, wherein the court (Hon. T. Olando) ordered on 15/12/2018 that the said parcel do revert back to the deceased's estate.
19. In conclusion the Respondents submitted that the ruling of the magistrate's court should be upheld. On this, they relied on the Court of Appeal's celebrated case of Rono vs. Rono [2005]1 E.A. 363, where the court held that the estate of a polygamous deceased should be distributed according to the number of children and not the number of houses.
20. I have considered the evidence tendered before the trial court as well as the rival submissions. It is not in dispute that the deceased had three wives/households namely Marcella Adero Ogutu, Akongo Ogutu and Magret Ochieng Ogutu as per the chief's letter dated 10th January 2018 which is not contested by the parties. It is also not in dispute that there were four appointed administrators namely: Raphael Obongo Ogutu, Michael Odhiambo Ayimba (1st house), Alloys Ayimba Ogutu (2nd house) and Peter Otieno Ogutu (3rd house). It is not in dispute that this court had earlier intervened in this matter and set aside the lower court's order and directed the summons for confirmation be heard afresh and procedurally in accordance with the law. It is also not in dispute that the deceased had gifted some of the beneficiaries prior to his death and further made some partial distributions as well. It is also not in dispute that some of the beneficiaries have intermeddled with the estate of the deceased. It is also not in dispute that the trial court did not receive oral testimonies of all the beneficiaries and their witnesses.
21. The bone of contention is on the distribution of the deceased's estate taking into account the deceased's partial distribution during his life time. It is instructive that the trial court did send for a report from the area chief regarding the true position on the ground but it seems the trial magistrate opted not to consider the said report which was quite comprehensive and reflected the correct state of affairs on the ground and that the beneficiaries would have shed light on them in their testimonies had all of them been ordered to tender oral evidence and be subjected to cross-examination. It is obvious that had the learned trial magistrate juxtaposed the evidence tendered with the said chief's report, he would not have fallen into error and hence these appeals. The Appellants' grievances appear to stem from the trial court's order to have some of the properties distributed contrary to the manner in which the deceased had arranged prior to his demise.
22. I have considered the chief's report dated 19/1/2024 regarding the position on the ground as well as the proposed distributions by the Appellants and the Respondents. The said chief's report dated 19/1/2024 was as follows:



S/NO	Parcel Number	User
1	Siaya/Karapul-Ramba/2083	Raphael Obong'ó Ogutu (Homestead) His home together with his family members. Permanent residential houses and a commercial building belonging to Raphael Obongó Ogutu. Mary Ayimba (Residential houses) Both Raphael Obongó Ogutu and Mary Ayimba are from 1 st family.
2	Siaya/Karapul-Ramba/446	Lower part was sold to one Albert Oluendo by one of the beneficiaries, the late Vitalis Nyapola Ogutu. 2 nd block is cultivated by Aloys Ayimba Ogutu. Both Aloys Ayimba Ogutu and the late Vitalis Nyapola Ogutu are from the 2 nd family. 3 rd block is cultivated by Raphael Obongó Ogutu. 4 th block is cultivated by Mary Ayimba. Both Raphael Obongó and Mary Ayimba are from the 1 st family.
3	Siaya/Karapul-Ramba/308	Consolata Adhiambo constructed a self-contained house on part of that parcel. Her family members reside in that house. Michael Ayimba, son of the late Michael Ayimba Ogutu laid a foundation to construct a house on part of that land though the construction was stopped. The foundation is still intact. Both Michael Ayimba and Consolata Adhiambo are from the 1 st family.



23. The above chief's report has given a glimpse of what obtains on the ground but the same should have been backed up with a surveyor's report regarding the exact sizes of the parcels as occupied by the respective beneficiaries on the ground.
24. As the deceased died intestate, then it is the court which is mandated to distribute his estate to his beneficiaries. In *Re Estate of Henry Kithia Mwitari (deceased) (2021) eKLR* it was held that the duty of the probate court is to oversee the transition of the deceased's estate to the rightful beneficiaries.
25. It is noted that the parties herein are in agreement that the deceased had made some partial distribution to his three families and even some of his children prior to his demise. They have confirmed that a majority of the family members are still residing on the portions allocated by the deceased and that a majority of them want to maintain their positions. It is quite clear that the beneficiaries herein appear to hold dear the wishes of their late father. This thus leads me to come to the conclusion that the fulfilment of the wishes of the deceased is paramount to a majority of the family members herein. I am in agreement with the holding by Mativo J (as he then was) in *Nyeri High Court Succession Cause No. 404 of 2012 Re Estate of James Migwi Gakau* where he held that the wishes of the deceased who had distributed his land in his lifetime must be respected. However, it is clear that the trial court only received oral evidence of some beneficiaries and then ordered the parties to file rival modes of distributions but again, did not allow the parties to give oral evidence and be cross-examined so as to establish the correct status of the properties on the ground. It transpired that some properties had been intermeddled with by some beneficiaries and that the trial court ought to have received evidence from the beneficiaries and to ensure that any properties sold to third parties be ordered to revert back in the name of the deceased for purposes of distribution. Again, the distribution ordered by the trial court has the effect of disrupting and displacing the beneficiaries and hence the need to interfere with it. I find that this was a matter which required to be handled in a delicate manner and that the court should first receive the oral evidence of the parties as well as the true status on the ground. This court is not in a position to do so on appeal and thus it must remit the matter back to the trial court to do the right thing. Even though this court had earlier ordered the trial court to hear the summons for confirmation of grant afresh, it can still make the same orders so as to ensure that the right thing is done and the matter resolved in an appropriate manner and with finality. I am persuaded by the Appellants' arguments that this matter was not properly adjudicated by the trial court and thus the need to interfere with the said trial court's decision.
26. In view of the foregoing observations, it is my finding that the Appellants' appeals have merit. The same are allowed. The orders made by the learned trial magistrate on 2nd April 2024 are hereby set aside and substitute with an order that the summons for confirmation of grant dated 14th July 2021 be heard afresh by the trial court. The status regarding occupation of the properties by the beneficiaries shall be maintained pending determination of the summons for confirmation of grant. As parties are members of one family, each party shall bear their own costs.

DATED AND DELIVERED AT SIAYA THIS 23RD DAY OF JANUARY 2025

D. KEMEI

JUDGE

In the presence of :

M/s Achieng.....for 1st and 2nd Appellants

Raphael Obong'o.....3rd Appellant

Oduol.....for Respondents



Ogendo.....Court Assistant

