



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Daniel Juma Mumelo (Deceased) (Succession Appeal  
E003 of 2021) [2025] KEHC 2949 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2949 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
SUCCESSION APPEAL E003 OF 2021**

**REA OUGO, J**

**MARCH 13, 2025**

**IN THE MATTER OF THE ESTATE OF DANIEL JUMA MUMELO-  
(DECEASED)**

**BETWEEN**

**MARGARET CHILANDE SIMIYU ..... APPELLANT**

**AND**

**ALICE NAFULA JUMA ..... RESPONDENT**

*(An appeal from the Ruling/Order of Hon. M. Munyekenye SPM  
in Webuye Succession Cause No. 42 of 2019 dated 15.9.2021)*

**JUDGMENT**

1. Margaret Chilande Simiyu (the appellant) filed an objection in Succession Cause no. 42 of 2019. Daniel Juma Mumelo (the deceased) died on 13.11.2016. Alice Nafula Juma, the widow of the deceased (the respondent), filed a petition for letters of administration intestate on 27.5.2019. The estate of the deceased has one asset Land Parcel No. Ndivisi/ Khalumuli/1962 as per the affidavit in support of the petition for letters of administration intestate.
2. The appellant in her affidavit of protest filed on 15.2.2021 deponed that at the time the deceased died in 2016, she had a decree against him in Webuye LDT Case No. 14 of 2008 over the whole of land title number Ndivisi/ Khalumuli/1962 measuring 0.207 Ha. She claimed that the parcel of land was family-inherited land, that her late husband was entitled to a share, and that they have stayed there from 1982 until he died in 2003 with her son John Wenwa Simiyu. The deceased died and left the administrator and her children in a separate land title Ndivisi/Khalumuli/2450 & 4144 where he was buried and they stay there to date. The late Patrick Simiyu Mumelo had a gift share from his father one-acre land, which was registered in the name of his elder brother Buyayi Mumelo. Before his death, Patrick Simiyu Mumelo sold portions of land from the same to Mourice Wasike, Jackson Sikuku, Zablon Ingosi, who



occupy their portions. The late Patrick Simiyu transferred the portions to the buyer from the registered owner (brother) titles numbers Ndivisi/ Khalumuli/ 1963,1995,1996 & 1993, and the balance parcel number 1962 was meant for her and her son John Wenwa Simiyu. She is, therefore, entitled to the said parcel of land.

3. The trial court delivered a ruling on 15.9.2021, the subject of this appeal.
4. The appellant's appeal is premised on the following grounds of appeal, as stated in her memorandum of appeal ;
  - i. The learned trial magistrate did not fully conform to the provisions of the Succession Act.
  - ii. The learned trial magistrate misdirected herself in finding and believed that the letter from the Chief was as if final and never bared name of the appellant which is wrong in law.
  - iii. The learned trial magistrate failed to appreciate as she should have that the Appellant matrimonial house since 1980 is on the particular portion of title disputed where she has stayed and occupied since then.
  - iv. The learned trial magistrate failed to note as she should have the deceased herein never occupied and used the disputed title of land whole of his life time and the appellant had no alternative place to stay.
  - v. The learned trial magistrate failed to properly evaluate administrator's and her witnesses statement this disputed parcel of land being ancestral property despite registered by the deceased herein was not meant for him.
  - vi. The learned trial magistrate ignored appellant's witness statement a brother of the deceased herein and misdirected herself in her finding and believed this was the deceased property and the appellant had no relationship to the deceased but the deceased whole of his life time never before competent court of law sought any claims against the appellant or children or her late husband.
  - vii. That the Ruling has due its many contradictions and numerous erroneous findings caused a failure of justice thus appellant under customary law of inheritance is entitled to be part of the succession of the deceased herein.
5. The appeal was canvassed by way of written submissions. The appellant and respondent acted in person in the lower court. the appellant continued to act in person in the High Court. In her written submissions she raises three issues for determination as follows; whether the Objector's exclusion from the process was a material issue in the process ( 1<sup>st</sup> issue) , whether the trial magistrate erred in law and in fact in failing to appreciate the provisions of the *Law of Succession Act* (2<sup>nd</sup> issue) and whether the trial magistrate considered both issues of fact and law in concluding the matter ( 3<sup>rd</sup> issue). In her submissions, she states that the deceased was holding parcel number 1962 in trust for his brother the late Patrick Simiyu Mumelo. She submits that the trial magistrate dismissed her protest without subjecting the same to hearing and without her evidence and her witnesses. On the 1<sup>st</sup> issue she relied on Form 3 of the Probate and Administration Rules, which provides that a petitioner must disclose if the estate has liabilities or not. She relied on sections 86 and 89 of the *Law of Succession Act*. She submitted that the trial Court considered the existence of a valid court decree on the transfer of the land parcel number 1962 while allowing the citation in Misc. Succession No. 34 of 2019 but the court disregarded the same in the succession cause. For this, she relied on Rule 7 (1)(d) of the probate and administration rules. She further submitted that a decree against a deceased person in the absence of variation setting aside or otherwise being stayed is a proven liability against the estate of the deceased.



The respondent accepted the decree in the citation proceedings, and therefore, she was aware of its existence. On the 2<sup>nd</sup> issue, she submitted the trial court directed that the matter was to proceed by way of viva voce evidence and parties were instructed to file witness statement. On the contrary, when the matter came up on 7.7.2012, the same court directed that the respondent file her statements, and ruling date would be issued. The parties were not granted an opportunity to have their statements adopted as evidence and cross-examined on the same. Reliance was made on the case of Gerald Macharia Njogu v Samuel Macharia Murimi [2016 eKLR. On the 3<sup>rd</sup> issue, the appellant submitted that the evidence proved that the Objector held a decree from a competent court against the estate of the deceased, which the court ought to have considered in its ruling. She is likely to suffer injustice if the appeal is disallowed as she has been in the said land for over 30 years. The appellant has another set of submissions dated 19.6.2024. The only additional issue she raises is that the trial court dismissed her protest summarily. She should have been heard to determine the relationship she had with the deceased under customary law as the land properties are ancestral land and not personally acquired.

6. The respondent in her submissions gave a brief background on the succession cause before the trial court and raised the following issue for determination, whether the decree in Webuye LTD case No. 14 of 2008 entitled the appellant then 1<sup>st</sup> objector and the then 2<sup>nd</sup> objector inclusion and entitlement as heirs to the deceased in a succession cause. It was submitted that section 35 of the [Law of Succession Act](#) provides for the persons entitled to participate in succession proceedings for an intestate being the wife and children. That the appellant and the 2<sup>nd</sup> objector were not the wife and child of the deceased and were, therefore not entitled to be included in the succession cause.

### **Analysis And Determination**

7. I have considered the rival submissions and the proceedings before the trial court. In considering the issues raised by the parties, I find that the appellant has raised a key issue, in that she was not heard on her objection despite the court's earlier directions. I have carefully perused the lower court proceedings. After the objection was filed, the trial court noted on 17<sup>th</sup> February 2021 that there were objection proceedings and the matter would be given directions on how the same would proceed. The appellant informed the court that she had filed documents and her witness statement and that she sought they proceed by way of submissions, and the 2<sup>nd</sup> objector also informed the court he would file submissions. The respondent sought time to answer the protest and to put in statements for her witnesses. The Court then ordered that the matter would proceed by way of viva evidence and the parties to file their witness statements. The matter was scheduled for hearing on 7.7.2021, it was not heard on the said date. On 11.8. 2021, when the matter came up for hearing, the appellant and objector informed the court that they had put in their papers. Thereafter, the court gave a Ruling date and delivered the ruling on 15.9.2021.
8. Article 50 (1) (k) of [the Constitution](#) 2010 states as follows;
  1. Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body...
    - (k) to adduce and challenge evidence.
9. It is not indicated why the trial court chose not to hear the parties by way of viva voce, as stated in the court's earlier order. The appellant has faulted the trial court for failing to hear her and her witness. Having made an order that the parties were to be heard by way of viva voce, the trial court ought to have heard the parties, or give a reason why it was not necessary to hear the parties. The objector had filed her statement and a witness statement. The objector challenged the petitioner's failure to include her claim



as a liability in the estate. A party with a dispute in court has a right to a fair hearing, to adduce evidence in support of his or her and challenge evidence. In my view, it is in the interest of justice that the parties be heard through viva voce evidence. I need not determine the other issues raised. I, therefore, set aside the ruling dated 15.9.2021; the appeal is allowed. The lower court file will be returned to Webuye Law Court for a hearing and determination. Each party is to bear its own costs.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 13TH DAY OF MARCH 2025.**

**R.E.OUGO**

**JUDGE**

In the presence of:

Margaret Chilande Simiyu /Appellant

Mr. Wegesa - For the Respondent

Wilkister - C/A

