



**Wambare v Wambare (Succession Appeal E001 of 2024)
[2025] KEHC 4891 (KLR) (25 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4891 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
SUCCESSION APPEAL E001 OF 2024**

**DK KEMEL, J
APRIL 25, 2025**

BETWEEN

DANIEL OKOTH WAMBARE APPELLANT

AND

WILFRED OCHIENG WAMBARE RESPONDENT

(Being an appeal from the ruling of Hon. Benjamin Limo (PM) in Siaya Chief Magistrate's Court Succession Cause No. E550 of 2021 (Estate of Margaret Wambare Jagongo) delivered on 1/8/2023)

JUDGMENT

1. The appeal arises from the ruling of Hon. Benjamin Limo (PM) in Siaya CM's Court Succession Cause No. E550 of 2021 dated 1/8/2023 wherein he ordered the estate of the deceased to be distributed equally among the beneficiaries.
2. Aggrieved by the said ruling, the Appellant filed a memorandum of Appeal dated 20/8/2023 wherein he raised the following grounds of appeal;
 1. The learned trial magistrate erred in law and in fact in failing to consider the evidence before him as a whole with respect to distribution of the deceased estate.
 2. The learned trial magistrate erred in holding that the wishes of the deceased did not matter in the distribution of property.
 3. The learned trial magistrate erred in law and fact in otherwise failing to exercise discretion in the proper manner resulting in injustice to the Appellant.
3. This being the first appellate court, its duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to an independent analysis and come to own independent conclusion as to whether or not to uphold the decision of the of the trial court. (See *Selle Vs. Associated Motor Boat Company Ltd* [1968] EA 123).



4. It is noted from the record of appeal that the Appellant and Respondent had disagreed on the proposed mode of distribution of the estate of the deceased. The parties herein had been granted an opportunity to go for mediation but however they did not reach a settlement. The trial court then directed them to file and exchange their respective modes of distribution of the estate. There was therefore no hearing conducted as the trial court relied on the rival affidavits. The Respondent herein who is the Petitioner proposed equal distribution of the estate among the 13 children of the deceased. The Appellant herein who was one of the beneficiaries adopted a proposed mode of distribution by Christine Akinyi Wambare who presented a note that had allegedly been written by the deceased to act as will and that a majority of the beneficiaries supported a mode of distribution which was in accordance with her wishes as indicated on the will.

The said note (will) dated 28/9/2011 is written in Dholuo language and which the said beneficiary Christine Akinyi Wambare used in coming up with her proposed mode of distribution. It is noted that the learned trial magistrate ruled in favour of the mode of distribution proposed by the Respondent.

5. The appeal was canvassed by way of written submissions.
6. The Appellant's submissions mainly hinged on the ground that the Respondent had left out other beneficiaries while petitioning for the grant and hence the grant should be revoked pursuant to the provisions of Section 76 of the Law of Succession Act so that a fresh administration of the estate can be carried out. The Appellant's second plank in this appeal is that the trial court ignored the proposed mode by the beneficiaries who are the majority and further that the Respondent ended up inheriting the town developed properties while the rest of the beneficiaries inherited rural land and who have been disadvantaged. It was finally submitted that the certificate of confirmation of grant should be revoked or canceled and that the properties on land parcels Siaya/Karapul Ramba/396, 2193 and 4332 be reverted back to the deceased for distribution.
7. The Respondent raised two main issues for determination; firstly, whether there was a valid will regarding the wishes of the deceased and secondly, whether the Appellant has established the requisite threshold for revocation of grant.
8. The Respondent submitted that the deceased did not leave behind a will as claimed by the Appellant. It was submitted that the purported note did not amount to a valid will and that the trial court property rejected it and ordered the estate to be distributed equally between the beneficiaries and that it rejected the proposed mode of distribution by the Appellant and beneficiaries as the same would have amounted to unfair distribution.

It was further submitted that the Appellant has not availed sufficient reasons why the grant should be revoked yet he and the beneficiaries participated in the proceedings leading to the issuance of the grant and confirmation thereof. It was further submitted that the issue of other beneficiaries not having been listed was addressed during the confirmation of the grant as all of them were present. The Respondent finally sought for the dismissal of the appeal with costs.

9. I have considered the record of appeal and the rival submissions. It is not in dispute that the Respondent therein had filed for letters of grant of administration intestate in the estate of the deceased herein and that a grant was subsequently issued to him. It is also not in dispute that the Respondent herein filed summons for confirmation of grant dated 17/11/2022 which led to one of the beneficiaries Christine Akinyi Wambare filing a separate mode of distribution of the estate and which the Appellant wholly supported. It is not in dispute that the parties herein were granted an opportunity to go to mediation but that they failed to reach a settlement thereon and that the trial court directed them to file separate mode of distribution. It is not in dispute that majority of the beneficiaries were in favour



of the proposed mode of distribution by Christine Akinyi Wambare while the Respondent's mode of distribution only attracted the support of one beneficiary Rose Anyango Otieno. It is not in dispute that the trial court ruled in favour of the Respondent's mode of distribution and which has precipitated the present appeal. I find the issue for determination is whether the trial court's finding on the mode of distribution was proper.

10. I must point out from the outset that the Appellant having accepted the trial court's directions that parties do file their proposed mode of distribution, then he is deemed to have abandoned and or waived his quest in seeking to revoke the grant and therefore his main concern is on the issue of distribution of the deceased's estate.
11. It is trite that the primary duty of a succession court is the distribution of the estate of a deceased person. The trial court was presented with two rival modes of distribution. As noted above, the mode of distribution by the Respondent is that the assets should be shared equally among all the beneficiaries while that by Christine Akinyi Wambare on behalf of the rest of the beneficiaries provides for an unequal distribution of the estate on the basis that the deceased had wished the same that way.
12. The law guiding the courts in the distribution of an intestate estate of a deceased person is found in Section 38 and 40 of the [Law of Succession Act](#) which provide as follows:

Section 38: - where an intestate has left a surviving child or children but no spouse, the net intestate estate shall subject to the provisions of Section 41 and 42, devolve upon the surviving child if there be only one or shall be equally divided among the surviving children.

Section 40

- (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall in the first instance, be divided to the number of children in each house but also adding any wife surviving him as an additional unit to the number of children.
- (2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in Section 35 to 38.

The Respondent's proposal is in tandem with the provisions of Section 38 of the [Law of Succession Act](#). On the other hand, the proposal by Christine Akinyi Wambare and backed up by a majority of the beneficiaries appears to be unequal. The said Christine Akinyi Wambare brought up a note dated 28/9/20211 alleged to be a will by the deceased wherein the deceased had made a raft of how she wished her estate to be inherited. However, it is noted that the said document is neither signed by the testator nor witnesses/attested by a witness. Indeed, a perusal of the said document leaves no doubt that the same cannot pass muster to be described as a will by any stretch of imagination in view of the strict provisions of Section 11 of the [Law of Succession Act](#) which provides that no will shall be valid unless: -

- a. The testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;
- b. The signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;
- c. The will is attested by two or more competent witnesses, such of whom must have seen the testator sign or affix his mark to the will or have seen some other person sign the will, in the presence and by the direction of the testator or have received form the



testator a personal acknowledgment of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time and no particular form of attestation shall be necessary.

It is also instructive that before a person desires to make a will he/she must satisfy certain conditions inter alia; that the will must have been executed with testamentary intent; that the testator must have had the testamentary capacity; that the will must have been executed free from fraud, duress, undue influence or mistake; that the will must have been duly executed.

The foregoing provisions leaves no doubt that the deceased did not make a valid will. However, this notwithstanding; there is evidence of the wishes of the deceased regarding the manner in which she sought to arrange how her properties were to be shared amongst her children. It is not in dispute that prior to the filing of the succession cause, the beneficiaries used to collect rent from some of the rental properties. Indeed, the Respondent's summons for confirmation of grant dated 17/11/2022 shows that the Respondent had proposed that Parcel No. Siaya/Karapul/Ramba/396 was to be shared between himself and three other beneficiaries. Likewise, he had proposed that parcel Siaya/Karapul/Ramba/2193 was to be shared between himself and two other beneficiaries. This is shown vide the Respondent's supporting affidavit sworn on 17/11/2022 vide paragraph 4 thereof as follows: -



No	Asset	Beneficiary	Ha
1	Siaya Karapul/ Ramba/396	Wilfred Ochieng Wambare James Amboga Wambare Maxwel Omondi Wambare	0.04 0.04 0.04
2	Siaya/Karapul/ Ramba/4332	Wilfred Ochieng Wambare Pamela Achieng Wambare Christine Akinyi Wambare Rose Anyango Otieno Nashon Adino Wambare	0.065 0.065 0.065 0.065
3	Siaya/Karapul/ Ramba/2193	Wilfred Ochieng Wambare Daniel Okoth Wambare Esterh Auor Wambare	0.243 0.027 0.027
4	South Gem/ Gombe/1006	Rose Anyango Otieno Wilfred Ochieng Wambare	0.755 0.755
5	South Gem/ Gombe/4002	Wilfred Ochieng Wambare Nashon Adino Wambare Daniel Okoth Wambare Maxwel Omondi Wambare	1.0 1.0 1.0 1.0



It is noted that pursuant to the Respondent's supporting affidavit, a consent to confirmation of grant was duly signed on the schedule. Hence, had the summons for confirmation of grant not been objected to, then the grant would have been confirmed and the assets shared as proposed by the Respondent and shared as such. It is therefore quite baffling for the Respondent to abandon his earlier proposed mode of distribution and to come up with a new one wherein he has sought to inherit three properties to himself. The other beneficiaries have maintained that the assets taken up by the Respondent are developed with rental houses and that they stand to suffer prejudice as they have been relegated to the rural areas. Indeed, there is evidence that some of the beneficiaries used to collect rent from the said rental properties and that is why the Respondent upon obtaining the certificate of confirmation of grant, wrote a letter dated 13/12/2024 to the Deputy Registrar seeking clarification regarding the payment of rent by the tenants. This is clear proof that the tenants in those premises used to pay the other beneficiaries.

13. Even though the Respondent proposed equal distribution of the assets, it is clear that he took up for himself alone all the developed properties. This is only equality in terms of land sizes but not in terms of how developed the assets are. In fact, what the Respondent proposed amounted to unequal distribution and that the same is not fair. I find the proposal by the beneficiaries though unequal in sizes, is quite fair in the circumstances and in tandem with the principles of equity. In any event, the Respondent himself had made such a proposal when he filed the summons for confirmation of grant and was approved by the beneficiaries. The Respondent has not given reasons as to why he had to come up with a new schedule of distribution without seeking to amend the earlier one that he had filed. I find the Respondent was bound by his pleadings and should have rendered an explanation as to why he did not want the estate to be distributed as he had earlier proposed. I find the Respondent's conduct to be one in bad faith as he duped the beneficiaries and later threw them under the bus when he proposed the new distribution in terms of sizes. If indeed, the Respondent was for equality then he should have proposed that all the assets both developed and undeveloped be shared equally. If that position was to be taken, then all the assets would have to be split between the 13 beneficiaries and that the developed properties would have to be interfered with. In most cases, developed properties are usually sold and the proceeds shared equally. I am sure that that is not what the Respondent wanted and likewise the beneficiaries. I find the proposed mode of distribution by Christine Akinyi Wambare and adopted by a majority of the beneficiaries to be reasonable and appropriate as it resonates quite well with the beneficiaries prior to the confirmation of grant. It is instructive that the Respondent's earlier mode of distribution in support of the summons for confirmation of grant is still part of the record and which supports the beneficiaries' mode of distribution. The Respondent's latest mode of distribution is nothing but a selfish agenda to enable him acquire all the developed properties in Siaya township and to relegate his siblings to the rural areas. To that extent, I find that the learned trial magistrate went into error when he approved the Respondent's mode of distribution which was not supported by a majority of the beneficiaries. The finding must therefore be interfered with as an injustice was visited upon the majority of the beneficiaries.
14. In view of the foregoing observations, I find the Appellant's appeal has merit. The ruling by the learned trial magistrate delivered on 1/8/2023 is hereby set aside and substituted with the following orders:
 1. The grant issued to the petitioner dated 20/4/2022 is confirmed and that the estate of the deceased shall be distributed as proposed vide paragraph 6 of the Affidavit of Christine Akinyi Wambare sworn on 8/7/2023 as follows:



No	Asset	Beneficiary	Size In Ha	Remarks
1	Siaya/Karapul/ Ramba/2193	Esther Awuor Wambare Daniel Okoth Wambare Maxwel Omondi Wambare	As Proposed As Proposed As Proposed	1 Unit Self Contained And Vacant Land 1 Unit Self Contained And Vacant Land Vacant Land
2	Siaya/Karapul/ Ramba/4332	Wilfred Ochieng Wambare Nahashon Adino Wambare Christine Akinyi Wambare Rose Anyango Otieno Pamela Achieng Wambare Cliff Ochieng Wambare Berill Achieng Wambare Juliet Adhimbo Wambare	As Proposed As Proposed As Proposed As Proposed As Proposed As Proposed As Proposed	Unit No. 1 Upper Side Of 3 Rooms & Vacant Land Unit No. 2 & 3 Of 3 Rooms & Vacant Land Unit No.4 And 3 Rooms Unit No. 5 & 6 Of 3 Rooms Each & Vacant Land Unit No. 7 Of 3 Rooms Unit No. 8 Of 3 Rooms 2 Shops & Vacant Land 4 Rooms & Vacant Land
3	Siaya/Karapul/ Ramba/396	Maxwell Omondi Wambare Bonface Wambare Wambare James Amboga Wambare	As Proposed As Proposed As Proposed	1 Shop & Vacant Land 1 Shop & Vacant Land 1 Shop & Residential Rooms Attached To The



				Perimeterwall Directely Behind It
4	South/gem/ Gombe/402	Daniel Okoth Wambare Maxwel Omondi Wambare Nahashon Adino Wambare	1.33 Hectares 1.33 Hectares 1.33 Hectare	Vacant Land Homestead And Vacant Land Vacant Land
5	South Gem/ Gombe/1006	Rose Anyango Otieno	0.755 Hectares	Homestead & Vacant Land

2. The certificate of confirmation of grant issued on 1/8/2023 is hereby cancelled and that a fresh one be and is hereby issued in terms of paragraph *para_14 subpara_1 (1)* above.
3. All new titles that have been issued in respect of parcel Numbers Siaya/Karapul/Ramba/396, 2193 and 4332 are hereby ordered cancelled and to revert back in the name of the deceased herein Margaret Wambare Jagongo alias Magret Wambare and be made available for distribution among the beneficiaries.
4. As parties are members of one family, I make no orders as to costs.

DATED AND DELIVERED AT SIAYA THIS 25TH DAY OF APRIL, 2025.

D. KEMEI

JUDGE

In the presence of:

Okello.....for Appellant

Okanda.....for Respondent

Mboya.....Court Assistant

