Oyola v Odwory (Civil Appeal E041 of 2024)
[2025] KEHC 8507 (KLR) (16 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8507 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CIVIL APPEAL E041 OF 2024

WM MUSYOKA, J

JUNE 16, 2025

BETWEEN

MAXIMILLA MASIGA OYOLA .... APPELLANT

AND

MONICA AORI ODWORY .... RESPONDENT

(Appeal from orders made in the ruling of Hon. Kassim Akida, Resident Magistrate, RM, on 30th July 2024, in Busia CMCSC No. E515 of 2023)

JUDGMENT

1. The appeal herein arises from proceedings that were conducted in Busia CMCSC No. E515 of 2023, in the estate of Sylvester Oduor Ouma, who I shall heretoafter as the deceased. The said proceedings had been commenced by the appellant herein, Maximilla Masiga, after she had been allowed to initiate them, through orders made and directions given in Busia CMC Citation No. E045 of 2023, on 9th August 2023.

2. The appellant filed a petition, on 12th September 2023, in Busia CMCSC No. E515 of 2023, in her name and that of the respondent herein, Monica Aori Odwory. All the documents were signed by the appellant. The respondent did not sign any of them. The appellant sought that a joint administration be committed to her and the respondent. She listed the survivors of the deceased as herself and the respondent, in their capacities as widows, and three sons and two daughters, whose names were listed in the petition. The property, the deceased died possessed of, was listed as Bukhayo/Matayos/1369.

3. She attached a letter, from the Assistant Chief of Nang'oma Sub-Location, dated 14th April 2023, which identified the two widows, three sons and two daughters. It was pointed out, in that letter, that the respondent bore the deceased four children, while the appellant did not bear any. One of the daughters, Petronilla Anyango Wanjala, was said to have been born to a woman not married to the deceased. The appellant also attached a certificate of death, dated 30th May 2022, indicating

that the deceased died on 18th June 2021. There was also a certificate of official search, on Bukhayo/Matayos/1369, showing that that property was registered in the name of the deceased, on 4th March 1988, and that that property did not have any encumbrances.

4. Letters of administration intestate were made to the appellant and the respondent, on 23rd October 2023, and a grant was later duly issued, on 31st October 2023. The appellant then filed a summons for confirmation of the grant of 31st October 2023. The said application was dated 4th April 2024. She proposed, in it, that Bukhayo/Matayos/1369 be shared equally between her and the respondent.

5. The respondent filed her own summons for confirmation of grant, dated 4th May 2024. She named seven survivors of the deceased, as the two widows, the three sons and the two daughters, and proposed that Bukhayo/Matayos/1369 be shared equally between all seven survivors of the deceased.

6. The appellant filed yet another summons for confirmation of grant, dated 4th June 2024. She proposed, in her second application, distribution of Bukhayo/Matayos/1369 equally between the two widows, as proposed in the application dated 4th April 2024. The purpose of that second application, by the appellant, appeared to disclose that the deceased had some ancestral land, which was occupied by the respondent and the children, and to indicate that she had no claim to that land, and the same could devolve to the respondent and the children absolutely. Her claim, she pointed out, was to Bukhayo/Matayos/1369, which as not ancestral, as the deceased had acquired the same with his own resources. The registration details of the ancestral land were not disclosed.

7. The three applications for confirmation of grant were canvassed orally. Only the appellant testified. She said that if distribution was based on children, rather than wives, she would be disadvantaged.

8. Judgement was delivered on 30th July 2024, by Hon. Kassim Akida, RM. It was rendered in Kiswahili. The trial court decided, on the basis of section 40 of the *Law of Succession Act*, Cap 160, Laws of Kenya; *James Muiruri (Deceased)* [2021] eKLR (Ng'etich, J) and *Mary Rono v Jane Rono* [2005] eKLR [2005] KECA 326 (KLR) (Omolo, O'Kubasu & Waki, JJA), in the terms proposed by the respondent. The basis was that distribution of the estate of the deceased was founded on the number of the children of the deceased, where he had died a polygamist; that the appellant had not provided evidence of existence of ancestral land; and the only available asset was Bukhayo/Matayos/1369.

9. The appellant was aggrieved, hence the appeal herein, vide a memorandum of appeal, dated 20th August 2024. The grounds of appeal are that she was discriminated against as she was childless; the money in the bank and retirement benefits were not distributed; and the other survivors had benefitted from ancestral land.

10. Directions were given, on 17th March 2025, for canvassing of the appeal by way of written submissions. The appellant filed submissions, the respondent did not. I have read through the written submissions and noted the arguments made.

11. I will deal with the three grounds of appeal in turn.

12. The first ground is on being discriminated against, on the basis of childlessness. The deceased died intestate. Under the concept of intestacy, in all systems of succession and the law, the ultimate beneficiaries are the children of the deceased. The concept of succession itself is about property moving from the deceased to his or her children. That is why it is said to be successive. The concept of succession explains and facilitates that movement. It is designed to move the wealth or property from the generation of the parents to that of the children, and not from one parent to the other parent. Succession is not meant to be horizontal, but vertical. It is not ascendant, but descendent. It is about the right of one group replacing another group. The property is meant to move from the dead property

owner, the ancestor, to his or her children, that is to say his or her descendants. It descends from a parent to a child. Trans-generational or descendent succession is the norm, while intra-generational or horizontal succession is the exception. Succession is only horizontal or ascendant in exceptional circumstances. See *FEO v ACO (Sued as Co-Administratrix of the Estate of the Late BPO)* [2024] KEHC 14889 (KLR)(Musyoka, J).

13. A surviving spouse is not a descendant of his or her dead spouse. A surviving husband is not a descendant of his dead wife, and vice versa. The inheritance of property by a spouse does not fall neatly into the concept of succession. That explains why a surviving spouse is only entitled to a life interest in the assets left behind by his or her dead spouse, according to sections 35, 36 and 40 of the *Law of Succession Act*, for the true inheritors or heirs are the children, and the surviving spouse should only get to utilise the property in the interim, pending eventual devolution to the real heirs, the children. The point that I make is that children are the premier stakeholder in succession proceedings, followed by the surviving spouse.

14. In view of the above, the appellant was not an ultimate beneficiary of the intestate estate of their dead husband. The ultimate beneficiaries were his children, in the scheme of intestate succession, under all systems of law, including the *Law of Succession Act*. Under intestacy law, in whichever system of law, including the *Law of Succession Act*, the surviving spouse is only entitled to a life interest in the assets of the estate of their dead spouse, which interest is held during the lifetime of the surviving spouse. Upon that life interest determining, in the manner spelt out in Part V of the *Law of Succession Act*, the property would pass to the ultimate beneficiaries, the children.

15. The deceased died a polygamist. Under the law of intestate succession, in Part V of the *Law of Succession Act*, specifcally at section 40, the property is initially divided between the two houses, taking into account the number of children in each house. Thereafter, the share due to each house would be distributed in accordance with sections 35, 36 and 38 of the *Law of Succession Act*. Section 35, would apply where there is a surviving widow in that house, with children. The share due to that house, in that scenario, would devolve upon the widow, to hold during life interest, and upon termination of the life interest, it would devolve upon the children equally. Section 36 would apply where that house comprises of a surviving widow who has no children. She would be entitled to the first Kshs. 10,000.00 or 20% of the property in the share due to that house, whichever is greater, absolutely, and would hold the rest, the balance, during life interest. Upon termination of the life interest, the property would pass to the survivors of the deceased. Section 38 would apply to a house where there are children but no surviving spouse, the children in that house would share the share due to that house equally amongst themselves.

16. The deceased herein had two wives, both of whom survived him. That meant his estate comprised of two houses. The first house had a surviving spouse and surviving children; the second house had a surviving spouse but no surviving children. Under the scheme, in section 40 of the *Law of Succession Act*, the first house comprises of six units, being the first surviving spouse and the five children; while the second house has one unit, being the surviving spouse in that house. The two houses combined make seven units. Bukhayo/Matayos/1369 should be divided into seven units. Each unit should translate to 0.171 of a hectare. The first house should be allocated six units, out of the seven, based on the six members of that house, being the one surviving spouse and the five surviving children; while the second house should get one unit, based on the one member of that house. That should translate to equal distribution of the seven units amongst the seven survivors of the deceased. That is how the trial court handled the distribution. It was in accordance with the law, section 40 of the *Law of Succession Act*. See *Kuria and another v Kuria* [2004] KLR (Musinga, J), *Rono v Rono & another* [2005] 1 EA 363,

[2005] eKLR (Omolo, O'Kubasu & Waki, JJA) and *Munyole v Munyole* [2022] KECA 373 (KLR) (M'Inoti, Kiage & M Ngugi, JJA).

17. The appellant argues that that distribution was discriminatory. I see no discrimination. I see equality instead. Equity applies. Equity is equality. Succession was under the Chancery Court in England, where equitable principles were applied. The deceased was survived by seven immediate family members. Two widows and five children. His property was shared equally amongst the seven. That was equity.

18. A distribution, of Bukhayo/Matayos/1369, between the two houses equally, without considering the number of children in each house, would have produced an unequal and inequitable result. It would have meant that the widow without children would have gotten more resources than the widow with five children.

19. I am alive to the fact that the proposal, for equal distribution between the houses, without considering the number of children in each house, held sway under customary law. What the appellant is urging, in effect, is that customary law be applied, instead of *Law of Succession Act*. That is not possible. The *Law of Succession Act* applies to the instant estate. The *Law of Succession Act* superceded customary law, through section 2(1)(2), when it was brought into operation on 1st August 1981. The deceased died in 2021, long after the *Law of Succession Act* had come into force, in 1981, and overtaken the customary law of succession.

20. The other argument is that the other assets of the estate were not distributed, that is to say money and retirement benefits. The probate court only distributes what the parties have disclosed and proved to exist.

21. It is the appellant who initiated Busia CMCSC No. E515 of 2023. In the petition, she only disclosed one asset, Bukhayo/Matayos/1369, and attached a copy of a certificate of official search for that property, as proof that that asset existed, and was registered in the name of the deceased, as at the date of his death. The appellant was the first administratrix to file a summons for confirmation of grant. That dated 4th April 2024. She disclosed only one asset. Bukhayo/Matayos/1369. It was only that one asset that she proposed for distribution. She did not disclose that the deceased had money in some bank, nor provide details of where the said money was being held. Similarly, she did not disclose that the deceased was entitled to retirement benefits, nor provide details of who was holding those benefits.

22. The court does not act blindly. It acts only on the evidence tabled. The court does not go out of its way to collect evidence. The evidence is provided by the parties. It is the parties who should know the property that the deceased owned and died possessed of, and where that property is. It is the duty of the parties to get details on and particulars of the property, and to place that evidence before the court. The trial court could not distribute property that was not before it.

23. In the application, dated 4th June 2024, the appellant had alleged that there was ancestral land, and implied that that land was in the possession of and under the control of the respondent and the children. She provided no details of that ancestral land. She attached no documents to establish that that property existed, and was registered in the name of the deceased, and thereby making it available for distribution in these proceedings. The trial court dealt with that issue of the alleged ancestral land, by finding that no evidence was tabled to support it, and it was right in that respect. The appellant submits that the respondent and the children have benefitted from the ancestral land. No proof was provided of that fact. The trial court could not take into account evidence which had not been established. The issue of ancestral land remained in the realm of allegation and conjecture. There was no concrete evidence on it, which could influence the trial court to take it into account in making the final orders.

24. Overall, I find no merit in the appeal herein. Consequently, I hereby dismiss it. There shall be no orders on costs, given that the parties are members of the same family. The trial records, in Busia CMCSC No. E515 of 2023, shall be returned to the relevant registry, while this appeal file shall be closed. I grant to the appellant leave, of thirty days, to appeal to the Court of Appeal, if she is so inclined, should she be aggrieved by the outcome of her appeal herein. Orders accordingly.

DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS 16TH DAY OF JUNE 2025.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Maximilla Masiga Oyallo, the appellant, in person.

Advocates

Mr. Wycliffe Okutta, instructed by Ouma-Okutta & Associates, Advocates for the appellant.

Mr. Erick Jumba, instructed by Balongo & Company, Advocates for the respondent.