



REPUBLIC OF KENYA



**In re Estate of Hezekiah Onyango Jimbo (Deceased) (Succession Appeal  
E002 of 2022) [2025] KEHC 10832 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10832 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
SUCCESSION APPEAL E002 OF 2022**

**JM OMIDO, J**

**JULY 17, 2025**

**IN THE MATTER OF THE ESTATE OF HEZEKIAH ONYANGO JIMBO (DECEASED)**

**BETWEEN**

**JENIPHER AOKO ONYANGO ..... APPELLANT**

**AND**

**PENINAH AKINYI OKIDIA ..... RESPONDENT**

*(Being an appeal from the Judgement of Hon. P.N. Gesora, Chief Magistrate,  
delivered on 28th January, 2022 in Kisumu CMCC Succession Cause No. 329  
of 2019, In the Matter of the Estate of Hezekiah Onyango Jimbo (Deceased))*

**JUDGMENT**

1. This appeal emanates from the judgement of Hon. P N. Gesora, Senior Chief Magistrate delivered on 25<sup>th</sup> April, 2023 in Kisumu CMCC Succession Cause No. 329 of 2019, In the Matter of the Estate of Hezekiah Onyango Jimbo (Deceased).
2. The Appellant has 18 grounds of appeal in her memorandum of appeal dated 11<sup>th</sup> March, 2022.
3. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of *Selle v Associated Motor Boat Co. Ltd* [1969] EA. 123 to reassess, reanalyze and reevaluate the evidence adduced in the trial court and draw my conclusions. (See also *Peters v Sunday Post Limited* [1958] EA 424).
4. A brief history of the matter as per the evidence adduced before the trial court is that a grant of letters of administration intestate was on 30<sup>th</sup> September, 2019 issued to Peninah Akinyi Okidia, the Respondent herein, as administrator of the estate of Hezekiah Onyango Jimbo (Deceased), who met his demise on 4<sup>th</sup> May, 2014.



5. The Appellant herein, Jenipher Aoko Onyango, filed an objection seeking that the grant be revoked. Her contention was that she was the deceased's sole surviving spouse. She stated that the deceased died testate and in his will set out how he wished his estate to be distributed upon his demise.
6. The Appellant further contended that two properties among those listed by the Respondent – Parcel Numbers Kisumu/Koru/1438 and Kisumu/Koru/1444 – did not form part of the estate of the deceased as the same had been transmitted to Askar Auma Omondi and the Appellant respectively, before the demise of the deceased. She further stated that part of another parcel – Kisumu/Koru/1558 – which together with Kisumu/Koru/1559 were subdivisions of Kisumu/Koru/144 had been sold to one Christabel Ouko.
7. The Respondent stated that Kisumu/Koru/1444 had been transferred to the Appellant by the deceased to hold in trust for her 7 children and that the remainder of the deceased's estate was to be distributed to the children of the deceased's first wife, an agreement that the Appellant was privy and party to.
8. Upon considering the positions of the parties, the learned trial Magistrate rendered himself as follows in his judgement:

“I have carefully considered the application by way of summons for confirmation of the grant issued herein and the objection raised. I have carefully studied the various affidavits sworn and filed herein alongside the oral evidence adduced and submissions filed herein. The first issue for determination is whether the deceased herein died testate or intestate. The Objector in her affidavit sworn on 26 th April 2021 averred that deceased left behind a will setting out how he wished his estate distributed posthumously. She annexed the said will as JAO1. It is important to interrogate the said annexure and determine whether it is a will as set out in law.

Section 11 of the *Law of Succession Act* states:

No written will shall be valid unless:-

- a) The testate 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 be written as a will.
- c) The will is attested by two or more competent witnesses each of whom must have seen the testator sign or affix his mark on the will or have seen some other person sign the will.

The will must be attested by two or more witnesses. Annexure “JAO1” produced herein does not meet the requirements set out herein above. It contains names and figures. There is a thumb print that is not verifiable. On the lower part of the annexure it indicates that this was discussed by deceased and there is a stamp of the Assistant Chief. The same does not meet the minimum threshold to be called a will. I so hold in the end and I find and hold that deceased herein died intestate.

It follows therefore, the grant of letter of administration issued by the court on 30<sup>th</sup> September 2019 is proper and valid.



Deceased herein owned 81.6 acres. It is acknowledged that he did sell ten acres to the late Christabel Ouko, he also gave 4.2 acres to his daughter Aska and 6.7 acres to his late son Charles Juma Onyango. He also reserved 10 acres for the homesteads. It is the remainder that is in issue as regards distribution. The Objector herein has land parcel

Kisumu/Koru/1444 registered in her name. This was done by the deceased when he was alive.

This was also done after deceased's first wife had passed on. It will be unfair for the Objector to hold on to the 20 acres by herself and seek to have a share in the remaining 30 or so acres. Having made a finding that the deceased died intestate I find and hold that she holds 20 acres in Kisumu/Koru/1444 in trust for her children.

The proposed mode of distribution as set out in paragraph 10 and 11 of the affidavit sworn on 7<sup>th</sup> May 2021 is the fairest way of distributing deceased estate and I adopt it. As regards Kisumu/Wawidhi A 5536 and 6066 I will not deal with them as they were not part of these proceedings. I proceed to confirm the grant herein as above. Considering the nature of the proceedings herein I order that each party bears its own costs."

9. There is no doubt, from the position that the Respondent took, that she claimed that the property parcel number Kisumu/Koru/1444 was transferred by the deceased to the Appellant to hold in trust for the Appellant's 7 children and that the same therefore ought to have been considered when determining the shares that the beneficiaries of the deceased's estate were to get.
10. On her part, the Appellant claimed that land parcel number Kisumu/Koru/1444 was transmitted to her by the deceased as a gift inter vivos, well before his demise and that the same did not, therefore, form part of the deceased's estate.
11. From the judgement and findings of trial the court (as reproduced above), although the learned trial Magistrate reached the finding that there was a trust, he did not address himself as to how he arrived at that decision, as to uphold the claim by the Respondent of the existence of a trust, particularly regarding parcel number Kisumu/Koru/1444. He also did not address himself to the claim by the Appellant that the said parcel had been given and transferred to her by the deceased as a gift inter vivos. Thus then, the issue as to whether parcel number Kisumu/Koru/1444 formed part of the deceased's estate was not properly determined by the trial court yet it was an issue of controversy between the parties.
12. The issue that then abounds for me to determine is whether the learned trial Magistrate fell into error in his judgement, which culminated in the grant being confirmed, without determining the aforesaid issues of controversy between the parties.
13. When a party alleges the existence of a trust especially in the context of inheritance and distribution of a deceased person's estate the court has to determine whether such a trust exists based on evidence and legal principles.
14. When a trust is alleged, the court is obligated to determine the following questions:
  - a. Was the alleged trustee holding the property for the benefit of another?
  - b. Was there a clear intention to create a trust?
  - c. Was there certainty of the subject matter and the beneficiaries?



15. The court should then proceed to determine the above questions on the basis of the evidence that the parties present (written documents, oral testimonies and the conduct of the parties).
16. Of course, the party alleging the existence of a trust bears the burden of proof and the standard upon which the party must prove that a trust did in fact exist and that the same related to the property in question, is on a balance of probabilities.
17. When a court fails to address the issue of whether a trust exists in a succession dispute, especially when that issue was properly raised before it, an appellate court has several options, depending on the circumstances of the case and the nature of the evidence on record, which include the following:
  - a. Determine the issue on appeal, if there is sufficient material, and substitute its own finding for the trial court's omission, under the general appellate jurisdiction of the court under Section 79G of the *Civil Procedure Act* and Article 165 of *the Constitution*. In the case of *Gitobu Imanyara v AG* [2016] eKLR, the court held that an appellate court has jurisdiction to make its own conclusions on matters that are not properly addressed by a lower court where the evidence is sufficient
  - b. Remit the case back to the trial court, under Section 78(1)(b) of the *Civil Procedure Act* for rehearing and/or reconsideration and proper determination of the trust issue. In the case *Peters v Sunday Post Ltd* [1958] EA 424, the court emphasized that where credibility and oral testimony are central, the trial court is in the best position to assess the facts.
  - c. Set aside or vary the judgement. Where the lower court's failure to address the trust issue has led to an erroneous or incomplete judgment, the appellate court may set aside the judgment partially or entirely or vary the judgement to include findings or orders that ought to have been made had the trust issue been properly considered.
18. I have considered the trial court's record and the evidence that was presented by the parties and I am of the view that the most appropriate manner to address the issues is to remit the matter back to the trial court for the court to take and consider the evidence of the parties, with a focus on the issues that were not addressed.
19. I take that view for the reason that the evidence that is on record is in my opinion not sufficient to determine the issues, and further that it would be important for the court to consider the credibility of the evidence of the witnesses, which is manifested, *inter alia*, through demeanour, in the interest of justice.
20. In the result, I allow the appeal, set aside the judgement of the trial in its entirety and remit the matter back to the lower court for trial.
21. The trial court file shall be mentioned before the Chief Magistrate, Kisumu on 6<sup>th</sup> August, 2025 for directions, which may include reallocation to any other court with jurisdiction, so that the matter may be heard and determined apace, considering its age.
22. The nature of this matter demands that I make no orders as to costs of the appeal.
23. This file is hereby closed.

**DELIVERED (VIRTUALLY), DATED & SIGNED THIS 17<sup>TH</sup> DAY OF JULY, 2025.**

**JOE M. OMIDO**

**JUDGE**



For the Appellant: Mr. Aoko.

For the Respondent: Mr. M.M. Omondi.

Court Assistants: Mr. Ngoge & Mr. Juma.

