



**In re Estate of Jenipher Oturi Wango (Deceased) (Family Appeal
E006 of 2025) [2025] KEHC 12858 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12858 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
FAMILY APPEAL E006 OF 2025
DK KEMEL, J
SEPTEMBER 19, 2025
IN THE MATTER OF THE ESTATE OF JENIPHER OTURI WANGO (DECEASED)**

BETWEEN

MARY OKECH OCHOLA APPELLANT

AND

GEORGE ONYANGO WANGO RESPONDENT

(Being an appeal from the Judgment and Ruling of the Chief Magistrate's Court at Siaya before Hon. J.P. Mkala (RM) delivered on 30th October 2024 and 29th January 2025 respectively, in Siaya Succession Cause No. E102 of 2022 in the Estate of Jenipher Oturi Wango)

JUDGMENT

1. Jenipher Oturi Wango (deceased) died on 15th April 2003. A grant of Letters of Administration Intestate was issued to Mary Okech Ochola (Appellant) by Hon. M. Wambani (CM) on 13th June 2022. The property left by the deceased is parcel No. North Gem/Malunga/97(2.8 ha). Upon filing the Summons for Confirmation of Grant on 2nd August 2022, in respect to the property being allocated to her, a share of 100%, a Certificate of Confirmation of a Grant was issued on 31st August 2022 by Hon. Lester Simiyu (PM).
2. George Onyango Wango (Respondent) who claims to be the son of the deceased, filed a Summons for Revocation of the Grant dated 9th January 2016, seeking revocation of the said grant issued on 13th June 2022 and a temporary injunction in respect to the parcel of land. The Respondent contended that the Grant was obtained fraudulently by making false statements that the Appellant was the sole surviving beneficiary to the estate when the family consisted of more than one beneficiary.



3. On 24th April 2024, the matter was referred to Court Annexed Mediation by the Court, but on 3rd July 2024, Counsel present informed the Court that mediation had failed. The Court fixed the matter for hearing through viva voce evidence.
4. OW1 George Onyango Wango stated that the title is in his mother's name, Jenipher Oturi Wango. He stated that her other sisters were never in the filing for Grant. He stated the parcel of land was bought through the proceeds from Samuel Ochieng Wango (Deceased), though he didn't have proof. He disputed the authenticity of the sale agreement dated 16th March 1994, which bears the name of the Appellant herein as the purchaser, since their mother was still alive. He stated that he set his home on the land in 2022, and that's when he realized there was a succession.
5. OW2 Mary Akech Minunda stated that Jenipher bought a piece of land. She adopted her statement dated 23/8/2024 as her evidence in chief. She stated that she recalls that the Petitioner bought land but did not witness the sale transaction. That the purchase money came from her son.
6. OW3 Eunice Achola Agik adopted her statement dated 23/10/2024 and stated that her father had another parcel of land, No. 107. She stated that her mother, who was the second wife, moved to parcel number 097. She stated that Samuel Ochieng died in 1996, and thereafter, the land was purchased. She stated that the title is in the name of Jenipher Oturi Wango, but according to the sale agreement, Mary Oketch Ochola was the purchaser. She stated that Samuel Ochieng contributed towards the purchase price, as well as Mary. She stated that parcel No.097 belonged to her mother having been purchased from Samuel's proceeds. She stated that the title is in the name of her mother, though the Petitioner purchased it on behalf of her mother. She stated that it is not written that her mother was holding in trust for her.
7. That marked the close of the Objector's case.
8. RW1 Mary Oketch Ochola (Petitioner) adopted her statement filed on 7/8/2024 as her evidence in chief and also produced her list of documents as exhibits 1-9. She stated that they are eight siblings, three of whom are deceased. She stated that though the Chief's letter indicated that she was the only surviving child, there are other siblings. She stated that the objectors reside in parcel No. 097, and that Samuel Wango was buried therein, as he had a Simba (hut). That the purchase consideration was Kshs 49, 000/= . That she bought the land on behalf of her mother.
9. RW2 Jarred Ogwanga Wayodi stated that he witnessed the purchase transaction. She stated that Jenipher had eight children who witnessed the sale but did not sign. She stated that Mary bought the land for her mother. That the deceased informed her that her daughter who is the Petitioner herein was the one buying the land.
10. RW3 Lilian Michael Otieno Wanga stated that the land was bought by Mary. She stated that she was aware of the succession but did not sign any succession form. She stated that her mother relocated in 1975, but could not remember the year.
11. RW4 Olga Atieno Wanga stated that the parcel of land was bought by Mary Oketch Ochola. She stated that she was aware of the succession case but did not sign anything. She stated that they are 8 siblings. She stated that Samuel built a Simba on the parcel No. 097 and thereafter buried thereon. She stated that the Objector as well built a Simba on the land and that plot 097 has been their home since 1996.
12. That marked the close of the Petitioner's case.
13. In his ruling delivered on 30th October 2024, the learned trial Magistrate held that the Appellant and her witnesses conceded that the deceased had eight children, including the Respondent and the Appellant,



thus the Appellant had concealed facts material to the succession process. The learned trial Magistrate found the land title bore the name of the deceased and not the Appellant, despite claiming that she bought it for the deceased. The learned trial Magistrate invoked Article 27 of *the Constitution* to find that all children of the deceased, whether male or female, married or unmarried, had equal rights to the parcel of land. The Grant was revoked, and it was ordered that the parcel of land revert to the deceased. It was ordered that a new Form 41 be issued in the name of the Appellant and Respondent, and thereafter parties to file a consent on distribution within 30 days from the date of the ruling or parties to file separate proposals on distribution within the same time, lest the Court make a verdict with the parties or suo moto.

14. On 30th October 2024 Hon. J.P. Mkala (RM) at Siaya Law Courts, issued the Grant of Letters of Administration Intestate to the Appellant and Respondent. The Respondent filed an affidavit of proposed mode of distribution, sworn on 26th November 2024, wherein he averred that: the deceased was survived by Mary Okech Ochola, Samuel Ochieng Wango (deceased) survived by Winnie Akoth, Eunice Achola Agik, George Onyango Wango, Lilian Mildred Atieno Wango, Olga Otieno Wango, and Josephine Auma (deceased) survived by Glen Owino Tuju; the parcel of land to be shared equally in shares of 0.39 ha.
15. In a response affidavit sworn on 6th January 2025, the Appellant averred that: a homestead (dala) measuring approximately 0.23 ha be carved out and registered in the joint names of the seven (7) beneficiaries; the remainder of approximately 2.57 ha be shared equally in the share of 1/7 each; under the Luo Customary Law, the home ought not to be sub-divided; and it is only fair and just that after curving out, each beneficiary to get 1/7 share to avoid future disputes.
16. In his ruling delivered on 29th January 2025, the learned trial Magistrate held that Article 27 of *the Constitution* provides equity among the siblings; thus, the parcel of land is to be shared equally among the seven siblings. The learned trial Magistrate noted that under the African culture, the male child is usually left to take care of the homestead; thus, the Respondent, who had built a house in the homestead, the homestead shall be part of the homestead. It was ordered that the parcel of land be shared equally between the seven siblings at 0.4 ha each, and the share belonging to Samuel Ochieng Wango (deceased) be held by Winnie Akoth, and Josephine Auma (deceased) share be held by Glen Owino Tuju.
17. Consequently, the learned trial Magistrate issued a Certificate of Confirmation of Grant dated 21st January 2025, indicating a share of the parcel of land for each of the beneficiaries at 0.4 ha.
18. Aggrieved, the Appellant has appealed vide the Memorandum of Appeal dated 14th February 2025, contending that:
 1. The learned trial magistrate erred in law and in fact, by delving into matters not specifically pleaded, i.e, Section 26 of the *Land Registration Act*.
 2. The learned trial magistrate erred in fact and law by shifting the burden of proof from the Respondent to the Appellant.
 3. That the learned trial magistrate erred in law and fact, by demonstrating ostensible bias towards the Appellant by failing to weigh all the oral evidence presented before it.
 4. That the learned trial magistrate erred in law and fact by failing to direct that a government surveyor visit the impugned estate before distribution, despite an oral application being made by the Appellant's counsel.



5. That the learned trial magistrate erred in law and fact by demonstrating ostensible bias towards the Appellant in allowing the Respondent's proposed mode of distribution even in the absence of any survey report as to ground measurements.
 6. That the learned magistrate erred in law and fact by arriving at the finding that the Respondent was the only one in the homestead in the absence of any survey report.
 7. That the learned trial magistrate erred in law, by finding that the homestead is left to the male child without any reference that led the court to that conclusion.
19. The Appellant prays that: forms P41 and P54, issued pursuant to the trial Court's judgment and ruling, be revoked; forms P41 and P54, issued to the Appellant before the impugned judgment and ruling, be reinstated; the position obtaining before the ruling be reinstated; and the Respondent be ordered to pay costs of this appeal.
20. The appeal was canvassed by way of written submissions. Both parties duly complied.
21. The Appellant submits that the parcel of land No. North Gem/Malunga/97 was not an ancestral land to be inherited since she solely purchased it from Auma Onyango Bande on 16th March 1994 at a purchase price of Kshs. 490,000.00 vide the sale agreement dated 16th March 1994 for the sake of relocating the deceased and building her a home. According to the Appellant, this was due to the prolonged family wrangles which emanated from their step mother, one Silvia Miginjo Wango, in the ancestral land LR No. South Gem/Wagai/107, measuring approximately 1.2 ha, after the death of their father Elikana Wango, who passed away in the year 1985, to whom the parcel of land was registered on 14th July 1972. The Appellant submits that the Respondent's claim should only lie on the parcel of land LR No. South Gem/Wagai/107 and not LR No. North Gem/Malunga/97. According to the Appellant, an oral application for a government surveyor to be directed to visit the estate was made by the Appellant's counsel, but the court did not adhere to the request, and distribution of the deceased's estate was solely made to the Respondent contrary to Section 29(a) of the [Law of Succession Act](#). Reference is made to Section 66 of the [Law of Succession Act](#), which gives the Court discretion to determine the person or persons to whom the grant of letters of administration shall be issued. It is submitted that under Section 39(1) (e), the Court has the discretion to determine the relatives based on the nearest degree of consanguinity and affinity. According to the Appellant, she and the Respondent have an equal share since they are siblings and children in the estate of the deceased Jenipher Oturi Wango. Reference is made to Article 27 of [the Constitution](#) that prohibits any form of discrimination and Section 29(a) of the [Law of Succession Act](#), where children are not classified based on gender or marital status. Reliance is placed on Makhandia J. (as he then was) in Re Estate of Solomon Ngatia Kariuki (Deceased) (2008) eKLR; Kimaru J.(as he then was) in Peter Karumbu Keingati & 4 Others vs Dr. Ann Nyokabi Nguthi & 3 Others(2014)eKLR. Reference is made to Section 38 of the [Law of Succession Act](#) on equal distribution of the intestate estate amongst the surviving children of the deceased.
22. The Respondent submits that the other beneficiaries were left out of the succession process. It is submitted that the question of ownership of the parcel of land, as to whether it belonged to the deceased so as to form part of the estate of the deceased, had to be decided between the estate and the Appellant. According to the Respondent, the consideration for the green card indicates Kshs. 40,000.00 contrary to the consideration of Kshs. 490,000.00 indicated in the Sale Agreement. The Respondent asserts that LR No. North Gem/Malunga/97 belongs to the deceased, who moved from the matrimonial home to settle on the parcel of land. It is submitted that the graves belonging to deceased family members are on this property, and homes have been built on the same. According to the



Respondent, he has proved that he has an interest in the deceased's estate as a beneficiary. It is submitted that the deceased's estate ought to be divided equally among the surviving children. According to the Respondent, it is trite that the Respondent's as the surviving son, should inherit the homestead and look after the family heritage. It is submitted that the Certificate of Grant has an error on the face of the record for including Washington Wango (Deceased), and that the same should be corrected. The Respondent submits that the Probate and Administration Forms were deliberately left out of the Record of Appeal to prevent this Court from noting the origins of the Appellant's mischief when starting the succession process.

23. As to whether the appeal was filed within time, the Respondent refers to Section 79G of the *Civil Procedure Act* to submit that the current application, dated 14th February 2023, was filed more than 30 days outside the time limited for filing an appeal. It is submitted that the Appellant never sought leave to file the appeal out of time, and the reason for the delay has not been satisfactorily explained to the Court. The Respondent asserts that it is the Appellant who should bear the costs of this appeal since the verdict of the trial Court on the mode of distribution was just and fair. The Respondent urges this Court to dismiss the appeal and application with costs.
24. Having considered the appeal in light of the filed pleadings, evidence on record, and written submissions filed on behalf of the parties herein, I find the issue for determination is whether the appeal has merit.
25. The Respondent contends that leave was not sought to file this appeal out of time. Though the application dated 14th February 2023 referred to by the Respondent, which is alleged to seek leave to file an appeal out of time, is not in the Court file, the Respondent submits that there is an inordinate delay of 30 days in filing the same. The Appellant has not mentioned or submitted anything regarding the Respondent's assertion.
26. It is trite that leave must be sought to appeal out of time, lest the Notice of Appeal filed is a nullity. I have not seen any Notice of Appeal on record in respect of this appeal. In *Pepco Construction Company Limited versus Carter & Sons Limited*, Nairobi CA No. 80 of 1979 (UR), the Court of Appeal made an observation that:- "A notice of appeal is what gives this court jurisdiction in any appeal. It is a primary document in terms of Rule 85(1) of the Rules. A record of Appeal must contain a valid copy of the notice of appeal. The omission to include a valid copy renders the appeal incompetent..." The predicament in this appeal is exacerbated by the fact that the appeal as filed arises from a ruling and judgment. In *Nuru Ibrahim Amrudin versus Amir Mohamed Amir Civil Appeal No. 23 of 1998 (UR)*, the Court of Appeal ruled that "an appeal can only be against a decree or an order, not against a Judgment or ruling..."
27. In *Salat v Independent Electoral and Boundaries Commission & 7 others (Application 16 of 2014) [2014] KESC 12 (KLR) (Civ) (4 July 2014) (Ruling)*, the Supreme Court had this to say:
 - “ 53. By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time, and recognizing ‘an appeal is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.
 54. To file an appeal out of time and seek the Court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of



2014 has been accorded a reference number in this Court's Registry. This is irregular as that document is unknown in law, and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court's perusal when making his application for extension of time; and not to lodge an appeal and seek to legalize it. Petition No. 10 of 2014, having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court's Record."

28. It is noted that the impugned judgement was delivered on 30/10/2024 and that the Appellant was required to lodge her appeal not later than the 30/11/2024. It seems the Appellant opted to continue with the lower court order and participated in the summons for confirmation and distribution of the estate and only saw the need to lodge appeal after the latest ruling dated 29/1/2025 was made by the trial court. A perusal of the Memorandum of Appeal dated 14/2/2025 indicates that the appeal is against the judgement of 30/10/2024 as well as the ruling dated 29/1/2025. If the Appellant intended to lodge appeal against the judgement of 30/10/2024 then she ought to have sought leave to lodge appeal out of time. There is no evidence that the Appellant sought for such leave. Even the Appellant's appeal against the ruling dated 29/1/2025 is not saved due to the fact that the same is tied to the hip with the appeal against the judgement dated 30/10/2024 as can be seen from the grounds of appeal and the eventual prayers sought. It is not possible to sever or separate the two appeals that have been lodged by the Appellant herein. It was upon the Appellant to put her house in order by indicating which of the impugned decision was to be litigated. She did not do so and hence the appeal as presented is not tenable in law. I find that these state of affairs warrant for striking of the Appellant's appeal. I see no reason for further analysis of the appeal at this juncture.
29. In the upshot, i find no merit in the Appellant's appeal. The same is dismissed. As parties are family members, i order each party to bear their own costs of this appeal.

Orders accordingly.

DATED, SIGNED, AND DELIVERED AT SIAYA THIS 19TH DAY OF SEPTEMBER 2025.

D. K. Kemei

Judge

In the presence of:

Ochanyo.....for Appellant

M/s Mwilulo for Advcate Nyanga for Respondent

Okumu..... Court Assistant

