



**In re Estate of Prisca Apondi Adhaya (Deceased) (Civil Appeal
E018 of 2024) [2025] KEHC 12843 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12843 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E018 OF 2024
DK KEMEL, J
SEPTEMBER 19, 2025
IN THE MATTER OF THE ESTATE OF PRISCA APONDI ADHAYA (DECEASED)**

BETWEEN

GEORGE AWUOR ADHAYA APPELLANT

AND

WILLIAM GEORGE OPONDO 1ST RESPONDENT

LEONIDA OMONDI 2ND RESPONDENT

*(Being an appeal against the Ruling of Hon Margaret Wambani (CM)
in Siaya CM P & A No. 81 of 2017 dated 7th day of November 2024)*

JUDGMENT

1. The appeal herein arises from the ruling of Hon Margaret Wambani (CM) in Siaya Succession Cause No. 81 of 2017, dated 7th November 2024, wherein she allowed the Respondents' application dated 19/1/2016 and ordered that parcel numbers North Gem/ Ndere/1296 and 1218 do not. Form. Part of the estate. The deceased, therefore, should be excluded from distribution as proposed by the Appellant.
2. Being aggrieved by the ruling above, the appellant lodged his Memorandum of Appeal dated 11th November 2024, wherein he raised the following grounds of appeal:
 - i) That the magistrate erred in fact by not critically analyzing the issue of dependence of the Respondents on the estate of the deceased.
 - ii) That the Chief Magistrate erred in law in wholly believing the submissions of the Respondents.
 - iii) That the Chief Magistrate erred in law by referring to a different matter, being Siaya Misc Succ. Cause No. 23 of 20215, in total contradiction to the subject matter being Siaya Succession Cause No. 81 of 2017.



The Appellant therefore prayed that the appeal be allowed and that the Respondents' objection be dismissed, and that the estate be distributed as proposed by the Appellant, and that the costs of the appeal be awarded to him.

3. This being the first appellate court, its duty is to reevaluate the evidence presented before the lower court and subject and subject it to an independent analysis so as to arrive at an independent conclusion as to whether or not to uphold the decision of the lower court. See *Selle v Associated Motor Boat Company Ltd* [1968] EA 123.
4. A perusal of the record of appeal indicates that the Appellant had petitioned for letters of Grant in the estate of the late Rispa Apondi Adhaya and listed parcel number North Gem/ Ndere/ 352 as the only asset for distribution. The Respondents herein later filed an application dated 19/1/2016 wherein they objected to the inclusion of the aforesaid parcel of land, as the same had been closed on subdivision and which has created several other parcels, such as North Gem/Ndere/1217, 1218, and parcel 1217 was subdivided to create 1296. The Respondents, therefore, sought an order excluding their parcels from the Appellant's schedule of distribution. The trial court directed the objection to be canvassed by way of viva voce evidence.
5. William George Opondo Ogola (PW1) adopted the contents of his objection and documents annexed thereto as his evidence in chief. He stated that parcel number North Gem/Ndere/352 had already been subdivided by the deceased and that he has his title, and thus the Appellant should not introduce a parcel of land which has since been closed upon subdivision. It was his case that parcel number 352 was already subdivided into several portions, namely 1217, 1218, and 1219, and that parcel 1217 was subdivided and which created parcel 1296. That the Objectors were bona fide purchasers and hence the three parcels should not be included in the distribution of the estate of the deceased. That his portion is number 1296. That at the time of the death of the deceased, the parcels in her name were 1219 and 1295.

On cross-examination, he stated inter alia that the report by the Land Registrar indicated that parcel 352 had been subdivided and had been closed, but that there was an error when the same was not captured on the register; that he bought land from a third party who had bought it from the deceased.

6. Leonida Omondi (PW2) adopted the contents of the affidavit in support of the objection. Her case is that parcel No. 352 was subdivided into 3 parcels 1217, 1218, and 1219. That her parcel No. is 1218, which is her subdivision. That she is opposed to the appellant's including his parcel in the list of distribution. That Calisto Joseph Omondi Nyaiyeka was her husband and who was issued with the title to the land on 14/11/2007. That her family has the sale agreement. Her husband died in the year 2013. That her husband bought the land from the deceased herein, Priscah Apondi Adhaya, and that her title is No.1218. And that she has the title deed to the said land. That the Appellant's mother sold land belonging to the petitioner's uncle, and that his mother's portion is still intact, namely parcel numbers 1219 and 1295.
7. George Awuor Adhaya (DW1) testified that land 352 belonged to his late mother. That he searched the Siaya Land Registry on 4/3/2010 and which indicated his mother as the registered owner. That he did another search again on 2/4/2015, which established that her mother's ownership was still intact, and likewise on 18/4/2015. On 27/6/2017, he restricted the register. That the objectors did not buy land from him or his mother. That his mother died in 2009. That he is in physical occupation of the land. That the first objector's title deed is 1296. That the alleged title deeds were issued after the death of his mother. That he is the only child of his mother. That the objectors are out to snatch the land away from him. That the report by the Land Registrar indicates that parcel 352 was subdivided into three parcels, but the land registrar did not inform him about the error in closing the register after subdivision.



8. After the close of the cases, the parties filed an exchanged submission. The learned trial magistrate later ruled in favour of the Respondents. This then precipitated the present appeal.
9. The appeal was conversed by way of written submissions. Both parties complied.
10. Vide submissions dated 4/4/2025, learned counsel for the Appellant submitted inter alia; that the Appellant conducted a search on the land registry prior to filing the succession cause which indicated that the deceased herein as the registered owner of parcel No. 352 as at 11/8/2015; that the discrepancy regarding the closure of the register upon subdivision ought to have been properly explained by the Land Registrar but who was never called to tender evidence and produce the report dated 29/1/2018 indicating that the failure to close the register was due to an error; that the Appellant was not accorded an opportunity to cross-examine the said Land Registrar; that the trial court erred in allowing the production of the report by the Land Registrar as an exhibit without calling the maker thereof contrary to section 35 of the *Evidence Act*; that the trial court ought to have considered the fact that the parties had presented rival documents regarding ownership of the parcels of land and therefore should have seen the need to call the Land Registrar to clear doubts as to the ownership of the parcels of land; that the Appellant now urges his court to allow his appeal so that the file can be forwarded to the lower court for further deliberations regarding the ownership of the properties.
11. Vide submissions dated 17/6/2025, learned counsel for the Respondents raised three issues for determinations namely whether the trial court considered the Appellant's response to the objection and his submissions, whether the letter by the Registrar was properly presented to court and relied upon by the trial court and finally, whether the issue of inconsistency between the Green Card and the title deed documents would warrant setting aside the ruling of the trial court.
12. As regards the 1st issue, it was submitted that the trial court duly considered the evidence from both sides as well as submissions before arriving at its ruling and hence the ruling should be upheld.
13. As regards the 2nd issue, it was submitted that the failure to call the Land Registrar to testify was not fatal and that the same was cured by section 38 of the *Evidence Act*, which provides that any entry in any public or official book, register, or record is itself admissible. Further, it was submitted that section 83 (1) of the *Evidence Act* permits the courts to presume to be genuine any document declared by law to be admissible in evidence of any particular fact. It was further submitted that the document which was authored by the Land Registrar was proper evidence and could not be taken as hearsay evidence. Further, it was submitted that the Appellant did not raise any objection to the production of the report by the Land Registrar as an exhibit. It was submitted that the parties agreed by consent to have the letter by the Registrar dated 29/1/2018 produced as an exhibit and hence the trial court did not err when it relied on it in its ruling.
14. As regards the 3rd issue, it was submitted that the issues raised on appeal are new matters which should have been raised before the trial court. It was submitted that the Appellant did not challenge the authenticity of the documents of ownership presented by the Respondents, such as sale agreements, title deeds, and copies of Green Cards. It was submitted that a perusal of the documents presented by the Respondents was properly made with the participation of the deceased who was the seller, in that the deceased had entered into the transactions before her demise. Learned counsels for the Respondents urged the court to dismiss the appeal with costs.
15. I have considered the record of appeal together with the rival submissions. The issue of determination is whether the Respondents' objection raised before the trial court was proved on a balance of probabilities.



16. The genesis of the dispute between the parties relates to the acquisition and subdivision of the land parcel North Gem/ Ndere/ 352. Indeed, the Appellant had filed the succession cause over the estate of the deceased herein and had indicated the said parcel No. 352 as the only property of the deceased, which, according to him, belonged to the deceased herein, who was his mother. The Respondents, upon learning of the Appellant's move to inherit the said property, moved to court and filed the objection dated 19/1/2016. Whereas the Appellant maintains that the said parcel of land belongs to the deceased according to searches conducted, the Respondents on their part maintained that they're bona fide purchasers of the suit property and which was subdivided into three portions namely; parcel 1217, parcel 1218, and parcel 1219 and later subdivision from parcel 2017 which gave rise to parcels 1295 and 1296. It is noted from the copies of searches by the Appellant that the parcel No.352, as of 11/8/2015, showed the deceased as the registered owner. However, the report by the Land Registrar dated 29/1/2018 indicated that land parcel 352 was divided into three parcels of land, namely, 1217, 1218, and 1219, which were in the name of the deceased and which were transferred to the purchasers. The Land Registrar admitted that the land registry failed to close the register upon subdivision of parcel No. 352, and which he termed an error on their part. That parcel No. 1217 was later subdivided into 1295 and 1296, and that parcel 1218 was transferred to Calisto Joseph Omondi Nyaiyeka (husband to the 2nd respondent), while parcel No. 1219 was still in the name of the deceased. That parcel 1296 was transferred to one James Nyajer Ogoro and later to William Opondo Ogola (1st Respondent), and that parcel 1295 remained in the name of the deceased. It was the Land Registrar's position that the only two parcels of land currently belonging to the deceased are numbers 1219 and 1295 only.
17. Looking at the record of appeal, it is clear that the parties agreed by consent on the 26/3/2023 to have the report by the Land Registrar produced as an exhibit. That being the position, the parties were thus required to ventilate their rival claims which revolve around the key question whether parcel number North Gem/Ndere/352 was solely the property of the deceased herein and thus available for distribution by the Appellant. The said report dated 29/1/2018 together with the copies of search records and green cards thus became the fulcrum upon which the trial court analyzed the parties' rival claims.
18. The Appellant's grouse both in the trial court and in this appeal is that the deceased who was his mother did not sell any part of her land parcel number 352 and that the documents presented by the Respondents should not have been relied upon by the trial court and further that the Land Registrar who authored the report dated 29/1/2018 should have been called to testify and to enable the Appellant cross him regarding the contents of the said report.
19. I have carefully perused the copies of Green Cards produced before the trial court and which reveals the history and chronology of the transactions regarding parcel North Gem/Ndere/352 all the way up to the creation of parcels numbers 1217, 1218, 1219, 1295 and 1296 and which are inter alia; that parcel North Gem/Ndere/352 was registered in the name of the deceased Prisca Apondi Adhaya on 9/9/2004 and title deed issued on 22/3/2006; that on 6/11/2007 the deceased entered into a transaction which led to the subdivision of Parcel 352 and generated parcels 1217,1218 and 1219 wherein she transferred parcel 1218 to Joseph Omondi Nyaiyeka and remained with parcel 1219 and that parcel 1217 was again subdivided into two portions namely 1295 which remained in the name of the deceased while parcel 1296 was transferred to one James Nyajer Ogoro on 3/4/2009 and which was later transferred to William George Ogolla (1st Respondent herein) on 15/1/2015 and title deed thereto issued on 20/1/2015; that the only parcels belonging to the deceased and which are the free property of the deceased and available for distribution are 1219 and 1295. It is noted that the Appellant did not object to the production of the report by the Land Registrar and that the same was produced by consent.



20. The Appellant's objection to the report by the Land Registrar at this stage seems overtaken by events since he had the opportunity to do so before the trial court. In any event, the Appellant agreed to have the said report produced by the Respondents as an exhibit. Nothing prevented the Appellant from seeking to have the author thereof to appear in court and to be cross-examined. Again, the Appellant did not raise any issue over the same for determination and hence the trial court dealt with the matter as presented by the parties. I find that it will amount to an ambush upon the Respondents for the Appellant to raise new issues in this appeal. In the case of James Odera T/A AJ Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013]eKLR it was held as follows:

“On all these occasions no objection was raised by the Appellant against the Respondent appearing in person when in fact he had an advocate on record. The Appellant is therefore deemed to have waived his right to complain later on about the Respondent's manner of representing himself in the absence of the filing of a notice to act in person, and also deemed to have held the Respondent out as being competent to represent himself in the manner done.”

Again, in the case of Kazungu v Republic [2025] eKLR the Court of Appeal held as follows:

23 It was not permissible for matters and issues not raised at the trial court to be raised for the first time on appeal. In this instance, permitting an issue to be raised for the first time in reply to the Appellant is improper, as the Appellant had no fair notice of this issue. Such an issue should not be decided on appeal.”

...In Wachira v Ndanjeru [1977]KLR 252 where this court spoke to the bar, with Platt, JA observing that:

“...the discretion to allow a point of law to be taken for the first time on appeal will

Not be exercised unless full justice can be done between the parties. It will not usually be allowed when to do so would involve disputed facts which were not investigated or tested at the trial, Nor will a party be allowed to raise on appeal, a case totally inconsistent with that which he raised in the trial court, even though evidence taken in that court supports the new case.”

28. For the foregoing reasons, and on the authority of the fore-cited judicial decisions, we respectfully decline to consider or pronounce ourselves on the new issue raised for the first time in the instant appeal.”

21. It is noted that the Appellant has challenged the admission by the trial court of the report of the Land Registrar on the grounds that it violated the provisions of section 35 of the Law of *Evidence Act*. The said Act provides as follows;

Section 35- Admissibility of documentary evidence as to facts in issue;

I. In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, Be admissible as evidence of the fact that if the following conditions are satisfied, that is to say: if the maker of the statement either-

- (i) had personal knowledge of the matters dealt with by the statement; or
- (ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his



personal knowledge) in the performance of a duty to record information supplied to him by a person who had or might reasonably be supposed to have. Personal knowledge of those matters: and

- (b) if the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the Court unreasonable.

Learned counsel for the Appellant has submitted that even though Section 38 of the *Evidence Act* provides for a presumption that all public records are to be taken judicial notice of, the maker of any document sought to be relied upon ought to be called to testify and be cross-examined. It was therefore submitted that the trial Court erred when it accepted the documents without calling the Land Registrar

Indeed, Section 35 of the *Evidence Act* provides that documents should be produced by their makers. However, there is an exception to this rule under Section 38 of the said Act, which provides as follows;

“An entry in any public or other official book, register or record, stating a fact in issue or a relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in the performance of a duty specially joined by the law of the country in which such book, register or records, kept is itself admissible.”

Further, the courts are allowed under section 83 (1) of the said Act to take judicial notice of the documents made by persons performing official duties. Hence the documents namely, Title deeds, copies of search certificates, and Green Cards made by a land registrar in the execution of his/her duties must be deemed as admissible under section 38 of the said Act. That being the position, the failure to call the author of the report dated 29/1/2018 was not fatal as the documents speak for themselves, and further, the said report was produced by consent of the parties. In the case of Republic V Judicial Service Commission & 2 others; Githinji (Ex parte) (Judicial Review Application no. 8 of 2019) [2019] eKLR, it was held as follows:-

“ Further, section 83 (1) Of the *Evidence Act* made it clear that courts would presume to be genuine every document declared by law to be admissible as evidence of any particular fact, substantially in the form, and purporting to be excluded in the manner, directed by law in that behalf and purporting to be duly certified by a public officer.

As stipulated in section 83 (2) of the *Evidence Act*, the courts would presume that any officer by whom any such document purported to be signed or certified, held when he signed it, the social character which he claimed in such document.

The applicant’s birth certificate was presumed to be the true evidence of the dates and other facts it declared, and the officer who issued the certificate had the authority to issue it, and he issued the certificate relying on the entries in the register and such useful and relevant information.”

22. As noted from the foregoing paragraphs, it is clear to me that the process of subdivision of parcel No. North Gem/Ndere/352 was properly conducted by the land’s registry and which led to the new parcel Nos. 1217, 1218, 1219, 1295 and 1296. It is further noted that the deceased herein having been registered as the owner of parcel No. 352, later subdivided the same into parcel Nos. 1217, 1218, and 1219 wherein she transferred 1218 to Callisto Omondi who was the husband to the 2nd Respondent



herein on 14/11/2007. The deceased is also again subdivided parcel No. 1217 into two portions namely, 1295 and 1296 and that parcel No. 1296 was transferred to one James Nyajer Ongor who later transferred it to William George Opondo (the 1st Respondent herein). The two parcels remaining namely, 1219 and 1295 are registered in the name of the deceased and therefore for all intents and purposes, they are the only free property of the deceased which are available for distribution by the Appellant.

23. Even though the Appellant has claimed that the transfer of some of the properties was conducted after the demise of the deceased, the fact remains that the deceased is the one who initiated the subdivision in the first place after entering into sale transactions with the purchasers and therefore, the titles having been issued to the purchasers, the purchasers were at liberty to transfer and pass interests thereon to other persons. Hence, the demise of the deceased was not a bar to subsequent dealings by the new owners. The Appellant's objection on that ground must fail.
23. An analysis of the entire evidence presented before the trial court together with the submissions herein leaves no doubt that the Respondents had proved their claim against the Appellant in the trial court. The parcel No. 352 having been subdivided by the deceased giving rise to other parcels in which titles were issued, it was therefore improper for the Appellant to proceed and seek to distribute the said property yet the same was not free property of the deceased. It is instructive that the titles to parcel Nos. 1218, and 1296 had been issued way back prior to the death of the deceased and therefore, the same did not form part of the estate of the deceased. It is believed that the Appellant while petitioning for letters of grant, had conducted due diligence and obtained the correct status of the assets of the deceased. It can be seen from the copies of the Green Cards that the deceased had transferred two parcels (1218 & 1296) to purchasers before her demise and therefore the Appellant is deemed to have been aware of the same but instead went ahead to purport that the whole of parcel 352 belonged to the deceased yet that was not correct. Clearly, the Appellant deliberately misled the court as he concealed material facts from the court. The Respondents were therefore entitled to file objections as the two parcels ought not to be included in the schedule of distribution since parcel number North Gem/Ndere/352 had already been subdivided into several parcels and that the same had been closed on subdivision. Hence, the trial court's finding was proper and must be upheld.
24. As the Respondents acquisition of parcels 1218 & 1296 had been found to be legitimate and that the same did not form part of the estate of the deceased, the Appellant's recourse if any, is to pursue any further claims in the Environment and Land Court where he can challenge the issue of ownership of those parcels as the said parcels are no longer free property of the deceased herein. The Appellant is thus barred from listing parcel North Gem/Ndere/352 in the schedule of distribution as the same is no longer in existence following its subdivision into parcels 1217, 1218, 1219, 1295 and 1296. The Appellant is advised to proceed and amend his schedule of distribution and only include parcels 1219 and 1295 as the free properties of the deceased and to lay claims, if any, regarding parcels 1218 and 1296 in the Environment and Land Court.
25. In view of the foregoing observations, it is my finding that the Appellant's appeal lacks merit. The same is dismissed with costs to the Respondents.

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

D.KEMEI

JUDGE

In the presence of:

Mberere.....for Appellant



M/s Kamau for Wanyala.....for Respondents

Okumu.....Court Assistant

