



REPUBLIC OF KENYA



**Orieny v Nyaboro & another (Civil Appeal E001 of 2023)
[2024] KEHC 840 (KLR) (5 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 840 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E001 OF 2023
KW KIARIE, J
FEBRUARY 5, 2024**

BETWEEN

SAMWEL SIXTUS ORIENY APPELLANT

AND

MARTIN OKEYO NYABORO 1ST RESPONDENT

MARGARET ADONGO 2ND RESPONDENT

*(Being an Appeal from the judgment in Ndhiwa Principal Magistrate's
Succession Cause No. 106 of 2017 by Hon. E.M. Onzere – Principal Magistrate)*

JUDGMENT

1. Samwel Sixtus Orieny was the petitioner in Ndhiwa Principal Magistrate's Court Succession Cause No.106 of 2017. The respondents herein applied for revocation of the grant by an application dated April 28th, 2021, on the grounds of concealment of some material fact. The learned trial magistrate allowed the application by a ruling dated the 7th day of December 2022.
2. The appellant was aggrieved by the ruling and filed this appeal. The firm of G.S. Okoth & Advocates represented the appellant. He raised the following grounds of appeal:
 - a. The learned trial magistrate misdirected herself on several matters of law and fact.
 - b. The learned trial magistrate erred in the law of Succession in revoking a grant of letters of administration intestate. In contrast, the grant was not obtained in violation of the provisions of Section 76 of the [Law of Succession Act](#).
 - c. The learned trial magistrate erred in the law of succession in defining a levirate wife as being included in the definition of "wife" as contained in Section 3(1) of the [Law of Succession Act](#).



- d. The learned trial magistrate erred in law in failing to adequately define what constitutes a lawful marriage following Luo Customary Law of marriage and in failing to appreciate the role of dowry in constituting a valid marriage under Luo Customary Law.
 - e. The learned trial magistrate erred in Luo Customary Law of marriage by holding that by taking his levirate wife into his home together with the children of her deceased husband Nyaboro, the said woman thus became the wife of the late Kwedho Ondiek and that he thus adopted her children who were all adults by then and were not biologically sired by him.
 - f. The learned trial magistrate erred in law in applying judicial precedents by relying on a precedent based on Kikuyu Customary Law, which is matrilineal in lineage. In contrast, the Luo Customary Law of Marriage is patrilineal in lineage.
 - g. The learned trial magistrate erred in law in failing to note that Isdora Akello Nyabora and her children did not fall within the definition of wife, child, and even dependent under Section 3(1), 3(2), and 29 of the [Law of Succession Act](#) and the burial of a deceased child one's land is not evidence of adoption.
 - h. The learned trial magistrate erred in law in deciding the case against the weight of evidence.
3. The firm of Quinter Adoyo & Company Advocates represented the respondents. The respondent contended that the revocation was based on sound legal principles. The appeal, therefore, lacks merits.
 4. As the first appellate court, it is my responsibility to carefully review all of the evidence presented and consider that I did not have the opportunity to observe the witness's testimony and their behaviour. I will follow the principles outlined in the *Selle v. Associated Motor Boat Co. Ltd.* [1965] EA 123, which states that the first appellate court must examine and assess the evidence presented in the trial court and then come to its conclusions.
 5. the trial magistrate must address and decide on three competing issues. She did so, resulting in the decision that is now being appealed.

The appellant argued that since the deceased, Samwel Kwedho Ondiek alias Ondiek Kwedho, died without a will and had no children or wife, he was the closest relative and, therefore, the most suitable person to petition for the letters of administration and to inherit the deceased's estate. The deceased was his paternal uncle.

6. It is uncertain when Samwel Kwedho Ondiek, also known as Ondiek Kwedho, passed away. The appellant provided a death certificate that indicates he died on April 14, 1988, while the respondents presented a certificate showing he died on February 18th, 1990. Though the discrepancy in the date of death might suggest an intention to deceive, it is irrelevant to this case. The deceased passed away after the [Law of Succession Act](#) commenced on July 1st, 1981. Section 2 (1) of the [Act](#) provides:

Except as otherwise expressly provided in this [Act](#) or any other written law, the provisions of this [Act](#) shall constitute the law of Kenya in respect of and shall have universal application to all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this [Act](#) and the administration of estates of those persons.

The Luo customary law on inheritance was, therefore, inapplicable.

7. The appellant, in his replying affidavit, averred in paragraphs 3 and 4 as follows:
 3. That the deceased Kwedho Ondiek died on the 14th day of April 1988 and I am related to the deceased by being his nephew and prior to his death he had no wife and no children and left



me living and occupying his land parcel No. West Nyokal/Kaganda /453 as his only next of kin, and the particulars thereof are set out in the chief's letter of introduction of beneficiaries dated 24th day of February 2017.

4. That the said deceased paternal uncle, prior to his death, also inherited a woman by the name of Isidora Akeyo w/o Nyaboro, deceased, who later, when my deceased uncle was old and frail, invited her three sons, namely Hezron Achoki Nyaboro (deceased), Joel Ogunda Opiyo (deceased) and Martin Akeyo Nyaboro to come and live with her.
8. If we were to assume that the deceased died on the 14th day of April 1988, as stated by the appellant, then the chief's introductory letter indicates he was a late entrant into the land of the deceased. The letter says he started living on the deceased's land in 1985. This waters down his contention that it was the respondents who were strangers.
9. Rival evidence was called to show the status of Isidora Akeyo Nyaboro. The appellant had his witnesses maintain that she was never married to the deceased herein. According to their evidence, she was in a levirate union. It was argued that theirs was a wife inheritance union. In the *Restatement of African Law:2 The Law of Succession* by Eugene Cotran, the following extract on Luo Customary law on inheritance is informative. On page 167, the author says:

Children of a levirate union are regarded as the children of the deceased husband, inheriting his property or sharing it with any other previous sons. Such children do not inherit any property from their natural father, i.e. the levir, unless he has no sons, brothers or half-brothers.

.....

A widow may choose to sever completely her relationship with her deceased husband's family and go back to her father's home. This is treated as a divorce and the rules for return of dho i keny apply. Guardianship of the widow reverts to her father, or, in his absence, to her brothers, until she remarries when the new husband becomes her legal guardian.

10. We can discern that in Luo customary law, levirate union and widow inheritance are two distinct concepts that relate to succession matters, particularly in the context of marriage and the inheritance of property or rights after the death of a spouse.

A levirate union is when a man marries his deceased brother's widow.

The primary purpose of the levirate union is to ensure the continuity of the deceased brother's lineage and to provide support and protection for the widow and her children.

In a levirate union, the surviving brother essentially steps into the role of the deceased husband, taking on the responsibilities towards the widow and any children from the previous marriage.

The levirate union is often seen as a social and familial obligation to maintain family ties and ensure the well-being of the widow and her children.

Widow inheritance refers to when a male relative of a deceased husband takes the widow as his wife. In such cases, the inheritor becomes the widow's husband in all aspects and for all intents and purposes.

11. It was not in dispute that Isidora Akeyo Nyaboro left her former husband's home and went to live with the deceased herein. When the deceased herein passed away, she remained in the home. This was, therefore, widow inheritance as opposed to levirate union.



12. During his lifetime, the deceased registered a land parcel with the number West Nyokal/Kaganda/453 as co-owners with the sons of Isdora. This is evidenced in the certificate of search which the respondent filed. This was an indication that he had adopted them as his own. This act left no room for doubt regarding his intentions.
13. The learned trial magistrate was informed by all these facts to make a finding that the grant was obtained by concealment of some material facts. The appeal, therefore, is dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 5TH DAY OF FEBRUARY 2024

KIARIE WAWERU KIARIE

JUDGE

