



REPUBLIC OF KENYA



**Omiti & another v Okello & 2 others (Civil Appeal E029 of 2022)
[2024] KEHC 2238 (KLR) (6 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2238 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E029 OF 2022**

KW KIARIE, J

MARCH 6, 2024

BETWEEN

MARTIN ONYANGO OMITI 1ST APPELLANT

JACKENS OMONDI OMITI 2ND APPELLANT

AND

ZIBIA ANYANGO OKELLO 1ST RESPONDENT

CARREN APONDI NOAH 2ND RESPONDENT

WILKISTER ANYANGO 3RD RESPONDENT

*(Being an Appeal from the ruling and order in Oyugis Principal Magistrate's
Succession Cause No.283 of 2020 by Hon. C. Okore –Principal Magistrate)*

JUDGMENT

1. On June 2nd, 2022, Hon. Celesa Okore granted an application filed on January 24th, 2022. The effect of the court's decision was to cancel the previously confirmed grant. The applicants argued that the deceased held the land in trust for his siblings. The appellants were not satisfied with this ruling and filed an appeal. They were represented by Abidha & Company Advocates. The grounds on which their appeal was premised were:
 - a. That the learned magistrate erred in law and, in fact, in determining the application dated 24th day of January 2022 suo moto and without confirming whether the 2nd appellant was served or not, thereby violating the principles of fair hearing under article 50(1) of [the constitution](#) 2010
 - b. That the learned magistrate erred in law and fact in ignoring the issue of jurisdiction raised in the notice of Preliminary Objection dated the 11th day of April 2022 on the basis that the same was a mere procedural technicality.



- c. That the learned magistrate failed to determine the issue of the respondent's capacities and merely considered the same as a technicality notwithstanding the precedents of the High Court and the Court of Appeal.
 - d. That the learned magistrate erred by allowing the application dated the 24th day of January 2022 without applying the relevant provisions of the *law of Succession Act*, noting the glaring admissions of the respondents that they were neither dependents nor beneficiaries in the estate of the late John Omiti.
2. Kisaka & Associates Advocates represented the respondents. They argued that the grounds of appeal were not adequately substantiated.
 3. This Court is the first appellate court. I know my duty to evaluate all the evidence on record, bearing in mind that I had no advantage of seeing the witnesses testify and watching their demeanour. I will be guided by the pronouncements in the case of *Selle vs Associated Motor Boat Co. Ltd.* [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its conclusions in the matter.
 4. When an issue of locus standi has been raised, the trial court must address it and find whether the parties have the requisite capacity to urge the case. It was erroneous for the learned magistrate to dismiss the claim of the respondents' capacity as a mere technicality. The preliminary objection ought to have been heard before revoking the grant.
 5. The respondents may have a good claim prima facie. However, this claim should have been taken to the Environment and Land Court with the requisite jurisdiction for determination. A succession court can only deal with matters of inheritance, not title to land.
 6. I, therefore, find that the learned magistrate misdirected herself in allowing the application. The appeal is allowed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 6TH DAY OF MARCH 2024

KIARIE WAWERU KIARIE

JUDGE

