



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CIVIL APPEAL NO. 149 OF 2019**

**IN THE MATTER OF THE ESATE OF JOASH ARENDE - DECEASED**

**BENARD OUMA AKAMA.....APPELLANT**

**-VERSUS-**

**JEREMIAH ODERO.....1<sup>ST</sup> RESPONDENT**

**JOEL OTIENO ARENDE.....2<sup>ND</sup> RESPONDENT**

**ROSALINA ODONGO ARENDE.....3<sup>RD</sup> RESPONDENT**

**(An Appeal arising from the Order of Confirmation and Distribution made on 16 /12/2019 by**

**Hon. KAMAU C.M. (SRM) at Rongo SRMCCC Succession Cause No. 62 of 2016)**

**BETWEEN**

**BENARD OUMA AKAMA.....OBJECTOR**

**-VERSUS-**

**JEREMIAH ODERO**

**JOEL OTIENO ARENDE**

**ROSALINA ODONGO ARENDE.....ADMINISTRATORS**

**JUDGEMENT**

**A. INTRODUCTION**

1. This appeal emanates from the ruling of the orders of confirmation of grant and distribution of the estate of **Joash Arende (Deceased)**, issued on 28/2/2018 by Hon. Kamau C.M (RM) made on 16/12/2019 in **Rongo Succession Cause No. 62 of 2016 between Benard Ouma Akama and Jeremiah Orende & 2 Others**. The estate is comprised of **Land Parcel Numbers L.R. Kamagambo/Kabuoro/836 and L.R. Kamagambo/Kabuoro/652**.

2. Being dissatisfied with the ruling of the trial Magistrate, the appellant through the firm of **Odumbe Okello Advocates**, preferred the instant appeal on the following grounds:-

- i. The trial Magistrate erred in law and in fact in relying in the Law of Succession Act which was not applicable at the time of the demise of Joash Arende Bobo (Deceased) arriving at an erroneous decision;**
- ii. That the trial court failed to appreciate that the applicable legal regime under the circumstances was Luo Customary Law;**
- iii. The trial court failed to appreciate and take into account the directive and opinion of this court in Succession Civil Appeal No. 24 of 2018 and proceeded to distribute the estate of the deceased in accordance with the Law of Succession Act;**

iv. That the trial court disregarded that the objectors have resided on the suit parcel of land being an ancestral land for a period of 50 years thus disinheriting them;

v. That the trial court erred in law in failing to admit the evidence of the death certificate which confirmed that he died before the inception of the Law of Succession Act.

3. Thus, the appellant prayed as follows: -

a) That the ruling of the trial court confirming the grant be set aside;

b) That this court re-distributes the estate of the deceased in accordance with Luo Customary Law;

c) Costs of the appeal and that of the subordinate court be borne by the respondent.

4. The appeal was canvassed by way of written submissions and both parties complied.

## **B. WRITTEN SUBMISSIONS**

5. The respondents filed their submissions on 25/9/2020 and gave a history of this matter. They submitted on two issues for determination; whether the instant appeal is *res judicata* and whether this court should entertain this appeal by dint of being *functus officio*.

6. On *res judicata*, the respondents submitted that this court had already deliberated on and settled the issues now being raised by the appellants vide **Migori Succession Civil Appeal No. 24 of 2018** therefore this court lacks jurisdiction to entertain this appeal.

7. On the second issue, the respondents submitted that this court became *functus officio* in the instant appeal brought by the appellant vide **Migori Succession Civil Appeal No. 24 of 2018**. In the first appeal, this court addressed itself on similar issues with the ones being raised in the instant appeal hence this court is devoid of jurisdiction to entertain the same matter again.

8. Further to the foregoing, the respondents submitted that the appellant was cited by the Hon. Lady Justice R.N. Sitati in **Kisii Succession Cause No. 541 of 2010**, that he had given false statement in order to administer in the estate of the deceased and the grant previously issued to him was revoked on 9/2/2011 since he obtained it by fraud. The respondents urged that the appeal be dismissed for being frivolous.

9. The appellant filed his submissions on 24/9/2021. He mainly faulted the trial Magistrate's decision to overlook the distribution of the estate of the deceased in accordance with Luo Customary Law based on the advisory opinion of this court in **Migori Civil Appeal No. 24 of 2018** since the deceased died before the inception of the Law of Succession Act.

## **C. DISCUSSION AND DISPOSITION**

10. I have carefully considered the memorandum of appeal, the record of appeal and the respective rival submissions. The issues for determination arising therefrom are:-

i. Whether the instant appeal is *res judicata*;

ii. Whether this court is *functus officio*;

iii. Whether the appeal has merit.

iv. Who bears the costs?

11. This being the first appeal, the court is guided by the principles set out in the cases of **Selle & Another vs Associated Motorboat Company Ltd & Others [1968] 1EA 123** and **Peters v Sunday Post Limited (1958) EA 524**. This court is under the duty to re-evaluate the evidence on record and reach its own conclusion; but in doing so, it should bear in mind that it did not have the advantage of seeing and hearing the witnesses testify before it and it is not open for this court to review the findings of the trial court simply because it would have reached a different results as if it was hearing the matter for the first time.

12. On whether the present appeal is *res judicata* and the court is *functus officio*, I have considered the issues which were dealt with in **Migori Civil Appeal No. 24 of 2018**. In the aforementioned appeal, the main issue which the court addressed itself on, was on the failure of the trial Magistrate to distribute the estate of the deceased in accordance with the provisions of **Sections 2 (2) and 71 of the Law of Succession Act (The Act)** and **Rules 40 and 41 of the Probate and Administration Rules**. In the present appeal, the appellant is asking this court to fault the trial court's ruling of 16/12/2019 for not taking into account the directives issued in the judgement of **28/2/2019** by **Mrima J in Migori Civil Appeal No. 24 of 2018** to distribute the deceased's estate in accordance with Luo Customary Law. Whereas the issues may be similar in that they considered whether **Section 2 (2)** of the Act was applicable, yet the court in **Migori Civil Appeal No. 24 of 2018** set aside the orders of the Magistrate and the matter was sent back to the said court to consider the issues again. Therefore, the argument that this court is *res judicata* and *functus officio* cannot stand.

13. It is not in dispute that the deceased died on 15/11/1980. This was before the commencement of the Law of Succession Act. In the judgement by Mrima J in **Migori High Court Succession Civil Appeal No. 24 of 2018**, the learned Judge in paragraphs 9 and 10 observed:

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“The date of the commencement of the Act is 01/07/1981. The estate of the deceased herein is therefore not subject to the Act but to the customary laws applicable to the deceased at the date of date. The distribution of the estate was to be done in accordance with such customs and laws. However, the administration of the estate could be undertaken in accordance with the Act...The record does not show that the distribution was done in accordance with the customary laws applicable to the deceased at death. With profound respect to the Learned Magistrate I must find, which I hereby do, that the court erred in acting on wrong principles in reaching the finding. The ruling and order made on 28/02/2018 cannot therefore stand and is hereby set aside.”

14. Section 2 (2) of the Act provides:

“The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

15. As the deceased was Luo and died before the commencement of the Act, the estate should be distributed in accordance with Luo Customary Law in so far as it is not repugnant to justice and good morals or inconsistent with other written laws. The law concerning customary law distribution of the estate of deceased persons is well settled. Customary Law is a question of fact and must be proved by evidence as was held in the case of *Kimani v Gikanga* [1965] EA 735 that:-

“where African customary law is neither notorious nor documented it must be established for the Court’s guidance by the party intending to rely on it and also that as a matter of practice and convenience in civil cases the relevant customary law, if it is incapable of being judicially noticed, should be proved by evidence or expert opinions adduced by the parties.”

16. Rule 64 of the Probate and Administration Rules also makes provision for the application of African Customary Law in the following terms:

“Where during the hearing of any cause or matter any party desires to provide evidence as to the application or effect of African Customary law he may do so by the production of oral evidence or by reference to any recognized treatise or other publication dealing with the subject, notwithstanding that the author or writer thereof shall be living and shall not be available for cross-examination.”

17. In the impugned ruling of 16/12/2019, the learned Magistrate relied upon the Certificate of Titles on record which showed that the deceased was the registered owner of the parcels of land and that he did not hold the land as a trustee. The court held that only the beneficiaries of the deceased were entitled to the estate. In essence, what the trial Magistrate did was distribute the estate in accordance with **Part V of the Act** as if the deceased died intestate after the commencement of the Act, which he erred in law.

18. The Magistrate ought to have made inquiries whether there are any other overriding interests in the first registration. **Section 30 (g) of the Registered Land Act (now repealed)** whose equivalent is now **Section 28 (b) of the Land Registration Act, 2012** makes provision for rights of a proprietor on all registered land as follows: -

“28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-

(a)...

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Section 30 (g) of the Land Registration Act provides: -

“Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-

(g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed.”

19. On the above provisions, the Supreme Court in *Isack M’inanga Kiebia v Isaaya Theuri M’lintari & another* [2018] eKLR noted that

“A customary trust falls within the ambit of the proviso to Section 28 of the Registered Land Act, while the rights of a person in possession or actual occupation, are overriding interests and fall within the ambit of Section 30(g) of the Registered Land Act.”

20. The Supreme Court in *Isack M’inanga Kiebia* (supra) recognized the overriding interests under **Section 30 (g) of the Registered Land Act (now repealed)** as follows:-

"What is one to make of section 30(g) of the Registered Land Act? This recognizes as overriding interests:

**"The rights of a person in possession, or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed."**

...If the rights of a person arising under African customary law as evidenced by his/her being in possession or actual occupation of the land are not overriding interests under Section 30 (g) as decreed in Obiero vs Opiyo, what are they?

.....Such rights of a person that subsisted at the time of first registration, as evidenced by his being in possession or actual occupation, are rooted in customary law. They arise under African customary law. They derive their validity from African customary law. **They are "rights to which one is entitled in right only of such possession or occupation". They have no equivalent either at common law or in equity. They do not arise through adverse possession, neither do they arise through prescription. .... It is customary law and practice that clothes the rights of a person in possession or actual occupation, with legal validity. If customary law and practice, does not recognize such possession or actual occupation, then it cannot be a right to which a person is entitled. .... We now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor. Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust.**

**We also declare that, rights of a person in possession or actual occupation under Section 30(g) of the Registered Land Act, are customary rights. This statement of legal principle, therefore reverses the age old pronouncements to the contrary in Obiero vs Opiyo and Esiroyo vs Esiroyo. Once it is concluded that such rights subsist, a court need not fall back upon a customary trust to accord them legal sanctity, since they are already recognized by statute as overriding interests ..... We agree with the Court of Appeal's assertion that "to prove a trust in land; one need not be in actual physical possession and occupation of the land." A customary trust falls within the ambit of the proviso to section 28 of the Registered Land Act, while the rights of a person in possession or actual occupation, are overriding interests and fall within the ambit of Section 30(g) of the Registered Land Act.** [Emphasis added].

21. Therefore, it is incumbent upon the court in which claims of customary trust have been presented to it, to call for evidence and evaluate the case on its own merits to determine if the trust binds the registered proprietor.

22. I have carefully considered the replying affidavit dated 30/7/2019 by the appellant and his submissions to this court. I take judicial notice of the fact that the appellant represented himself in the trial court. In the replying affidavit, which was his protest, he did not, in accordance with **Section 2 (2) of the Act and Rule 64 of the Probate and Administration Rules** lead oral evidence or produce evidence through publications or treatises on the applicable customary law and the manner of distribution of the estate of the deceased. If such publications are not at the disposal of the appellant, it is my considered view that an additional affidavit or witness statement by an expert in Luo Customary Law and Cultural practices in regard to distribution of estates would have sufficed.

23. Be that as it may, it behooved the trial court in compliance with the directives from the Superior Court and to reach a proper finding, to summon competent witness (es) or expert (s) or ask the protestor to do so, in order to guide the court on the distribution of the deceased's estate in accordance with Luo Customary Law. It was not proper for the trial court to proceed with the distribution of the estate of the deceased by placing reliance on affidavits and the titles of the parcels of land in the estate of the deceased as opposed to **viva voce** evidence.

24. For the above reasons, I find that the court applied the wrong principles in arriving at the distribution of the deceased's estate by ignoring Luo Customary Law. I find merit in the appeal and is hereby allowed. The appellant is once again being given the opportunity to present his claims in the estate of the deceased in a proper manner.

25. From the foregoing, I make the following orders;

- i. The ruling of the subordinate court, confirming the grant, and delivered on 16/12/2019 be and is hereby set aside;**
- ii. The administrators and/or any of them shall file and serve Summons Confirmation of Grant and distribution of the estate of the deceased in Principal Magistrate's Court Rongo within 30 days hereof.**
- iii. Further directions as to the hearing on the Summons be taken before that court.**
- iv. Each party shall be their own costs in this appeal.**

**DELIVERED, SIGNED AND DATED AT MIGORI THIS 9TH DAY OF DECEMBER, 2021.**

**R. WENDOH**

**JUDGE**

**Judgement delivered in presence of:-**

Mr. Mwita holding brief Okota for Appellant.

In person Respondents.

**Nyauke** - Court Assistant