**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NYERI**

**SUCCESSION APPEAL NO. E021 OF 2024**

**TITUS TATUA**

**KAIRU……**

**APPELLANT**

**VERSUS**

**ESTHER WAMUYU KAIRU**

**WIMSEY MUTAHI**

**KAIRU……RESPONDENTS**



**JUDGMENT**

1. This is a Judgement arising from the Ruling of the lower court delivered on 16.9.2024 by Hon. D.K Matutu SPM in Mukurweini PMSUCC Cause No. E068 of 2022.

2. The Appellant was the Petitioner. He filed Summons for confirmation of the Grant dated 21.11.2022 on 30.5.2023. The summons was in respect of the deceased's LR No. Gikondi/Karindi/351.

3. Subsequently, the Respondents filed an affidavit sworn on 10.4.2023 by which it was materially deposed that before his demise, the deceased had made wishes gifting one

Kairu, son of 1st Respondent herein, which should be followed without which the 1st Respondent would be unsettled. The protest dated 12.1.2024 reiterated, also contended that the land was about 3 acres and the Respondents had been living on it as the deceased had assigned them. It was also deposed that the high court in Nyeri vide HCCC No. 149 of 1994 had distributed the said parcel as follows: Kairu Guchugu 1 acre, Titus Tatua Kairu 1.4 acres and Mutahi Kairu Wimsey 1.4 acres, but then the land was subsequently discovered to be only 3 acres.

4. The lower court considered the protest and delivered its Ruling allowing the protest and directed that the land be distributed among the Appellant, the 1st and 2nd Respondents in equal shares.

5. The Memorandum of Appeal dated 29.3.2022 raised the following material Grounds of Appeal.
   (a) The learned magistrate erred in law and fact in finding that the deceased had settled the beneficiaries on the ground.
   (b) The learned magistrate erred in law and fact in failing to address HCC NO 149 OF 1994 which conformed the wishes of the deceased.
   (c) The learned magistrate erred in law and fact in disregarding the deceased's wishes.

**Evidence**

6. PW1 was Wimsey Mutahi Kairu. She testified that there was no land to be subdivided as the deceased had already subdivided the land among the beneficiaries. She relied on produced documents including a copy of the decree dated 22.12.1998.

7. PW2 was the 2nd Respondent. She affirmed the testimony of the 1st Respondent. She testified that they were of one mother while the Appellant was from another house of the deceased. She proposed equal shares.

8. DW1 was the Appellant. According to him, there was no wish that the deceased left. He was given half of the parcel by his father, the deceased. On cross examination, he testified that the 1st Respondent lived on the land. The deceased had two wives.

**Submissions**

9. The Appellants filed submissions dated 24.8.2025 and submitted that the court purported to vary the judgement in HCC 149 OF 1994 that well stipulated shares to be 1.4 for the Appellant and which judgment had not been appealed by either party.

10. It was in this regard submitted that no party was disinherited as all were provided for and the intentions of the deceased ought to have prevailed. No authorities were filed.

11. On their part, vide the submissions dated 17.11.2025, the Respondent submitted that the 1st Respondent had a right to inherit and the Appellant failed to cite the Esther Wamuyu as a dependant and in the meaning of dependants pursuant to Section 29 of the Act. They cited Section 29 of the Law of Succession Act.

**Analysis**

12. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

13. In the case of **Mbogo and Another vs. Shah [1968] EA 93** where the Court stated:

> "…that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

14. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus **Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123**, where the law looks in their usual gusto, held by as follows; -

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

15. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

16. In the case of **Peters vs Sunday Post Limited [1958] EA 424**, court therein rendered itself as follows:

> "It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion.

17. It is thus established that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or the court has clearly failed on some material point to take into account of particular circumstances. This was the finding in **Mwangi vs Wambugu** [1984] KLR 453 where the court observed that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

18. This court's role is also to establish whether the lower court's finding was based on the evidence. The Court of Appeal in **Kiruga vs Kiruga & Another [1988] KLR 348**, observed thus:

> "An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand."

19. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

20. The Appellant's case was largely that the deceased's estate was distributed according to the deceased wishes. The said wishes were not documented and appear to have been anchored on the existence of an oral will. The Appellants on the other hand anchored their protest on the ground that the estate of the deceased ought to have been distributed equally under intestacy. Under Section 9 of the **Law of Succession Act** it is provided as doth:

> No oral will shall be valid unless: a. It is made before two or more competent witnesses and
>
> b. The testator dies within a period of three months from the date of making the will.

21. While discussing the requirements of a valid oral will, Musyoka J in **Re Estate of Evanson Mbugua Thong'ote** (Deceased) [2016] eKLR stated thus:

> An oral will is made simply by the making of utterances orally relating to disposal of property. In asserting whether the deceased had made a valid oral will, it needs to be considered first whether there was an utterance of the will. The question being whether there was an oral utterance of the terms of the will. The other consideration is that the utterance ought to be made in the presence of two or more persons.

22. To this court, the allegations of the Appellant do not justify a conclusion that there was an oral will. There was no evidence of an oral will.

23. It was not in disputed that the 2nd Respondent was a beneficiary by virtue of being a daughter of the deceased. On dependants, the **Law of Succession Act (Cap 160 Act defines who is a dependant at Section 29** as follows:-

> "(a)the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
>
> (b)such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own,

brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

24. According to the summons for confirmation of Grant dated 25.5.2023, the 1st Respondent was named as a beneficiary. She was a sister to the 2nd Respondent.

25. Further, the disputed parcel of land was said to be 3 acres. Having declared that there was no oral will, I think that the learned magistrate proceeded well guided on the proper legal principles. There was nothing christened in law as the wish of the deceased if the same could not be traced to an oral or written will. It was an aspiration that must be supported in order to be constituted as an oral will.

26. It was clear and not a disputed matter that although the court had in HCC No. 149 of 1994 declared that the land be distributed as 3 portions of 1.4 acres, 1.4 acres and 1 acre, the parcel was in fact not equal to 3.8 acres as it was only 3 acres. The estate should have devolved under Section 39 of the Law of Succession Act as follows:

39. Where intestate has left no surviving spouse or children

(1)Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—(a)father; or if dead(b)mother; or if dead(c)brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none(d)half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none(e)the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

27. The Appellants had proposed under paragraph 5 of the supporting affidavit to the summons for confirmation of Grant as follows:

a) LR No. Gikondi/Karindi/351 to be shared into equal parts as follows:

(i) Titus Tatua Kairu

(ii) Wimsey Mutahi Kairu

(Equal Share)

28. From the above proposal, it is clear that the Appellant left out the 1st Respondent. I have not seen any reason for leaving out the 1st Respondent. The allegation that the wishes of the deceased were to share only between the Appellant and the 2nd Respondent had no basis. Even if the

deceased had left a will to that effect, the same would not be validated for that reason of leaving a beneficiary who was entitled as daughter.

29. Consequently, I find no reason to fault the decision of the learned magistrate. She properly adverted her mind to the judgement and decree of court dated 22.12.1998 who implementation was practically impossible for the decreed sizes exceeded the available land area.

30. Based on the above, I find the Appeal is not merited and unsuccessful.

**Determination**

31. In the upshot, I make the following Orders:

(i) The Appeal is not merited and is dismissed with costs of 45,000/=.

(ii) 30 days stay of execution.

(iii) The file is closed.

**DELIVERED, DATED** and **SIGNED** at **Nyeri**, virtually on this **20th** day of **November, 2025**. Judgement delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**

**JUDGE**

**In the presence of: -**

Mr. Kung’u for the Respondent

Ms. Poline Mwangi for the Appellant

Court Assistant: Michael