



REPUBLIC OF KENYA



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Otieno v Otieno (Civil Appeal 597 of 2019)
[2025] KECA 1933 (KLR) (21 November 2025) (Judgment)

Neutral citation: [2025] KECA 1933 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 597 OF 2019
SG KAIRU, J MOHAMMED & WK KORIR, JJA
NOVEMBER 21, 2025

BETWEEN

FLORENCE JANET ACHIENG OTIENO APPELLANT

AND

KATH ANYANGO OTIENO RESPONDENT

(Being an appeal against the Ruling of the High Court at Nairobi (W. Musyoka, J.) dated 3rd February 2017 in Succession Cause No. 1872 of 2012)

JUDGMENT

1. The appellant, Florence Janet Achieng Otieno, and the respondent, Kath Anyango Otieno, are widows of the late Godwin Guya Otieno (the deceased), with the appellant being the 1st wife and the respondent being the 2nd wife. The deceased died intestate, leaving behind the 1st wife with four children and the 2nd wife with three children. In a ruling dated 3rd February 2017, W. Musyoka, J. confirmed the grant of letters of administration to the two widows in respect of the deceased's estate and distributed the estate as follows:

- “(a) First house - Kisumu/Kadongo/4040 and 4280, and Plot No. 68 Holo Market;
- b. Second house - Kisumu/Kadongo/3940, 4143 and 4145;
- c. Debts and liabilities - to be settled from the proceeds of sale of LR No. 15428 Nairobi, with the balance of the purchase price being shared between the two houses at the ratio of 5:4;
- d. Upon the transfer of Kisumu/Kadongo/4150 to the name of the deceased, the same shall be sold and the proceeds of sale shared out between the houses at the ratio of 5:4.



- e. Any other assets that have not been distributed above, or have not been identified, shall be sold and the proceeds of sale distributed in the ratio of 5:4 between the first and the second house; and
 - f. The property in each house shall devolve to the widows during life interest and shall pass to the children in equal shares thereafter.”
2. Both the appellant and the respondent have expressed dissatisfaction with the distribution of the estate of the deceased. For the appellant, she is, as can be gleaned from her Memorandum of Appeal dated 2nd} December 2019, dissatisfied with the order directing the sale of L.R. No. Kisumu/ Kadongo/4150, arguing that the same is her matrimonial home and the place where the deceased’s remains are interred. She is also aggrieved with the order granting her L.R. No. Kisumu/ Kadongo/4280, contending that the property should be given to the respondent, as it was her (the respondent’s) matrimonial home. In addition to the foregoing, she faults the learned Judge for failing to find that the sale of L.R. No. 15428 Njathaini Area, Nairobi City was sufficient to settle the deceased’s debts and liabilities and there was no need to sell any other property. The appellant therefore prays that the estate be redistributed afresh.
 3. On her part, the respondent in her cross-appeal dated 4th} July 2024 is dissatisfied with the order that L.R. No. 15428 Njathaini Area, Nairobi City be sold and the proceeds utilized to settle the debts and liabilities of the estate, and that any balance be shared between the two houses at the ratio of 5:4 and prays that the order be reversed, and the property allocated to her.
 4. From the affidavits filed by both parties before the High Court, there was no agreement as to the liabilities of the deceased’s estate. However, the parties agreed on the assets of the deceased’s estate, and valuation of some of them, as follows:
 - i. Kisumu/Kadongo/4040- valued at Kshs. 800,000
 - ii. Kisumu/Kadongo/4280
 - iii. Kisumu/Kadongo/3940-valued at Kshs. 95,000
 - iv. Kisumu/Kadongo/4143
 - v. Kisumu/Kadongo/4145-valued at Kshs. 1,050,000
 - vi. Kisumu/Kadongo/4150- valued at Kshs. 8,400,000
 - vii. Plot No. 68 Holo Market- valued at Kshs. 300,000
 - viii. LR. No. 15428 Nairobi- valued at Kshs. 12,000,000
 - ix. Plot No. 31 Kisumu
 - x. Motor vehicle KZS 899
 5. When this appeal came up for hearing, learned counsel, Mr. Oonge appeared for the appellant, while learned counsel, Mr. Khasiani represented the respondent. Counsel for the parties entirely relied on the filed written submissions.
 6. In the submissions dated 12th} February 2021, learned counsel Mr. Oonge argued that the deceased’s estate should be re-distributed so that L.R. No. Kisumu/Kadongo/4150 is allocated to the appellant. To buttress this argument, counsel contended that in ordering this property to be sold, the learned Judge failed to consider that the land was not only the appellant’s matrimonial home but also the place



where deceased was laid to rest. Turning his attention to L.R. No. Kisumu/Kadongo/4280, counsel submitted that this parcel should be allocated to the respondent since it is her matrimonial home. Counsel maintained that such an order would enable the family of the deceased to have the matter finally settled. Regarding L.R. No. 15428 Njathaini Area, Nairobi City, counsel argued that it was unanimously and expressly agreed in a family meeting that the property be sold off and the proceeds therefrom utilized to offset the deceased's liabilities. Counsel therefore supported the decision of the learned Judge in so far as it ordered that this property be sold. He, however, faulted the learned Judge for failing to find that the proceeds from the sale of this parcel would settle all the estate's debts and liabilities, hence there was no need to dispose any other property of the estate. It was counsel's ultimate plea that the appeal be allowed.

7. On his part, learned counsel Mr. Khasiani for the respondent opposed the appeal and, at the same time, supported the cross- appeal through the submissions dated 22nd July 2024. In opposition to the appeal, counsel argued that the appellant's proposal would lead to unequal treatment of the two families, as the appellant's household would get a larger share than the respondent's household. Opposing the appellant's call for the sale of L.R. No. 15428 Njathaini Area, Nairobi City, counsel submitted that the property is the respondent's matrimonial home, though without a house, and that the respondent will eventually have to get resources to erect her house thereon. Counsel submitted that the respondent cannot be compared with the appellant who was left with a single-storey house on L.R. No. Kisumu/Kadongo/4150. Counsel maintained that the respondent had never occupied L.R. No. Kisumu/Kadongo/ 4280 as her matrimonial home. He concluded by urging that the widows should retain their matrimonial homes and a fresh equitable distribution be made in respect of the other properties.
8. We have considered the appeal, the cross-appeal and the rival arguments. There is no dispute that the deceased was a polygamous man with two wives and that he left behind seven children, 4 with the appellant and 3 with the respondent. There is also no dispute as to the known assets forming the estate of the deceased. In our view, therefore, the only issue for determination is whether the parties have established grounds for interference with the learned Judge's distribution of the deceased's estate between the two houses.
9. The deceased, having been polygamous and having died intestate, the distribution of his estate was subject to the provisions of section 40 of the >/akn/ke/act/1972/14 Law of Succession Act}}, which provide that:
 - “(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house but also adding any wife surviving him as an additional unit to the number of children.
 - (2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”
10. The Court has enunciated various principles that undergird the application of section 40 of the Law of Succession. For instance, in *Koech & Another v Chemutai & 2 Others* [2022] KECA 1309 (KLR), the Court held that the said provision should be interpreted in a manner that promotes equality and non- discrimination, non-applicability of customary law repugnant to justice and morality, and the appropriate application of equitable principles. And in *Scolastica Ndululu Suva v Agnes Nthenya Suva* [2019] KECA 1053 (KLR), the Court pointed out that although section 40 of the >/akn/ke/



act/1972/14 Law of Succession Act}} is the general provision for the distribution of the estate of a polygamous deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.

11. Additionally, we note that each party has identified what she believes to be the matrimonial home. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) provides clear guidance on this matter in Article 21(1) as follows:

“A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.”

12. We observe that a matrimonial home is always of sentimental value to the surviving spouse and her children. Happy memories, if they were indeed happy, of the deceased's life are intertwined with the matrimonial home. Generally, it is an asset that should remain with the spouse who lived there with the deceased. In our view, such a property ought not to, ordinarily, be sold, unless it is the only available property that can be sold so that the proceeds can be used to offset the debts and liabilities, but that was not the case herein.
13. We also appreciate that in distributing the estate of a deceased, the court takes into account the facts as laid bare by the parties while seeking to ensure equity in the distribution and not necessarily equality. It is upon these principles that we will consider this appeal.
14. From the affidavit sworn on 1st} November 2013 the respondent at paragraph 5 desired that the estate be distributed as follows: the appellant to get L.R. No. 4280 Paw Akuche and L.R. No. 4143 Paw Akuche; the respondent to take L.R. No. 4145 Paw Akuche and L.R. No. 15428 Lower Kiambu (this should be the plot that the parties also refer to as L.R. No. 15428 Njathaini Area, Nairobi City); L.R. No. 4040 Paw Akuche be shared equally, as well as the proceeds of the sale of motor vehicle registration number KZS 899; and, L.R. No. Paw Akuche 3940, Plot No. 68 Holo Market and Plot No. 31 Kisumu Town to be sold and the proceeds used to offset the liabilities. We presume Paw Akuche also means Kisumu/Kadongo. It is apparent that L.R. No. Kisumu/Kadongo/4150 did not feature in the respondent's list of assets at paragraph 4 of her affidavit and in the mode of distribution at paragraph 5 of the same affidavit. At paragraph 16 of her supplementary affidavit sworn on 2nd} April 2014, the appellant while agreeing with the respondent's proposed mode of distribution proposed the following variations:

- i) Land Reference Number: 15428 be sold off to offset deceased's outstanding liabilities and surplus proceeds of the sale be shared equally between the two households of the deceased.
- ii. Motor Vehicle KZS 899 be granted to Kath Anyango Otieno wholly.
- iii. Plot Number 68 Holo Market to Florence Janet Achieng Otieno.
- iv. Plot Number 3940 Paw Akuche to Kath Anyango Otieno.”

15. Again, we do not come across any mention of L.R. No. Kisumu/ Kadongo/4150 in the appellant's stated affidavit. We have also perused the submissions filed before the trial court by the respondent on 14th} May 2014 and the appellant on 28th} May 2014, and do not find any mention of the said plot. The plot is, however, among the parcels of land whose valuation reports were presented to the learned Judge before he made his determination. Upon considering the proposals made by the



parties, the learned Judge rejected them as they did “not come anywhere close to the ratio of 5:4.” and proceeded to “determine what is more realistic.”

16. At the centre of this appeal lies the High Court's distribution of three properties, being L.R. No. Kisumu/Kadongo/4150, L.R. No. Kisumu/Kadongo/4280 and L.R. No. 15428 Njathaini Area, Nairobi City. The appellant contends that L.R. No. Kisumu/Kadongo/4150 should be transferred to her, L.R. No. Kisumu/Kadongo/4280 to the respondent, and L.R. No. 15428 Njathaini Area, Nairobi City, should be sold to meet the estate's debts and liabilities. The respondent, on the other hand, insists that L.R. No. 15428 Njathaini Area, Nairobi City is her matrimonial home and that it should be awarded to her, and not L.R. No. Kisumu/Kadongo/4280.
17. From the valuation reports on record, L.R. No. Kisumu/ Kadongo/4150 was valued at Kshs. 8,400,000, while L.R. No. 15428 Njathaini Area, Nairobi City was valued at 12,000,000. We also note that on L.R. No. Kisumu/ Kadongo/4150 stands a single-storey building, while L.R. No. 15428 Njathaini Area, Nairobi City has no structural developments. We further observe that the appellant's assertion that L.R. No. Kisumu/ Kadongo/4150 was her matrimonial home and the deceased's resting place was not controverted. On the other hand, the appellant similarly did not impeach the respondent's assertion that her life revolved around the dazzling lights of Nairobi, and that is where she intends to establish her home, and not on L.R. No. Kisumu/Kadongo/4280, where she didn't even have a house. Although the appellant was insistent that L.R. No. Kisumu/Kadongo/4280 was the respondent's matrimonial home, we find that in the affidavit sworn by the respondent on 1st November 2013 in support of the summons for confirmation of the grant, she explicitly offered this parcel of land to the appellant. Indeed, the respondent held the view that the appellant lived on L.R. No. Kisumu/Kadongo/4280. As already stated, L.R. No. Kisumu/Kadongo/4150 was at that time not in the picture.
18. A review of the distribution by the learned Judge shows that he directed the disposal of the crown jewels of the deceased's estate being L.R. No. Kisumu/Kadongo/4150 valued at Kshs. 8,400,000 and L.R. No. 15428 Njathaini Area, Nairobi City valued at 12,000,000. The learned Judge found at paragraph 8 of his ruling that the debt was Kshs. 548,787 only and this finding has not been challenged before this Court by any of the parties. We do not therefore understand the rationale of selling properties worth Kshs. 20,400,000 to pay a debt of Kshs. 548,787 when there were other properties of lesser value whose sale could have easily cleared the debt. We of course appreciate that the learned Judge had not been informed by any of the parties that the appellant's matrimonial home was on L.R. No. Kisumu/ Kadongo/4150. Nevertheless, it is important to always bear in mind that the purpose of succession is to pass the property of the deceased person to the next generation. On this principle, we quote W. Musyoka J. himself in *FEO v ACO (Sued as Co- Administratrix of the Estate of the Late BPO)* [2024] KEHC 14889 (KLR) wherein he opined that:

“.. I reiterate, that succession is trans-generational or inter-generational, not intra-generational. Wealth is moved from 1 generation to the next. The concept of succession explains and facilitates that movement. It is designed to move the wealth or property from the generation of the parents to that of the children, and not from 1 parent to the other parent. That is why it is successive. Succession is not meant to be horizontal, but lateral. It is not ascendant, but descendent. The property or estate should move from an ancestor to a descendant. It descends from a parent to a child. Transgenerational or descendent succession is the norm, while intra-generational or horizontal succession is the exception. Succession is only horizontal or ascendant in exceptional circumstances. If 1 parent has to inherit from the other, then they would only hold the property in trust for the children, who are the



ultimate inheritors or successors or survivors, in the succession scheme, hence the concept of life interest...”

19. In the circumstances, we find it proper to interfere with the learned Judge’s exercise of discretion in the distribution of the deceased’s estate. In order to achieve equity, we will have to distribute the estate afresh. Even though L.R. No. Kisumu/ Kadongo/4150 was yet to be transferred to the deceased’s estate, the fact that he had established a home on this property and that is where he was laid to rest, adequately established the premises as the deceased’s matrimonial home with the appellant. Similarly, the respondent’s un rebutted evidence was that she did not have a rural home as she lived with the deceased in Nairobi. Her testimony that she intended to establish a home in Nairobi was also not rebutted. On that basis, we would also interfere with the learned Judge’s orders regarding L.R. No. 15428 Njathaini Area, Nairobi City.
20. We observe that none of the parties was opposed to the distribution of the estate in the ratio of 5:4 between the appellant and the respondent as proposed by the learned Judge. In light of the number of children each widow had, we agree that the proposal was indeed just and fair.
21. Considering what we have already stated in this judgment, we accept the invitation of the parties to redistribute the estate of the deceased. In doing so, we have considered where the interests of the parties lie, even as we appreciate that the value of some of the properties was not disclosed. However, we have the valuation reports for properties situated in the same area with those whose valuation is not available. From the submissions of the parties, it is apparent that none of them is interested in L.R. No. Kisumu/ Kadongo/4280. We will bear this in mind when distributing the estate of the deceased. As such, we redistribute the estate of the deceased Godwin Guya Otieno as follows:
 - a. First House (Appellant) - Upon the transfer of L.R. No. Kisumu/Kadongo/4150 to the estate of the deceased, the property shall go to the appellant plus Plot No. 68 Holo Market, Plot No. 31 Kisumu, L.R. No. Kisumu/ Kadongo/3940, L.R. No. Kisumu/Kadongo/4143, and L.R. No. Kisumu/Kadongo/4040;
 - b. Second House (Respondent) – L.R. No. 15428 Njathaini Area, Nairobi City and L. R. No. Kisumu/ Kadongo/4145;
 - c. Debts and liabilities, and any interest that may have accrued thereon, shall be settled from the proceeds of the sale of motor vehicle registration number KZS 899 and L.R. No. Kisumu/ Kadongo/4280, with any balance of the proceeds of the sale being shared in the ratio of 5:4 between the appellant and the respondent;
 - d. Any other asset not distributed above shall be sold and the proceeds of sale distributed in the ratio of 5:4 between the appellant and the respondent; and
 - e. The property in each house shall devolve to the widows in life interest.

A fresh certificate of confirmation of grant in the above terms shall issue accordingly.
22. This being a family dispute, the ideal order on costs is to direct each party to bear own costs of the appeal, which we hereby do.

DATED AND DELIVERED AT NAIROBI THIS 21^T DAY OF NOVEMBER 2025.

S. GATEMBU KAIRU, FCI Arb. C.Arb.

JUDGE OF APPEAL

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JAMILA MOHAMMED

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JUDGE OF APPEAL

W. KORIR

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

