

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NYERI**  
**SUCCESSION APPEAL NO. E021 OF 2023**

DAVID MUHORO MWANGI

ANN WAMBUI MAINA.....

APPELLANTS

VERSUS

GRACE

WANGUI

MWAGO.....RESPONDENT

**JUDGMENT**

1. This is a Judgement arising from the Ruling of the lower court delivered on 26.9.2023 by Hon. V. Kosgey SRM in Karatina PMSUCC Cause No. 34 of 2019.
  
2. The Appellants are the Petitioners. They filed amended Summons for conformation of the Grant dated 28.7.2021 and sought the parcel of land Konyu/Gachuku/1239 to devolve to 3 equal portions jointly to David Maina Mihoro and Ann Wambui Maina; Anne Njambi Chuma and John Maina and Grace Wangui Mwago.
  
3. Subsequently the Respondent filed an affidavit of protest sworn on 15.2.2021 by which it was materially deposed

that before his demise, the deceased had spoken out declaring that the impugned parcel should devolve to Maina Mwago. It was deposed that as Maina Mwago was deceased, the parcel should devolve to the Respondent who was his mother.

4. The lower court considered the protest and delivered its Judgement allowing the protest on the ground that the Respondent had proved that the deceased wished the property to devolve to her son.
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 awarding Konyu/Gachuku/1239 to the Respondent without evidence of an oral will.
  - (b) The learned magistrate erred in law and fact in not appreciating that the alleged wish did not qualify as oral will.
  - (c) The learned magistrate erred in law and fact in not distributing the estate per section 39 of the Law of Succession Act.

### **Evidence**

6. PW1 was Grace Wangui Mwago. She adopted her witness statement dated 13.9.2021. The deceased was a brother to her husband. She proposed that the land be given to her son. The son had passed on but left wife and son. The

deceased asked her to do succession for the land in her name.

7. PW2 was Esther Njeri. The deceased was her uncle. The deceased had no wife. He had 3 siblings. She testified on cross examination that the deceased said the son named after the deceased would take over the land. That was the Respondent's son but who was is deceased.
8. PW3 was John Maina. The deceased was his uncle. The decease had no wife and children. No one farmed on the land.
9. DW1 was David Muhoro Mwangi. according to him, the deceased, his uncle, the land was one and a quarter acre in size. The deceased wished the farm to go to Mwangi Muhoro, Mwago and the Appellants. No one was living in the farm.

### **Submissions**

10. The Appellants filed submissions dated 12.5.2025 and submitted heavily that though the deceased died intestate the court erroneously introduced an alleged oral will to the detriment of the Appellants. Reliance was placed on section 9 and 10 of the Law of Succession Act.

11. It was in this regard submitted that the court ought to have proceeded guided by the rules of intestacy and not testacy. They cited Section 39 of the Law of Succession Act.
12. On their part, vide the submissions dated 16.6.2025, the Respondent submitted that there was overwhelming evidence conforming the wishes of the deceased and the lower court was correct in its conclusion. The Respondent did not cite authorities.

### **Analysis**

13. Being a first Appeal, the court relies on the principles as set out in Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA

**“....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or**

**probabilities materially to estimate the evidence.”**

14. 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.

15. This courts 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.”**

16. 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.

17. The Respondent’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.**

18. 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.**

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

20. What interests in this case is that it was common position of the parties that the deceased died leaving no wife and child. It is expected therefore that both the Appellants on the one hand and the Respondent on the other hand had their own parents from which they could inherit or had inherited. What they sort was but an additional share based on the fact that their uncle or bother in law who is the deceased herein did not leave a widow or child.

21. The court also takes particularity that the parties did not aver that what they had or would inherit without including the estate of the deceased herein was insufficient or inadequate. 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.**

22. As the Appellants are undisputedly also beneficiaries, under **Section 28 of the Law of Succession Act it is provided as follows**, it is provided as follows:

***In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—***

***a) the nature and amount of the deceased's property;***

***b) any past, present or future capital or income from any source of the dependant;***

***c) the existing and future means and needs of the dependant;***

***d) whether the deceased had made any advancement or other gift to the dependent during his lifetime;***

***e) the conduct of the dependant in relation to the deceased;***

***f) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;***

***g) the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant***

23. According to the summons for confirmation of Grant dated 13.2.2020, the Respondent was named as a beneficiary. She was a sister in law to the deceased. she had one son who is deceased. Although it was averred that the said son, one Maina Mwago left a wife and a son, nothing was said or adduced to prove this allegation.

24. Further, the disputed parcel of land was said to be 1  $\frac{3}{4}$  acres. Having declared that there was no oral will, I do not 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.

25. The deceased herein was said to have been a KDF officer. He was in the army. He could not be said to have wished what was not supported as an oral will. He had the capacity to make an oral or written will but none was made. Therefore, in so much as the purported wishes were not a will, the estate could only transmit in accordance with the rules of intestate.

26. 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. Konyu/Gachuku/1239 to be shared into equal parts as follows:
- b) David Maina Muhoro and Ann Wambui Maina jointly
- c) Ann Njambi Chuma and John Maina jointly
- d) Grace Wangui Mwago

28.From the above proposal, it is clear that the Responded would get a larger share comprising 1/3 of the estate alone. I do not think that the proposal by the Appellants was in any way prejudicial. In its apparent tenure and purport, the

proposal considered the circumstances of the case and gave a benefit larger to the Respondent most certainly on the pretext of the alleged wishes of the deceased towards her. The proposal was right and just and I will not interfere with it.

29. Based on the above, I find that the Appeal is merited and successful.

**Determination**

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

- (i) The Ruling and Order of the lower court in Karatina Succession Cause No. 34 of 2019 dated 26.9.2023 is set aside.
- (ii) The file is remitted to the lower court for the court to proceed and confirm the Grant as per the Amended Summons for Confirmation of Grant dated 28.7.2021. f
- (iii) For avoidance of doubt the protest is dismissed
- (iv) Each party shall bear own costs in the appeal.

**DELIVERED, DATED and SIGNED** at Nyeri, Virtually on this **19<sup>th</sup> day November, 2025**. Judgement delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**  
**JUDGE**

**In the presence of: -**

Mr. Gichana Maina for the respondent

Mr. Maina Karingiti for the Appellant

Court Assistant: Michael