

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CIVIL APPEAL NO. E061 OF 2024

JAMES AGGREY CHACHA.....APPELLANT

VERSUS

JECKONIA OKWIRI OTIU.....1ST RESPONDENT

**GORDON OLOO OTIU.....2ND
RESPONDENT**

(Being an appeal arising from the ruling of Hon. Eric Malesi (PM) delivered on 6th November 2024 in Madiany PM Succession No. E050 of 2023)

BETWEEN

JAMES AGGREY CHACHA.....OBJECTOR/APPLICANT

VERSUS

JEKONIA OKWIRI OTIU.....1ST
ADMINISTRATOR/RESPONDENT

GORDON OLOO OTIU.....2ND
ADMINISTRATOR/RESPONDENT

JUDGMENT

1. The appeal herein arises from the ruling of Hon. Eric Malesi (PM) in Madiany PM Succession Cause No. E050 of 2023 delivered on 6/11/2024 wherein he rejected the Appellant's proposed mode of distribution and accepted the one fronted by the Administrators/Respondents.
2. The Appellant was aggrieved by the said ruling and filed his Memorandum of Appeal dated 5/12/2024 wherein he raised the following grounds of appeal namely:
 - i) The learned trial magistrate erred in law in adopting the Respondents' proposed mode of distribution without taking into account that there were other beneficiaries to the estate of the deceased.

- ii) The learned trial magistrate erred in law and in fact in failing to appreciate that part of the deceased's estate was a gift inter vivos given to the church and the Appellant's wives.
- iii) The learned trial magistrate erred in law and fact when he adopted the Respondent's mode of distribution despite the Respondents admitting that a church was built on the deceased's estate by virtue of a gift inter vivos.
- iv) The learned trail magistrate failed to take into account the evidence and submissions by the Appellant.

The Appellant therefore prays that the impugned ruling be set aside and order that the estate be distributed as proposed by the Appellant since the same conforms with the wishes of the deceased. The Appellant also seeks for costs of the appeal.

3. This being the first appellate court, its duty is well spelt out namely to re-evaluate the evidence presented before the trial court and subject it to an independent analysis and arrive at its own decision as to whether or not to uphold the decision of the trial court. This court must take cognizance of the fact that it neither saw nor heard the witnesses when they testified and therefore must give due allowance in that regard. See **Selle Vs. Associated Motor Boat Co. Ltd [1968] EA 123.**

4. It is noted that the Administrators/Respondents filed summons for confirmation of grant dated 17/7/2023 where they proposed that the two properties be distributed as follows:

LR Siaya/Kokwiri/728 (0.5 HA) - Jeckonia Okwiri (whole)

LR Siaya/Kokwiri/212 (1.6 HA)

- **Helida Juma Ayonda.....0.53 HA**
- **Gordon Oloo Otiwu.....0.53 HA**
- **James Aggrey Chacha Otiu.. 0.53 HA**

5. On the other hand, the Appellant proposed that the two properties be distributed as follows:

Siaya/Kokwiri/728 - Free Medodist Church....0.25 HA

- **Agnes Chacha0.25 HA**

Siaya /Kokwiri/212 - Margaret Chacha.....0.8HA

- **Agnes Chacha.....0.8 HA**

6. Due to the rival modes of distribution of the estate, the trial court directed that the parties proceed by way of viva voce evidence.

7. **James Aggrey Chacha (OW1)** testified that the deceased had three sons who include himself and the two Respondents herein. That the Respondents lodged the succession without alerting him and thus he did not give his consent to the filing of the succession cause or the distribution. That the 2nd Respondent has ten acres on LR Siaya/Kokwiri/176 as well as parcels 705 and 214 while the 1st Respondent has parcels 706 and 715. That he was allocated parcels 707 and 213. That Agnes Chacha is his second wife who was allocated parcel 728 together with the church way back in 1983 by the deceased in the presence of the two Respondents herein. That his said wife and church have been in occupation of the parcel 728 since then. That the certificate of death presented by the Respondents is not valid as compared to his which is genuine and which he produced as DEXH 1.

On cross examination, he stated inter alia; that the deceased died on 9/10/2001 and that he received the certificate of death in 2013; that Agnes and Margaret are his wives who were given the land by the deceased; that he is not aware if the Respondents gave him a share of the estate; that the church is called Voice of Salvation and Healing Church; that Free Methodist Church came later;

that he was a pastor of Voice of Salvation and Healing Church.

8. **Margaret Chacha Otiwo (OW2)** testified that the parcel number 212 had been given to her by the deceased. That she was to share the portion with her co-wife. That she is still in physical occupation of the land.

On cross examination, she stated inter alia; that she was given the land in 1983; that she was married in 1976; that she was given the land as a reward.

That marked the close of the Appellant's case.

9. **Gordon Oloo Otiwu (RW1)** testified that he is the second Respondent. That he relied on his replying affidavit dated 18/5/2024 as his evidence in chief. That the deceased had four sons and that he transferred several parcels to them. That the deceased left two parcel numbers 212 and 728 in his name. That the deceased gave the 1st Respondent parcels 212 and 728 to be distributed to the 1st Respondent's three brothers. That the deceased had two wives and that the 1st Respondent was the only child from the first house while the second house had three sons. That the deceased informed them that the Appellant had snatched his Identity card. That the deceased had offered Voice of Salvation a parcel of land in 1983 and which was on plot 728.

On cross examination, he stated inter alia; that the Appellant refused to participate in the Succession proceedings; that the Respondents did not cite the Appellant to take out letters of grant; that the Voice of Salvation Church was set up in 1983; that there is no church building on the land but that there is a different church on it since 2022; that his total acreage is about 8 acres; that Agnes has never used the land; that all other beneficiaries except the Appellant were involved in the succession proceedings; that he did not know that he had to disclose the share received during the deceased's lifetime.

10. That marked the close of the Respondents' case. The learned trial magistrate later rendered his ruling which has precipitated the present appeal.

11. The appeal was canvassed by way of written submissions. The parties duly complied.

12. Learned counsel for the Appellant vide submissions dated 21/10/2025, submitted that the trial court erred when it failed to take notice of the existence of a church on the deceased's parcel of land for many years and also failed to remove the church during the distribution of the estate of the deceased. It was also submitted that the doctrine of constructive trust and or proprietary estoppel applied in the circumstances. That the deceased during his lifetime permitted the construction of the church on his land and that

members of the church invested their resources, time and faith and hence it is unconscionable for the beneficiaries to turn around and demand for eviction of the church. It was contended that there was a constructive trust in favour of the church over the specific portion of land it occupies and that it will be an unjust enrichment by the beneficiaries against the church members who built the church in good faith. Reliance was placed in the case of **Ephantus Mureithi Mwangi & Another vs. Gitau Mureithi & 2 Others [2018] eKLR** where it was held that a trust can be inferred from the conduct of the parties.

13. The Appellant's counsel further submitted that the proposed mode of distribution by the Respondents is simplistic and fails to account for the fait accompli regarding the existing church and that distributing the land with the church sitting in the middle of a potential subdivision renders the titles unworkable. It was the view of the Appellant's counsel that the court should delineate the specific portion occupied by the church and then the beneficiaries can share the remainder.

14. Learned counsel for the Respondents submitted that the distribution of the estate as approved by the trial court should be sustained. It was further submitted that the gift inter vivos made by the deceased during his lifetime must be perfected during the lifetime of the deceased. Reliance was placed in the case of **In re Estate of the late Gideon Manthi Nzioka (deceased) [2015] Eklr** as well as

Halsburys Laws of England 4th Edition Volume 20 (1).

It was therefore contented by the Respondents that there was no transfer of the suit properties that allegedly gifted to the Appellant by the deceased and hence the trial court was correct when it made the impugned order. The Respondents urged this court to dismiss the appeal with costs.

15. I have given due consideration to the record of appeal and the submissions filed by learned counsels. I find the issue for determination is whether the deceased had made some gifts inter vivos prior to his death.

16. It transpired from the lower court proceedings that the deceased had distributed his properties to his dependents prior to his demise leaving only two properties namely Siaya/Kokwiri/728 and Siaya/Kokwiri/212. The bone of contention is on the distribution of the said properties. The Appellant has proposed that his schedule of distribution should be accepted since the deceased had bequeathed the two properties to the church and the Appellant's two wives way back in 1983. On the other hand, the Respondents propose that parcel Siaya/Kokwiri/728 should be wholly taken up by the 1st Respondent while parcel Siaya Kokwiri/212 should be shared between the Respondents, Appellant and Helida Juma Ayonda whose husband was a son of the deceased.

The Appellant who raised the issue of gifts inter vivos bore the burden to prove the same on a balance of probabilities

by dint of the provisions of Section 107 and 109 of the Evidence Act. It was the evidence of the Appellant that the deceased distributed parcels Siaya/Kokwiri/706,715, 707, 213, 214 and 176 and added that he was allocated parcels 707 and 213 while the 1st Respondent was allocated parcels 706 and 715. He further stated that his younger wife Agnes Chacha was allocated parcel 728 and the remaining thereof was given to a church (Voice of Salvation and Healing Church which was later renamed Free Methodist Church). He further stated that parcel 212 was gifted for his eldest wife Margaret Chacha by the deceased in 1983.

Learned counsel for the Appellant confirmed that indeed the deceased's gift was not formally perfected during his lifetime and urged the court to find that a constructive trust existed in favour of the church congregation over the specific portion of land it occupies.

17. The issue of gifts inter vivos was aptly captured by Nyamweya J (as she then was) in **re Estate of the late Gideon Manthi Nzioka (deceased) [2015] eKLR** as follows:

“For gifts inter vivos the requirements of law are that the said gifts may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor or by way of resulting trust or the presumption of gifts of land must be by way of registered transfer or if the land is not registered it must be in writing

or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid. In this regard it is not necessary for the donee to give express acceptance and the acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee.”

The issue of constructive trusts is also discussed in the Halsbury’s Laws of England 4th Edition Volume 20(1) at paragraph 67 which states as follows:

“Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect and the court will not compel the intending donor, or those claiming under him to complete and perfect it, except in circumstances where the donor’s subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift was necessary to be done by him in order to transfer the property and which it was in his power to do.”

18. Looking at the rival evidence of the Appellant and the Respondents regarding the two parcels of land namely Siaya/Kokwiri/728 and 212, it is quite clear that the deceased had elaborately distributed several of his parcels of land to his sons and only left out the two parcels in his name. Even though the Appellant claims that the deceased bequeathed the two parcels to him and his two wives as well as the church in 1983, the evidence does not pass muster. The Appellant claimed that the deceased made the gift in 1983 in the presence of the two Respondents. However, the evidence of the Appellant's eldest wife Margaret Chacha (OW2) gave away the Appellant's claim when she stated that the gift made by the deceased in 1983 was in the absence of the two Respondents. This then showed that the Appellant was not truthful regarding the position of the gift over the parcel numbers 728 and 212. It was the evidence of the 2nd Respondent that the deceased gave parcel 728 to the 1st Respondent and directed that parcel 212 be distributed to the 1st Respondent's three brothers from the 2nd house since the 1st Respondent was an only son from the 1st house. It seems to me that the version of the Respondents regarding the distribution of the two parcels of land appears believable. In fact, it is unusual for the Appellant to include his two wives as dependants yet the two ought to claim from his portion as a dependant. Again, the status of the Appellant's wives could not be equated to the wife of the Appellant's late brother who

rightly claims the share of her deceased husband. I find the proposal by the Appellant to be untenable and must be rejected. In any event, I find that the Appellant failed to prove the existence of a gift inter vivos by the deceased as it transpired that the deceased did not perfect the gift during his lifetime. Indeed, it transpired from the evidence that the deceased had successfully transferred his properties to his sons and only left out the two parcels 728 and 212. If indeed, the deceased desired to transfer the remaining two parcels, nothing prevented him from doing so. Hence, it is my finding that the deceased did not perfect the gift during his lifetime. The Appellant's claim of a gift inter vivos therefore comes as a cropper. It can be seen from the schedule of distribution by the Appellant that the same is skewed in favour of his two wives and the church while the one presented by the Respondents catered for both houses in that the 1st Respondent from the 1st house was considered to take up parcel 728 while the 2nd Respondent and the Appellant plus the wife of their deceased brother were to share equally parcel 212. The issue of the presence of a church was not adequately ventilated as none of the church's representatives staked a claim to any portion of land during the hearing of the summons for confirmation of grant. It was thus erroneous for the Appellant to front the interest of the alleged church yet he did not explain the capacity given to him from the said church. The Appellant appeared to wear two hats as it were and was under

obligation to establish the twin interests. I find that he failed to do so on a balance of probabilities. The church did itself a disservice by fronting their interests, if any, through the Appellant when it could easily file its protest so that its interest if any could be established during the hearing of the summons for confirmation.

19. An analysis of the entire record and submissions leads me to come to the finding that the Appellant failed to prove the existence of a constructive trust in favour of the alleged church and further failed to prove the existence of a gift inter vivos by the deceased prior to his death on a balance of probabilities. Further, the Appellant's schedule of distribution of the estate was skewed in his favour, his family and the church to the prejudice of the Respondents and his deceased brother's family. Hence, the finding of the trial court was quite sound and must be upheld.
20. In the result, it is my finding that the Appellant's appeal is devoid of any merit. The same is dismissed. As the parties are family members, I order each party to bear their own costs.

Orders accordingly.

Dated and delivered at Siaya this 19th day of January 2026.

**D. K. KEMEI
JUDGE**

In the presence of:

Siwolo for Odongo.....for Appellant

Ogada.....for Respondents.

Maureen/Kimaiyo.....Court Assistant.