

REPUBLIC OF KENYA
IN THE HIGHTCOURT OF KENYA AT SIAYA
FAMILY APPEAL NUMBER E002 OF 2025

**IN THE MATTER OF THE ESTATE OF PENINA ATIENO
ONYANGO(DECEASED)**

GEORGE OWUOR ONYANGO.....
APPELLANT

VERSUS

ROBERT NONDI ONYANGO RESPONDENT

***(Being an Appeal from the Ruling of Hon. B. Limo (P.M)
Siaya, dated 16th December 2024 in Succession Cause No.
E001 of 2024)***

BETWEEN

ROBERT NONDI ONYANGO.....OBJECTOR

VERSUS

GEORGE OWUOR ONYANGO.....
PETITIONER

JUDGMENT

1. This appeal emanates from the ruling of Hon. B Limo dated 16/12/2024, wherein the court agreed with the Respondent’s objector vide an affidavit of protest dated 2/2/2023 that LR No. Kisumu/Manyatta ‘A’/3958 excised from LR. No. Kisumu/Manyatta A/109 did not form part of the deceased's property and that the same was excluded from the estate of the deceased.

2. Aggrieved, the Appellant has appealed to this Honorable court vide his Memorandum of Appeal dated 23/12/2024 wherein he raised the following grounds of appeal:
 - i. That the learned trial magistrate erred in law and fact in allowing the Respondent’s affidavit of protest to exclude land parcel no. Kisumu/Manyatta ‘A’/3958 from the assets of the deceased yet the property was duly registered in the names of the deceased.

- ii. That the learned trial magistrate erred in law and fact in failing to find that the Respondent's protest was principally based on assumptions and allegations that were still subject of an ongoing police investigations.
- iii. That the learned trial magistrate erred in law and fact in finding that the deceased's property No. Kisumu/Manyatta 'A'/3958 be excluded from the estate of the deceased in the absence of a decree from a court of law.
- iv. That the learned trial magistrate erred in law and fact in failing to consider the Appellant's submissions before arriving at his decision.
- v. The ruling was against the weight of the evidence.

3. The Appellant thus prays that the appeal be allowed and the Ruling of the trial court in Siaya Cmcc No. E001 of 2024 delivered on 16/12/2024 be set aside in its entirety and be substituted with an order dismissing the Respondent's Affidavit of Protest and the court to confirm that LR No. Kisumu/Manyatta 'A'/3958 formed part of the deceased's estate.

4. This being the first appellate court, its duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to an independent analysis so as to arrive at its own independent conclusion as to whether or not to

uphold the decision of the trial court. In carrying out this task, this court has to take into account the fact that it neither saw nor heard the witnesses as they testified and must therefore give due allowance for that. In the case of **Selle Vs Associated Motor Boat Co [1968] EA 123** the role of a first appellate court was well established; to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at its own independent conclusions. In so doing the court must accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which the appellate court does not, of having seen and heard the witnesses as they testified. The court however is not bound to accept any such findings if it appears that the magistrate failed to take any particular circumstance into account, or they were based on no evidence or were otherwise plainly wrong.

5. The record of the trial court indicates that the Respondent filed an Affidavit of Protest dated 2nd February 2023 brought pursuant to Rule 40 (6) of the Probate and Administration Rules wherein he sought for the exclusion LR No. Kisumu/Manyatta 'A'/3958 excised from LR. No. Kisumu/Manyatta A/109 from forming part of the deceased estate.
6. In the said protest, the Respondent averred inter alia; that he is the registered proprietor of LR No. Kisumu/Manyatta A/109 which was illegally subdivided to form LR No. Kisumu/Manyatta

'A'/3958 among other parcels; that he protested that the Appellant had included the said LR No. Kisumu/Manyatta 'A'/3958 as part of the estate of the deceased which ought not to be as the land did not belong to the deceased; that he annexed a copy of search from the lands offices marked as ROO2, and copy of the green card marked as ROO3 which showed that he was registered as the proprietor of LR No. Kisumu/Manyatta A/109 on 23/11/1995; that the land parcel number Kisumu/Manyatta A/109 was unlawfully, fraudulently and illegally subdivided without his consent into several land parcels including LR No. Kisumu/Manyatta 'A'/3958; that the deceased who was his late mother to both the Appellant and the Respondent followed up on the said case of fraudulent subdivisions which had also affected her land parcel too being LR No. Kisumu/Manyatta A/106; that he stands to suffer prejudice if the parcel of land is listed among the assets of the deceased yet it belongs to him and which had been fraudulently subdivided by unscrupulous individuals; that he annexed to his protest documents marked ROO-1 to ROO-8 in support of his affidavit of protest.

7. The Appellant was given ten days to file a response to the said protest before the court gave its ruling which response was not filed as the same is not on record.

8. The learned trial magistrate duly considered the matter and later came up with the impugned ruling.
9. The appeal was canvassed by way of written submissions. Both parties duly complied.
10. The Appellant submits that the trial court failed in referring to land parcel number 109, which ceased to exist and yet the land parcel in contention is LR No. Kisumu/Manyatta 'A'/3958. The Appellant further submits that the said land parcel number LR No. Kisumu/Manyatta 'A'/3958 is registered in the name of the deceased thus forming part of the deceased's estate as per an annexed a copy of a title deed marked GOO-1 in the further affidavit in response to the protest and that due to the alleged registration of the said land parcel in the name of the deceased, it formed part of the deceased's free property and thus the finding by the trial magistrate was in error since parcel 109 had already been subdivided into parcel 3958 and registered in the name of the deceased and thus free property for distribution among the beneficiaries. It was finally submitted that the Respondent ought to pursue the matter in a civil claim and not in these proceedings. Reliance was placed in the case of *In re Estate of Stone Kathuli Muinde (deceased)* [2016] KEHC 3725 (KLR).
11. On the other hand, the Respondent submitted that land parcel number LR No. Kisumu/Manyatta A/109 was registered

in his name, while LR No. Kisumu/Manyatta A/106 was registered in the name of the deceased. That as per the official search dated 16th April 2008, LR No. Kisumu/Manyatta A/109 was subdivided to form land parcel number LR No. Kisumu/Manyatta 'A'/3958 and LR No. Kisumu/Manyatta 'A'/3959 which were duly registered in the name of the Respondent herein.

12. It is the Respondents submissions that as at the time of her death on 28th April 2020, the deceased herein -Penina Achieng Onyango was not the registered proprietor of LR No. Kisumu/Manyatta A/109 which was subdivided to form land parcel number LR No. Kisumu/Manyatta 'A'/3958 and LR No. Kisumu/Manyatta 'A'/3959. That the said property did not form part of the estate of the deceased.

13. I have given due consideration to the record, the affidavit of protest, the annexures and the submissions of both parties on appeal and find the issue for determination is whether the said land parcel No. Kisumu/Manyatta 'A'/3958 (formerly Kisumu/Manyatta/109) forms part of the deceased's estate.

14. From the documentation on record, it is not in issue that on 23/11/1995 the deceased Penina Atieno Onyango was registered as the sole proprietor of land parcel number Kisumu/Manyatta A/106 ; while the Respondent herein was registered as the sole proprietor of land parcel number

Kisumu/Manyatta A/109. It is further not in dispute that LR No. 109 belonging to the Respondent Robert Nondi was later subdivided into two parcels being LR No. Kisumu/Manyatta 'A'/3958 and LR No. Kisumu/Manyatta 'A'/3959. It is likewise not in dispute that LR No. Kisumu/Manyatta/106 belonging to the deceased Penina Atieno Onyango was subdivided into other parcel numbers. Annexures ROO-2 to ROO-8 show a series of correspondences and court documentation which indicated the issues of the County Government of Kisumu's attempt to defraud and grab the said land parcels from the registered proprietors. Page 94, paragraph 22 of the Record of appeal shows that it is the Respondent herein Robert Nondi Onyango and the deceased Penina Atieno Onyango who made a report of fraud against the County Government of Kisumu over land parcels Kisumu/Manyatta A/106 & A 109. That the investigating officer who was working on the report made by the Respondent and the deceased concluded in his finding found at page 94 paragraph 25 of the record of appeal that the County Government of Kisumu had falsely, forcefully and fraudulently acquired the land parcels numbers Kisumu /Manyatta "A"106 and Kisumu /Manyatta "A" 109. Indeed, the Director of Public Prosecution filed a Miscellaneous Criminal Application No. E027 of 2022 before the CM's court at Kisumu wherein it sought orders (warrant) to enable the investigating officer to investigate the fraudulent subdivision of the deceased's parcel No. Kisumu/Manyatta/106 as well as the

Respondent's parcel No. Kisumu/Manyatta/109. The matter is still pending investigations.

15. From the record, the Appellant seems to challenge the ownership of the land parcel LR No. Kisumu/Manyatta 'A'/3958. This is however the wrong forum as the issues of title and ownership to land have the Environment and Land court as their right forum for determination. In **Re Estate of Mbai Wainaina(deceased) (2015)eKlr** W. Musyoka J held thus:

“The mandate of the probate court under the law of succession Act is limited. It does not extend to determining issues of ownership of property. It is not a matter of the probate court being incompetent but the provisions of the law of succession and the relevant subsidiary legislation do not provide a convenient mechanism for determination of some issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court. Consequently, and for the reasons above stated, I wish to find and hold that this court has no mandate to resolve the proprietary interest in land based on the alleged trust”

Again, in the case of in re Estate of Stone Kathuli Muinde (deceased) [2016] KEHC 3725 (KLR) Musyoka J held as follows:

“With regard to the assets, one of the questions that may present itself would be the ownership of the assets presented as belonging to the deceased. An outsider may claim that the property does not form part of the estate of the and therefore it need not be placed on the probate table. The resolution of such questions do not necessitate joinder into the cause of the alleged owner to establish ownership. It is not the function of the probate court to determine ownership of the asset alleged to be estate property. That jurisdiction lies elsewhere. Such claim to ownership of the alleged property as between the estate and third party should be resolved through the civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrate’s court or at the Civil or Commercial Division of the High Court or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that the court can give effect to it.”

It is noted that the Respondent herein is one of the beneficiaries of the estate of the deceased by virtue of being a son of the deceased and is also one of the administrators and hence he is not a third party in the real sense of the word. I find that he was entitled to ventilate his claim within the succession cause and that the trial court rightly found that the suit property should be isolated from the schedule of distribution and that the Appellant and rest of the administrators could still pursue the matter before the civil court or the Environment and Land Court. Indeed, the Respondent has claimed that his parcel of land including that of the deceased had been fraudulently subdivided by individuals in collusion with the County Government of Kisumu and that he is pursuing the matter with the relevant courts. The copy of search certificate presented by the Respondent showed that as at 23/11/1995 he was the registered proprietor of parcel number Kisumu/Manyatta/109 and that the same was later secretly subdivided in 1999 into parcels 3958 and 3959 as per the copy of records availed by the Respondent. It is also not in dispute that the deceased had bought the land from one Ibrahim Omollo in 1975 and which was registered as Kisumu/Manyatta A/106 and 109 and had parcel 109 registered in the name of the Respondent while parcel 106 was registered in her name. This information is vide the comprehensive statement she made before the criminal investigations department over the

said fraudulent subdivision. It is thus clear that the aforesaid parcel Kisumu/Manyatta/109 which was later subdivided into parcels 3958 and 3959 did not form part of the property of the deceased. If anything, the Appellant and his fellow administrators ought to have pursued parcel 106 which belonged to the deceased and which had also been fraudulently subdivided but not to include the portion belonging to the Respondent. Indeed, the suit property did not at any time form part of the free property of the deceased. It was appropriate to isolate the said property from the schedule of distribution and that the administrators, if aggrieved, were at liberty to participate in the proceedings wherein the Respondent would be pursuing the individuals who had fraudulently subdivided his parcel of land. I am satisfied that the suit property did not form part of the property of the deceased. Section 2 of the Law of Succession Act defines an estate and free property as the free property of a deceased person and that the free property means the property which the deceased was legally competent to dispose during his/her lifetime and which had not been terminated by his/her death. As observed above, the suit property should be excluded from distribution as it had not been registered in the name of the deceased prior to her demise and that the Appellant and his co-administrators are at liberty to pursue any interest therein in a civil claim and if they succeed then the property would be made available for

distribution among the beneficiaries. It is quite surprising that the Appellant who is also a family member has trained guns against the Respondent instead of gearing energies towards seeking to recover the parcels belonging to the deceased that had been unlawfully taken away by the Kisumu County Government.

16. The sum total of the foregoing analysis leads me to come to the conclusion that the suit property namely LR No. Kisumu/Manyatta 'A'/3958 having been excised from LR No. Kisumu/Manyatta A/109 initially registered in the name of Robert Nondi Onyango (Respondent herein) before the subsequent fraudulent and illegal subdivisions and registrations has never belonged to the deceased herein and thus should not form part of the estate of Penina Atieno Onyango. Hence, the finding by the learned trial magistrate was quite sound and must be upheld.

17. In the result, I find that the Appellant's appeal is devoid of merit. The same is hereby dismissed. This being a matter involving family members, there shall be no orders as to costs.

Orders accordingly.

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

D.KEMEI

JUDGE

In the presence of:

M/s Akinyi.....for Appellant

M/s Onsongo.....for Respondent

Maureen/Kimaiyo.....Court Assistant