



REPUBLIC OF KENYA



KENYA LAW
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**Okune v Okune (Succession Appeal E001 of 2025)
[2026] KEHC 99 (KLR) (19 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 99 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
SUCCESSION APPEAL E001 OF 2025**

DK KEMEL, J

JANUARY 19, 2026

BETWEEN

PAUL OTIENO OKUNE APPELLANT

AND

PAMELA ADHIAMBO OKUNE RESPONDENT

(Being an appeal against the ruling of Hon. Eric Malesi (PM) in Madiany Magistrates Court Succession Cause No. E 136 of 2023 dated 20/12/2024)

JUDGMENT

1. The appeal arises from the ruling of Hon. Eric Malesi (PM) in Madiany Principal Magistrate's Court Succession No. E 136 of 2023 dated 20/12/2024 wherein he rejected the Appellant's affidavit of protest together with his proposed schedule of distribution and allowed the Respondent's Summons for confirmation of grant dated 26/8/2024 and agreed with the schedule of distribution proposed by the Respondent.
2. The Appellant who is the 2nd Administrator herein was aggrieved by the aforesaid decision and filed his Memorandum of Appeal dated 1/1/2025 wherein he raised the following grounds of appeal namely:
 1. That the trial magistrate erred in law by relying on and applying customary law in the estate of the deceased who died on 8/5/2023 after the Law of Succession Act had come into force and thus contrary to Section 2(1) of the said Act while distributing the deceased's estate.
 2. That the trial magistrate erred in law in failing to consider Section 38 of the Law of Succession Act which provides for equal distribution of the assets while the deceased left no spouse except the children.
 3. That the trial magistrate erred in law in failing to consider Article 27 of the Constitution which provides that every person is equal in the eyes of the law as he used discriminating rules and



customs against the Appellant and barring him from the deceased's house and from further inheriting part of the same equally with the Respondent as proposed by him.

4. That the trial magistrate erred in law of evidence in deciding the case against the weight of evidence presented and holding that the deceased's house be preserved for posterity of the deceased with full observance of the Luo customs when in fact no customary evidence both documentary and oral evidence was presented by either party to warrant consideration and thus the trial court made its own assumption.
5. That the trial magistrate erred in law in assuming that he is an expert in Luo customary law by giving his opinion on Luo customs and pronouncing himself on issues of Luo customs against the Appellant yet he is not an expert on those customs and that none of the parties presented expert evidence to warrant reliance thereon.
6. That the trial magistrate erred in law of practice procedure and evidence in failing to take into consideration the evidence adduced and presented by the Appellant vide affidavits including annexures, photographs and the existence of the Appellant's homestead within the deceased's homestead as permitted by the deceased and thus it was not practical for the Respondent to inherit the same.
7. That the trial magistrate erred in law in failing to consider the Appellant's affidavits and submissions as well as cited authorities.
8. That the trial magistrate erred in his decision as he misunderstood the legal principle in the Law of Succession regarding distribution of the estate of the deceased.

The Appellant therefore prayed that the appeal be allowed and that the ruling of the trial court be set aside and order that parcel number Uyoma/Rageng'ni/1124 measuring 1.5HA be divided and shared in the manner namely that 1.1 Ha be registered in the name of Pamela Adhiambo Okune while the remaining 0.4 Ha which covers the homestead and Appellant's house be registered in the name of Paul Otieno Okune and that the parents' house built thereon be shared and utilized equally.

3. This being the first appellate court, its duty is to re-evaluate and subject the evidence presented before the trial court to an independent analysis and come up with its own conclusion as to whether or not to uphold the decision of the trial court. See *Selle Vs. Associated Motor Boat Co. Ltd* [1968] EA 123.
4. The record of the trial court indicates that no viva voce evidence was tendered and hence the trial court was only presented with rival affidavits. The Respondent who is the 1st Administrator filed summons for confirmation of grant dated 26/8/2024 wherein she proposed that the estate be distributed as follows:
 1. LR Uyoma/Ragengni/1124 – Pamela Adhiambo Okune
 2. LR Uyoma/Ragengni/1139 – Paul Otieno Okune
 3. Standard Chartered Shares – Pamela Adhiambo Okune
 4. KCB Shares – Paul Otieno Okune
 5. Plot No. 12A Ragengni - To be shared equally between beneficiaries.
 6. KCB Bond A/c 0XXXXXXXXXX67 – To be shared equally by the beneficiaries.
 7. East Africa Building Society A/c 0215051572-0 To be shared equally among beneficiaries.



8. Post Bank Account - To be shared equally among beneficiaries.
5. The Appellant (2nd Administrator) filed an affidavit of protest sworn on 11/9/2024 wherein he averred inter alia; that they have not yet agreed on the schedule of distribution of the estate; that he built his home on parcel Uyoma/Ragengni/1124 while his parents were alive and that he should be allowed to take 0.4ha so that he combines it with 0.7Ha and to be similar to that of the Respondent; that the parents residence be shared equally; that he proposed that the estate be distributed as follows:
 1. LR Uyoma/Ragengni/1139 (0.7Ha) – Paul Otieno Okune
 2. LR Uyoma/Ragengni 1124 (1.5Ha) 1.1 Ha be registered in the name of Pamela Adhiambo Okune 0.4 Ha be registered in the name of Paul Otieno Okune Parents house built thereon be shared equally
 3. Plot No. 12A Ragengni – to be shared equally with each taking one shop and three rooms.
 4. 350 shares at Standard Chartered Bank
A/c 0XXXXXX71 – 175 shares to each beneficiary
 5. 100 shares at KCB Bank A/c 0XXXXXX0 – 50 shares to each beneficiary.
 6. A/c at Post Bank – To be shared equally between the beneficiaries.
 7. A/c at KCB Bank NO. 0XXXXXXXXXX67 – To be shared equally between the beneficiaries.
6. The Respondent filed a replying affidavit dated 30/9/2024 wherein she averred inter alia; that she is opposed to sharing of parcel Uyoma/Ragengni/1124 since the deceased had desired that she inherits the same together with everything thereon including the parents’ house as she is the one who maintains it and pays the workers and further had taken care of the deceased until his demise and catered for the funeral and burial expenses; that she has no problem with the proposal by the Appellant regarding the remaining assets.
7. The Appellant upon being served with the Respondent’s response filed a further affidavit dated 10/11/2024 wherein he averred inter alia; that the deceased did not make a will regarding the distribution of his estate and hence the same should be shared equally; that the house left behind by the deceased should be shared equally because he also contributed to its maintenance during the lifetime of the deceased and that the receipts had been kept by the deceased; that the Respondent had been using rental income from the plot to pay the workers and not from her pocket; that he should be allowed to occupy a portion of 0.4Ha from parcel Uyoma/Ragengni/1124 so as to ensure that his share of 1.1 Ha tallies with that of the Respondent; that he also took care of his parents before they died; that he also contributed to the burial and funeral expenses; that the receipts furnished by the Respondent are not genuine; that the estate should be distributed equally between the beneficiaries.
8. The trial magistrate considered the rival affidavits and came up with the impugned ruling.
9. The appeal was canvassed by way of written submissions. Both parties duly filed and exchanged submissions.
10. I have given due consideration to the record of appeal and the submissions filed. It is not in dispute that the parties herein on 11/3/2025 entered into a consent in the following terms:

“By consent of the Advocate for the Appellant and the Advocate for the Respondent, the application dated 3/2/2025 by the Applicant is compromised in the following terms: -



1. Let there be stay of execution of the ruling dated 20/12/2024 as regards land parcel No. LR Uyoma/Ragengni/1124 measuring 1.5 Hectares and the structures and/ or houses built thereon.
2. The grant issued to the Appellant and the Respondent be confirmed partially as follows:-
 - a. Land Parcel No. Uyoma/Ragengni/1139 measuring 0.7 hectares to be registered in the names of Paul Otieno Okune.
 - b. Plot No. 12A Ragengni be shared equally to wit: 1 front door and 3 rooms to be owned by Pamela Adhiambo Okune and 1 front shop and 3 rooms to be owned by Paul Otieno Okune.
 - c. 350 shares at Standard Chartered Bank of Kenya Limited A/c No. 0XXXXXX71 to be shared equally to wit: Pamela Adhiambo to get 175 shares while Paul Otieno Okune to get 175 shares.
 - d. 100 shares at Kenya Commercial Bank Limited A/c No. 0XXXXXX0 be shared equally to wit: Pamela Adhiambo to get 50 shares while Paul Otieno Okune to get 50 shares.
 - e. A/c at Post Bank to be shared equally between the beneficiaries.
 - f. KCB A/c No. 0XXXXXXXXXX67 to be shared equally between the beneficiaries.
 - g. A/c No. 0XXXXXXXXXX-0 with East African Building Society to be shared equally between the beneficiaries.
11. From the foregoing consent, it is clear that the remaining dispute for this court's determination is in regard to land parcel number Uyoma/Ragengni/1124 together with the homestead of the deceased and the Appellant herein as have been agreed upon. It is noted that the Respondent wants to be allocated parcel No. Uyoma/Ragengni/1124 wholly and or exclusively to herself as well as the homestead of the deceased. On the other hand, the Appellant seeks to take a portion of 0.4 Ha thereof as it contained his homestead as well as the house of their deceased parents and to ensure that the shares on the lands are at par (1.1Ha). I find the issue for determination is how parcel No. Uyoma/Ragengni/1124 together with the homestead of the deceased should be distributed.
12. As noted from the rival contestations regarding the homestead of the deceased and the Appellant herein, none of the parties presented evidence to the effect that a will was made by the deceased prior to his demise. Again, the parties opted not to tender viva voce evidence so that the deponents of the affidavits could be cross examined at length and that the trial court could then establish the veracity and truth of those averments. The courts were thus left with no option but to consider only the rival affidavits. In the absence of a will or gifts inter vivos, the assets of the deceased should be distributed in accordance with Section 38 of the *Law of Succession Act* which provides as follows:

“Where an intestate has left a surviving child or children but no spouse, the net intestate shall, subject to the provision of Section 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”

It is noted that the parties herein have proposed to share equally the other assets except parcel Uyoma/Ragengni/1124 wherein the homestead of the Appellant and the deceased are situated. It came out



of the rival depositions that the Appellant should be given a portion of the said land measuring 0.4 Ha thereby leaving the Respondent with 1.1 Ha. That arrangement upto that point sits well with the parties as they now have 1.1 Ha of land to each of them. The point of departure now is the sharing and or use of their parent's homestead. Whereas the Respondent maintains that she is the right person to inherit it because she is a female child and who had taken care of the deceased until her demise, the Appellant on the other hand contends that he is the only son in the family and who had been permitted to erect his house about eight metres from that of his late parents and that he had also been assisting them by providing funds for improvement of the home occupied by his parents. It was the proposal of the Appellant that the parents' home be shared equally with both parties having equal rights of access thereto. Indeed, in principle, both parties herein being children of the deceased are entitled to access their parents' home. It is instructive that the Appellant has erected his homestead near that of the deceased parents and hence it would be unfair to deny him access thereto. In the case of *Rono Vs. Rono* [2005] eKLR it was held that equality in succession is not merely mathematical, it refers to equal benefit and enjoyment of the estate. I find it is fair and just that none of the parties should be denied access to their parents homestead since both of them have fond and nostalgic memories thereof and that the same has sentimental value to them.

13. A perusal of the judgment of the trial court shows that the learned trial magistrate appears to have been persuaded by the Respondent's submissions to the effect that Luo customs prohibit male children from occupying or residing in their parents' home and that the Respondent being a female child was the right person to occupy the said homestead. The trial magistrate seems to have further gone off tangent when he ordered that the homestead be preserved for posterity and for the grandchildren of the deceased. I find that the importation of Luo customs by the trial court was not warranted since the deceased died on 8/5/2023 long after the [Law of Succession Act](#) came into force in 1981. Under Section 2(1) of the said Act, the same provides as follows:

“Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of and shall have universal application to all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act.

Again, in Section 2(2) of the said Act, it provides as follows:

“The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

From the foregoing provisions, it is clear that the deceased who died on 8/5/2023 should have his estate dealt with in accordance with the provisions of Section 2(1) of the Act and not Section 2(2) thereof. Hence, the trial court fell into error when it imported Luo customs regarding the distribution of the estate of the deceased. In the case of the estate of Veronica Njoki Wakagoto (deceased) [2013] eKLR the court held as follows:

“The proceedings relate to the estate of a person who died on 5th November 2004. The Law of Succession which applies to the estate is not Kikuyu customary law but the [Law of Succession Act](#). the said Act come into force on 1st 1981. Section 2(1) of the [Law of Succession Act](#) expressly ousts the application of Kikuyu dying after the 1st July 1981. The whole of Section 2 of the [Law of Succession Act](#) is relevant to the matters the subject of these proceedings. For avoidance of doubt, I will set out in extenso, it says: -



1. Except as otherwise expressing provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of and shall have universal application to all cases of intestate or testamentary succession to the estate of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.
2. The estates of persons dying before the commencement of this Act are subject to the written law and customs applying at the date of death. I need not say more. The deceased herein died intestate. The estate of a person who dies intestate in Kenya after the 1st July 1981 is to be distributed in accordance with Part V of the *Law of Succession Act*.”

From the foregoing, it is clear that the learned trial magistrate heavily relied on the provisions of Section 2(2) of the *Law of Succession Act* despite the fact that the deceased died several years after the commencement of the Act. It is also instructive that the trial court did not direct the parties to present viva voce evidence so that the court is presented with the rival issues in clarity. That being the position, I find that the assets of the deceased should be shared and or used equally by the beneficiaries. To that extent, the finding of the trial court was in error and must be interfered with. I find that an order that the homestead of the deceased as well as the claims be made jointly accessible to the parties herein and which shall not be subject to the exclusive control by either party will be appropriate. In the alternative and in order to preserve the homestead for sentimental value, the parties do jointly maintain the said homestead and it be accessible to each of them without exclusive occupation rights being conferred on either party.

14. In view of the foregoing observations, it is my finding that the Appellant’s appeal has merit. The same is allowed. The ruling of the trial court dated 20/12/2024 is hereby set aside and substituted with the following orders:
 1. Land Parcel No. Uyoma/Ragengni/1124 measuring 1.1 Ha be registered in the name of Pamela Adhiambo Okune.
 2. A portion measuring 0.4 Ha in Uyoma/Ragengni/1124 containing the Appellant’s homestead be registered in the name of Paul Otieno Okune.
 3. The homestead of the deceased contained in LR Uyoma/Ragengni/1124 be made jointly accessible to the parties herein and which shall not be subject to the exclusive control by either party. In the alternative and in order to preserve the homestead for sentimental value, the parties do jointly maintain the said homestead and it be accessible to each of them without exclusive occupation rights being conferred on either party.
 4. All the remaining assets be distributed vide the consent entered into by the parties on 11/3/2025.
 5. Each party to bear their own costs.

DATED AND DELIVERED AT SIAYA ON THIS 19TH DAY OF JANUARY 2026.

D. KEMEI

JUDGE

In the presence of:

M/s Nyarige.....for Appellant.



Kavila for Alekeen.....for Respondent.

Maureen/Kimaiyo.....Court Assistant.

