REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

HCFCA NO. E005 OF 2025

MANASSEH ODUOR ONGWEN……
……APPELLANT

VERSUS

BENJAMIN ADIKA ONGWEN……1ST RESPONDENT

ISAYA MUNGOMA ONGWEN……2ND RESPONDENT

JOHANNA KOINANGE ONGWEN……3RD RESPONDENT

(Being an appeal against the whole ruling and orders of Hon. JP Mkala RM of Siaya Law Courts in Succession Cause No. 59 of 2019: delivered on the 29th day of January 2025.)

BETWEEN

BENJAMIN ADIKA ONGWEN……1ST OBJECTOR

ISAYA MUNGOMA ONGWEN……2ND OBJECTOR

JOHANNA KOINANGE ONGWEN……3RD OBJECTOR

VERSUS

MANASSEH ODUORY ONGWEN……PETITIONER

JUDGMENT

1. The appeal arises from the ruling and order of Hon. JP Mkala (RM) in Siaya Chief Magistrate's Court Succession Cause No. 59 of 2019 dated 29th January 2025 wherein he ordered the deceased's property (1/2) share comprised in LR No.

Siaya/Komenya -Kowala/125 (1.8 Ha) be shared equally among the beneficiaries with each taking a share of 0.36 Ha.

2. Aggrieved by the aforesaid ruling, the Appellant filed his Memorandum of Appeal dated 10th February 2025 wherein he raised the following grounds of appeal:

    1) That the learned magistrate erred in law and fact when he failed to take into account the factual circumstances of the deceased dependants and his properties that were relevant in ensuring equal distribution of the deceased's estate.
    2) That the learned magistrate erred in law and fact by failing to appropriately apply the applicable law as per the Succession Act Cap 160 Laws of Succession as required preceding the confirmation of grant in turn distributing the deceased's estate.
    3) That the learned magistrate erred in law and fact by failing to consider the evidence in support of the Petitioner's case before proceeding to distribute the deceased intestate estate and thus arriving at a distribution that was improper, unfair and contrary to the law.
    4) That the learned magistrate erred in law and fact by directing that ½ of the deceased's estate being land parcel Siaya/Komenya/Kowala/125 be shared equally among all the beneficiaries when there was sufficient evidence that other beneficiaries had been

bequeathed land by the deceased prior to his death and thus arriving at the wrong decision.

The Appellant therefore prayed that the appeal be allowed and the ruling of the trial court dated 29th January 2025 be set aside and costs be awarded to the Appellant.

3. This being the first appellate court, it is under obligation to re-evaluate the evidence tendered before the trial court and subject it to an independent analysis and to arrive at its own conclusion as to whether or not to uphold the decision of the trial court. In doing so, this court must take cognizance of the fact that it neither saw nor heard the witnesses testify and therefore it must make due allowance in that regard. See **Selle Vs. Associated Motors & Co. Limited [1968] EA 123.**

4. The record of the lower court shows that the Appellant herein had petitioned for letters of grant and later filed summons for confirmation of grant dated 7th January 2025 wherein he proposed the property of the deceased comprised in Siaya/Komenya -Kowala/125 measuring 1.8 Ha be shared equally between himself and his sister Cathrine Atieno Owino. The Appellant filed an affidavit in support of the summons wherein he averred vide paragraph 5 thereof that the other beneficiaries who include the Respondents herein had already been provided by the deceased during his lifetime as follows:

A) John Olunga Ongwen - Siaya/Komenya-Kowala/105

B) Isaya Mungoma Ongwen - Siaya/Komenya-Kowala/167

C) Benjamin Adika Ongwen - Siaya/Komenya-Kowala/1

D) Johana Koinange Ongwen – ½ of Siaya/Komenya-Kowala/125

The Respondents herein had earlier opposed the proposal by the Appellant and had proposed that the deceased's ½ share in Siaya/Komenya -Kowala/125 comprising 1.8 Ha be shared equally among the beneficiaries and that the allegations by the Appellant that the Respondents had been bequeathed properties by the deceased was false as no proof was availed by him.

5. The parties agreed to canvass the Summons for Confirmation of Grant by a way of affidavit evidence. The parties further agreed that the proceedings will be conducted in Succession Cause No. E059 of 2019 while Succession Cause No. 80 of 2019 was abandoned after the trial court struck out the same vide its ruling dated 27th November 2024.

6. The trial court considered the matter and came up with the impugned ruling.

7. The appeal was canvassed by way of written submissions. Both parties duly filed and exchanged submissions.

8. Vide submissions dated 10th October 2025, the Appellant submitted that parcel No. Siaya/ Komenya -Kowala/125 measuring approximately 3.6Ha which was registered jointly in the name of Lucas Ong'wen Opondo (deceased) and Johanna

Koinange Ongwen in half shares each and that the 3rd Respondent as joint owner will take 1.8 Ha and the balance of 1.8Ha due to the deceased should be allocated to the Appellant and his sister since the Appellant's brothers have already been allocated their shares by the deceased in his lifetime inter alia; John Olunga Ongwen- Siaya/Komenya-Kowala/105, Isaya Mungoma Ongwen -Siaya/Komenya-Kowala/167,Benjamin Adika Ongwen Siaya/Komenya-Kowala/1 and Johana Koinange Ongwen – ½ of Siaya/Komenya-Kowala/125.

9. It was submitted that the Appellant and the Respondents herein are blood brothers and as such the biological sons to Lucas Ong'wen Opondo (deceased). That the Appellant is the youngest of them all. That the certificate of confirmation of grant in this matter was confirmed to the appellant on the 20th day of February, 2020. That the petitioner apportioned to himself half share (1/2) of the land parcel Siaya/Komenya-Kowala/125. That the said land parcel is the deceased homestead and by Luo Customary Law, the youngest son has a right to remain at the homestead as the rest move out to establish their respective homes. That despite the fact that he has a right to remain at home, the appellant only apportioned himself half share of the said parcel of land.

10. It was also submitted that the objectors have not disclosed to the court that they already have land parcels that were given to them by their deceased father prior to his death, which land parcels they are fully in utilization in exclusion of

all others including the Appellant. That this was well explained and brought out by the appellant in his responses and that the same were never denied and or any evidence to the contrary adduced by all the Respondents to challenge the same at trial. For instance, Benjamin Ongwen, the 1st Respondent, has land parcel Siaya/Komenya Kowala/1 bequeathed to him by the deceased prior to his death, Isaya Ongwen, the 2nd Respondent, has land parcel Siaya/Komenya Kowala/167 bequeathed to him by the deceased prior to his death, Johana Koinange Ongwen, the 3rd Respondent, equally has land parcel Siaya/Komenya Kowala/105 bequeathed to him by the deceased prior to his death, and further he has land parcel Siaya/Komenya Kowala/125 half share as relinquished by the Appellant herein during distribution.

11. It was submitted that in the spirit of equality and recognizing that each and every son got land belonging to the deceased, the appellant only distributed land parcel Siaya/Komenya Kowala/125 half of the said share as between him and the sister one Catherine Atieno Owino daughter to the deceased who has a right to benefit and the half share is 0.9Ha each.

12. It was submitted that the principles of intestate succession come into play when a person dies without leaving a last will. That there is room to distribute the deceased estate equally amongst all the beneficiaries factoring in the lands too already occupied by the respondents as demonstrated by the Appellant in trial court then. That the Respondents herein did not controvert the fact that they already had land parcels

given to them by their deceased father and even occupied the same, when the appellant had nothing. Further, that there is no evidence on record by the respondents on how the proposed mode of distribution by the Appellant would lead to prejudice to any of the beneficiaries. That the present Respondents have never accepted any form of distribution whatsoever, and they are hell-bent to deny the Appellant the right to have a share of his deceased father's homestead as the youngest son when the rest had already been bequeathed land parcels.

13. It was submitted that the Objectors cannot claim to have owned the said parcels as they attempt to explain and that they have not exhibited any evidence on how they acquired the said parcels of land and even the dates they got registered could not be so as they were all of tender ages. It is a fact that the deceased bequeathed them the said parcels of land.

14. Learned counsel pointed out that the Appellant was inviting the trial court which it failed to affirm and still invites this court to invoke section 42 of the Law of Succession Act on gift inter-vivos which provides as follows: "Where an intestate has during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or Property has been appointed or awarded to any child or grandchild under the provisions of Section 26 or Section 35, the property shall be taken into

account in determining the share of the net intestate finally accruing to the child, grandchild or house."

15. It was submitted that is clear from these provisions the gift of any share of the assets of the deceased to a beneficiary must be made during his lifetime. That the effect of it is to diminish the residual net estate capable of being distributed to the other beneficiaries, meaning that under the definition of the free property of the deceased on account of that gift it is considered be part of that equation of distribution.

16. It was finally submitted that there is no evidence on record that the deceased person herein had failed to express clear intention, and never took steps to implement the settlement and even distributed his estate prior to his death among the respondents as he had already settled all by giving them the said land parcels which the appellant herein has never interfered with. Learned counsel therefore urged this court not to interfere with the certificate of confirmation of grant as ordered by the trial court and to allow the appeal.

17. Vide submissions dated 23rd October 2025, learned counsel for the Respondents gave a history of the matter from the beginning upto the time the trial court issued the ruling dated 29th January 2025 which is now the subject of the appeal.

18. It was submitted that the deceased **Lucas Ongeny Opondo** was survived by six (6) children, namely, **John Olunga Ongwen, Benjamin Adika Ongwen, Catherine Atieno Owino, Isaya Mungoma Ongwen, Johana Koinange Ongwen** and **Manasseh Oduory Ongwen** and that the identification of the persons beneficially entitled to the deceased's estate was duly ascertained and determined in accordance with provisions of Section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules. That the only property of the deceased is ½ share in Siaya/Komenya-Kowala/125 which the Respondents have proposed to be shared equally among the beneficiaries. Learned counsel urged the court to rely on the provisions of Section 38 of the Law of Succession Act which states that:

> ***"Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, "or be equally divided among the surviving children."***

19. Counsel proposed that this court should uphold the trial court's judgment in which the property was ordered to be shared equally among the beneficiaries as provided for in Section 38 of the Act. learned counsel sought reliance in the Court of Appeal case of ***Stephen Gitonga M'Murithi – vs – Faith Ngira Murithi*** (Nyeri COACA No.3 of 2015):

"Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their married or unmarried life."

20. It was submitted that the proposed mode of distribution by the Appellant is discriminatory and against the clear provisions of Section 38. Further, it was submitted that the Appellant's submissions that he should be allowed to inherit the property and his sister on the ground that he is the last born and ought to remain in the homestead pursuant to the Luo customs should be rejected because the application of customs are barred by Section 2 (1) of the Law of Succession Act which came into force on 1st July 1981 while the deceased herein died on 20th March 1982 and therefore the Law of Succession Act is the one to apply and not the Luo customary Law.

21. It was submitted that the Appellant's claim that the other beneficiaries had been provided for by the deceased prior to his death was not proved by way of evidence and documents showing that the deceased owned the properties before transferring to the Respondents. It was upon the Appellant to satisfy the burden of proof under Section 107, 108 and 109 of the Evidence Act which provide as follows:

Section 107. Burden of Proof:

(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 108. Incidence of Burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 109. Proof of Particular Fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Reliance was placed in the case of Machakos HC Succession Cause No.122 of 2010(***In The Matter of The Estate of The Late Gedion Manthi Nzioka***) where Hon. Justice P. Nyamweya in that "***For gifts inter vivos, the requirements of the law are that the said gift 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 trusts 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…….”

It was submitted that the Appellant failed to prove that the deceased made any bequests prior to his death.

22. It was finally submitted that the learned trial magistrate correctly applied the law as contained in Section 38 of The Law of Succession Act, and came to the correct decision that the deceased’s half-share of land parcel No. **Siaya/Komenya Kowala/125 measuring or estimated to measure 1.8ha**. should be shared equally among all the beneficiaries, including the Appellant and the Respondents. It was urged that the appeal be dismissed with costs.

23. I have considered the record of appeal as well as the rival submissions. I find the issues for determination are as follows:

    i) Whether the deceased herein made any bequests (gifts inter-vivos) during his lifetime.
    ii) How should the deceased’s ½ share comprised in Siaya/Komenya-Kowala/125 be distributed?

24. As regards the first issue, it is noted that the deceased herein died intestate on the 20th March 1982 after the coming into force of the Law of Succession Act on 1st July 1981. It is also not in dispute that vide Section 2(1) of the said Act all cases

of intestate or testamentary succession to the estates of the deceased persons were to be handled by the Law of Succession Act. The same provided 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 and to the administration of estates of those persons."***

As noted by Hon. Mr. Justice W. M. Musyoka in Kakamega HC Succession Cause No.875 of 2012 (***In the Matter of The Estate of Francis Andachila Luta***) at paragraph 13 of his judgement, "***By dint of Section 2 (1), the law to apply is the Law of Succession Act."***

25. Regarding gifts inter-vivos, Section 42 of the Law of Succession Act provides that any bequests made by a deceased to his dependants prior to his demise must be taken into consideration during the distribution of the remaining assets so as to ensure that there is fairness in the shares given to the beneficiaries. The said Section provides as follows:

Section 42 of The Law of Succession Act states that:

"Where –

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or,

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35,

that property shall be taken into account in determining the share of the net estate finally accruing to the child, grandchild or house."

26. It is noted that the Appellant has maintained that the Respondents and other beneficiaries have been catered for as the deceased had bequeathed them their parcels of land as listed by him. The Appellant presented copies of searches showing the same as - John Olunga Ongwen- Siaya/Komenya-Kowala/105, Isaya Mungoma Ongwen -Siaya/Komenya-Kowala/167, Benjamin Adika Ongwen Siaya/Komenya-Kowala/1 and Johana Koinange Ongwen – ½ of Siaya/Komenya-Kowala/125. The Respondents have countered those assertions and maintained that those parcels were registered to them in 1976 just like that of the deceased and that the same did not belong to the deceased as the Appellant has not presented any evidence of transfer from deceased to them as alleged. Indeed, it is trite law that he who alleges must prove. The Appellant having made the claims was under obligation to prove them in line with the provisions of Section 107, 108 and 109 of the Evidence Act which provide as follows:

Section 107. Burden of Proof:

(3) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(4) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 108. Incidence of Burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 109. Proof of Particular Fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

27. It is noted that the Appellant did not present any other evidence a part from the copies of searches. I find that he was under obligation to avail strong evidence such as calling witnesses who would corroborate his claims that the parcels which were allocated and registered to the Respondents and other beneficiaries initially belonged to the deceased and that the deceased gave out those properties as gifts inter-vivos. It is common knowledge that land adjudication and demarcation kicked off way in the early 1970s and those in possession of

parcels of land were the ones whose names were captured and later registered as owners of such parcels. It was incumbent upon the Appellant to call members from the community who would confirm that the parcels which were registered in the names of the Respondents and other beneficiaries initially belonged to the deceased and who okayed them to be registered as such. Thinking aloud, this court would postulate that during the time of the adjudication/demarcation, the Respondents and other beneficiaries could have been adults in their own right and were duly registered as owners of the properties either acquired customarily or through purchase. I find that the Appellant should not have left the burden of prove which was upon him to be taken as a matter of conjecture. Indeed, gifts inter-vivos require that the same must be proved by way of evidence and on a balance of probabilities. As it was held by Hon. Justice P. Nyamweya in Machakos HC Succession Cause No.122 of 2010 (***In the Matter of The Estate of The Late Gedion Manthi Nzioka***) that "***For gifts inter vivos, the requirements of the law are that the said gift 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 trusts 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…….***"

28. It is instructive that the Appellant was at pains to prove the aspect of gift inter-vivos as he was unable to avail evidence of

any transfer of land to the Respondents and other beneficiaries by the deceased. Even in the least, the Appellant should have called villagers to come forward and corroborate his allegations. Hence, the Appellant has left the issue in doubt to the point that the court is now left to second guess whether the Respondents and other beneficiaries were in possession of parcels of land allegedly given by the deceased prior to the adjudication/demarcation. This state of affairs is not good for a party who has lodged a claim in a court of law and who is duty bound to prove his claims once the adversaries have denied the same. Due to the doubts created I am satisfied that the aforesaid properties did not belong to the deceased and if they did, they were not given as gifts inter-vivos.

29. As regards the second issue, the Appellant in his schedule of distribution had proposed that the ½ share of land comprised in Siaya/Komenya-Kowala/125 (1.8Ha) be shared between himself and his sister Cathrene Atieno Owino in equal shares and that the Respondents and other beneficiaries should not get a share as they have already been provided for. The Respondents have vehemently opposed the proposal and maintained that this court should uphold the decision of the lower court which agreed with them that the said share be shared equally among all the six children.

30. The distribution of properties of intestate estates are mostly carried out in accordance with the provisions of Sections 32 to 42 of the Law of Succession Act, Cap.160, whichever is applicable, and in the present case I find the applicable provision is **Section 38** which states that:

> ***"Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, "or be equally divided among the surviving children."***

31. The Court of Appeal **in *Stephen Gitonga M'Murithi – Vs – Faith Ngira Murithi*** (Nyeri COACA No.3 of 2015) held as follows:

> ***"Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their married or unmarried life."***

32. It is noted that the Appellant has claimed that the Respondents are out to discriminate him in the distribution of property and that he has contended that by virtue of him being the last-born son, the Luo customs must kick in to solve the puzzle. However, the Respondents have opposed the introduction of customary law which would alter the need for equal distribution of the estate. As noted above, Section 2(1)

of the Law of Succession Act ousts the application of customary law where the deceased persons died after the coming into force of the Law of Succession Act on 1st July 1981. Indeed, the deceased was said to have died on 20th March 1982 and hence his estate should be governed by the Law of Succession Act. In that regard, the Appellant reliance on Luo customary law must be rejected. Again, the Appellant seems to suggest that as the last born child of the deceased, the Respondents might probably have been taken care of by the deceased prior to him being born but the Appellant has not availed any tangible evidence to show that the assets that the Respondents have initially belonged to the deceased before they were registered as the owners. I find that the Appellant did not come out convincingly to support an unequal distribution of the estate as proposed by him. As the Appellant's claim of gift inter-vivos has not been proved, I find that there is need to promote equality and therefore the estate comprised in ½ share Siaya/Komenya-Kowala/125 (1.8 Ha) shall be distributed equally among the six (6) beneficiaries.

33. In view of the foregoing observations, it is my finding that the Appellant's appeal lacks merit. The same is dismissed. As parties are family members, each party to bear their own costs.

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

D. KEMEI

JUDGE

In the presence of:

Oduol……for the Appellant.

Moses Orengo….for the Respondents.

Maureen/Kimaiyo……Court Assistant.