

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VIHIGA**  
**FAMILY APPEAL NO E003 OF 2022**

**IN THE MATTER OF THE ESTATE OF BENJAMIN OKUNGU**  
**DOBOLOSHO ALIAS BENJAMIN OKUNGU DOVOROSHO (DECEASED)**

**AGNES KADIGA**  
**DOVOROSHO.....APPELLANT**

**VERSUS**

**MOMORANDUM SAVAI DOVOROSHO.....1<sup>ST</sup>**  
**RESPONDENT**

**NELLY TANGO THUKU.....2<sup>ND</sup>**  
**RESPONDENT**

**(Being an appeal from the Judgment of Hon S.O Ongeru (SPM) delivered at Vihiga in Senior Principal Magistrate's Court Succession Cause No 45 of 2013 on 19<sup>th</sup> April 2022)**

**JUDGMENT**

**INTRODUCTION**

1. In his decision of 19<sup>th</sup> April 2022, the Learned Trial Magistrate, Hon S.O Ongeru, Senior Principal Magistrate, dismissed the Appellant's Affidavit of Protest sworn on 21<sup>st</sup> May 2021 and entered Judgment in the following terms:-

**1. That the property in South Maragoli/Buyonga/2173 shall be divided equally to the children who had received (sic) any share. They are Nelly Thuku, Timina Chahenza and Martha Okungu who shall share the property equally.**

**2. That the property in South Maragoli/Buyonga/2174 shall be registered in legal administrator who shall transfer to the purchaser.**

**3. That the property in Lumakanda being Kakamega/Lumakanda/8190-8192 shall divided equally amongst all children of the deceased taking into account the property already given to some of them.**

**4. That any claim thereof from any third party arising from the intermeddling the said Agnes Vulimu will be personally liable.**

**5. That as this dispute involved family members each party will bear his or her own costs.**

2. Being aggrieved by the said decision, on 11<sup>th</sup> May 2022, the Appellant filed a Memorandum of Appeal dated 8<sup>th</sup> May 2022. She relied on five (5) grounds of appeal.

3. Her Written Submissions were dated 22<sup>nd</sup> April 2025 and filed on 25<sup>th</sup> April 2025 while those of the 2<sup>nd</sup> Respondent's Written Submissions were dated and filed on 4<sup>th</sup> June 2025. The 1<sup>st</sup> Respondent did not participate in these proceedings or file any Written Submissions. The Judgment herein is, therefore, based on the said Written Submissions by the Appellant and the 2<sup>nd</sup> Respondent herein, which they both relied upon in their entirety.

### **LEGAL ANALYSIS**

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.

5. This was aptly stated in the case of **Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect, a fact that the Appellant herein reiterated in her Written Submissions.
6. Having looked at the Grounds of Appeal, and the respective parties' Written Submissions, it appeared to this court that the grounds raised were related and therefore the issue that had been placed before it for determination was whether or not the Trial Court erred in dismissing the Appellant's Affidavit of Protest sworn on 21<sup>st</sup> May 2021.
7. The Appellant averred that the succession proceedings in the Trial Court were commenced by one Sania Savayi Devorosh, a biological sister to the deceased herein. She pointed out that in her Petition, she listed herself and her two (2) sisters as the only beneficiaries surviving the deceased leaving out the entire family comprising of the widow and her ten (10) children with the deceased.
8. She contended that after gazettelement, a Grant of Letters of Administration was issued to the said Petitioner on 11<sup>th</sup> September 2018 but that before she could confirm the same, she passed on 27<sup>th</sup> February 2019 whereafter one Agnes Kalika Vidimu was then appointed the new administrator of the deceased's estate.

9. She pointed out that the said grant was confirmed on 26<sup>th</sup> March 2019 distributing the estate comprising of parcel number South Maragoli/Buyonga/2173 equally between Agnes Kidiga Vulimu and Adimora Oletia.
10. She further submitted that thereafter, one Marita Inyangala Okungu filed a protest against confirmation of the Grant citing the failure by the Petitioner to disclose to court she was married to the deceased and they had ten (10) children together and that further, the deceased's property Kakamega/Lumakanda/2911, had been left out.
11. She asserted that subsequent to the said protest, one Nelly Thago Thuku, a daughter of the deceased, filed an application for revocation of the grant dated 14<sup>th</sup> August 2020 which the Trial Court allowed. She further asserted that the Petitioner filed a Summons for Confirmation of Grant to redistribute the estate afresh which attracted protest proceedings which were heard by way of *viva voce* evidence. She pointed out that the Judgment that was delivered was subject of this appeal.
12. She contended that the Trial Court erred in holding that parties claiming beneficial interest as a result of trust should obtain judgment declaring such. She argued that customary trust could be established under the Law of Succession in Kenya and arose where land was held in trust for family members or the community based on traditional customs and practices.

13. She stated that to prove customary trust, a claimant had to demonstrate that before registration, the land was originally family, clan or communal, the claimant belonged to the family, clan or group associated with the land, the relationship between claimant and the land was not too remote and that the registered owner was not expected to hold the land in trust for others.
14. She was emphatic that customary trusts were often invoked in succession cases where land ownership disputes among family disputes arose and that courts considered factors like occupation, possession and historical agreements when determining whether a customary trust existed or not.
15. To buttress her point, she relied on the case of **M'inanga Kieba vs Isaya Theuri M'lintari & Isaac Ntongai** (eKLR citation not given) where the Supreme Court overturned the decision in **Esiroyo vs Esiyoro** (eKLR citation not given) where it was held that the rights under customary law became extinguished upon registration of the land in question by virtue of Section 28 of the Registered Land Act.
16. She argued that it was erroneous for the Trial Court to have summarily dismissed her beneficial interest without giving reasons or considering her claim in LR South Maragoli/Buyonga/2173. She further placed reliance on the case of **Succession Appeal Case No 75 of 2019 Mable Musimbi** (sic) (eKLR citation not given) where it was held that a probate court had the power to cancel all titles that had been transmitted from an estate of a deceased person

unlawfully. It was her contention that whereas the Trial Court admitted that the evidence that had been placed before him pointed to intermeddling, there was need to cancel the titles which should revert to the deceased's estate for fresh distribution.

17. On her part, the 2<sup>nd</sup> Respondent submitted that the deceased passed away on 26<sup>th</sup> May 2012 and was survived by her only wife one Peris (Berishi) Mmbone Okungu and ten (10) **(sic)** adult children, namely, Dan Okungu, Francis Okungu, Isaak Okungu, Johnston Okungu, Timina Chahenza, Martha Okungu, Rose Okungu, Irene Okungu and herself. She stated their mother died on 29<sup>th</sup> November 2019.

18. She averred that the deceased had purchased the Lugari land where he moved to stay with his family but tilled the Maragoli land and visited often. She stated that as of the time of his death, the deceased left behind L.R. No South Maragoli/Buyonga/2173 measuring 0.846 Hectares and L.R. No Kakamega/Lumakanda/2911 measuring above 4.8 Hectares which he distributed to his children, most of whom moved physically occupied the same despite not having titles to the same. She pointed out that the only beneficiaries who were not given any property by the deceased were Dimina Chahenza, Martha Okungu and herself.

19. She asserted that after the death of the deceased, his sister one, Sania Savai Dovolosho, secretly and unlawfully purported to sell part of the deceased's L.R. No South Maragoli/Buyonga/2173 to one Evans Adero Ayanze who started constructing a house in 2013.

20. She explained that her mother applied for a limited grant in **P & A No 34 of 2013** which was granted and dated 28<sup>th</sup> June 2013 and she sued the said Evans Adero Ayenze for trespass in **Vihiga Case No 19 of 2013**. She contended that in a Judgment that was delivered by Hon Mmasi on 3<sup>rd</sup> March 2015, eviction orders were granted against the said Evans Adero Ayenze. She was emphatic that there had been no appeal in the said matter to-date.
21. She further submitted that in an effort to defraud the estate of the deceased, the said Sania Savai Dovolosho filed for Letters of Administration to the deceased's estate in **P & A 45 of 2013** and listed herself and her sisters, Admorah Otesie and the Appellant herein as beneficiaries of the deceased's estate and excluded them and their mother. She added that the said Sania only mentioned the deceased's property as L.R. No South Maragoli/Buyonga/2173.
22. It was her contention that her mother filed an application to revoke the said Grant that Sania Savai Dovolosho obtained which was allowed whereupon their mother was issued with another Letters of Administration dated 22<sup>nd</sup> November 2017. She said that their mother filed Summons for confirmation of grant dated 16<sup>th</sup> March 2018 in **Vihiga P & A 24 of 2017** but she died on 29<sup>th</sup> November 2019.
23. She pointed out that she applied to be substituted as the administrator of the estate herein. She later learnt that Sania Savai Dovolosho died, she was substituted by Appellant herein and that a Grant was confirmed in the Appellant's name in their absence as

beneficiaries of the deceased's estate. She asserted that it was this Grant that the Appellant purported to use to subdivide L.R. No South Maragoli/Buyonga/2173 into two (2) portions giving 0.45 Ha to Evans Adero Ayenze and 0.45 Ha to Savai Dovolosho.

24. She was emphatic that in discovering the fraud, she approached this court in **P & A 45 of 2013** to cancel the fraudulent confirmed grant and titles and return the titles to the original owner of the land who was the deceased. She pointed out that she did not know who the 1<sup>st</sup> Respondent was as she was not a party to the proceedings at the Trial Court, thus, could not be introduced in the proceedings at this stage.

25. She argued that for a party to establish existence of a customary trust evidence, must be tendered in court to point to the existence of a trust. She asserted that the Appellant failed to tender any evidence to prove that the deceased held L.R. No South Maragoli/Buyonga/2173 in trust for her and her other sisters.

26. To buttress her point, she placed reliance on the case of **Vihiga ELCOS/E003 of 2023 Nigh Sifula Nasiari vs Raymond K. Omwami** (eKLR citation not given) where it was held that the burden of prove lay with the party relying on the existence of a trust to prove the existence thereof and that the claimant must prove the element of customary trust.

27. She stated that there was also no evidence adduced to prove that the said parcel was an ancestral land. She further contended that there was no evidence to show that while registering L.R. No

South Maragoli/Buyonga/2173, there was an intention to create a customary trust in favour of the Appellant and her sisters and that further, no witnesses were called to confirm the alleged customary trust as was required by law.

28. She asserted that the Appellant did not give any explanation to show why the deceased would hold the said land in trust for her and her sisters who were adults and why the other brothers and sisters were not enjoined in this matter if the said parcel was ancestral land. She was emphatic that the Appellant had exhibited acts of fraud in this matter by illegally obtaining letters of administration to the exclusion of the actual beneficiaries of the estate herein and that the court had been subjected to theatrics by having to cancel letters of administration unlawfully issued to the Appellant.

29. She further submitted that any subdivisions that were made by the Appellant without consent of the beneficiaries of the estate were illegal and ought to be cancelled by this court. She added that that applied to all titles emanating from the subdivision of L.R. No Kakamega/Lumakanda/2911 and L.R. No South Maragoli/Buyonga/2173 which properties ought to be reverted in the name of the deceased so that they could be subdivided and transferred to the beneficiaries herein especially the three (3) daughters who the deceased had not given any properties.

30. Notably, this court noted that whether the deceased had held the L.R. No South Maragoli/Buyonga/2173 in trust for the Appellant and her sisters was a pertinent one.

31. The 2<sup>nd</sup> Respondent testified that the deceased was her father but that the Appellant had excluded her, her siblings and mother from the succession proceedings. She stated that she salvaged the position which led to the Judgment of the Trial Court in which the deceased's estate was distributed to the rightful beneficiaries. She called witnesses, Elizabeth Namuraya Olengo (hereinafter referred to as "PW 2"), Johnstone Ernest Okungu (hereinafter referred to as "PW 3"), Timina Adema Chahenza (hereinafter referred to as "PW 4"), Irene Kedogo Okungu (hereinafter referred to as "PW 5") who corroborated her evidence.

32. The Appellant testified that the deceased was her brother and that their parents were staying in parcel 2173 where they were buried. She urged the court to grant them the said parcel. She called witnesses, Martha Inyangala Okungu (hereinafter referred to as "DW 2"), Daniel Sabwa Okungu (hereinafter referred to as "DW 3"), Enock Olengo Okungu (hereinafter referred to as "DW 4") and Rose Asigo Okungu (hereinafter referred to as "DW 5") who corroborated her evidence and supported that she be given the land at Emanda together with her sisters.

33. This court considered the authority relied upon by the Appellant **M'inanga Kieba vs Isaya Theuri M'lintari & Another[2015]eKLR** where it was held that each case would be

determined on its own merit noting the nature of the holding of the land and the intention of the parties.

34. A reading of the Trial Court's Judgment indicated that the court held that the Appellant had not proved the existence of a customary trust as alleged. Notably, a customary trust was an unregistered, overriding interest where land, often ancestral or family-owned, was registered in one person's name (trustee) but held for the benefit of others (beneficiaries), such as family or clan members. It was proved by demonstrating that the land was historically communal, that the claimant was a beneficiary, and their occupation was not "idle or adventurous".

35. It was trite law that whoever alleges must prove. Section 107 of the Evidence Act Cap 80 (Laws of Kenya) defines the burden of proof, establishing that whoever desires a court to give judgment regarding a legal right or liability dependent on the existence of facts must prove those facts exist.

36. Having analysed the evidence on record herein, it was evident that the Appellant and her sisters had tried to fraudulently obtain the estate of the deceased to the exclusion of the beneficiaries. She did not prove any historical agreement creating customary trust over the said parcel and/or call witnesses to testify that the deceased had been holding the said parcel in trust for his siblings. It was clear that the Appellant did not adduce any evidence to prove that indeed there existed a customary trust in respect of L.R. No South Maragoli/Buyonga/2173.

37. In the premises, this court was not persuaded that the deceased had held the said parcel in trust for the Appellant and her two (2) sisters as alleged. The Ground of Appeal No (1), (2), (3) and (4) of the Memorandum of Appeal were, therefore, not merited and the same be and are hereby dismissed.

**DISPOSITION**

38. For the foregoing reasons, the upshot of this court's decision was that the Appellant's appeal that was dated 8<sup>th</sup> May 2022 and lodged on 11<sup>th</sup> May 2022 was not merited and the same be and is hereby dismissed.

39. As this was a family matter, this court deviated from the general rule that costs follow the event and hereby directs that each party bears its own costs of this Appeal so as to preserve the family ties.

40. It is so ordered.

**DATED** and **DELIVERED** at **VIHIGA** this **29<sup>th</sup>** day of **January** 2026

**J. KAMAU**  
**JUDGE**