Hassan v Onyango (Civil Suit E065 of 2024)
[2026] KEHC 3309 (KLR) (11 March 2026) (Judgment)

Neutral citation: [2026] KEHC 3309 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL SUIT E065 OF 2024

DKN MAGARE, J

MARCH 11, 2026

BETWEEN

ZAIDA ADHIAMBO HASSAN ..... APPELLANT

AND

DAVID ONYANGO ..... RESPONDENT

JUDGMENT

1. This is an appeal from the judgment and decree of C.N.C. Oruo (PM) given on 21.03.2024 in Migori CMC Misc. Application Number E023 of 2023. The court dismissed the appellant's application, resulting in this suit. The appellant sought to compel the respondent to perform his duties by writing a letter to her stating that she is the daughter of the late Srinivasa Abdullahi Bhacket (deceased), who died intestate on 13.11.2022.

2. The respondent is a public officer working as the chief of Kamagambo location. He had filed an affidavit stating that the deceased died without children. He maintained that Kevin Orinda was a dependent. He further stated that there were many people who were children of the deceased person. He listed the other claimants as:

    a. Asman Hassan Bhakhety

    b. Abdalah Abdulahi

    c. Mwana Juma Idi Ajuama Adbdullahi

    d. Harrison Auko Nyamaji

    e. Ali Mohammed

    f. Joyce Kharssm

    g. Eunice Akinyi

h. Odero Nyamwaji

i. Penina Achola

j. Dinnah Anyango

k. Albert Ogwai Opondo

3. The respondent indicated that he could not issue a letter of introduction without evidence of proof of relationship. He stated that minutes of family members will suffice. He stated that the applicant is an opportunistic and strategic individual who wishes to reap where she did not sow.

4. The court heard the matter and dismissed it. According to the court, the applicant did not prove any relationship with the deceased.

Submissions

5. It was the appellant's submission that the burden of proof is on a party who will fail if no evidence is tendered. She relied on the decision of Mwanaisha S. Shariff J in the case of *Pandhai & another v Amingo* [2023] KEHC 27485 (KLR).

6. She submitted that the burden of proof is on the respondent to show that she is not a beneficiary. She placed reliance on the case of *Yusuf v Mohamed & another* [2022] KEELC 2937 (KLR), where N.A. Matheka posited that:

> There is the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence as ruled in the case of Isca Adhiambo Okayo vs Kenya Women's Finance Trust KSM CA Civil Appeal No 19 of 2015 (2016) eKLR.

7. She submitted that the court erred in insisting on a birth certificate when minutes were said to suffice. It was her submission that she had annexed family minutes to the supplementary affidavit dated 30.10.2023. Reliance was placed on the case of *In re Estate of Julius Ndubi Javan (Deceased)* [2018] KEHC 8523 (KLR), where Gikonyo J, stated as follows:

> (14) The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which prima facie valid should be determined before confirmation.

8. She further submitted that letters should be given to beneficiaries of the estate. She continued that the foregoing was the holding of the court in the case of *In re Estate of the late Magangi Obuki* 2020 KEHC 348 (KLR), where Wendoh J posited as follows:

> It was also submitted that only the chief is mandated to issue introductory letters, the Objector referred to the decision in Re Estate of Shem Kitanga (Deceased) where justice Njagi ruled that;
>
> > A succession cause starts with an introduction letter from the chief of the area where the intended Petitioner hails from. Though it is not a legal requirement, it

> is presumed that the chief is well familiar with the family of the deceased person and can inform the court of the beneficiaries left behind by the deceased.

In a bid to emphasize the importance of the chief's input, the Objector stated that in the case of *In Re Estate of Ambutu Mbogori* (2018) eKLR Gikonyo J. observed as follows;

> The Petitioner committed other sins; he initiated these proceedings without a letter of introduction from the chief. This letter serves an important purpose in the ascertainment of the deceased, the dependants, as well as the properties of the deceased.

9. The appellant maintained that the estate is being wasted, while the Respondent does not have evidence that the appellant is not a beneficiary.

10. The Respondent did not file submissions.

Analysis

11. The appellant was aggrieved by the said decision and filed a memorandum of appeal dated 03.10.2024 and raised 10 grounds of appeal. It is unnecessary to set the same out herein verbatim. Order 42 Rule 1 of the *Civil Procedure Rules* provides:

> 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
>
> (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

12. The Court of Appeal [Nambuye, Karanja & M'Inoti, JJ.A.] had this to say about compliance with Rule 86 (now Rule 88) of the *Court of Appeal Rules* (which is pari materia with Order 42 Rule 1 of the Civil Procedure Rules) in the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] KECA 224 (KLR):

> We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
>
> > We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs. The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues...

13. The court abhors repetitiveness of grounds of appeal which tend to cloud the key issues in dispute for determination. In the case of *Kenya Ports Authority v Threeways Shipping Services (K) Limited* [2019] KECA 472 (KLR), the court of appeal [Nambuye, M. Warsame & Otieno-Odek JJA] observed that:

> Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:
>
> > The memorandum of appeal contains some thirty two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better.

14. The appeal raises only one issue, that is, the court erred in deciding the case against the appellant against the weight of evidence and the provisions of the law. The rest of the issues are ancillary, repetitive, prolix, and a waste of judicial time.

15. This being a first appeal, this court is under a duty to reevaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 the Court stated:

> ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

16. The duty of the first appellate court was discussed by Clement De Lestang, VP, Duffus and Law JJA, in the locus classicus case of *Selle and another Vs Associated Motor Board Company and Others* [1968]EA 123, where the Judges in their usual gusto, held as follows:

> .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.

17. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. In the case of *Peters vs Sunday Post Limited* [1958] EA 424, the court therein rendered itself as follows:

> It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...

18. However, documents still speak for themselves. The observation of documents is the same as the lower court, as parties cannot read into those documents matters extrinsic to them. In *Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd* (2017)eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;

> Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

19. In Gerald Dworkin, *Odgers' Construction of Deeds and Statutes* (5th edn, Sweet & Maxwell 1967), the learned author at p. 106 states as follows:

> Parol Evidence and written documents. It is a familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of a deed or any written instrument. The rule applies as well as deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence.

As it stands this is not a rule of interpretation but of law, and means that the interpretation of the document must be found in the document itself with the addition if necessary of such evidence as we have previously seen is admissible for explaining or translating words and expressions used therein.

20. The legal burden of proof lies upon the party who invokes the aid of the law and asserts an issue based thereon. In *Anne Wambui Ndiritu –vs Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:

> As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.

21. The burden of proof is on whoever asserts. This is set out succinctly in sections 107-109 of the *Evidence Act* as follows:

107.

(1) Whoever desires any court to give judgment 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.

108. 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.

109. 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.

22. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau –vs George Thuo & 2 Others* [2010] 1 KLE 526 stated that:

> In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.

23. The appellant asserted that she is the daughter of the deceased. The respondent denies and asserts that the deceased died without a child. The respondent is not under a duty to prove a negative. Therefore, the appellant was under a duty to show that she is related to the deceased in any way. A birth certificate or notification of birth should be able to show.

24. The appellant raised an issue with the minutes filed in court vide an affidavit dated 30.10.2023. The appellant rightly submits that the duty of the respondent is to issue an introductory letter. However, the raison d'être of the issuing authority is to ensure that only the Dependants receive letters. In this case, the appellant fell far short of glory by failing to show any filial or consanguinity or dependent relationship.

25. I have seen the list of what appears to be a family meeting. It does not show the relationship between the persons named and the deceased, Spirinah Abdullahi Bhackety (deceased). They do not state who they are. Consequently, the court below was correct in finding that no family meeting occurred. To be family, the signatories must themselves be dependents with equal or lower priority. It is not a collection of names and signatures. The degrees of consanguinity are set out in the schedule to the *Succession Act.* It is provided under section 39 of the *Succession Act* as follows:

    1. Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-

        a. Father, or if dead

            a. Mother; or if dead

            b. Brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none,

            c. Half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none,

            d. The relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

    2. Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.

26. Without giving evidence of who the appellant was, the chief could not lawfully give a letter to a stranger. The chief is therefore a gatekeeper who then ensures fidelity to the estate of deceased persons. He cannot issue the introductory letter to the appellant in the absence of proof.

27. Therefore, the appeal lacks merit and is accordingly dismissed. Therefore Misc. Application Number E023 of 2023 remains dismissed.

28. Before I depart and address the question of costs, we need to address a structural issue, that is, the filing of a suit personally against the chief. A chief is appointed under Section 15(2)(d) of the *National Government Co-Ordination Act*. Consequently, he is a public servant protected in the performance of his duties. The chief is protected under section 22 of the *National Government Co-Ordination Act*. It provides as follows:

> Nothing done by a public officer appointed under this Act shall, if done in good faith for the purpose of executing the functions of the office, render such officer personally liable for any action, claim or demand.

29. Therefore, any suit filed should be against the office of the chief, so that the Attorney General defends him as the chief. In this case, it was filed as a private suit. This is anathema to good conscience and practice of law.

30. This leaves the issue of costs, which is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

31. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 (KLR) had this to say:

> It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

32. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Rai & 3 others v Rai & 4 others* [2014] KESC 31 (KLR), as follows:

18. It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation

22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging

consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

33. Having been sued in person, he incurred costs defending the suit. However, he did not defend the appeal. Therefore, each party should bear their costs.

34. As I pen off, it is important that this case be concluded and the estate be protected. The court notes that the land indicated as belonging to the estate appears to have been subdivided on 11.06.2018 into land parcel numbers Kamagambo/Kanyajwok 2974, 2975, and 2976. It is important to establish whether the estate is available or has been transferred inter vivos.

35. The chief indicated that there was a dependent identified as Kevin Orinda. He should issue a letter to the said person, who shall then file succession within 90 days from today. This will allow people who have any claim to file their objections and necessary documentation. This will also help the court determine whether, if there were no dependents, the estate would escheat to the state as bona vacantia.

Determination

36. In the upshot, I make the following orders:

    a. The appeal lacks merit and is accordingly dismissed.

    b. Each party to bear their own costs.

    c. To jump-start the process, including possible objections, the Chief Kamagambo location shall issue an introductory letter to Kevin Orinda, who shall then file succession within 90 days from the date of service.

    d. File is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF MARCH, 2026. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for parties

Court Assistant – Michael