

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MIGORI**  
**SUCCESSION APPEAL NO. E088 OF 2023**  
**IN THE MATTER OF THE ESTATE OF MANASON OGOL**  
**ONYANGO (DECEASED)**

**MOSES ONDITI OGOL.....**

**APPELLANT**

**VERSUS**

**MARGARET AKEYO ONYANGO..... 1<sup>ST</sup>**

**RESPONDENT**

**DORIS AOKO OGUTU..... 2<sup>ND</sup>**

**RESPONDENT**

**RICHARD OTIENO ONDITI..... 3<sup>RD</sup>**

**RESPONDENT**

**JACK OKOTH OGUTU..... 4<sup>TH</sup>**

**RESPONDENT**

**BENARD ONYANGO OGUTU..... 5<sup>TH</sup>**

**RESPONDENT**

**MILKA ATIENO SIERRA..... 6<sup>TH</sup>**

**RESPONDENT**

**MARCEL OUMA OYOKO..... 7<sup>TH</sup>**

**RESPONDENT**

**GEOFREY OGUTU OYOKO..... 8<sup>TH</sup>**  
**RESPONDENT**

**HAROLD OTIENO OYOKO..... 9<sup>TH</sup>**  
**RESPONDENT**

**TONY ACHIENG OYOKO..... 10<sup>TH</sup>**  
**RESPONDENT**

**RAEL OPIYO OTIENO..... 11<sup>TH</sup>**  
**RESPONDENT**

**MARGARET AOMO OTIENO..... 12<sup>TH</sup>**  
**RESPONDENT**

**JUDGMENT**

1. This is an Appeal from the Ruling and Order of Hon. C.N Ndegwa, Principal Magistrate, dated 28.11.2023, in Migori CMCSUCC Cause No.91 of 2019.
2. The Amended Memorandum of Appeal dated 14.4.2025 raised the following Grounds of Appeal:
  - (a)The learned magistrate erred in law and fact by failing to make due allowance for proceedings before the summons for confirmation of the grant dated 22.4.2023, which were material to the distribution of the estate.

- (b) The Ruling will affect the lawful and beneficial interest of several other persons in Suna East/Manyatta/722, which is comprised in the intestate estate.
- (c) The learned magistrate erred in law and fact in disregard that the late Manason Ogol Onyango had settled his sons and their families on different and known parts of Suna East/Manyatta/722 as the sole proprietor of that land.
- (d) The learned magistrate erred in law and fact in failing to recognize and make allowance for Luo customary law, leading to unjust distribution.
- (e) The learned magistrate erred in law and fact in disregarding the evidence, particularly the Appellant's defence exhibit no.2.
- (f) The learned magistrate erred in law and fact in taking into account material he ought not to have taken into account.
- (g) The learned magistrate erred in law and fact in contravening section 71 of the Law of Succession Act, leading to unending feuds and injustices.
- (h) The learned magistrate erred in law and fact in distributing the estate with ambiguity and unenforceability.

(i) The learned magistrate erred in law and fact in obstructing the intention of the Law of Succession Act, The Probate and Administration Rules and The Constitution of Kenya 2010.

### **Pleadings**

3. By the Summons for Confirmation of Grant dated 22.4.2022 and filed by the Appellant, in respect of the Estate of the Deceased.
4. The Appellant was the administrator. The deceased died on 4.6.2006 and was monogamous. He left one property subject to these succession proceedings. It is described as Suna East/Manyatta/722, measuring 6.41 ha. The letters of administration intestate grant were issued on 2.9.2020.
5. In the Affidavit in support of the Summons for Confirmation of Grant, the Appellant described the beneficiaries and their shares as follows:
  - a. Margaret Akeyo Onyango - 1.0 Ha
  - b. Doris Aoko Ogutu, Jack Okoth Ogutu  
and Benard Onyango Ogutu - 1.13 Ha
  - c. Moses Onditi Ogol - 1.49 Ha
  - d. Milka Atieno Sierra,  
Marcel Ouma Oyoko,  
Geofrey Ogutu Oyoko,  
Harold Otieno Oyoko and

- |  |           |
|--|-----------|
| Tonny Achieng Oyoko                              | - 1.23 Ha |
| e. Rael Opiyo Otieno and<br>Margaret Aomo Otieno | - 1.43 Ha |
| f. 4-meter-wide access road                      | - 0.13 Ha |

6. The Respondents filed an Affidavit of Protest dated 13.6.2022, sworn by Margaret Akeyo Onyango. By the said Affidavit, it was deposed as follows:

- a) The Respondents were not involved in the proceedings.
- b) The deceased distributed the estate in equal parts between his children during his lifetime.
- c) The protestors lived and cultivated on their parcels peacefully.
- d) The Petitioner retired, came home, and began interfering with demarcations.
- e) The Petitioner then planted boundary features against the boundaries set by the deceased.
- f) The county surveyor visited and surveyed the property, fixed boundaries on 25.3.2022.
- g) The boundaries in the surveyor report do not reflect the boundaries the deceased established.
- h) The portions should be equally distributed among the children of the deceased.

### **Evidence**

7. During the hearing, PW1 was Margaret Akeyo Onyango. She testified based on her affidavit of protest and documents attached thereto, which she produced in evidence.
8. The Appellant was her brother-in-law. The deceased was her father-in-law. Her husband was deceased. According to her, the deceased had already shared the land. The Petitioner was the only surviving son. The land was distributed equally among 5 sons of the deceased.
9. PW2 was Dorris Aoko Ogutu. She testified, reiterating PW1's testimony. The estate was 6 hectares. Her husband was the third son of the deceased.
10. The Appellant also testified in court. It was his case that the Respondents participated in the survey. The old boundaries were still in place. They showed how the deceased subdivided the land in his lifetime. He did not distribute the land equally. He used Luo customs. On cross-examination, he was 11 years old when the land was distributed. He was the only surviving son.

### **Submissions**

11. The Appellant filed submissions dated 14.4.2025 by which it was submitted that the court lacked jurisdiction to depart from orders of a magistrate of concurrent jurisdiction. Reliance was placed on **Wambui v Wambui** (2024) KECA 474.

12. It was also submitted that the magistrate misapplied section 38 of the Law of Succession Act and failed to take into consideration 42 thereof. Reliance was placed on **In Re Estate of Cyprian Imanyara Imiru** (Deceased) 2022 KECA 1176.
13. The Appellant also submitted that it was a matter of notoriety under section 59 and 60 of the Evidence Act that under customary law the deceased could have given property to the beneficiaries prior to his demise. These were submitted to be gifts *inter vivos* and reliance was placed on **Estate of Nkurumwa Ole Ntemel** (2024) KEHC 1385.
14. The Appellant also submitted that the 3rd-12th Respondents risked being condemned unheard. Reliance was placed on Articles 27, 40, 47 and 50(1) of the Constitution.

### **Analysis**

15. The issue for determination is whether the lower court erred in its finding application of Section 38 of the Law of Succession Act to the distribution of the estate into equal portions among all children.
16. The burden was on the Appellant as protestor to prove the allegation in the affidavit of protest. 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.”**

17. The Appellant was thus expected to demonstrate on a balance of probabilities that the assertions in the affidavit of protest were such as to shift the scales of justice towards adopting her mode of distribution as opposed to the Respondents suggested mode of distribution. 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 than 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.”**

18. The Respondent maintained that the affidavit of protest should have been allowed because the Appellant had interfered with the boundaries and allocated portions that were not equal as it should be by law.

19. The Appellant argued that the court ought to have maintained the distribution as per the surveyor's report, as that is what constituted the actual portions as subdivided by the deceased during his lifetime.

20. This matter relates to the intestate estate of a monogamous man. In respect of the distribution of the Deceased's estate, this court is guided by Section 38 of the Law of Succession Act, Cap 160, Laws of Kenya. Section 38 of the Law of Succession Act provides that:

38. Where intestate has left a surviving child or children but no spouse 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 shall be equally divided among the surviving children.

21. In relation to whether the alleged gifts could amount to gifts *inter vivos*, the Court in **Re Estate of The Late Gedion Manthi Nzioka (Deceased)[2015]eKLR** stated that:

***“For gifts inter vivos, the requirements of 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. 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. Gifts inter vivos must be complete for the same to be valid. In this regard it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee.”***

22. In **Naomi Wanjiru Njoroge & 2 others v Winston Benson Thiru [2018] eKLR**, the court stated as follows:

In law, gifts are of two types. There are the gifts made between living persons (gifts *inter vivos*), and gifts made in contemplation of death (gifts *mortis causa*). The assets that are the subject of a gift do not form part of the estate and such assets pass directly to the donee as provided for by **Section 31 of the Law of Succession Act** as follows;

***“A gift made in contemplation of death shall be valid, notwithstanding that there has been no complete transfer of legal title, if-***

***(a) the person making the gift is at the time contemplating the possibility of death, whether or not expecting death, as the result of a present illness or present or imminent danger; and***

***(b) a person gives movable property (which includes any debt secured upon movable or immovable property) which he could otherwise dispose of by will; and***

***(c) there is delivery to the intended beneficiary of possession or the means of possession of the property or of the documents or other evidence of title thereto; and***

***(d) a person makes a gift in such circumstances as to show that he intended it to revert to him should he survive that illness or danger; and***

***(e) the person making that gift dies from any cause without having survived that illness or danger; and***

***(f) the intended beneficiary survives the person who made the gift to him:***

***Provided that-***

***i. no gift made in contemplation of death shall be valid if the death is caused by suicide;***

***ii. the person making the gift may, at any time before his death, lawfully request its return. the person making the gift may, at any time before his death, lawfully request its return.***

23. In this case, I do not see how the estate as allegedly distributed amounted to gifts by the deceased to his sons during his lifetime. The parcel was still in the name of the deceased, and if he had intended that they be distributed to his sons, he should have initiated the transfer or actually transferred the land accordingly. **In re Estate of Godana Songoro Guyo (Deceased) [2020] eKLR**, the court stated thus:

It may be noted that the concept of gifts is divided into two categories. First gifts *intervivos* and gifts *causa mortis*. Gifts *intervivos* as contemplated in the Law of Succession are such that the owner of the property or asset donates it to another without expectation of

death. In any event the person who makes such a gift must have the capacity and competency to gift the property and the gift must be perfected. In the case of *intervivos* the gift must go into immediate and absolute effect. It is also well established that where the gift has been made, delivery to the beneficiary is necessary to consummate the gifts. Further, it is fundamental to understand the intention of the parties and their acts done sufficient to establish the passing of the gift to the donee....

Therefore, the Law requires of the beneficiary that the deceased relinquished dominion over the title to land reference **Kilifi/Ngerenyi / 443** in their favour. The evidence must also show that the deceased intended to make the gift of this particular property by taking steps to perfect delivery of it to the sons in exclusion of anyone else. Sometimes looked at from customary Law perspective the father as the head of the family under parental executive order can permit any of his children use of the Land, without the necessity of giving up the title to pass to the user. The mere delivery for use is therefore not sufficient to qualify the property as a gift *causa mortis* or gift *intervivos*.

24. Adherence to the rule-based model on transfer of immovable property involves an inquiry on the Law of gifts *inter vivos* or *causa mortis* featuring in **Odunga's Digest on Civil Case Law and Procedure Vol (III) Page 2417 at paragraph 5484 (d) e - 1** thus:

***“Generally speaking the moment in time when the gift takes effect is dependent on the nature of the gift; the statutory provisions governing the steps***

***taken by the donor to effectuate the gift. (See in Re Fry Deceased {1946} CH 312 Rose: and Trustee Company Ltd v Rose {1949} CL 78 Re: Rose v Inland Revenue Commissioners {1952} CH 499 Pennington v Wulfe {2002} 1WLR 2075 Maledo v Beatrice Stround {1922} AC 330 Equity will not come to the aid of volunteer and therefore, if a donee needs to get an order from a Court of equity in order to complete his title, he will not get it. If, on the otherhand, the donee has under his control everything necessary to constitute his title completely without any further assistance from the donor, the donee need no assistance from equity and the gift is complete. It is on that principle that in equity it held that a gift is complete as soon as the donor has done everything that the donor has to do that is to say as soon as the donee has within his control all those things necessary to enable him, complete his title. Where the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person. Likewise a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the donee has not yet been registered as a proprietor. (See Shell's Equity 29ED Page 122 paragraph 3)"***

25. Therefore, I consider that there was no gift made. The only lawful way was what the learned magistrate did, which was in consonance with section 38 of the Law of Succession Act. The

presence or absence of Luo customs is an irrelevant consideration in succession. Section 2(1) and (2) of the Law of Succession provides as follows:

(1) 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.

(2) 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.

26. Therefore, the written laws and customs applying at the date of death are applicable only to persons who died before 1 July 1981, by dint of notice allowing the Law of Succession Commencement.

27. The deceased's dependants are settled in terms of the section of **Section 29** of the **Law of Succession Act (Cap 160 Act)**, which defines who is a dependant as follows:-

**“(a)the wife or wives, or former wife or wives, and the children of the deceased whether or not**

**maintained by the deceased immediately prior to his death;**

**(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and**

**(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.**

28. The deceased herein died on 4.6.2006. This was at the time of universal application of the succession act, subject only to limitations in relation to a person who, at the time of this death, is a Muslim. Luo customs or any other customs are not covered under section 4 of the Succession Act.

29. Consequently, I find no basis to fault the reasoning of the lower court. The sole property left by the deceased was available for distribution among all his beneficiaries, and in equal shares.

30. I therefore find no way in which the lower court failed in serving the justice deserved to the estate of the deceased herein as required under Section 38 of the Law of Succession Act. The court finds the appeal to be without merit.

31. This appeal is, fortunately, the end of the road for the parties by dint of section 50 of the Succession Act, which provides as follows:

(1) An appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate, and the decision of the High Court thereon shall be final.

32. The appellate process is governed in part by Order 42 of the Civil Procedure Rules. The court has powers under Order 42, Rule 32, to make such orders as to effectuate the decision and to do justice. The said rule provides as follows:

The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made, and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents, although such respondents may not have filed any appeal or cross-appeal.

33. There is no possibility that the appellant, who is keen on a diametrically opposite subdivision, will do justice to the parties. The best order, therefore, is to relieve him of the burden of responsibility. However, noting that the applicant is not keen on distribution, the court hereby removes him as an

administrator and appoints him as an administrator in lieu of the former administrator.

34. The appellant to return the grant issued to him for revocation and confirmation in equal shares as ordered by the court below in favour of the new administrator.

35. The lower court matter shall be mentioned on 22.04.2026 to confirm transmission, failing which the lower court shall exercise its powers to ensure effective transmission in terms of section 83 of the Law of Succession Act.

36. To enable the conclusion of the matter, the same shall be mentioned in the lower court to confirm the status of transmission. The court shall replace any administrator party not aiding in the conclusion of the administration.

37. This leaves the issue of costs, which 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.

38. 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.

39. The best order, therefore, is to let sleeping dogs lie. Let there be peace, and there be a finalization of the estate. The court will thus give directions for the finalization of the estate and order that each party bear its costs.

### **Determination**

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

- (i) The appeal is unmerited and is dismissed.
- (ii) Each party to bear their own costs.
- (iii) However, noting that the appellant is not keen on distribution, the court hereby removes him as an administrator and appoints Margaret Akeyo Onyango as an administrator in lieu of the former administrator.
- (iv) The lower court matter shall be mentioned on 22.04.2026 to confirm transmission, failing which the lower court shall exercise its powers to ensure effective transmission in terms of Section 83 of the Law of Succession Act.

- (v) The appellant to return the grant issued to him for revocation and confirmation in equal shares as ordered by the court below in favour of the new administrator.
- (vi) This file is closed.

**DELIVERED, DATED, and SIGNED** at **NYERI** on this **9<sup>th</sup>** day of **March, 2026**. Judgment delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**  
**JUDGE**

**In the presence of: -**

Mr. Odero for the Appellant

No Appearance for the Respondents

Court Assistant: Nderitu M.