

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT HOMA BAY**  
**SUCCESSION APPEAL NO. E061 OF 2024**

**JACOB OCHIENG ONGAWA.....APPELLANT**

**VERSUS**

**BARRACK AMOLO OCHARO.....RESPONDENT**

**(Being an appeal from the ruling of Hon. S.O. Ongeri (Senior Principal Magistrate) delivered on 24<sup>th</sup> September 2024 in Oyugis PMC Succession Cause No. 517 of 2021)**

**JUDGMENT**

**1. Introduction**

1. This is a first appeal arising from the ruling of the Senior Principal Magistrate at Oyugis delivered on 24<sup>th</sup> September 2024 in Succession Cause No. 517 of 2021 concerning the estate of the late Arogo Okuna.
2. The dispute relates to the mode of distribution of the only known asset of the estate namely Land Parcel No. Kabondo/Kodhoch West/81 measuring approximately 3.40 hectares.
3. The appellant, who is the administrator of the estate, had proposed that the estate be distributed among the three beneficiaries in the following proportions:
  1. Jacob Ochieng Ong’awa – 1.99 Ha
  2. David Ouma Ochieng – 1.05 Ha
  3. Barrack Amolo Ocharo – 0.70 Ha

This mode of distribution was based on a survey allegedly conducted in February 2023 reflecting the existing boundaries on the ground.

4. The respondent filed an affidavit of protest challenging the proposed distribution and contending that the estate ought to be distributed equally among the beneficiaries.
5. Upon considering the protest, affidavits and submissions, the trial court held that the appellant had not proved that the deceased had distributed his land during his lifetime and ordered that the land be distributed equally among the beneficiaries.
6. Being dissatisfied with that decision, the appellant filed the present appeal.

## **2. Grounds of Appeal**

From the Memorandum of Appeal, the appellant raises several grounds which may be summarized as follows:

1. The trial magistrate erred in law and fact by failing to recognize that the deceased had distributed the land to his sons during his lifetime.
2. The magistrate failed to appreciate that the beneficiaries had been in possession of their respective portions for over fifty years.
3. The court disregarded the provisions of Section 42 of the Law of Succession Act which protects gifts or settlements made by a deceased person during his lifetime.
4. The court wrongly held that the appellant had not discharged the burden of proof.
5. The magistrate erred by declining the appellant's request to call viva voce evidence and instead directing that the matter be determined through written submissions.

The appellant therefore seeks that the ruling of the trial court be set aside and that the estate be distributed according to the proposed survey report.

### **3. Duty of the First Appellate Court**

This being a first appeal, this Court is obliged to re-evaluate the evidence on record and draw its own independent conclusions while bearing in mind that it did not have the advantage of seeing or hearing the witnesses.

This principle was stated in *Selle & Another v Associated Motor Boat Co. Ltd* (1968) EA 123 where the Court of Appeal held that a first appellate court must reconsider the evidence, evaluate it itself and draw its own conclusions.

### **4. Issues for Determination**

Having considered the record of appeal and the submissions of the parties, the following issues arise for determination:

1. Whether the deceased distributed Land Parcel No. Kabondo/Kodhoch West/81 during his lifetime.
2. Whether the trial court erred in ordering equal distribution of the estate.
3. Whether the appellant was denied an opportunity to adduce oral evidence.

### **5. Whether the deceased distributed the land during his lifetime**

The appellant's case is that the deceased subdivided the land between his two sons, whose respective descendants later occupied the portions. He contends that the current distribution reflects the boundaries established long ago.

The respondent on the other hand denied that such distribution ever took place and maintained that the estate should be shared equally among the beneficiaries.

The law recognizes that a deceased person may distribute property during his lifetime. Section 42 of the Law of Succession Act provides that property given by a deceased person during his lifetime shall be taken into account in determining the share of the net intestate estate.

However, the party alleging such distribution bears the burden of proving it.

In *In re Estate of Stanley Kori Kiongo (Deceased)* [2016] eKLR, the court held that allegations that a deceased distributed property during his lifetime must be proved by clear and cogent evidence and the court must be satisfied that the distribution actually occurred.

Similarly, in *Martha Wanjiku Waweru v Mary Wambui Waweru* [2013] eKLR, the court held that where a deceased person clearly distributed his property during his lifetime and beneficiaries took possession accordingly, the court ought to respect those wishes.

In the present case, the appellant relied mainly on:

1. his affidavit evidence;
2. the alleged long occupation by beneficiaries; and
3. a survey report prepared in February 2023.

However, the record shows that the deceased died in 1973 long before the adjudication and registration of the property in the current title. It raises doubt as to whether the deceased could have formally distributed the registered land.

Further, no documentary or independent evidence such as clan resolutions, witnesses or adjudication records was produced to confirm that the deceased carried out such distribution.

The alleged distribution therefore remained largely unsupported by independent evidence.

I therefore agree with the trial magistrate that the appellant did not satisfactorily prove that the deceased distributed the land during his lifetime.

## **6. Whether the appellant was denied an opportunity to call oral evidence**

The appellant also argued that the trial court denied him an opportunity to call viva voce evidence.

The record however shows that the court directed the parties to file written submissions after considering that the issues raised could be determined on the basis of the affidavits and documents filed.

The appellant did not demonstrate how the alleged oral evidence would have materially altered the outcome of the case. In any event parties are bound by their pleadings and this being a succession matter, such evidence in support of the ought to have been annexed to the further affidavit which was not done.

Courts have discretion under the Probate and Administration Rules to determine matters through affidavit evidence where appropriate.

I therefore find no prejudice occasioned to the appellant.

## **7. Whether the estate ought to be distributed equally**

It is not disputed that the deceased died intestate.

Under Section 38 of the Law of Succession Act, where an intestate leaves children but no spouse, the net estate shall devolve equally among the surviving children.

In this case the beneficiaries before the court are grandchildren of the deceased but they stand in the place of their respective parents. The proposed distribution was that the estate was to be distributed as follows:

Jacob Ochieng Ong'awa – 1.99 Ha

David Ouma Ochieng – 1.05 Ha

Barrack Amolo Ocharo – 0.70 Ha.

It is interesting to note that the petitioners are administrators of the estate of deceased and they proposed to inherit a lions share of the estate. The beneficiaries are said to be the grandsons of the deceased representing their fathers who were sons to the deceased. Even without looking at the survey

report, this distribution is prima facie discriminatory and in breach of Article 27 of the Constitution. The said Article provides that; - 27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

In the absence of credible evidence that the deceased distributed the land during his lifetime, the applicable principle is equality of distribution among the beneficiaries under section 38 of The Law Succession Act.

The learned trial magistrate therefore correctly applied the law in directing that the property be shared equally

## **8. Conclusion**

Having carefully re-evaluated the entire record of appeal and the submissions of the parties, I am satisfied that the learned trial magistrate properly evaluated the evidence and correctly applied the law and arrived at the decision that the estate be shared equally amongst the beneficiaries.

## **9. Orders**

Accordingly, the Court makes the following orders:

- a. The appeal is dismissed in its entirety.
- b. The ruling of the Senior Principal Magistrate delivered on 24<sup>th</sup> September 2024 in Oyugis PMC Succession Cause No. 517 of 2021 is hereby upheld.
- c. The estate property Land Parcel No. Kabondo/Kodhoch West/81 shall be distributed equally among the beneficiaries as ordered by the trial court.
- d. Administration be concluded within 120 days from today.
- e. Mention on 29.6.26 before the trial Court to confirm compliance with order no. (d) herein above.

- f. Since the parties are family members, each party shall bear his own costs of the appeal.
- g. Right of appeal.

**T.A ODERA**  
**JUDGE**  
**11.3.26**

**Delivered, virtually via Teams Platform on this 11<sup>th</sup> day of March 2026, in the Presence of:**

Miss Omollo Achieng for the Appellant

N/A For Respondent

Court Assistant - Ogendo