

REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL NO. E096 OF 2024

IN THE MATTER OF THE ESTATE OF JOASH OKOTH OCHIENG
(DECEASED)

FLORECENCE AKINYI OKOTH.....

APPELLANT

VERSUS

EDDAH MUSIMBI GACHUKIA..... 1ST
RESPONDENT

MARY ATIENO OTIENO..... 2ND
RESPONDENT

NOON OTIENO BWANA..... 3RD
RESPONDENT

JUDGMENT

1. The Appellant was aggrieved with the finding of the lower court in the Ruling dated 30.10.2024 and delivered at Rongo in Succession Cause No. 120 of 2023 by Hon. C.N.C. Oruo, Principal Magistrate.
2. In the said ruling, the court made the following findings:
 - a) Florence Akinyi Okoth and Eddah Musimbi Gachukia being the wives of Josiah Okoth Ochieng (Deceased) agree to equally share the property of the Deceased.
 - b) Edda Musimbi Gachukia to live in the same compound with Florence Akinyi Okoth, and that the compound

shall be divided into equal shares between both parties.

3. The Ruling followed an objection dated 30.10.2024. In the objection, the Appellant contended that she was the only wife of the deceased with whom they had together 6 children. Therefore, the Appellant's case was that the letters of administration can only be granted to her and not the Respondents.

4. The matter proceeded to mediation where parties recorded a partial consent thus:

Florence Akinyi Okoth and Eddah Musimbi Gachukia being the wives of Josiah Okoth Ochieng (Deceased) agree to equally share the property of the Deceased.

5. The lower court proceed to adopt the partial consent. The court also noted that the issue that was not agreed upon in the mediation was whether Florence Akinyi Okoth and Eddah Musimbi Gachukia should stay in the same compound as Eddah Musimbi Gachukia had declined to stay with Florence in the same compound.

6. The Court then directed Edda Musimbi Gachukia to live in the same compound with Florence Akinyi Okoth and that the compound shall be divided into equal shares between both parties.

7. Aggrieved, the Appellant lodged the Memorandum of Appeal dated 22.11.2024 raising material grounds as follows:

- (a) There was no agreement from the mediation.
- (b) The deceased was monogamous with Appellant as only wife.
- (c) The chief's letter introduced non-beneficiaries and left out beneficiaries.
- (d) A polygamous marriage never existed.

Submissions

8. The Appellant filed submissions dated 16.12.2025. It was submitted that the court misapprehended evidence that the chief's letter was written in conspiracy. Reliance was based on **In Re Murathe Mwaria (Deceased)** and Section 76 of the Law of Succession Act to submit that the procedure for obtaining grant was defective.

9. The Appellant also submitted that the court disregarded the marriage certificate produced in evidence, which showed that the Appellant was the only wife. Reliance was placed on Section 35 of the Law of Succession Act and Section 107 of the Evidence Act.

Analysis

10. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind

that a subordinate court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

11. 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. 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 it 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.”

12. The duty of the first appellate court was set out in the 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 re-subordinate and the Court of Appeal is not bound to follow the subordinate 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.”

13. This court has neither seen nor heard the witnesses. It is the subordinate court that has observed the demeanor and truthfulness of those witnesses. 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.

14. This court's jurisdiction to review the evidence should be exercised with caution. In the cases 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..."

15. The appeal arises from an order that was given in a mediation. The Appellant denies the order, but evidence shows there was an agreement, and there was no protest against the confirmation of the grant. It is not in dispute that the grant was issued to both Florence Akinyi Okoth and Eddah Musimbi Gachukia as joint administrators.

16. The court has to preserve and respect orders issued under alternative dispute resolution. As the Supreme Court in Nyutu

Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) (2019) eKLR observed, this judicial interference can only be countenanced in exceptional instances. The Supreme Court stressed the need for adherence to the principle of party autonomy, which requires a high degree of deference to arbitral decisions and minimizes the scope for intervention by the courts.

17. In this case, there is a mediation settlement agreement dated 26.7.2024 with an attendance schedule demonstrating that the Appellant signed it.

18. The matters now alleged in the appeal were not before the lower court for determination. Objection proceedings are different from Protest proceedings.

19. Objection proceedings are provided for under **Sections 67, 68 and 69 of the Law of Succession Act, Cap 160, Laws of Kenya**. The relevant provisions provide as follows:

67. Notice of application for grant

(1) No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for such grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of

publication, and the period so specified has expired.

(2) A notice under subsection (1) shall be exhibited conspicuously in the court-house, and also published in such other manner as the court directs.

68.Objections to application

(1)Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by such notice as aforesaid, or such longer period as the court may allow.

(2)Where notice of objection has been lodged under sub-section (1), the court shall give notice to the objector to file an answer to the application and a cross-application within a specified period.

69.Procedure after notice and objections

(1)Where a notice of objection has been lodged under subsection (1) of section 68, but no answer or cross-application has been filed as required under subsection (2) of that section, a grant may be made in accordance with the original application.

(2)Where an answer and a cross-application have been filed under subsection (2) of section 68, the court shall proceed to determine the dispute.

76.Revocation or annulment of grant. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion..."

20. The Appellant did not invoke any attack on the process of confirmation of the grant as earlier observed herein. This ought to have been filed as a protest, but it was not.

21. Based on the above, I find no difficulty in holding that the appeal is not supported and will fail. I will, however, add one aspect to the question of the compound. The court was right in ordering that the compound be divided equally. It, however, does not have the authority to direct the parties to live there. A succession court can only subdivide the land and not direct who lives and who does not live. The appellant also has no power to send away parties who wish to live in the compound. Conversely, a party that wishes to live in the compound cannot prevent the other party from living there

22. There is a constitutional imperative that everyone has a right to own property anywhere. Article 40(1) provides as follows:

- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-*
- (a) of any description; and*
 - (b) in any part of Kenya.*

23. Before I depart, I need to disabuse the appellant that she is not the only widow. The record shows that she gave birth to children with the deceased, the last one having been born in the year 2000. Thereafter, she went with the deceased to a catholic church to solemnize a wedding, shortly before he

died. The chief's letters show that there were wives in the family other than herself. Therefore, the mere fact that she solemnized the marriage after a long time of being either in a customary state or cohabitation does not, by and of itself, dissolve the other marriages. It only shows that the deceased entered into a monogamous marriage when he had no capacity to do so.

24. If it is true that they married at the age of 59, then there is no way the children born between 1982 and 2000 can be a product of that marriage. In the case of **Scolastica Ndululu Suva v Agnes Nthenya Suva [2019] KECA 1053 (KLR)**, the court of appeal [E. M. Githinji, Hannah Okwengu & J. Mohammed, JJA], held as follows:

[12] The deceased died intestate and therefore the administration of his estate is governed by the provisions of the Law of Succession Act. In his lifetime, the deceased had three (3) wives. The 1st wife who was mother to the interested party Mark Suva walked out of the marriage and is not party to these proceedings. The 2nd wife was the respondent whom the deceased first married under the Kamba Customary law in September, 1971 and then wedded in church under the African Marriage and Divorce Act in 1975. There are five issues of this marriage. The 3rd wife is the appellant whom the deceased married under the Kamba Customary Law in 1983 and with whom he had five (5) children. An attempt was made to question the validity of the appellant's marriage to the deceased during the subsistence of his monogamous marriage to the respondent.

However, **section 3(5)** of the **Law of Succession Act** is clear that the appellant is nevertheless a wife for the purposes of **sections 29 & 40** of the **Law of Succession Act**. Thus, the deceased beneficiaries are therefore, the appellant and her five (5) children, the respondent and her five (5) children and the interested party all totaling to thirteen (13) beneficiaries.

25. The case above dealt with a scenario where the subsequent marriage was under custom. It follows that there is no court that will find that women who were married properly under the custom can be excluded. Had the appellant been serious she could have raised issues with the grant of joint letters or sought for revocation. What she did was to protest a mediation agreement she signed. Indeed, she did not even apply to set the agreement aside. What appears to have happened is that she agreed but received advice from interested busy bodies to appeal. Her only contention was whether she should live in the same compound as the respondent. This is the court's decision regarding the subdivision of the compound. Once it is subdivided, it will be a different plot. The appellant will have the right to erect a China wall between the two equal plots or even a laser wire. The right she does not have is to send the co-wife away from the said parcel.

26. In effect, therefore, the appeal is dismissed except for the correct decision on whether the parties should live in the compound. They have shared the compound equally, but no

one can exclude the other or force the other to live in her own part of the compound.

27. 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.

28. 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.

29. Given the delicate balance for people living in the same household, for long-term peace, each party should bear its own costs.

30. The court notes that the appeal is unnecessary; however, parties have a right to approach the court. On a happy note, the last appeal is under this question. Section 50(1) of the Succession Act 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.

31. It is my sincere hope that parties will live in harmony and peace.

Determination

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

- a) The appeal is allowed in part to a very small extent, as follows:
 - (i) The order to share the land and compound equally is upheld as per the mediation agreement.
 - (ii) The order that the parties live in the same compound is set aside. In lieu thereof, I issue an order directing that the compound will be divided equally, but each party will utilize their portion. No party will force them to live in their respective portions.
 - (iii) For avoidance of doubt, the widows will hold titles in trust for their children, equally.
 - (iv) The rest of the appeal is dismissed.
- b) Each party shall bear own costs.

DELIVERED, DATED and SIGNED at **NYERI** on this **30th** day of **April, 2026**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the presence of: -

Mr. Tonge Yoga for the Appellant

No appearance for the Respondents

Court Assistant - Martin/Michael

ORIGINAL