Misigo v Onguka (Civil Appeal 35 of 2020) [2026] KECA 769 (KLR) (24 April 2026) (Judgment)

Neutral citation: [2026] KECA 769 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 35 OF 2020

MS ASIKE-MAKHANDIA, HA OMONDI & LK KIMARU, JJA

APRIL 24, 2026

BETWEEN

ABISALOM KAYERA MISIGO ..... APPELLANT

AND

TOM WILLIAM ONGUKA ..... RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Kakamega (Njagi, J.) dated 9th October 2019inCause No. 851 of 2012)

JUDGMENT

1. Aluoch Obara alias Aluocuhi Ubala, the deceased, passed away on the 12th May 1975. At the time of his death, he was registered as the proprietor of land parcel number Kakamega/Lusiola/1096, hereinafter "the suit land ". A Grant of letters of administration intestate was issued to Abisalom Kayera Misigo, the appellant on the 9th October 2012.

2. Vide Summons for confirmation of grant dated 20th February 2015, the appellant herein petitioned for confirmation of the issued to him on the 9th October 2012 on the grounds that he was a son to the deceased who at the time of his death was the registered proprietor of the suit land having distributed his other lands to his other sons and thus the suit land had been set aside for the appellant.

3. The application was opposed by the respondent, Tom William Nguka, (the protestor) vide a protest dated 18th May, 2015 on the grounds that the appellant was not a son of the deceased; that the deceased had only one wife, Naomi Sagina, with whom he was blessed with three children – William Nguka Alwoch, John Erotso, and Zipporah Kanaiza Ayiende; that the protestor was the son of the late William Nguka Alwoch. He sought that the estate of the deceased be distributed to the beneficiaries of the deceased in accordance with his protest.

4. In his determination, the learned judge found that the appellant was not the deceased's son, but the son of the deceased's brother, Misigo; that that the protestor, being the deceased's grandson, along with

his siblings and the heirs of his uncle and aunt, John Erotso and Zipporah Kanaiza respectively, were the rightful beneficiaries of the deceased's estate. Consequently, the court dismissed the appellant's summons for confirmation of grant, revoked the letters a grant of letters of administration intestate previously issued to him, ordered that a fresh grant be issued in the name of the respondent; and distributed the suit land as set out in the protest.

5. Aggrieved by the decision of the High Court, the appellant challenged that outcome on grounds that:

    a. That the learned judge erred in law and in fact by failing to appreciate that the petitioner was the son of the deceased Aluoch Obara.

    b. That the learned judge erred in law and in fact by failing to appreciate that the deceased having sired the petitioner then the petitioner had all the rights of a son to inherit from the deceased.

    c. That the learned judge erred in law and fact by failing to appreciate that the other son had been allocated land being Kakamega/Lusiola/1096 for William Nguka and Kakamega/Lusiola/1100 John Erutso.

    d. That the learned judge erred in law and fact by failing to appreciate that land parcel no. Kakamega/Lusiola/1096 which was allocated to the 1st House is actually the matrimonial home for the appellant.

    e. That the learned judge erred in law and fact by failing to appreciate that the appellant was the only surviving son of the deceased and hence the one to inherit the parcel of the land known as Kakamega/Lusiola/1096.

    The appellant thus prayed that this appeal be allowed; the appellant be allowed to retain Plot No. Kakamega/Lusiola/1096; and be awarded costs of this appeal.

6. In support of this appeal, the appellant through the written submissions filed on his behalf by the firm of M.N. Oonge Advocate reiterates that he is the son of the deceased as his mother was inherited by the deceased, who was the brother to the appellant's biological father; that the deceased fathered the appellant and named him Misigo. He contends that according to section 29(b) of the *Law of Succession Act*, he is a dependant of the deceased by virtue of being his step-child thus has a right to benefit from his estate.

7. The appellant argues that the respondent being a grandchild of the deceased cannot inherit directly from the deceased but through his parents, maintaining that prior to his death, the deceased sub-divided his land into 3 portions and had the same allocated to his 3 sons with the suit land herein being reserved for him.

8. That in any event the suit land is matrimonial property as the deceased resided thereon together with his wife, the appellant's mother and the appellant. That as such the appeal is merited and it ought to be allowed.

9. The respondent did not file any written submissions, and there is on record a Notice of Non-Compliance date 23rd June 2025, signed by the Deputy Registrar.

10. This is a first appeal. The Court's mandate as the first appellate court is to re-evaluate the evidence, assess it and reach a conclusion. Rule 31(1) of the Court of Appeal Rules 2022 provides that:

    1. On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power:

        a. to re-appraise the evidence and to draw Inferences of fact.

See also this Court's decision in Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR.

11. Having carefully considered the record, it is evident that this appeal turns on the issue of the appellant's paternity. Consequently, the issue for determination before this court is whether the learned judge erroneously disinherited the appellant as a son of the deceased; and for failing to find that the appellant had been allocated the suit land.

12. The appellant pleaded before the High Court that he is a son of the deceased by virtue of his mother, Rose Mmbone, having been inherited by the deceased. He reiterated the same in his testimony. In cross-examination, the appellant stated that his last name in his national Identity Card was Misigo. That this was the name of his biological father and not that of the deceased herein.

13. The appellant's case was further supported by the testimony of his brother Meshack Obala Misigo, who testifying as, DW2, confirmed that the deceased was his uncle, but had 3 sons namely- William Nguka, John Mguke and the appellant. That during land registration the deceased sub-divided the suit land into 3 for his 3 sons prior to his death, gave land to William and Mguke but reserved the appellant's portion under his name because the appellant was not present during land registration; the respondent is a son to William Nguka and that his share fell on the portion given to his father.

14. The respondent who described himself as a grandson to Aluochi Ubala, (variously referred to as Alwuoch Obala), the deceased, was stirred into action when he received a letter from the appellant's advocate, warning him not to interfere with the suit land; and threatening to evict him therefrom, as the appellant had settled his family thereon. He learnt that the appellant had obtained grant of letters of administration of the deceased's estate, yet as far as he knew, the appellant was not a son of the deceased, who only had 3 children, William Anguko Oluoch, his father, John Erodho Aluoch and Zipporah Kanaiza Ayenda. He also conducted a search and realized that the appellant had transferred the suit land which belonged to the deceased, to his sole name, on 20th July 2010 under the pretext that he had purchased it from the deceased. This is what propelled him being served with an eviction notice.

15. Eventually, the respondent was able to persuade the Land Registrar to cancel the registration of the appellant from that suit land; and it reverted to the name of the deceased. The respondent then placed a restriction on the suit land, saying his late father William Nguka had purchased parcel No 1099 and not been given the same by the deceased as alleged by the appellant; that he had lived on suit land since birth; had constructed a house and lived there with his family. The respondent was perturbed that the appellant had petitioned for confirmation of grant of letters of administration in respect of the deceased's estate, yet he was not the latter's son but a nephew, being the son to deceased's brother. Consequently, the respondent filed a protest to the confirmation of the grant.

16. The respondent's case was supported by the testimony of PW2, Zipporah Kanaiza Ayende, his aunt and daughter of the deceased. She testified that the deceased had 3 children, one of whom had died and was survived by the respondent herein and his siblings and 2 others who were alive. In cross-examination the PW2 testified that the appellant was a child of her uncle Misigo who died before the deceased. However, she denied that the deceased took care of the appellant prior to his death.

17. Abraham Vusaka Mutimuli, PW3, a clans-mate to the deceased, confirmed that the late Aluoch and the late Misigo were brothers who had both inherited land belonging to their father Obara, which they shared out between themselves, and each had his own share together with their respective children. The brothers lived peacefully on their respective portions, but after their deaths, the appellant whom the witness referred to as a son of Misigo started demanding a share of Aluoch's shamba. He was categorical that that the deceased had one wife, Naomi Sagina; and three children namely William Nguka Alwoch, John Erotso Alwoch and Zipporah Kanaiza Ayiende; That the respondent is a son to William Nguka.

18. In making a finding in favour of the respondent, the learned judge stated:

> " The petitioner stated that the name in his identity card is Abisalom Kayere Misigo. There is nothing placed before the court to proof that the petitioner is a son to the deceased. The petitioner said that he was born in 1943. He is therefore making allegations on matters that took place more than 70 years ago. The allegations are just the word of the petitioner and his brother DW2 on one hand and the protestor and his witnesses, PW2 and PW3 on the other hand. The burden of proof is always on the person who alleges. The petitioner did not discharge that burden to proof that he is a son of the deceased. The deceased died in 1975. The petitioner did not demand any land from the deceased before the deceased died. He is making the claim over the land after the death of the deceased. There is nothing in the title deed to show that the deceased had retained the land in his name in trust for the petitioner. The land was therefore the free property of the deceased at the time of his death for which the petitioner had no interest.
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> ...
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> ... Is the petitioner then claiming the land on the basis that he bought it from the deceased or is it because he is a son to the deceased? The petitioner migrated to Migori in 1980. This was 5 years after the death of the deceased. He came back to claim the land from the protestor in 2012 which was 32 years later after his migration to Migori. He said that it is the protestor's mother who was at the time utilizing the land. Why would he have stayed away from the land for 32 years and come back to stake his claim on the land? The petitioner has admitted that his mother was a wife to a brother to the deceased called Misigo. The petitioner's surname as per his identity card is Misigo. He did not assume the name of the deceased Aluoch Obara when he registered for an identity card. He instead assumed the name of Misigo. That is prima facie evidence that he is a son to Misigo who must have been his father. The petitioner has failed to prove that he is a son to the deceased."

19. It is this finding that aggrieved the appellant, leading to this appeal.

20. From the foregoing, it is evident that the appellant's claim to the deceased''s estate was anchored on the contention that he was the deceased's son by virtue of his mother having been inherited by the deceased.

21. It is trite that he who alleges must proof. The appellant asserted that his mother was inherited by the deceased. We must note that wife inheritance is a customary law practice. It is trite law that a person who seeks to propound customary law practice must call evidence to prove the existence of that customary law practice. In Sakina Sote Kaittany & another vs. Mary Wamaitha [1995] eKLR, Gicheru, JA (as he then was) had this to say concerning proof of customary law and practices:

> " The onus of proof to establish a particular customary law rests on the party who relies on that law in support of his case... As a matter of necessity the customary law must accurately and definitely established. The court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward the customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially, of the present apparent lack in Kenya of authoritative text books on the subject, or of any relevant case law, this would in practice, usually mean that the party propounding the customary law would have to call evidence to prove that customary law, as he would prove the relevant facts of his case."

22. The onus was on appellant to bring in an expert in Luhya customary law to support his claim. He failed to do so. Yet, even if the court were to overlook his paternity and assume that he was a dependent of the deceased, a dependent under section 29

    a. and (c) of the *Law of Succession Act* must prove that he or she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency that counts. The appellant also failed to prove this.

23. We are unable to find fault with the trial judge's findings of fact that the appellant is the son of the late Misigo who was a brother to the deceased. The appellant has no basis in law, upon which to claim in priority in succession to the estate as compared to the respondents who were grandchildren to the deceased. In any case, according to the record, the late Misigo was given land by his father, it is that land wherein the appellant's portion lies.

24. Accordingly, we are satisfied that the appellant failed to prove that he was a son of the deceased as to qualify him as a dependant within the provision of section 29 of the *Law of Succession Act*. The upshot is that there is no merit in this appeal and it is dismissed with costs to be borne by the appellant.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF APRIL, 2026.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

.....

H. A. OMONDI

JUDGE OF APPEAL

.....

L. KIMARU

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR