

REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION APPEAL NO. E028 OF 2024

IN THE MATTER OF THE ESTATE OF NGORONGO KIBE
(DECEASED)

ORIGINAL

CHARLES NGORONGO WANG'ONDU.....	1ST
APPELLANT	
BENARD MWAI WANG'ONDU.....	2ND
APPELLANT	
IRENE WAMUCII WANG'ONDU.....	
3RD APPELLANT	
GLADYS MWERU WANG'ONDU.....	4TH
APPELLANT	
DANIEL WAITITU WANG'ONDU.....	5TH
APPELLANT	
PETER NGORONGO MAKANGA.....	6TH
APPELLANT	
WANGECHI NGORONGO.....	7TH
APPELLANT	
CAROLINE MURINGI WANJIKU.....	8TH
APPELLANT	
MARGARET WANGECHI WANJIKU.....	9TH
APPELLANT	
FAITH WANGARI WANJIKU.....	
10TH APPELLANT	
IRENE WAMUCII WANJIKU.....	
11TH APPELLANT	
GLADYS MWERU WANJIKU.....	
12TH APPELLANT	
ESTHER WANJIRU WANJIKU.....	
13TH APPELLANT	

SAMANTHA DIANA KAMAU.....
14TH APPELLANT MERCY WACUU
KAMAU..... 15TH APPELLANT

VERSUS

HELLEN WANGECHI MAKANGA.....
RESPONDENT

JUDGMENT

1. This is an appeal from the Ruling of Hon. N.W. Wanja (Resident Magistrate) dated 25.10.2024 in Othaya PMCSUCC Cause No. E080 of 2021.
2. The Memorandum of Appeal dated 18.9.2023 raised the following grounds of appeal:
 - (a) The learned magistrate erred in law and fact by finding that the Appellants, who were the grandchildren and great-grandchildren of the deceased, were not entitled to inherit through their mother and grandmother, who is the sister-in-law of the deceased, contrary to law.
 - (b) The learned magistrate erred in law and fact in finding that the appellants could not inherit directly from their grandfather/great-grandfather since their grandmother/great-grandmother was still alive, who was the daughter-in-law of the deceased.
 - (c) The learned magistrate erred in law and fact in ignoring the fact that the Appellant's father/grandfather,

who was a direct beneficiary of the estate, was deceased and the Appellants were entitled to inherit.

- (d) The learned magistrate erred in law and fact in referring to the Appellants as strangers even after establishing and finding that they were grandchildren/great-grandchildren of the deceased.
- (e) The learned magistrate erred in law and fact in holding that the Respondent had not obtained the grant fraudulently despite evidence that she concealed the existence of blood relatives who were the Appellants.
- (f) The learned magistrate erred in law and fact in finding that the Appellants had been provided for through their mother/grandmother, who was not a blood relative of the deceased, and in fact, when they were not provided for at all.
- (g) The learned magistrate erred in law and fact in failing to find that the Respondent had dishonestly allocated to herself and her siblings a bigger share at the expense of other beneficiaries.

Pleadings

3. By the Summons for Confirmation of Grant dated 28.3.2022 and filed by the Respondent, the Respondent sought a Certificate of Confirmation of Grant in respect of the grant of letters of administration intestate dated 29.9.2021.

4. The Respondent was the administratrix. The deceased died on 24.10.1978. He was the registered owner of the estate subject to these succession proceedings. It is described as Plot No. 561/91.

5. In the Affidavit in support of the Summons for Confirmation of Grant, the Respondent described under paragraph 5 thereof the beneficiaries and their shares as follows:

<u>Beneficiaries</u>	<u>Share</u>
a. Mary Wangechi Maina Alice Wanjiru Ndungu Monica Wambui Maina John Theuri Maina	1/7 equally
b. Lawrence Wanjiru Makanga	1/7 absolutely
c. Sarah Muringi Wang'ondy	1/7 absolutely
d. Irene Wangechi Penter Ngorongo	1/7 equally
e. Consolata Nyawira Ngorongo	1/7 absolutely
f. Hellen Wangechi Makanga	1/7 absolutely
g. Regina Nyawira Nderi	1/7 absolutely

6. The Appellants filed a summons for revocation of the grant dated 17.4.2024, supported by the affidavit sworn by Charles Ngorongo. By the said Affidavit, it was deposed as follows:

- a) The 1st to 7th Appellants were grandchildren of the deceased.

- b) The 8th to 15th Appellants were great-grandchildren of the deceased.
- c) The Respondent's mother, 1st to 5th Appellant's father (John Wang'onde Ngorongo), and the 6th and 7th Appellant's father (Peter Ngorongo Kibe) were children of the same father.
- d) The 1st to 7th Appellants were beneficiaries just as the Respondent was.
- e) The 8th to 13th Appellants were children of their late sister Veronica Wanjiku Wang'onde,
- f) The 14th and 15th Appellants were children of the late Naftali Makanga Wang'onde.
- g) The Respondent did not disclose and deliberately concealed the existence of the Appellants when applying for the grant.
- h) The Respondent had allocated herself and her siblings bigger shares to disinherit other beneficiaries.

7. The Respondent filed her Replying Affidavit dated 22.5.2024 by which she deposed in material as follows:

- (a) The 1st to 5th Appellants were children of Sarah Muringi Wangonde, who is the daughter-in-law of the deceased and who was adequately provided for in the summons for confirmation of grant.
- (b) The 6th and 7th Appellants are siblings, and the 6th Appellant had come to court with unclean hands, having sold the estate to one John Wangonde Ngorongo.

- (c) The Appellants never made an objection to the making of the grant.
- (d) The 8th to 13th Appellants are grandchildren of Sarah Muringi Wangonde, who was provided for.
- (e) The 14th and 15th Appellants are grandchildren of Sarah Muringi Wangonde, who was provided for.
8. In his joinder supplementary affidavit sworn on 18.6.2024, the 1st Appellant stated that the 1st to 5th Appellants were children of Sarah Muringi Wangonde but they were not adequately provided for as the said Sarah was allocated 1/7 absolutely not to hold on their behalf.
9. It was also deposed that the proposal was not equitable as the house of Sarah, which would have 6 people, only got 1/7 share, expected to extend to the 8th to 15th Appellants, making a total of 14 persons.
10. The Appellants also contended that they had stayed in the estate for over 40 years.

Submissions

11. The Appellants filed submissions dated 13.6.2025. They submitted that the court erred in finding that they could not inherit directly from the deceased's estate.

12. It was submitted that the court misapplied **Re Estate of Wahome Njoki Wakagoto (2013) eKLR** as Sarah Muringi Wangondu was not a blood relative of the deceased.
13. The Appellants relied on **Re Estate of Emoli Luhitse Paul (2021) KEHC 1389 KLR**, based on which it was submitted that, as the Appellants could not inherit through their mother, who was the deceased's daughter-in-law and not a biological kin of the deceased.
14. They submitted further that they did not need chief's letter to be joined in the proceedings. They relied on *Re Estate of Emoli (supra)*.
15. Further, it was submitted that the Respondent concealed the existence of the Appellants. They cited, inter alia, **Re Estate of Moses Wachira Kimotho (2009) eKLR**.
16. The Respondent also filed submissions dated 16.9.2025. She submitted that the case of **Re Estate of Wahome Njoki Wakagoto (2013) eKLR** was correctly applied as the Appellants had been provided for through their mother.
17. It was submitted that under Section 35(1) of the Law of Succession Act, the interest of Sarah Muringi Wangondu was a life interest in the estate, which would devolve upon the Appellants on her demise. Reliance was placed, inter alia, on **Re Estate of Florence Mukami Kinyua (2018) eKLR**.

18. The Respondent also submitted that the Appellants did not prove any concealment of material facts or nondisclosure within the meaning of Section 76 of the Law of Succession Act to revoke the grant. They relied inter alia on **Ndolo v Ndolo (2008) eKLR** to submit that an allegation of fraud must be strictly proved.

19. She submitted that the provision of 1/7 share to Sarah Muringi Wangonde was reasonable and adequate as each child of the deceased was entitled to an equal share.

Analysis

20. 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.

21. 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-trial 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.

22. The Court is to bear in mind that it had 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.

23. 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...

24. This court does not have the advantage of seeing and hearing the witnesses as did the lower court, yet it must reconsider the evidence, evaluate it itself, and draw its own conclusions.

25. The Appellants sought to revoke the Grant and get a reasonable provision from the estate of their deceased grandfather/great-grandfather. The burden was on the Appellants to prove their assertions. 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.

26. This is not a criminal trial. It is a civil trial in which the court must find for one party or the other on the balance of probabilities. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in **William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526** as follows:

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 more probable than not that the allegations that he made occurred.

27. This was further enunciated in the case of **Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions [2015] KECA 616 (KLR)**, where the Court of Appeal [J Karanja, GG Okwengu, CM Kariuki, JJA] stated as follows:

The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in *Miller -vs- Minister of Pensions* [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-

That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.

28. The Appellants maintained that the share of 1/7 to their mother/grandmother was not a direct share to them, their mother/grandmother was not a blood relative, and they could only inherit through their deceased grandfather/great-grandfather. It was their case that the 1/7 share from the estate was a share to Sarah Muringi Wangonde and was inadequate for their number, and would amount to 14 of them sharing the provided 1/7 share.

29. The Respondent, on the other hand, maintained that the share of 1/7 out of the estate was wholly given to the Appellant's mother/grandmother, and the Appellants were to inherit through their mother/grandmother.

30. Be that as it may, on dependants, the Law of Succession Act (Cap 160 Act defines who is a dependant at Section 29 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.

31. The Appellants were clearly dependents of the deceased but on a lesser priority. The issue was whether a provision to their mother/grandmother of a 1/7 share of the deceased's estate was tantamount to a share for them as grandchildren and great-grandchildren of the deceased.

32. As the Appellants are undisputedly also beneficiaries, under Section 28 of the Law of Succession Act, it is provided as follows:

In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—

a) the nature and amount of the deceased's property;

b) any past, present or future capital or income from any source of the dependant;

c) the existing and future means and needs of the dependant;

d) whether the deceased had made any advancement or other gift to the dependent during his lifetime;

e) the conduct of the dependant in relation to the deceased;

f) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;

g) the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.

33. In the circumstances of this case, there were other beneficiaries as per the schedule of distribution. The size of the deceased's estate was not disclosed, and the court is unable to determine its extent. However, it was described as Plot No. 561/91, Othaya Town. As per paragraph 5 of the supporting affidavit to the summons for confirmation, 7 equal portions were to be subdivided therefrom. I note that 1/7 share was proposed absolutely to Lawrence Wanjiru Makanga, Sarah Muringi Wang'onde, Consolata Nyawira Ngorongo, Hellen Wangechi Makanga and Regina Nyawira Nderi. The remaining 2/7 of the plot was to be shared equally among the six listed beneficiaries.

34. The Appellants' case was that they ought to have shared directly from the estate of the deceased. However, in this case, a share to Sarah Muringi Wang'onde was clearly a share to the deceased's son, Wangonde Ngorongo, who was the spouse of the said Sarah Muringi Wang'onde and the father/grandfather of the Appellants.

35. What is the place of grandchildren in an estate? First section 41 of the Succession Act provides as follows:

Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who pre-decease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.

36. The section provides for children whose parents are heirs and deceased. These are basically grandchildren of deceased parents. The next question is, what is the role of grandchildren whose parents are alive?

37. The grandchildren must be disabused of the fallacy that wives of deceased heirs are not beneficiaries. Section 29 of the Succession Act provides as follows:

For the purposes of this Part, "dependant" means-

- (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, grandparents, 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.

38. A grandmother is an heir to a grandfather. Great-grandchildren cannot disinherit her simply for being the wife of a deceased son. The great-grandchildren and grandchildren must have their time in waiting. In the case of **In re Estate of Nicodemus Asili Ajinga (Deceased)**

[2025] KEHC 2308 (KLR), A. C. Bett J, posited as follows:

A grandchild is not an automatic beneficiary of a deceased. He only becomes a beneficiary by virtue of his relationship with the deceased and can only inherit his parents share of the estate by taking their place. In Re Estate of Wahome Njoki Wakagoto [2013] eKLR, the court held as follows:-“Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents’ indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own

parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”

36. In regard to PW2, PW3 and DW1, they are entitled to inherit the share of their deceased husbands subject to the provisions of Section 35 (1) of the Law of Succession Act which provides:- “Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-

- a. the personal and household effects of the deceased absolutely; and
- b. A life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.”

37. In the case of *Tau Kakungi v. Margethe Thorning Katungi v. Another* [2014] eKLR, the court held as follows:

“The effect of section 35 (1) is that the children of the deceased are not entitled to access the net estate so long as there is surviving a spouse. The children’s right to the property crystallizes upon the determination of the life interest following the death of the life interest holder or her remarriage. Prior to that, the widow would be entitled to exclusive right over the net estate. This means that if the net estate is generating income she would be the person entitled exclusively to the income so generated. The device is designed to safeguard the position of the surviving spouse. The ultimate destination of the net intestate estate where there are surviving children is the children. It is the children who are

entitled of right to the property of their deceased parent. However, if the property passes directly to the children, in cases where there is a surviving spouse, he or she is likely to be exposed to destitution. This would particularly be the case where the surviving spouse was wholly dependent on the departed spouse. She would be left without any means of sustenance.”

39. It is irrelevant that the great-grandchildren of Sarah Muringi Wang’onde are numerous. They must wait for their time on the table. Sarah Muringi Wang’onde is not the widow of the late Ngorongo Kibe (Deceased). Life interest does not apply to her. There must be an end to what life interest is to be held in a matter where it is a daughter-in-law who inherits. The court had an option of sending the 1/7 share to the estate of the late for inheritance, but this would postpone the same problem without any change. This was the court’s discretion. 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.

40. Without adducing evidence that the plot was of such expanse that a share of 1/7 out of it to the Appellants' Mother/Grandmother was so dismal as to amount to disinheritance, the court is unable to interfere with the finding of the lower court on the provisions as suggested by the Respondent.

41. This is so because, whereas the Appellants claimed that they were not directly provided for, they did not renounce an inheritance from the share that their mother/grandmother was given of 1/7 out of the estate. Further, the same sharing principle they sought to dispute would apply to other beneficiaries who received equal shares of 1/7 to hold absolutely and who had children and grandchildren who would wish to share from the deceased's estate.

42. The court had the obligation to do all that it could to ensure equitable distribution for the entire estate of the deceased, and which I find it did, including by protecting the interest of the Appellants through a share to their mother/grandmother. **In re Estate of Jackson Nicholas Kyengo Mulwa (Deceased) [2021] KEHC 1545 (KLR)** the court stated as follows:

32. In the interest of justice, it is paramount that all beneficiaries of the deceased are properly catered for. The Law of

Succession Act, in its very nature, aims at ensuring all beneficiaries of a deceased person and their interests are protected...

43. Therefore, it is the finding and holding of this court that the Appellants did not lay a basis upon which this court can order provision or further provision to them directly out of the estate of the deceased. Like the lower court, I am unable to find a ground based on which to revoke the grant herein. The grounds for revocation or annulment of grant of Letters of Administration are set out in Section 76 of the Law of Succession as follows:

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-

- a. That the proceedings to obtain the grant were defective in substance;
- b. That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- c. That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, notwithstanding that the allegation was made in ignorance or inadvertently;
- d. That the person to whom the grant was made has failed, after due notice and without reasonable cause either-
 - i. To apply for confirmation of the grant within one year from the date thereof,

or such longer period as the court order or allow; or

- ii. To proceed diligently with the administration of the estate; or
- iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

e. That the grant has become useless and inoperative through subsequent circumstances.

44. The court explained the rationale of Section 76 of the Law of Succession Act in **Re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR** where the Court observed as doth:

Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud

and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.

45. The Appellants' interest was well taken care of through their mother/grandmother, and they can only retreat to share in the portion that they were provided with. They cannot seek further provision from an estate that is well covered by other entitled beneficiaries, as the court cannot order that which is more than what is available for sharing.

46. Consequently, I find no basis to fault the reasoning of the lower court. The sole property left by the deceased was available for distribution in the manner proposed in the Respondent's summons for confirmation of grant. However,

that is for the court to deal with. Whether to agree and give Sarah Muringi Wang'ondy absolutely, or as the court will find, it is not within the province of revocation. It is not a question of determination under section 76 of the Succession Act.

47. So long as Sarah Muringi Wang'ondy is their matriarch, the applicants must bid their time. However, should they be tempted to hasten her departure, they will not inherit. Section 96 of the Law of Succession Act provides as follows:

(1) Notwithstanding any other provision of this Act, a person who, while sane, murders another person shall not be entitled directly or indirectly to any share in the estate of the murdered person, and the persons beneficially entitled to shares in the estate of the murdered person shall be ascertained as though the murderer had died immediately before the murdered person.

(2) For the purpose of this section, the conviction of a person in criminal proceedings of the crime of murder shall be sufficient evidence of the fact that the person so convicted committed the murder.

48. There was no material nondisclosure since the appellants are not current dependents who need to be disclosed. They must learn to live under the shadow of their matriarch until her exit in a natural manner. This leaves the issue of costs, which are generally discretionary. The great-grandchild may still wait for eternity. Whether a widow of a beneficiary can

inherit together with children, the court of appeal had occasion, in which I had the privilege, in earlier parts of my life, to argue before the court of appeal successfully, that is, **Sugut v Jemutai & 3 others [2023] KECA 202 (KLR)**. The Court of Appeal, per Kiage, JA posited as follows:

32. Selly also argued that she and her children were dependants of the deceased and are as such entitled to an inheritance of his estate having been under his care before his demise. Section 29 of the Act defines a dependant to mean; '(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'.

33. The learned Judge upon considering this issue found that indeed Selly was a dependant of the deceased in view of the fact that she had been living on the suit land for over 18 years commencing during the life time of the deceased when she would take care of him, as well as cultivate the land and fend for herself and her children. Following this kind of conduct between the deceased and Selly, and pursuant to section 28 of the Act, the learned Judge

was convinced that there was a dependency relationship.

35. Moreover, I find the provisions of section 40 of the Act to be instructive on this issue. The section requires that where a deceased married more than once, his net intestate estate should be divided among the houses according to the number of children per house but also adding the number of wives surviving him as an additional unit. It is common knowledge from the evidence tendered that the deceased had two households. Notably, members of the first house, including Excyty, the alleged husband to Selly, predeceased the deceased and what remained was the second household comprising of Esther and her 8 children, making 9 units.

49. The appellant should take solace that occupation is irrelevant in order to claim interest. In the case of **Gichuki & another v Njenga & 3 others [2026] KECA 374 (KLR)**, the Court of Appeal posited as follows:

In *Isack M’Inanga Kiebia v Isaaya Theuri M’lintari & Another [2018] KESC 22 (KLR)*, the Supreme Court, recognised African customary trusts as overriding interests rooted in customary law. In determining whether a customary trust exists, the nature of the landholding and intention of the parties is important, and where it is established that the land holding was for the benefit of members of the family, a customary trust will be presumed to have been created in favour of the members of the family whether or not they were in possession or catwalk occupation of the land.

26. The Court further held that whether a customary trust exists is to be determined on a case-by-case basis, depending on the evidence. It identified the following as some of the factors to be taken into account:

- i. The land in question was before registration, family, clan or group land.
- ii. The claimant belonged to such family, clan, or group.
- iii. The relationship of the claimant to such family, clan or group was not so remote or tenuous as to make his/her claim idle or adventurous.
- iv. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
- v. The claim was directed against the registered proprietor who was a member of the family, clan or group.

50. Flowing from the foregoing, and on the basis of the law, the appeal lacks merit and is accordingly dismissed.

51. 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.

52. 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.

53. 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.

54. The appellants had no merit whatsoever. They were an unnecessary expense to the respondent. They should bear the modest costs of Ksh. 105,000/=.

Determination

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

- a) The appeal is not merited and is dismissed.
- b) Costs of Ksh. 105,000/= to the Respondent.
- c) File is closed.

DELIVERED, DATED and SIGNED at on this **23rd** day of **April, 2026**.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the presence of: -

No appearance for the Appellants

Mrs. Magua for the Respondent

Court Assistant - Michael