



REPUBLIC OF KENYA



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**Aluga v Olare & another (Civil Appeal 68 of 2019)  
[2025] KECA 163 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KECA 163 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 68 OF 2019  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
FEBRUARY 7, 2025**

**BETWEEN**

**FREDRICK OGAL ALUGA ..... APPELLANT**

**AND**

**JOHN OYOO OLARE ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH OREYO TANA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment and Decree of the High Court of Kenya at Migori (Mrima, J.) dated 14th February, 2019 in Succession Cause No. 469 of 2014)*

**JUDGMENT**

1. The substance of this appeal stems from the judgment of the High Court at Migori in Succession Cause No. 469 of 2014.
2. The matter was with regard to the estate of Olare Tana who passed away on 10<sup>th</sup> July, 1972. Two of his brothers, Joseph Oreyo Tana and Gabriel Aluga Tana, made an application for grant of letters of administration intestate in Migori Senior Principal Magistrate's Court Succession Cause No. 15 of 1995. The same was issued on 8<sup>th</sup> May, 1996, and confirmed on 23<sup>rd</sup> October, 1998 on terms that the deceased's sole property being Kanyamkago/Kawere 1/90 (hereinafter, the suit land), devolved wholly to the administrators jointly.
3. In a summons dated 4<sup>th</sup> November, 2014, John Oyoo Olare, who claimed that he was the deceased's only surviving son, made an application for revocation of the said grant of letters of administration on the grounds that: the deceased ought to have been succeeded by his true heirs; he was neither notified nor did he consent to the application for grant of letters of administration; there was fraud on the part of the deceased's brothers in transferring the property to themselves to the exclusion of the real heirs; and the subordinate court lacked jurisdiction to deal with the deceased's estate as the property



- measured 35.5 hectares (approximately 88.75 acres) whose value was in excess of Kshs. 100,000 (which at the time was the upper limit of the pecuniary jurisdiction of magistrates' courts in probate matters).
4. The record shows that when the matter came up for directions at the first instance on 14<sup>th</sup> November, 2014, Majanja, J. directed the parties to seek an amicable solution due to the fact that according to section 2 of the *Law of Succession Act* (the Act), the matter was not governed by the Act, but by customary law, since the deceased died before 1981; which is the year the Act came into force. The learned judge considered that it would be most appropriate for the matter to be discussed at the level of the elders who, the learned Judge felt, were well versed with customary law matters, and in particular, succession matters; and who also had the knowledge of events of the early 1970s.
  5. Thereafter, when the matter came up for directions on 5<sup>th</sup> March, 2015, Mr. Kisera, counsel for the respondents, and other interested parties produced a report of family and clan members' meetings held on 18<sup>th</sup> January, 2015, and 11<sup>th</sup> February, 2015. The report stated that after deliberations, it was found that the deceased's father, by the name Tana Otieno, had five sons who included Gabriel Aluga Tana; Aduda Tana; Nyakado Tana; Joseph Oreyo Tana; and the deceased (Olare Tana); all of whom had died except for Joseph Oreyo Tana.
  6. Nyakado Tana died without having sired children to inherit his wealth, hence there was a scramble for his portion of land by some of his nephews. Meanwhile, it was also found that before Tana Otieno died, he bequeathed his land to his eldest son, Olare Tana, to administer it and also hold it in trust for his four other brothers. Upon Nyakado Tana's death, Olare Tana and his four brothers agreed to subdivide the suit land to enable each one develop their own portions; and since then, each of them lived peacefully on their portions until their deaths. Trouble whirled up when Tana's grandchildren argued that the suit land should be divided equally among them, notwithstanding the fact that Olare Tana and his brothers had lived peacefully on the various respective portions during their lifetime without any land disputes. According to the minutes of the meetings, all five brothers had common and visible boundaries; none of which criss-crossed each other.
  7. The learned Judge noted that various family members wanted to secure pieces of land that they had occupied. He opined that while he was entitled to revoke the grant of letters of administration for some of the reasons advanced by deceased's son, he was also alive to the reality that the deceased had died over forty years ago (at the time of the application); the grant was confirmed in 1998; and the land dispute involved a large family which continued to grow with the passage of time.
  8. Noting the rather advanced age of the parties, the learned Judge was of the opinion that it would be in the interest of justice if the matter was dealt with when the people involved still had clear memories of all the issues at hand. In addition, he opined that being a land matter, the same should be resolved expeditiously in order to forestall future land disputes. Further noting that Article 159 of *the Constitution* provided for alternative dispute resolution and that it was his duty to promote it, the learned Judge made the following orders on 5<sup>th</sup> March, 2015:
    - a. The issue of Land Parcel No. Kanyamkago/Kawere 1/90 and who are the heirs/descendants of the deceased and occupants thereof shall be arbitrated by the District Officer Oyani Division assisted by Local Elders.
    - b. The District Officer together with the Clan Elders shall come up with a map showing the parts occupied by each person and a mutation sketch map prepared with assistance of the District Land Registrar, Migori County.
    - c. All the parties herein shall give the District Officer and the Elders all necessary assistance to resolve the matter.



- d. The matter shall be mentioned on 17<sup>th</sup> April 2015 to confirm progress on the same and for any further orders.
9. On 1<sup>st</sup> July, 2015, the Deputy County Commissioner for Uriri Sub- County (Commissioner) filed an update report before the court on the steps that had been taken to implement the court order. According to the report, the beneficiaries of the estate of the deceased had managed to come up with agreed names of the elders who were to arbitrate over the matter. After deliberations between the Commissioner, the elders and the beneficiaries, the number of beneficiaries to the estate of the deceased was unanimously agreed at five. They were Olare Tana, Aluga Tana, Aduda Tana, Nyakado Tana and Joseph Oreyo Tana. As such, the first limb of the court order was implemented without any hitch. The identification of the beneficiaries was and has never been challenged, thus far.
10. Even with the identities of the beneficiaries to the estate having been identified, its distribution became a thorny issue as the elders sharply differed on the issues. By this time, the matter was before Mrima, J., Majanja, J. having rotated out of the High Court station. Mrima J. encouraged the parties to find an amicable solution on the question outside considering it was a family matter; and that the family needed to remain united. The learned Judge's efforts appeared to have born fruits since on 28<sup>th</sup> November, 2016, the parties eventually recorded a consent on the way forward as follows:
- a. The County Surveyor, Migori County who is present in Court Mr. Peter Wanjala, be and is hereby ordered to carry out the survey works over and in respect of LR No. Kanyamkago/ Kawere 1/90 and to prepare the requisite mutation in line with the arbitral award by the Assistant County Commissioner Uririr/Oyani Divisions filed in Court on the 1<sup>st</sup> day of July 2015.
  - b. The sub-division and the attendant mutation shall be such that the distribution shall be in favour of the 5 identified heirs/beneficiaries of the estate only.
  - c. The survey charges to be communicated by the surveyor towards and in respect of the exercise shall be shared equally by the 5 beneficiaries and in default by any of the beneficiaries, either of the beneficiaries shall foot the same, but shall recover from the defaulting party.
  - d. The County Surveyor to be provided with security by the Administration Police Commandant of Uriri Sub-County during the exercise.
  - e. The payments in line with limb (c) above in respect to the survey costs to be paid within 30 days of today.
  - f. Upon receipt of the relevant survey charges, the County surveyor to notify all the parties concerned of the due date of the survey works and the surveyor to carry out and conclude the exercise within 30 days of such notice.
  - g. The County surveyor to file his report, if any, together with the duly completed mutation form with the court within a further 30 days of completing the exercise.
  - h. Mention on the 27<sup>th</sup> day of February, 2017 for further directions and orders.
11. The exercise on identification of shares was duly undertaken by the Commissioner, the elders, the beneficiaries and the County surveyor and report filed in court on 9<sup>th</sup> May, 2017, together with a Mutation Form. The report had four beneficiaries instead of five, but it was satisfactorily explained that one of the beneficiaries, Nyakado Tana, had passed on and was not survived by any widow or children.



12. By an order of the court, the County surveyor, appeared and formally produced the report. All parties examined him accordingly. Thereafter, parties were directed to file their respective submissions and they all complied. The applicant, John Oyoo Olare, fully supported the report by the surveyor and relied on several decisions in urging the trial court to adopt the report. The Interested Party, one Fredrick Ogal Aluga, who is the appellant herein, opposed the report on two grounds which were that: the negotiations between the beneficiaries never crystallized for implementation, and the elders were not properly appointed since some were under age whereas others hailed from another clan.
13. The learned Judge overruled the appellant's objections, adopted the report filed in court and made orders on distribution of the deceased's estate according to the report.
14. Due to the death of his father, Gabriel Aluga Tana, who was one of the administrators of the deceased's estate, the appellant herein was later substituted as the 2<sup>nd</sup> respondent in High Court.
15. Aggrieved by the learned Judge's decision, the appellant herein filed the present appeal against the judgment and order of the High Court. The appellant's Memorandum of Appeal dated 16<sup>th</sup> April, 2019, gives a history of events that have taken place in the suit land between the families of the five sons of Tana, and explains his dissatisfaction with the recommendations as was stated by the learned Judge in his judgment (as shown herein above); and does not necessarily highlight the appellant's grounds of appeal. Nonetheless, a reading of the grounds of appeal suggests that the appellant is aggrieved because he feels that the learned Judge, A.C. Mrima, J. failed to take into consideration the customary law route that had been proposed and initiated by Majanja, J. as he was then, who previously presided over the matter. According to the appellant, the learned judge failed to implement the order made by Majanja, J. which was in line with customary law; and instead replaced part of the order and adopted a resolution of the dispute under the law of succession. The appellant alleged that the learned judge adopted the recommendations in the report filed on 1<sup>st</sup> July, 2015, as an award and made it the judgement of court; which according to him, was an error on the part of the learned judge and amounted to a miscarriage of justice.
16. The appellant also alleges that the suit was filed using a forged death certificate of Olare Tana.
17. The 1<sup>st</sup> respondent herein filed a notice of motion application dated 3<sup>rd</sup> July, 2023, to strike out the appeal and/or dismiss the appeal on grounds that:
  - a. The appellant lodged a Notice of Appeal on 11<sup>th</sup> March, 2019, and filed a Memorandum of Appeal and Record of Appeal on 25<sup>th</sup> April, 2019, but served the same to the 1<sup>st</sup> respondent on 9<sup>th</sup> June, 2023.
  - b. The Memorandum of Appeal and Record of Appeal ought to have been served before or within seven (7) days from the date the appeal was lodged, in line with the provisions of Rule 92(1) of the Court of Appeal Rules, 2022.
  - c. The Memorandum of Appeal and Record of Appeal were served outside the statutory timelines and the appellant herein ought to have sought extension of time and/or leave of court to serve the Memorandum of Appeal and the Record of Appeal out of time.
  - d. The appellant herein neither sought for nor obtained leave of the High Court prior to filing the instant appeal. Thus, no right of appeal and/or attaches to the decision and order of the High Court and therefore the instant appeal is premature, inept and stillborn.
  - e. In the circumstance, the Record of Appeal and the Appeal herein constitute and/or amount to an abuse of due court process.



18. The application was supported by the affidavit of the 1<sup>st</sup> respondent's counsel, Winny Adhiambo Ochwal. Also attached was the summons for revocation of grant that was filed in the High Court by the 1<sup>st</sup> respondent, which was the genesis of this instant appeal.
19. Due to some technical hitch, the 1<sup>st</sup> respondent's application, which was potentially dispositive of the entire appeal, was not scheduled to be heard first. Instead, the main appeal was scheduled for hearing. However, during the conference hearing, counsel for the 1<sup>st</sup> respondent informed the Honourable Deputy Registrar that they had not been served with the record of appeal. This would, eventually, be one of the grounds of the application dated 3<sup>rd</sup> July, 2023 to strike out the appeal.
20. In any event, the substantive appeal was listed for hearing. During the hearing, the appellant appeared in person while Ms. Ochwal appeared for the 1<sup>st</sup> respondent. While the appellant had filed his written submissions to the main appeal, Ms. Ochwal had only filed submissions in support of the 1<sup>st</sup> respondent's application dated 3<sup>rd</sup> July, 2023. After initial deliberations, and with a view to finalizing the appeal substantively, the Court permitted Ms. Ochwal to treat her written submissions in support of the application as part of her submissions in opposition to the main appeal; and then to orally respond to the main appeal by the appellant.
21. Ultimately, Ms. Ochwal made three arguments in opposition to the appeal: two were procedural and one was substantive.
22. First, Ms. Ochwal argued that no appeal lies before us to determine. This is because the appeal filed by the appellant must be struck out because the appellant failed to serve it on time. The appellant, through his replying affidavit dated 17<sup>th</sup> July, 2023 concedes that he did not serve the appeal on time; and that he only served it after the conference hearing with the Honourable Deputy Registrar. He says that this is because he did not know about the rules of the Court that required him to serve the memorandum and record of appeal within seven days of it being lodged.
23. Second, Ms. Ochwal argued that the appeal should be dismissed because the Court lacks jurisdiction to entertain it because the appellant failed to obtain leave to file the appeal; and that such leave is required by the law. She submitted that the High Court exercised its jurisdiction under section 47 of the *Law of Succession Act*; and stated that section 50 therein provides that: "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". According to the 1<sup>st</sup> respondent, a keen reading of the Act reveals that there is no automatic provision for appeal to the Court of Appeal. Therefore, since the Act is silent on the automatic right of appeal from the High Court to the Court of Appeal in probate matters, it was necessary for the appellant to seek leave of court before lodging an appeal; as provided for under Rule 41 of the Court of Appeal Rules, 2022. For this reason, Ms. Ochwal opined that the appellant should have sought leave either in the High Court or this Court, before lodging the instant appeal. She relied on a number of cases by this Court including: Rhoda Wairimu Karanja & Another vs. Mary Wangui Karanja & Another [2014] eKLR; Josphine Wambui Wanyoike vs. Margaret Wanjira Kamau & Another [2013] eKLR; and John Mwita Murimi & 2 Others vs. Mwikabe Chacha Mwita & Another [2019] eKLR.
24. Turning to the substance of the appeal, Ms. Ochwal submitted that the learned judge did not err in adopting the recommendations made by the arbitration committee. This was because, she argued, the appellant had submitted himself to the committee; and he did not point out how the committee failed to adhere to customary laws in its verdict.



25. We have considered the record of appeal, the contending submissions made by the parties, the authorities cited and the law. This is a first appeal. The standard of review is de novo:

we are required to review issues of both facts and law afresh and come to our own independent conclusions. We are, however, obligated to bear in mind that the trial judge had the advantage of seeing and assessing the demeanor of witnesses. (See *Selle vs. Associated Motor Boat Co. Limited* (1968) EA 123). In addition, this Court must be cognizant of the fact that it should not interfere with the findings of fact by the trial court unless they were based on no evidence, or on a misapprehension of the evidence, or the trial judge is shown demonstrably to have acted on wrong principles in reaching his findings. (See *Jabane vs. Olenja* (1968) KLR 661).

26. The 1<sup>st</sup> respondent has raised two procedural obstacles to the appeal that we must dispose of in limine before considering the merits. The first one is the question whether the appeal before us is fatally infirm for the reason that the appellant failed to serve the memorandum and record of appeal timeously as demanded by Rule 92 of the Court of Appeal Rules, 2022 (Rules).

27. Rule 92 is simple and categorical:

“Service of memorandum and record of appeal

1. The appellant shall, before or within seven days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies thereof on each respondent who has complied with the requirements of rule 81.
2. The appellant shall, in addition to the service under subrule (1), serve copies of the memorandum of appeal and the record of appeal, on such other parties to the original proceedings as the Court may, at any time on application or of its own motion, direct, and within such time as the Court may appoint.”

28. In the present case, the memorandum of appeal was lodged on or around 25/04/2019. It was not served until on or around 09/06/2023 – more than four years later. The appellant concedes as much. The appellant’s only plea is that he was unaware that he was required to serve the documents on the respondents. Unfortunately, this will not save him in this instance. The Court is unable to overlook this critical omission. We note that the 1<sup>st</sup> respondent filed their notice to strike out the appeal timeously under Rule 86 i.e. within thirty days of service. On that score, we would strike out the appeal herein.

29. There is a second procedural reason – suggested by the 1<sup>st</sup> respondent – why this appeal is for striking out. The appellant preferred it without first obtaining leave. This Court, in *Rhoda Wairimu Karanja & Another vs. Mary Wangui Karanja & Another* (supra) held thus:

“...under the *law of Succession Act*, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this Court ”

30. This position was re-affirmed in *Josphine Wambui Wanyoike vs. Margaret Wanjira Kamau & Another* (supra). We re-affirm the decisions of this Court in *Rhoda Wairimu Karanja & Another vs. Mary Wangui Karanja & Another* (supra) and *Josphine Wambui Wanyoike vs. Margaret Wanjira Kamau &*



Another (*supra*), where it was clearly stated that in succession matters, there is no automatic right of appeal to this Court without leave of court.

31. In this particular instance, however, we must point out that even if we were to consider the merits of the case, we would still find the appeal unmeritorious on its substance.
32. The appeal is predicated on the ground that the learned Judge erred because he failed to adhere to customary law as Majanja J. had earlier ruled was applicable. We think that the appellant is misguided on this point for two reasons which are highlighted in the reasoning of the learned Judge which we reproduce here in extenso:

“8. I will start with the objection on the Elders. According to the Report by the Commissioner, the Elders were unanimously agreed and appointed by the beneficiaries on 18/03/2015. Those are the Elders who took part in the meeting convened on 25/03/2015 by the Commissioner which took place at the Estate land and the beneficiaries identified. The Interested Party took part in the process of appointing the Elders and identifying the beneficiaries. Until the filing of his submissions which challenged the distribution of the estate land on 09/07/2018 (which was over 3 years from the appointment), the Interested Party had no problem with the earlier processes and findings. I therefore find the objection on the Elders as an afterthought and an attempt at scuttling the distribution process. On whether the negotiations crystallized leading to the distribution, the Report by the County Surveyor was very clear. The boundaries of the respective portions were identified by the Elders and the Surveyor only picked them and came up with a Mutation. None of the parties raised any objections on the boundaries. Had that happened the Elders would have definitely and satisfactorily dealt with the issue(s) and if they encountered any hardships they would have referred the matter back to Court just like how they handled the matter initially. I again do not find any merit on the objection. The Interested Party has also not challenged the customary law considerations by the Elders to be unconstitutional in any way. The upshot is that the objections by the Interested Party are hereby overruled.

9. I have as well carefully addressed my mind to this matter. From the history of the matter, it appears that the land was registered in the name of the deceased in trust of his brothers who are the now beneficiaries. One of the beneficiaries was Gabriel Aluga who was the father to the Interested Party herein. Since the beneficiaries were brothers had the matter fallen within the confines of *Law of Succession Act*, Cap. 160 of the Laws of Kenya, the position would have been equal shares on all of them. However, that is not the case since the *Law of Succession Act* did not apply in this matter. The current proposed distribution is that Gabriel Aluga (the father to the Interested Party) has the biggest share of 13.79Ha followed by Aduda Tana with 11.99Ha, Joseph Oreyo with 5.99Ha and Olare Tana with 4.49Ha. Whereas the other beneficiaries seem to concede to such a proposal the Interested Party still wants more of the land.

10. Be that as it may, Article 10(b) of *the Constitution* provides for social justice, equity and human dignity as some of the national values. Considering the matter in light of these values and the proposed distribution and in the interests of Article 45(1) of *the Constitution* which holds the family as the



natural and fundamental unit of society and the necessary basis of social order and the need for the family members to peacefully co-exist, I find no basis to interfere with proposed distribution by the Elders.

11. This Court is also alive to the approach taken by the Court (Majanja, J.) on the Summons for Revocation of the Grant filed on 08/11/2014 and the fact that one of the Administrators is now deceased and I shall make appropriate orders towards implementation of this judgment.”
33. We think the learned Judge was correct for two reasons. First, as the learned Judge points out, the appellant had, of his free volition, exercised his agency in acceding to the Alternative Justice Mechanism (AJS) and the panel of elders selected. In doing so, he freely exercised his free will, and, as both Majanja J. and Mrima, J, indicated, all the parties were paying obeisance to Article 159(2)(c) of *the Constitution*. Once parties have acceded to such an alternative mechanism, they cannot flippantly defect therefrom merely because they did not like the outcome of the mechanism. For this Court to permit such defection would be to fail to “promote” AJS as mandated by *the Constitution*. In the present case, the appellant vaguely argued before the learned Judge that no consensus had “crystallized”. However, substantial evidence was tabled before the learned Judge in the form of minutes to demonstrate that there was, in fact, a consensus by the elders who heard the case.
34. The second reason the appellant would fail in his bid to successfully attack the award by the panel of elders on substantive grounds is because he was unable to demonstrate how, on substance, that it violated the customary norms he had acceded to, and that the decision was, therefore, perverse, or that the decision failed to meet the constitutional minimums. The appellant would be entitled to demonstrate that the outcome of the decision by the elders to whom he had submitted through AJS was disproportionate or that the outcome was otherwise violative of *the Constitution*. He did not do so; and prima facie, the award by the elders is not discriminatory or does not otherwise violate any constitutional norm or threaten the ethos of *the Constitution*. Indeed, the award is one that grants the appellant a larger parcel of land than the other beneficiaries!
35. The upshot is that this appeal must fail for at least three reasons. First, the appeal was filed without the leave of the court hence rendering it infirm. Second, the memorandum of appeal and record of appeal were not timeously served hence rendering the appeal fatally infirm. Third, on substance, the appellant has been unable to demonstrate any reversible error on the part of the learned Judge. The result is that we hereby dismiss the appeal in its entirety with costs to the 1<sup>st</sup> respondent, who is the only party who resisted the appeal actively.
36. Orders accordingly.

**DATED AND DELIVERED AT KISUMU THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

.....

**JUDGE OF APPEAL**

**JOEL NGUGI**

.....



**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

