



Agot v Odongo (Civil Appeal 234 of 2019) [2025] KECA 482 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KECA 482 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 234 OF 2019
MSA MAKHANDIA, LK KIMARU & AO MUCHELULE, JJA
MARCH 7, 2025

BETWEEN

STEWART JALANGO AGOT APPELLANT

AND

GEORGE OKOTH ODONGO RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Kisumu (Cherere, J.) dated 4th April 2019 in HC Succession Cause No. 1349 of 2013)

JUDGMENT

1. This appeal is proffered by Stewart Jalango Agot (“the appellant”), against the judgment and decree rendered by Cherere, J. in the High Court of Kenya at Kisumu, Succession Cause No. 1349 of 2013, on 4th April 2019. The appellant, who is the brother of Edwin Okelo Agot Oketch, deceased, petitioned for a Grant of Letters of Administration Intestate for the estate of the deceased. The grant was issued on 30th April 2013 and, subsequently, confirmed on 15th December 2014. George Okoth Odongo (“the respondent”), after learning of the succession proceedings applied for the revocation of the Grant as a son to the deceased and on the grounds that the Grant was procured by the appellant by way of false representations and concealment of material facts regarding the existence of the children of the deceased.
2. The appellant in response denied that the deceased was ever married or that the respondent and his siblings were the offsprings of the deceased and their mother, Rose Atieno Odongo, deceased as well.
3. Upon closure of the pleadings, the trial court directed that the application be disposed of by way of viva voce evidence.
4. The respondent’s testimony was that he was the son of Edwin Okelo Agot Oketch, and Rose Atieno Odongo, both deceased. That his parents aforesaid solemnized their marriage at the Catholic Church St. Peter and Paul Nyangoma on 12th October 1989. From the union came, the respondent, Dovine



- Atieno, Beatrice Adhiambo, and Risper Akinyi. Only Dovine Atieno, Beatrice Adhiambo and the respondent are still surviving their parents. That their parents separated in 1991, and he and his siblings were raised by their maternal grandparents, Philister Jowi Odongo and Aloyce Odongo. However, Beatrice Adhiambo later returned to deceased's home in 2003 and stayed with him until his death. The respondent on his part, returned later in 2008 and lived in the appellant's servant's quarters.
5. That when the deceased passed on in 2011, he attended funeral. That the funeral program listed his mother as the deceased's spouse and him and his siblings as the deceased's children. That some of the photographs taken during the funeral showed himself, his siblings, and his aunt Dorothy Auma in attendance. Additionally, the photographs showed a semi-permanent house he had built on the deceased's land. That he used his maternal grandfather's name, Odongo, as his third name when obtaining his identity card, as he was at the time staying with him. Given all the foregoing, he urged the court to recognize the deceased's children as the rightful beneficiaries of the estate, rather than the appellant, who was merely the deceased's brother.
 6. PW2 Beatrice Adhiambo Okelo, the sister of the respondent, PW3 Bernard Omboke Agot, stepbrother to the deceased and the appellant, PW4, Zacchaeus Okoth Akeng'o, father in charge of Sacred Heart of Jesus Nyangoma Catholic Church, and PW5 Philista Jowi Odongo, grandmother to the respondent all testified in support of the respondent's position.
 7. In response, the appellant in his testimony, conceded that he was the deceased's brother and was entitled to petition for the grant of letters of administration, as the deceased was not married to the respondent's mother or at all. Neither did the deceased have any children. He nonetheless conceded that the deceased's photograph in the funeral program produced by him and the one by the respondent was similar but denied knowledge of the deceased's widow and children named in the latter. He stated that a Google search and the Kenya Catholic Directory for 2006 showed that St. Peter Catholic Church at Nyangoma, where the deceased and Rose Atieno were allegedly married, did not exist, and on that basis, he argued that the marriage certificate exhibited was not authentic. He denied that the respondent, Beatrice Adhiambo Owino, and others were the deceased's children, citing the respondent's identity card, which bore his father's name as Odongo. The appellant claimed that the deceased name was Edwin Okelo Agot Okech and not Edwin Okelo, as indicated on the identification report for Beatrice Atieno. He also denied PW5's evidence that he had accompanied the deceased to the home of the respondent to pay dowry. The appellant further denied that the respondent and his siblings attended the deceased's funeral, stating that he could only identify his sister Dorothy Auma, his eldest son James Jalang'o, and the respondent in one of the funeral photographs produced by the respondent, but he did not know where the photographs were taken.
 8. DW2, Dorothy Auma Agot, the sister of the deceased and the appellant testified in support of the appellant's position maintaining that the deceased never married and had no children. She denied that the respondent and his siblings attended the deceased's funeral, stating that she could only identify herself, the appellant's eldest son James Jalang'o, and the respondent in one of the funeral photographs produced by the respondent, but she did not know where they were taken.
 9. In a judgment delivered on 4th April 2019, the trial court agreed with the respondent's case, allowed the application and thereby revoked the Grant. In its place, it granted the letters of administration jointly to the respondent and Beatrice Adhiambo Okelo. The court also canceled the appellant's registration as the proprietor of land parcel No. North Sakwa/Maranda/1622, the only asset of the estate of the deceased and reverted it to the estate. The court further directed that once ownership reverts to the deceased, the appointed administrators apply for confirmation of the grant after determining all beneficiaries and their respective entitlements. Additionally, the appellant was ordered to pay the costs of the application to the respondent.



10. The appellant being aggrieved by the decision has now preferred this appeal vide a memorandum of appeal dated 14th October 2019, in which he raises sixteen grounds but which can be condensed into the following; that the trial court erred in law and fact by revoking the grant of letters administration issued to the appellant and granting it in the joint names of the respondent and Beatrice Okelo; that the decision excluded the deceased's brothers and sisters from the estate and failed to consider that the deceased held the suit property on behalf of the family; erred in finding that the deceased and Rose Atieno Odongo, were married, and that their purported children, George Okoth Odongo and Beatrice Okelo, were heirs to the estate of the deceased, relying on hearsay evidence, wrongly authenticating marriage certificate, misinterpreting the existence and identity of the church where the marriage of both deceased parents of the respondent allegedly took place, and admitted photographs with no probative value. He concluded that the judgment was against the weight of the evidence presented.
11. The appeal was canvassed by way of written submissions with limited oral highlights. At the plenary hearing of the appeal on 11th November 2024, Mr. Chacha Odera, teaming up with Mr. Kisia, and Mr. Odongo, learned counsel appeared for the appellant. Relying on their written submissions dated 16th April 2024, Mr. Odera pointed out that the trial court erred in holding that the appellant, who is the deceased's brother, was not entitled to either a share or the whole of the deceased's estate. Counsel argued that this finding went against the evidence adduced on behalf of the appellant. It was submitted that the respondent's evidence indicated that the suit property was his grandfather's land, where several of his grandfather's children and descendants had built houses. Therefore, for the trial court to proceed on the basis that the appellant had no interest, either partial or whole, in the suit property, she misdirected herself.
12. Counsel went on to submit that the entire case revolved around whether the respondent, was an offspring of the deceased or not. That the respondent in his evidence had stated that he returned to the deceased's home in 2008. He described himself in official government documents as the son of Alois Odongo. His home was in Kombewa, Nyaruoth, and the family was in Kakul, which is in Central Alego. However, the suit property was in Sakwa very far away from Alego. Beatrice Adhiambo Akelo indicated in a report that she was born on 12th July 1993. However, in her evidence, she claimed to have been born in 1987, which was merely to fit within the timeline when the deceased and their mother, separated in 1991. Further, he submitted that examination of the various photographs of the casket in which the appellant was laid discloses some variations, one, is a half casket with a half door for body viewing, while the other has a sliding door and frills around it. The appellant contended that these two coffins were different from the white coffin used to bury the deceased.
13. Based on all the foregoing, the appellant questioned the credibility of the evidence provided by the respondent and their witnesses. Furthermore, counsel raised the issue of DNA testing to determine once and for all the paternity of the respondent and his siblings maintaining that the trial court should have insisted on this exercise. Counsel argued that it was not within the trial court's purview to revoke the letters of administration and subsequently issue them to the respondent jointly with his sister. Finally, counsel submitted that the trial court erred in cancelling the respondent's registration as the proprietor of land parcel No. North Sakwa/Maranda/1622, and restoring it to the estate of the deceased. Counsel submitted that the respondent only prayed for revocation of grant and nothing more but the court erred in granting the prayer complained of to the respondent absent of such a prayer in the summons. This as per counsel was contrary to what section 51 of the *Law of Succession Act* provides. That the trial court ought to have only issued directions that the respondent do file summons afresh for grant of the letters of administration. He, therefore, prayed for the appeal to be allowed with costs.



14. On his part, the respondent, through Mr. Lore, learned counsel. submitted that the trial court noted that the respondent had the capacity to apply for the revocation of the grant on the grounds that the appellant had consciously concealed material facts, knowing that the respondent was a son of the deceased. As the son, he ranked in priority to the appellant according to the degree of consanguinity. Furthermore, counsel argued that there was no evidence of the deceased ever divorcing the respondent's mother, and even if this had been brought up by the appellants during the trial, it would not have changed the fact that the deceased had children. That in any event, it was important to note that separation or even divorce between spouses does not negate the parental relationship with the children. The trial court was therefore correct in holding that there was overwhelming evidence to support the respondent's case for the revocation of the grant of Letters of Administration obtained by the appellant. That the trial court did not err in appointing the respondents as joint administrators of the estate of the deceased as they were the proper heirs. Furthermore, it was improper for the appellant to raise the issue of a DNA report at this stage, as it was not a subject of contention during the trial. Counsel maintained that the trial court exercised its discretion according to the law and its findings should not be disturbed. Lastly, counsel submitted that the appellant failed to refute the fact that he had his own properties, which he had already bequeathed to his children.
15. This being a first appeal, parties are entitled to and indeed, expect a rehearing, re-evaluation, and re-consideration of the evidence afresh and a determination thereon. In other words, a first appeal is by way of retrial and this Court, as the first appellate court, has a duty to re-evaluate, re-analyze, and re-consider the evidence and draw its own conclusions, of course, bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. See *Selle v Associated Motor Boat Co.* [1968] EA 123.
16. This Court further stated in *Jabane v Olenja* [1986] KLR 664, thus:

“More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular *Ephantus Mwangi v Duncan Mwangi Wambugu* (1982-88) 1 KAR 278 and *Mwanasokoni v Kenya Bus Services* [1982-88] 1 KAR 870.”
17. Having considered the record of appeal in the light of our mandate set out above, only two issues that fall for our determination are whether: the trial court was right in revoking the grant initially issued to the appellant and in his place appointing the respondent and his sister, Beatrice Adhiambo Okelo as joint administrators of the estate of the deceased. Secondly, whether following the revocation of the grant, the trial court was right to cancel the respondent's registration as the proprietor of land parcel No. North Sakwa/Maranda/1622 and restoring it to the estate of the deceased.
18. As already stated, the respondent along with his sister Beatrice Adhiambo Okelo (PW2), his uncle Benard Omboke Agot (PW3), and his grandmother Philista Jowi Odongo (PW5), all testified that the deceased was indeed, married to Rose Atieno. PW4 Zacchaeus Okoth Akeng'o, the father in charge of Sacred Heart of Jesus Nyangoma Catholic Church, presented a marriage certificate issued to the deceased couple on 12th October 1989 at the Catholic Church St. Peter and Paul Nyangoma. He stated that the church was later consecrated and renamed Sacred Heart of Jesus Nyangoma Catholic, as shown on a certificate dated 15th June 2008.
19. The Kenya Catholic Directory for 2006, produced by the appellant, indicated that the Catholic Church St. Peter and Paul Nyangoma did not exist. However, we agree with the reasoning of the



learned Judge that given the evidence by PW4, it was expected that the appellant would provide credible evidence that the church did not exist as of 12th October 1989 when the marriage took place and certificate of marriage was issued, but this was not done. However, he went on a fishing expedition in a desert in an attempt to prove that the church did not exist, by producing a letter dated 6th March 2017 from the firm of Messrs Macharia Ng'aru and Wetangula Advocates to the Registrar of Societies, seeking confirmation of the registration of Nyangoma Catholic Church and the Registrar of Societies response dated 17th March 2017, confirming that the church was not registered. However, and as correctly pointed out by the trial court, the church in issue and to which the request should have applied was the Catholic Church St Peter and Paul Nyangoma and not Nyangoma Catholic Church. It is also instructive that the evidence of PW4 with regard to the changes in the name of the Church was not contested. We would also not hold it against the trial court for observing that it was not convinced that the church would embark on a treacherous expedition of manufacturing records dating back to 1960's merely to assist the respondent. The church stood to gain nothing from such an adventure. The evidence that was presented in the trial court was clear, and in particular, PW4's evidence, which indicated that the church had been known as Sacred Heart of Jesus Nyangoma Catholic since 2008, as demonstrated by a certificate of consecration dated 15th June 2008, who tendered an extract from the marriage book for Catholic Church St. Peter and Paul Nyangoma, covering the period from December 1960 to October 2005. This extract confirmed that the marriage certificate issued to the deceased spouses on 12th October 1989 had indeed been extracted from that record.

20. We are therefore satisfied just like the trial court that there was credible evidence that there was a marriage between the deceased spouses in the church. Further, we are satisfied that the court rightly invoked the provisions of section 68 of the Evidence Act in accepting secondary evidence of a copy of the marriage certificate that had been produced by the respondent given that the parties to the union were all deceased.
21. Were there any issues out of the marriage? The respondent stated that his parents were blessed with children, three of whom namely Dovine Atieno, Beatrice Adhiambo, and the respondent have survived their parents. His testimony was corroborated by the evidence of his sister PW2, his uncle PW3, and his grandmother PW5.
22. Though the appellant contended that the respondent and PW2 were not the children of the deceased and that the trial court erroneously so concluded, it was without conclusive evidence to substantiate the assertion, that the burden of proof of paternity rested with him as he is the one who made the allegation but he miserably failed to do so. The respondent testified that he attended his father's funeral with his sibling PW2 and that the funeral was also attended by the larger Okelo family, including the appellant, his sister DW2, and the appellant's eldest son James Jalang'o. The respondent produced a funeral program and photographs taken at the funeral. The program indeed listed the deceased's children, among them the respondent and his sister PW2. Furthermore, in some of the photographs taken during the funeral, the appellant, DW2, and his cousin James Jalang'o appear alongside him. Although the appellant disputed the authenticity of the photographs, the appellant never led any evidence by those who appeared in them, disclaiming the same. All he did was to concede that DW2 and eldest son, James Jalang'o appeared in the photographs but was not sure where they were taken. In our view, this is not a sufficient rebuttal. The discrepancies regarding the casket in which the deceased was laid were neither here nor there given that the presence of the respondent and PW2 at the funeral was not sufficiently discredited or rebutted.
23. The appellant and DW2 denied knowing the respondent but failed to explain why the respondent attended a funeral with the larger Okelo family and why they appeared in the photographs with



- the respondent. Indeed, we agree with the trial court that their inability to recall whose funeral the photographs were taken left the respondent's evidence unchallenged.
24. The respondent explained that the absence of the deceased's name on his identity card was due to him obtaining it whilst living with his maternal grandparents after his parents separated. As a result, he used his maternal grandfather's name, Odongo, as his third name. This might explain as well why he described himself in official government documents as the son of Alois Odongo, his home as in Kombewa, Nyaruoth, and the family being in Kakul, which is in Central Alego, which according to counsel for the appellant was far away from the suit property which was in Sakwa. This explanation was corroborated by PW5. Additionally, PW2's KCPE certificate bore the name Beatrice Adhiambo Okelo. Her testimony that she lived with the deceased while preparing for her KCPE examination at a nearby local primary school known as Milenga Primary School in 2004 was not controverted, if anything, it was corroborated by the respondent. Additionally, the appellant's evidence that the Primary School was located in the same village where the deceased lived, further supported the respondent's and PW2's testimony that she lived with the deceased before he passed away.
 25. So in what capacity was the deceased staying with her? Furthermore, her ID card identification report, filed on 16th March 2017, listed her parents as Edwin Okelo and Rose Atieno. Though the appellant argued that the deceased's name was Edwin Okelo Agot Okech, not Edwin Okelo, nothing much really turns on this. A closer scrutiny of the record reveals clearly that Edwin Okelo Agot Okech and Edwin Okelo was indeed, one and the same person, the deceased. This conclusion is supported by multiple pieces of evidence, including the testimony of witnesses who consistently referred to the deceased by both names. Additionally, other documents, such as the funeral program and identification reports, listed the deceased under both names. The appellant's own acknowledgment of the deceased's identity in various contexts also reinforces the conclusion that Edwin Okelo Agot Okech and Edwin Okelo are one and the same person. The trial court was therefore right in so holding.
 26. From the evidence tendered in court, we are satisfied just like the trial court that the respondent proved that indeed he was the son of the deceased and equally had other siblings. If the appellant was contesting the same, the noble thing he would have done was to make an application for the DNA testing that counsel for the appellant has now belatedly raised in his submissions. In the case of *BAY v ABG & Another (Civil Appeal E019 of 2021)* [2023] KEHC 25995, this Court reiterated that issues regarding the admissibility of evidence, including the need for DNA testing, should be addressed during the trial. The failure to apply for a DNA test in the trial court was deemed a significant oversight that could not be rectified on appeal.
 27. The fact that the court relied on the funeral programs and the pictures by the respondent is not a new phenomenon to courts at all, and we are certain that the appellant's counsel is well aware of this fact. The appellant's attempt to impugn the trial court's decision on that basis stands on a quicksand. This Court in *Waiyaki & Another v Kamau & Another (Civil Appeal 456 of 2018)* [2024] KECA 1151, considered a copy of the deceased's funeral program as evidence to demonstrate the relationship between the deceased and the respondents. Yet again, in the case of *Washington Muchiri Muturi v Elizabeth Wangari Gichuki (Petition No. 33 of 2022)*, the Supreme Court of Kenya dealt with issues related to matrimonial property and the presumption of marriage based on long cohabitation. The Court emphasized the importance of considering various forms of evidence, including marriage certificates and funeral programs, to establish family relationships and rights.
 28. We are not at all impressed by the submission by the appellant that the court relied on documents that ought not to have been tendered in evidence as this ought to have been raised in the trial court and cannot therefore form the basis of overturning the decision of the trial court. In stating as much, we are fortified by the decisions of this Court in *Meta Platforms, Inc & 2 Others v Motaung & 186*



Others; Kenya National Human Rights and Equality Commission & 14 Others (Interested Parties) (Civil Appeal E232 & E445 of 2023 (Consolidated)) [2024] KECA 1262, where the Court emphasized that objections to the admissibility of documents should be raised at the trial stage. If no objection is raised, the document is deemed admissible, and its admissibility cannot be challenged on appeal. Again in the case of *Outa v Okello & 3 Others (Petition 6 of 2014)* [2017] KESC 25, the Supreme Court held that a document produced without objection in the High Court cannot form the basis of an appeal on the grounds that it ought not to have been used in evidence.

29. In the ultimate we agree with the trial court's determination that the marriage between the respondent's deceased parents indeed resulted in legitimate offsprings. The appellant's contentions to the contrary were entirely without merit, baseless, and motivated by an ulterior intent to dispossess the rightful heirs of the deceased's estate. The respondent being the son of the deceased ranks in priority to the appellant when it comes to who should administer the estate of the deceased. Accordingly, the trial court was right in revoking the grant on that basis and appointing the respondent and his sister instead.
30. Following the revocation of the grant, the court also canceled the respondent's registration as the proprietor of land parcel No. North Sakwa/Maranda/1622, restoring it to the estate of the deceased. The appellant submitted that this was an error since the respondent only prayed for revocation of grant and nothing more. That absent of such prayer, the trial court as per the appellant, ought to have ordered the respondent to file summons afresh for grant of the letters of administration. These submissions by the appellant are not entirely correct as one of the prayers in the application for revocation of the grant was for the respondent to be appointed the administrator of the estate of the deceased in place of the appellant.
31. In any event, we find this reasoning outrageous and far from what the intention of the *Law of Succession Act* was and the general duty of the court. The primary function of a court dealing with succession disputes is the distribution of the estate of a deceased person, ensuring that all beneficiaries are fairly represented and their rights are protected. We thus, do not find anything wrong and or objectionable with the said order. This Court in the case of *Thiga & 2 Others v Thiga (Civil Appeal 174 of 2020)* [2024] KECA 1393, emphasized that the issuance of letters of administration to objectors who were deceased children and had been left out without a fresh application was valid. The Court held that the trial court had the discretion to make such orders to ensure justice and fairness in the distribution of the deceased's estate. Further, the Supreme Court in the case of *In Re Estate of Mukuna Karanu (Deceased) (Succession Cause 222 of 2007)* [2022] KEHC 16751, held that the trial court had the discretion to issue letters of administration to objectors who were deceased children and had been left out without a fresh application. The court emphasized the importance of ensuring that all beneficiaries are fairly represented in the administration of the estate.
32. Accordingly, we reject the appellant's argument on the said issue and conclude that the decision of the trial court was both reasonable and in full compliance with the law.
33. Lastly, the argument by the appellant that the grant of the letters of administration to the respondent and the sister would prejudice the deceased's brothers' interests, as the parcel of land was ancestral land in which they had all erected their respective family houses, does not hold any water as the same has not been supported by any tangible evidence. It is a mere apprehension and speculation. The trial court was very clear on which parcel of land it ordered to be administered by the respondent and the sister. It was not the entire land belonging to the family. It was the parcel of land that the appellant upon fraudulently obtaining a grant of letters of administration caused it to be transferred, and registered in his name. We accordingly find the appellant's argument not only far-fetched but also devoid of any legal merit. It is a baseless conjecture aimed at disinherit the respondent and his siblings. The appellant



too did not dispute the respondent's assertion that he had his own properties which he had gifted inter vivos to his children.

34. Upon a comprehensive examination of the entire appeal, we find it devoid of merit. Consequently, it is dismissed with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF MARCH 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

