



**Olang v Miduri (Suing on Behalf of Albert Miduri Olang) (Civil Appeal
46 of 2020) [2025] KECA 1028 (KLR) (30 May 2025) (Judgment)**

Neutral citation: [2025] KECA 1028 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 46 OF 2020
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA
MAY 30, 2025**

BETWEEN

ELLY MUNDU OLANG APPELLANT

AND

POLYCARP ONYANGO MIDURI RESPONDENT

SUING ON BEHALF OF ALBERT MIDURI OLANG

(Being an Appeal from the Judgment and decree of the High Court at Kisumu, (Cherere, J.) dated 31st October 2019 in HC SUCCESSION CAUSE NUMBER 214 OF 2008)

JUDGMENT

1. According to Niccolò Machiavelli, in his book "The Prince": "A son can bear with equanimity the loss of his father, but the loss of his inheritance may drive him to despair."
2. This quote encapsulates the emotional and practical challenges faced by families dealing with inheritance disputes, particularly in the context of Kenyan succession laws. In Kenya, succession cases, especially those involving land, the death of a loved one often unearths deep-seated family tensions that were previously dormant or hidden. The complexities surrounding the administration and distribution of an estate can lead to conflicts and disputes among family members. Land, being a valuable and emotionally charged and significant asset, frequently becomes a focal point of contention.
3. Machiavelli's observation underscores the emotional weight and potential for conflict that accompanies inheritance woes. While the loss of a parent is a profound emotional experience, the perceived or real inequities in the distribution of an inheritance, particularly land, can exacerbate family rifts and lead to prolonged legal battles. This is evident in the case of the Estate of Manasse Olang Oriewo, "deceased" where the administration and distribution of his estate have led to this appeal, highlighting the ongoing struggles over inheritance.



4. In this appeal, Elly Mundu Olang, “the appellant” and Albert Midura Olang who is visually impaired, are brothers and sons to the deceased who passed away on 15th May 1996. The latter appointed his son, Polycarp Onyango Miduri, “the respondent” to represent him in the succession cause that ensued following the passing on of the deceased. The deceased left behind a substantial estate consisting of land parcels: Kisumu/Chiga/428, Kisumu/Chiga/2130, Kisumu/Muhoroni /863, and Kisumu/Muhoroni/918.
5. Following the demise, the appellant single handedly petitioned for a grant of Letters of Administration Intestate, which were issued to him on 11th July 2008. Subsequently, a Certificate of Confirmation of grant was issued. The respondent however, by summons dated 2nd August 2018, sought the revocation of the grant on the grounds that the appellant had obtained the grant by concealing the material fact that he had a brother, the respondent who was equally entitled to a share of the estate of the deceased. By consent recorded on 11th February 2019, the grant was revoked, and a fresh one issued in the joint names of the appellant and respondent.
6. The parties however, failed to agree on the mode of distribution of the estate, prompting the trial court to order each party to file separate proposals and have the dispute determined by the court. The appellant proposed that Land Parcels Kisumu/Chiga/428, Kisumu/Chiga/2130, and Kisumu/Muhoroni/863 be wholly devolved to him, and that 70% of Land Parcel Kisumu/Muhoroni/918 be devolved to him, with the remaining 30% to the respondent.

The respondent, on the other hand, proposed that Land Parcels Kisumu/Chiga/428 and Kisumu/Muhoroni/863 be shared equally between them, while Land Parcel Kisumu/Chiga/2130 be wholly given to the appellant, and Land Parcel Kisumu/Muhoroni/918 be divided into three portions with portions 'A' and 'B' going to the appellant whereas Portion 'C' goes to the respondent.
7. Because of the stalemate the trial court directed that the appellant, whose proposal was not in consonance with Section 38 of the *Law of Succession Act*, had the burden of proof justifying his proposed mode of distribution and ordered that the cause proceeds by way of the appellant’s evidence only.
8. The appellant testified that prior to his death, the deceased had caused the registration of Land Parcel Kisumu/Chiga/423 in favour of the respondent and Land Parcel Kisumu/Chiga/761 in favour of the appellant. He claimed that being the last born, he was entitled under Luo Customary Law to Land Parcel Kisumu/Chiga/428, where the family home is situate. He also claimed the whole of Land Parcel Kisumu/Muhoroni/863, on the basis that he had bought it though he caused it to be registered in the name of the deceased. Without providing any reason, he proposed that Land Parcel Kisumu/Chiga/2130 devolve wholly to him. He further proposed that 70% of Land Parcel Kisumu/Muhoroni/918 devolve to him, stating that he paid Kshs. 700/- out of the Kshs. 1,000/- government levy for the property, while the respondent paid Kshs. 160/-. The appellant additionally stated that the distribution of Land Parcel Kisumu/Muhoroni/918 had been discussed in a meeting with the Chief for Muhoroni Location, Jason Otieno Alal, PW2, and it was agreed that the respondent would get 3 acres out of it.
9. PW2, testified, that with regard to Kisumu/Muhoroni/918, it was agreed that the appellant would get portions 'A' and 'B' and the respondent Portion 'C', while Land Parcel Kisumu/Muhoroni/ 863 would be disposed of and proceeds thereof shared equally.
10. PW3, Joseph Ocholla Omollo, a priest, was tasked by the chairman of the clan, Mr Okide to reconcile the parties whereat it was tentatively agreed that Land Parcel Kisumu/Chiga/428, will be equally shared, Land Parcel Kisumu/Chiga/2130 would solely go to the appellant, Kisumu/Muhoroni/918



to be shared in the ratio of 70/30 in favour of the appellant, the respondent to pay the appellant Kshs 140,000/= being his share of the purchase price in respect of Kisumu/Muhoroni/863 which allegedly the respondent had sold. However, the tentative agreement was not honoured as none of the parties signed it.

11. After considering the evidence led, the trial court determined as follows:

Kisumu/Muhoroni/918 ownership to the deceased. and revert

2. The grant is confirmed in the following terms:

- a. Land Parcel No. Kisumu/Chiga/2130 shall devolve wholly to the appellant.
- b. Land Parcel No. Kisumu/Chiga/428 shall devolve to the appellant and the respondent in equal shares.
- c. Land Parcel No. Kisumu/Muhoroni/863 shall devolve to the appellant and respondent in equal shares. (d) Portions 'A' and 'B' of Land Parcel No. Kisumu/Muhoroni/918 shall devolve to the appellant, and Portion 'C' to the respondent.
- (e) Each party shall bear its own costs of these objection proceedings.

12. The appellant is now before this Court on appeal against the judgment and decree aforesaid. In his memorandum of appeal dated 6th March 2020, he contends that the trial court misunderstood the principles for determining the free property of a deceased person, failed to recognize that Land Parcel No. Kisumu/Chiga/2130, although in the name of the deceased, was actually purchased by the appellant; disregarded the appellant's proposed distribution for Kisumu/Chiga/2130 and misinterpreted Section 42 of the *Law of Succession Act* by incorrectly treating the parcel as a gift inter vivos by the deceased to the appellant; ignored the testimony and minutes from the area Chief, which detailed a unanimous resolution regarding Land Parcels Kisumu/Muhoroni/918 and Kisumu/Muhoroni/863 and that the decision was based on contradictory evidence. In the ultimate, the appellant sought that the appeal be allowed with costs.

13. The appeal was canvassed by way of written submissions. During the plenary hearing of the appeal, there was no appearance for the appellant either in person or through counsel whilst Mr. Ogusu Gilbert, learned counsel appeared for the respondent. The court being satisfied that the appellant though served with appropriate hearing notice but was absent, had nonetheless filed his written submissions and the respondent's counsel indicating that he wholly wished to rely on his written submissions filed, directed that the judgment be crafted based on the respective submissions by the parties.

14. The appellant in arguing the appeal condensed all the grounds into two thematic areas; misapprehension of the law and want of proper evaluation of the evidence presented by the appellant. Counsel submitted that the trial court misapprehended the principles that are applicable in determining what constitutes the free property of a deceased person. It was submitted that the appellant had tendered evidence showing that Land Parcel No. Kisumu/Chiga/2130 was not part of the deceased's estate since he had purchased it and caused it to be registered in the name of the deceased. This evidence, was supported by a witness statement from Paul Opiyo Oriecho, which was not objected to by the respondent, when tendered in evidence. That even the respondent's own proposed mode of distribution suggested that this parcel should devolve wholly to the appellant.

15. While relying on the case of *Mary Rono v Jane Rono & Another* [2005] eKLR, the appellant argued that the distribution of a deceased's estate must be carried out judiciously, taking into account all relevant factors and legal provisions. The trial court, however, misapprehended these principles,



leading to the distribution that resulted in the appellant receiving 1.15 hectares, which was 0.25 hectares less than what the respondent received with regard to the above parcel of land.

16. It was the appellant's contention that in reality, the court's distribution gave him just 0.9 hectares whereas the respondent received 2.15 hectares from the deceased's estate. Prior to the court's distribution, the parties had received certain parcels as gifts inter vivos from deceased. The appellant received 0.15 hectares (Land Parcel Kisumu/Chiga/761) while the respondent was given 1.4 hectares (Land Parcel Kisumu/Chiga/423). As a result, the respondent ended up with over double the land (2.15 hectares) compared to the appellant.
17. On the second issue, counsel submitted that the trial court disregarded the testimony alluding to a unanimous resolution of the parties regarding Land Parcels No. Kisumu/Muhoroni/918 and Kisumu/Muhoroni/863. The appellant testified that on 4th May 2011, the parties attended a meeting convened by the Chief of East Kolwa location. At this meeting, it was agreed that Land Parcel No. Kisumu/Muhoroni/863 would be sold to clear debts, and Land Parcel No. Kisumu/Muhoroni/918 would be distributed in a 7:3 ratio in favour of the appellant, based on their respective contributions.
18. That the trial court adopted the consensus for Kisumu/Muhoroni/918, allocating portions 'A' and 'B' to the appellant and portion 'C' to the respondent. However, the trial court disregarded the resolution regarding Kisumu/Muhoroni/863 and ordered it to be divided equally between the parties. This inconsistency in evidence treatment led to a misdirection by the trial court. While recognizing the monetary contributions for Kisumu/Muhoroni/918, the trial court ignored evidence related to Kisumu/Muhoroni/863's disposal for loan arrears settlement. The trial court accepted parts of the minutes to distribute Kisumu/Muhoroni/918 but took extraneous matters into account when canceling titles related to Kisumu/Muhoroni/863.
19. In the end, the appellant prayed that the appeal be allowed as prayed.
20. In answer, Mr. Ogusu argued that the appellant's claim to Land Parcel No. Kisumu/Chiga/2130 was baseless. He pointed out that the parcel was registered in the name of the deceased, that the Green Card showed that the parcel was registered in the deceased's name in 1983. The respondent also noted that there was no evidence to support the appellant's claim that he bought it from Paul Opiyo Oriecho, as the Land Register only showed the deceased as the registered proprietor.
21. Regarding Land Parcel No. Kisumu/Muhoroni/918, the court's decision to allocate portions A and B to the appellant and portion C to the respondent was deemed fair. Counsel submitted that the trial court correctly disregarded the appellant's claims about the retired Chief's meeting concerning Land Parcel No. Kisumu/Muhoroni/863, as the parcel was registered in the deceased's name. The trial court's decision to devolve this property equally between the appellant and the respondent was justified, considering the appellant had concealed material facts and sold the property without consent of the respondent.
22. Counsel opined that the trial court's judgment accurately reflected the true position and was fair. The trial court's distribution considered principles of equity and was justifiable. In conclusion, counsel maintained that the appellant's concealment of material facts and unauthorized sale of some of the parcels justified the trial court's decision, and therefore urged this Court to uphold the same.
23. On a first appeal, the duty of the court is to re-evaluate, re-assess, and re-analyze the evidence on record and draw its own conclusions, while bearing in mind that it did not have the advantage of seeing and



hearing the witnesses firsthand. This duty was succinctly set out in the case of *Selle v. Associated Motor Boat Co. Ltd.* [1968] EA 123, thus:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

24. This requirement ensures that the appellate court conducts a thorough and in-depth review of the trial court’s decision, ensuring justice is served by considering all relevant factors and evidence. With the above in mind, the issue for our determination is whether the distribution of the deceased’s estate by the trial court was in accordance with the law.
25. The distribution of the estate of the deceased is primarily guided by The *Law of Succession Act*. The principles enshrined therein ensure that the distribution of the deceased’s estate is fair and just, taking into account all relevant factors and legal provisions. In the case of *Mary Rono v. Jane Rono & Another* (supra), the Court reiterated the need for fairness in the distribution of a deceased’s net estate, ensuring decisions are made on a sound legal and factual basis. The Court stated:

“... while I do not doubt the discretion donated by the Act in matters where dependants seek fair distribution of the deceased net estate I think the discretion, like all discretions exercised by courts, must be made judicially or to put it another way, on sound legal and factual basis. ... I think, in the circumstances of this case there is considerable force in the argument by Mr. Gicheru that the estate of the deceased ought to have been distributed more equitably taking into account all relevant factors and the available legal provisions.”

26. One of the key principles that avail to the circumstances of this appeal is that the net estate should devolve upon the surviving children equally as there is no surviving spouse. In this regard Section 38 of the *Law of Succession Act*, provides inter alia:
27. It would appear that there is really no serious disagreement with the distribution of Land Parcel No. Kisumu/Chiga/2130, to the appellant by the trial court. Indeed, the distribution proposals by both parties filed with the court all favoured its devolvement to the appellant. The evidence led in that regard by the appellant was not controverted at all. The trial court therefore properly took into account this aspect in ordering the parcel to devolve to the appellant in terms of Section 42 of the *Law of Succession Act* which requires the court to take into account properties previously settled for the parties in determining the distribution of the deceased’s estate. The appellant’s only lament is that the trial court should not have treated this parcel as part of the estate as he had bought it out of his own funds but caused it to be registered in the deceased’s name. The appellant did not justify or explain why it was necessary to register the parcel in the deceased’s name and not himself and yet he was an adult.
28. Evidence on record demonstrate that the parcel was registered in the name of the deceased on 14th December 1983. How then could the parcel have been sold to the appellant by Paul Opiyo Oriecho? And how come the said vendor does not feature in any of the title documents? In any event, Section 3 of the *Law of Contract Act* dictates that any sale of land be in writing; no such evidence was adduced, more so the sale agreement. To our mind the alleged purchase of the parcel was a concocted story to



- achieve a desired result and the trial court cannot therefore be faulted for ignoring it. Therefore, the contention by the appellant that the trial court misunderstood the principles for determining the free property of a deceased person, particularly in relation to this Parcel is misplaced.
29. Under Section 3(1) of the [Law of Succession Act](#), free property of the deceased is defined thus “in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.” Going by this definition, this parcel as at 15th May, 1996 when the deceased passed on was still registered in his name and he could easily and freely dispose it of, and his interest had not in any event, been terminated by his death. Given the foregoing the trial court was right in treating the property as part of the estate of the deceased and distributed it accordingly.
 30. Regarding Land Parcel No. Kisumu/Muhoroni/918, the court's decision to distribute portions A and B to the appellant and portion C to the respondent cannot be faulted. Indeed, both parties were in agreement to this mode of distribution. It was not only fair but also equitable. We note the appellant has not faulted the distribution. We have no reason to depart from the distribution therefor.
 31. Turning to Land Parcel Kisumu/ Chiga/428, we note that the trial court directed it devolves to both parties equally. The appellant claimed entitlement to the whole parcel because he was the last born of the deceased. That according to Luo Customary law and rites, he was entitled to the whole parcel on which the homestead is built. Other than making the assertion, the appellant led no evidence to that effect. In any event if such distribution was to be adopted, it will fly in the face of the clear provisions of Section 38 of the [Law of Succession Act](#). Supposing that the only asset of the deceased was that parcel on which the homestead was built, would it mean that the other siblings would not be entitled to a share of such inheritance on the basis of the last born's entitlement? That will not only be unfair, unconscionable but inequitable! The [Law of Succession Act](#) does not envisage such scenario. In any case and as properly observed by the trial court, the appellant had not demonstrated that it was the deceased's intention to have him exclusively inherit this parcel of land. We conclude on this issue by stating that though the appellant was the deceased's last born, that per se did not in law entitle him to the deceased's homestead to the exclusion of the respondent. The trial court, in the premises cannot be faulted in the manner it dealt with the issue.
 32. How about the distribution of Land Parcel Kisumu/Muhoroni/863? It is important to note that the appellant through concealment of material facts sold the parcel purporting that it was by consensus of the family so as to allegedly defray a loan facility. This was an outright lie and the trial court felt so and rightly in our view, that it was fair and just that the parcel devolves to the parties equally. The minutes of the area chief over the issue were of no evidential value as they were not signed by any of the parties. Finally, because of the appellant's blatant lies, he cannot be allowed to benefit from his own mischief. The trial court's decision on the issue cannot be faulted therefor.
 33. Did the trial court misinterpret Section 42 of the [Law of Succession Act](#) in the distribution of the deceased's estate? Section 42 of the [Law of Succession Act](#) provides:
 34. This section requires the court to consider any property previously settled for the benefit of a child or grandchild when determining the distribution of the deceased's estate. The purpose is to ensure that the distribution is equitable, taking into account any prior benefits received by the beneficiaries.
 35. In the present case, the trial court noted that the respondent had no objection to Land Parcel No. Kisumu/Chiga/2130 devolving wholly to the appellant. The trial court applied Section 42 of the Act, taking into account properties previously settled for the parties. The court found that Land Parcels Kisumu/Chiga/761 and Kisumu/Chiga/2130 together entitled the appellant to a total of 1.15 hectares, which was 0.25 hectares short of the respondent's entitlement to Land Parcel No. Kisumu/



Chiga/423, measuring 1.4 hectares. The court reasoned and rightly so in our view that the intention of the legislature was to ensure equitable, not necessarily equal, shares of the estate.

36. Therefore, the trial judge's finding was right and aligned with the principles of Sections 38 and 42 of the Law of Succession Act, aiming to achieve an equitable and just distribution of the deceased's estate. See Thiga & 2 others v Thiga (Civil Appeal 174 of 2020) [2024] KECA 1393 (KLR).
37. Having analyzed all the issues presented in this appeal and answered each one in the negative, it is clear that the trial court's decision was based on sound legal and factual grounds. The principles of equitable distribution of the deceased's estate, as outlined in Sections 38 and 42 of the Law of Succession Act, were appreciated and applied.
38. Therefore, the only reasonable conclusion is that the appeal is devoid of merit and is accordingly dismissed with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF MAY, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

