



REPUBLIC OF KENYA



**KENYA LAW**  
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**Sugut v Jemutai & 3 others (Civil Appeal 110 of 2018)  
[2023] KECA 202 (KLR) (17 February 2023) (Judgment)**

Neutral citation: [2023] KECA 202 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPEAL 110 OF 2018  
PO KIAGE, M NGUGI & F TUIYOTT, JJA  
FEBRUARY 17, 2023**

**BETWEEN**

**ESTHER JEPKEMEI SUGUT ..... APPELLANT**

**AND**

**SELY JEMUTAI ..... 1<sup>ST</sup> RESPONDENT**

**KILIBWONI LAND DISPUTES TRIBUNAL ..... 2<sup>ND</sup> RESPONDENT**

**NANDI DISTRICT LAND REGISTRAR ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya at Eldoret,  
(Mwilu, J.) dated 7th December, 2015 in Civil Suit No. 96 of 2004  
As Consolidated with Misc. Civil Application No. 139 Of 2004)*

**JUDGMENT**

**JUDGMENT OF KIAGE, JA**

1. By this appeal the appellant, Esther Jepkemei Sugut (Esther) asks this Court to find as erroneous and reverse the judgment of the High Court (Mwilu, J as she then was) dated December 7, 2015 by which that court revoked the confirmation of grant that awarded the suit properties to her and redistributed the property between the two households of Esther and the 1<sup>st</sup> respondent, Selly.
2. Esther, had, by a plaint dated July 16, 2004, sued the respondents claiming that she was the registered owner of land parcels Nandi/Lessos/452 and Nandi/Lessos/469 (suit properties). The said properties originally belonged to her late husband Joseph Sawe Sugut (the deceased) and upon his demise they devolved to her as his heir. This followed Selly's lodging of proceedings against Esther in the 2<sup>nd</sup> respondent tribunal sometime in the year 2001, alleging that she was entitled to ownership of the said properties by virtue of being a widow of the deceased's late son and a step-son of Esther, by the



name Excyty Kipketer Arap Sawe (Excyty), a name that is rather a jawbreaker. The 2<sup>nd</sup> respondent tribunal heard the dispute and awarded ownership of both parcels of land to Selly. On July 3, 2001, the Principal Magistrate's Court at Kapsabet entered judgment in accordance with that decision and thereafter issued a decree. The appellant contested the 2<sup>nd</sup> respondent's award arguing that proceedings before it were a nullity for lack of jurisdiction. In the end she sought various orders including that; she is the sole and absolute owner of the suit parcels of land, and Selly, all her servants and agents be evicted from the suit land.

3. Selly filed a statement of defence and counter-claim in response alleging that Esther had obtained the suit properties through fraud, the particulars of fraud being that she; obtained registration of the suit land on the strength of a grant obtained from a court without jurisdiction, failed to obtain her consent while applying for the grant of letters of administration of the estate of the deceased and to indicate all the beneficiaries entitled to the estate in the application for grant, failed to notify her on the existence of succession proceedings in respect of the estate of the deceased and secretly registered herself as the owner of the suit parcels of land. Selly denied trespassing on the suit land, asserting that she had all along resided on the land as a wife to the late Excyty. In the result she counterclaimed for a declaration that the registration of Esther as the registered owner of the suit properties was illegal, null and void, and consequently that registration should be canceled and she should be substituted as the owner. Selly further sought a permanent injunction restraining Esther and her agents from dealing with the suit land in any way. She had also lodged summons for annulment of the grant issued to Esther in Misc Civil Application No 139 of 2004. With consent of the parties, the two matters were consolidated.
4. The matter proceeded by way of viva voce evidence with Esther calling 9 witnesses and Selly 7 witnesses in support of their respective claims. Various judges heard the matter, concluding with Mwilu, J (as she then was) who, by a judgment dated December 7, 2015, found in favor of Selly. The learned Judge specifically made the following orders;
  - a. A declaration that the proceedings before the Kilibwoni Land Disputes Tribunal in Land Case No 6/2001 including the award were valid.
  - b. A declaration that the award delivered in the Kilibwoni Land Disputes Tribunal in Land Case no 6 of 2001 was valid and enforceable.
  - c. The proceedings before the Kapsabet Principal Magistrate' court relating to succession being cause no 39 of 1995 are valid.
  - d. The confirmation of grant awarding the property to the plaintiff is revoked with the properties redistributed in terms of orders (e) and (f).
  - e. Nandi/Lessos/452 (15.493) is awarded to the 1<sup>st</sup> defendant being the late Excyty's share to hold the same under life interest and in trust for her children.
  - f. Nandi/Lessos 469 (6.071 acres) is awarded to the plaintiff as a surviving spouse in terms of section 35 of the Law of Succession under life interest and in trust for her children.
  - g. The Land Registrar, Nandi District make appropriate corrections to the titles effecting the orders (e) and (f) above.
  - h. Each party to bear their own costs.
5. That decision aggrieved Esther and after lodging a notice of appeal, her learned counsel filed a memorandum of appeal comprising a prolix 35 grounds, too many by any standards, but later condensed in written submissions to 6 issues for consideration as follows; Whether proceedings before



the Kilibwoni Land Disputes Tribunal in case no 6 of 2001 including the award were valid. Whether the 1<sup>st</sup> respondent was a dependant of the estate of the late Joseph Sugut and was there any justification in awarding her land parcel no. Nandi/Lessos/452 in exclusion of 9 beneficiaries. Whether there was justification in revoking the grant issued to the appellant, who ranks in priority to all dependants. Whether the 1<sup>st</sup> respondent can be lawfully married to a deceased person and have capacity to be awarded any property on behalf of the estate of her deceased husband. Whether the learned Judge misapprehended the evidence before her by excluding the legal principles regarding beneficiaries hence ignoring the appellant's case. Whether due to a 5-year delay in delivery of judgment, there was a valid judgment.

6. Ultimately, Esther prayed that the appeal be allowed, the judgment of the trial court be reversed, and Eldoret Misc Civil Application No 139 of 2005 be dismissed for lack of merit.
7. At the hearing of the appeal, Esther and Selly were represented by learned counsel Mr Magare and Ms Kiptoo respectively, while Mr Odongo appeared for the 2<sup>nd</sup> and 4<sup>th</sup> respondents. Counsel had filed written submissions which they sought to highlight. Mr Odongo made oral submissions.
8. Mr Magare begun by protesting the 6-year delay in delivery of the judgment, arguing that it was an injustice that can only be remedied by setting aside the judgment in its entirety. Counsel relied on the decision in *Manchester Outfitters Suiting Division Ltd & Another Vs Standard Chartered Financial Services Ltd & Another [2002] eKLR* for this proposition. The learned Judge was further faulted for finding that the 2<sup>nd</sup> respondent tribunal had jurisdiction to handle a matter that had already been dealt with by the succession court. Counsel asserted that Selly's claim before the tribunal was on ownership of the suit land, which issue did not fall within the jurisdiction of the 2<sup>nd</sup> respondent tribunal pursuant to section 3 of the Land Disputes Tribunals Act (repealed).
9. On distribution of the suit property, the learned Judge was reproached for apportioning land parcel no. Nandi/Lessos/452 to Selly when she did not qualify as a dependant of the deceased. To counsel, before sharing the property, the court ought to have identified the beneficiaries who were Esther and her 8 children, with Esther being counted as a unit by dint of section 40 of the *Law of Succession Act* (the Act). Further, counsel contended, even if Selly was to be taken as a wife, she should have been considered as one unit vis-à-vis Esther and her children.
10. Mr Magare criticized the learned Judge for failing to consider that there were nine dependants in Esther's house as opposed to only one in the second household, being Excety. Further, Counsel submitted, in a succession matter the issue is never who is in occupation but who is entitled to the property in issue. For this contention, reliance was placed on the decision in *Grace Chebet Sisimwo & 4 Others Vs Everlyne Cherukut Sisimwo & Another [2019] eKLR*. Moreover, pursuant to section 38 of the Act, where an intestate leaves no spouse, the estate ought to be divided equally among the deceased's surviving children, the only question being whether the late Excety could be counted as a surviving child and whether he left any dependant for the purpose of survivorship. According to counsel, the evidence on record did not justify the kind of conclusion reached by the trial court, more so because survivorship is determined in accordance with section 43 of the Act at the time of death and not after. Counsel opposed the awarding of a deceased child (Excety) two-thirds of the estate to the exclusion of the other 9 dependants, relying on section 41 of the Act, as applied in *Christine Wangari Gachigi Vs. Elizabeth Wanjira Evans & 11 Others [2014] eKLR*.
11. It was further asserted that pursuant to section 40 of the Act, the number of dependants among whom the suit property should have been apportioned was 10 namely, Esther's 8 children and herself as the surviving spouse of the deceased, as well as Excety if it was proved that he survived his father. In the result, counsel submitted, each heir would be entitled to 2.4388 acres of the total 24.388 acreage



contrary to what the trial court awarded, being 8.895 acres to Esther and 15.493 acres to Selly. The decision in *Mary Rono Vs Jane Rono & Anor. [2005] eKLR* was cited in support of this submission. In that case the Court, while referring to section 40 of the Act, held that distribution of the net estate of a deceased is to be done according to the number of children per house adding any wife surviving as an additional unit to the number of children. Counsel however qualified the foregoing assertion stating that if it was proved that the late Excyty predeceased the deceased and had no heir, then the suit land was to be shared equally among the remaining 9 units, that is 2.396 acres each, in accordance with section 38 of the Act.

12. Mr Magare disputed Selly's claim that she was married to the late Excyty posthumously 3 years after his death, contending that there was no marriage and the children born long after his death could not be his dependants. Counsel challenged the learned Judge's revocation of the confirmed grant awarding the suit property to Esther for the reason that Esther failed to; disclose to Selly that she was taking out letters of administration to the estate of the deceased, and to obtain the consent of all the necessary beneficiaries. To counsel, Selly had not proved marriage to the deceased's late son through the posthumous 'Itook' ceremony in order to be counted as a wife. Counsel contended that evidence of the marriage of Selly to Excyty posthumously and under custom was marred by contradictions. In addition, according to Muzee Arap Simatwa (PW9), an expert in Nandi customs, such marriages under Nandi custom were usually conducted in the presence of family members and neighbors, contrary to what happened in the instant case where only the relatives of Selly and the deceased are said to have attended.
13. Counsel asserted that Esther had no obligation to get the consent of Selly before obtaining the confirmation of grant because she was not a beneficiary for purposes of the Act. In any case, contended counsel, the alleged 'Itook' marriage ceremony was conducted privately, in the absence of and without the knowledge of Esther.
14. Opposing the appeal, Ms' Kiptoo reminded us of our role as a first appellate court, to re-appraise the evidence and draw our own inferences. She contested Mr Magare's submission that the impugned judgment was illegal, having been delayed for over 6 years. Counsel insisted that delay by itself does not vitiate a judgment, relying on the judgment of Lakha, JA in Manchester Outfitters Suiting Division Ltd (supra). On distribution of the suit property, counsel posited that the same was at the discretion of the court and section 40 of the Act was not applicable because Esther did not disclose other properties belonging to the deceased. Further, counsel approved the court's holding that a customary marriage had taken place arguing that the same had been proved. She submitted that even though she had not provided any authority on the 'Itook' marriage ceremony, witnesses testified on it.
15. Concerning the claim that the 2<sup>nd</sup> respondent was bereft of jurisdiction to handle the matter, Ms Kiptoo affirmed the High Court's finding as proper, arguing that the tribunal drew its jurisdiction from section 3 of the Land Disputes Tribunals Act (now repealed). The section provided that;
  - '3. (1) Subject to this Act, all cases of a civil nature involving a dispute as to—
    - a. The division of, or the determination of boundaries to land, including land held in common;
    - b. A claim to occupy or work land; or
    - c. Trespass to land, shall be heard and determined by a Tribunal established under section 4'.



16. It was submitted that the evidence tendered by Selly and her witnesses supported the assertion that together with her children they were dependants of the deceased, in accordance with section 29 of the Act besides being a wife to Excyty. The evidence included, Eliud Bitok (DW4)'s testimony to the effect that as chief of Koitot location he knew the deceased and one day when he visited him, he found Selly who was introduced to him by the deceased as a daughter-in-law. Julius Serem (DW5), a younger brother to Selly testified to having been sent to the deceased's home to collect a dowry of 5 cows. Kipkemei Arap Maiyo (DW2), father to Selly testified that his daughter was married to the deceased's late son posthumously. Alfred Kiplamai Arap Bor (DW6), a brother to the deceased stated that Excyty was engaged to Selly but he died before marrying her. Maritim Arap Kipsaina (DW7), an expert in Nandi customs gave evidence that a woman can be married to a deceased person although such marriages were rare and he was privileged to attend an 'Itook' ceremony 60 years back.
17. Ms Kiptoo further submitted that Selly and her 4 children were under the care of the deceased and he settled them on the suit properties during his lifetime. She approved the learned Judge's revocation of the grant, arguing that the application in that regard had met the stipulated grounds under section 79 of the Act. Counsel urged that the proceedings for obtaining the grant were defective since the consent of Selly as one of the dependants had not been sought. Further, Esther had left out the names of her children and other dependants, and part of the deceased's property in applying for letters of administration. Moreover, asserted counsel, in considering an application for revocation of grant, a Judge exercises his/her discretion as happened in this case and the same can only be interfered with in exceptional cases. The decision in *MBOGO & ANOR Vs SHAH [1968] EA 93* was cited in this respect.
18. Turning to the contention concerning re-distribution of the estate of the deceased by the learned Judge, counsel admitted that since the deceased's late son, Excyty, predeceased him, strictly following the letter and spirit of section 40 of the Act, it can be concluded that the first house of the deceased had no unit at the time of his demise. However, counsel added to that admission, 'This mischief is curable by a representative of the late Excyty (his widow) stepping into the void left by the deceased's son for purposes of inheriting Excyty's share of the Estate for the benefit of Excyty's children'. The foregoing submission notwithstanding, counsel contended that since the deceased had personally taken in Selly and her four children, and was providing for them, it was proper for the trial court to hold as it did that the children of Excyty were dependants of the deceased.
19. Similarly, Mr Odongo for the 2<sup>nd</sup> and 4<sup>th</sup> respondents opposed the appeal contending that where a statute-established a mechanism for dispute resolution, the court should cede to that jurisdiction. Counsel submitted that the Land Disputes Tribunals Act provided a mechanism for Esther to deal with awards of the 2<sup>nd</sup> respondent tribunal, being instituting an appeal or judicial review proceedings, but she chose the wrong procedure by instituting a suit. Reliance was placed on this Court's decision in *Catherine C Kittony Vs Jonathan Muindi Dome & 2 Others [2019] eKLR* for this argument.
20. In reply to the foregoing submissions, Mr Magare contended that the issue of Esther having used the wrong procedure to challenge the decision of the 2<sup>nd</sup> respondent tribunal was being raised for the first time on appeal. Further, this was a unique case where the decision of a court was challenged at the tribunal instead of the High Court. On the alleged 'Itook' marriage ceremony, counsel maintained that it never existed as its nature does not appear anywhere in academic texts, including the writings by Eugene Cotran, the late renowned scholar on customary law in Kenya. With respect to the claim that Esther had failed to disclose some property that was part of the estate, Mr Magare urged that, 'non-disclosure of unknown property does not lead to exclusion'. Counsel concluded by maintaining that the delay in delivery of judgment was inexcusable and fatal.



21. I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the *Court of Appeal Rules 2010*; *Selle Vs Associated Motor Boat Co [1968] EA 123*). I do accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge. I think that this further widens our latitude for departure where necessary.
22. I shall now consider the issues on which we were addressed by counsel and on which I think this appeal stands or falls namely;
- a. Whether the impugned judgment was valid in view of the delay.
  - b. Whether proceedings before the 2<sup>nd</sup> respondent Tribunal in case no 6 of 2001 including the award were valid.
  - c. Whether Selly and her children were entitled to the estate of the deceased.
  - d. Whether there was justification in revoking the grant issued to the Esther.
23. On the first issue, Esther complains that the judgment of the trial court is illegal due to the delay in delivery and consequently it should be set aside, relying on Manchester Outfitters Suiting Division Ltd (*supra*). I concur with the observation made in that decision that a delayed judgment prolongs and increases the stress and anxiety of litigation and reduces public confidence in the judicial process. I am mindful, however, that the vicissitudes of judicial service and the pressures attendant thereto may in some instances conspire to cause such delay as occurred herein. I note that the learned Judge at the end of her judgment expressed her 'sincere and absolute regret at the most unfortunate and unintended delay' in delivery of the judgment. Were I to accept the appellant's submissions I would have to remit the matter to the High Court for a retrial. I apprehend that ordering a retrial would be subjecting the parties to further and unconscionable delay. Moreover, the matter has been in court since the year 2004, and it is highly probable that the memory of witnesses has considerably faded. For these reasons I take the view that this Court as a first appellate court shall proceed to re-evaluate and re-assess the record with a view to making its own inferences of fact as is expected of us. I am unprepared to make the drastic holding that the judgment, though long delayed, was thereby a nullity.
24. Turning to the question of whether the proceedings and award of the 2<sup>nd</sup> respondent were valid, Esther contended that the 2<sup>nd</sup> respondent lacked jurisdiction to deal with the matter before it as it concerned ownership of the suit property, a subject that is outside the jurisdiction donated to it pursuant to section 3 of the Land Disputes Tribunals Act (now repealed). That submission was however contested by the 2<sup>nd</sup> respondent, arguing that if Esther was aggrieved by its decision, she should have challenged it through the proper mechanism, by way of instituting an appeal or a judicial review application, but



not a suit. The decision of this Court in Catherine C Kittony (*supra*) was referred to for this assertion. In that decision, this Court held and I would respectfully concur that;

'In the instant appeal, it is not in dispute that the appellant was aggrieved by the decision of the 2nd respondent. However, instead of lodging an appeal before the Provincial Appeals Committee constituted for the province in which the land which was the subject matter of the dispute was situated and if still dissatisfied to appeal to the High Court on a point of law (see: Section 8(1) and(9) of the Land disputes Tribunal Act) or institute judicial review proceedings to quash the decision by the 2nd respondent as it was alleged that it acted in excess of its jurisdiction in making the award, the appellant opted to file a fresh suit before the ELC which was not in order. See also Speaker of National Assembly v Njenga Karume [2008] 1 KLR. We reiterate that if indeed the appellant did not agree with the decision of the 2nd respondent and wished to challenge it, it behooved her to follow the route prescribed by the Land Disputes Tribunals Act before proceeding anywhere else'.

25. Next is whether Selly and her children are entitled to the estate of the deceased. She asserts that they have a right to the estate based on two grounds. First, she was posthumously and by custom married to Excyty, the late son to the deceased and his deceased first wife. Second, she was a dependant of the deceased together with her four children, by virtue of the fact that the deceased took care of them during his lifetime and settled them on the suit property. Of the four children, the first child was allegedly born before Excyty expired, and the other three were sired by his cousin after his death.
26. Concerning whether Selly was legally married to the late Excyty, evidence was adduced to the effect that she was married to him in 1989 through a Nandi traditional marriage ceremony known as 'Itook' and dowry paid in November 1992. The ceremony took the form of Selly's hand being fastened with traditional grass on the bed of the late Excyty to symbolize the ring that he would have put on her finger. Two old men who are now deceased then spat milk and alcohol on her to symbolize the marriage. DW2, the father to Selly testified to the marriage ceremony having taken place although he did not attend it. DW3, a neighbor, attested to having attended the marriage ceremony. DW4, a chief, testified that he was informed by the deceased that Selly was his daughter-in-law on one of his visits to the deceased's home. DW5, Selly's younger brother indicated that he is the one who fetched dowry from the deceased's home and DW6, a brother-in-law to Esther, also gave evidence in support of the marriage. An expert witness DW7, testified on the existence of the 'Itook' Nandi marriage ceremony, noting however, that the last time he attended such a ceremony was 60 years ago. He stated that the ceremony is performed when the spouse is not alive and the wife-to-be must have had a child with the deceased spouse. The parents of the girl are not necessary participants. Further, that 'Itook' was similar to the 'Toloch' ceremony as referred to by PW9, the expert witness for Esther. According to DW7, there was no need for witnesses at the 'Itook' ceremony. The bride price which is preceded by 'stalking the cows', a phrase that refers to identifying dowry, is supposed to make people aware of the marriage.
27. Esther contested the marriage of Selly to her step-son, Excyty, asserting that marriage under customary law cannot take place after the groom has died. She submitted that her brother-in-law, DW6, was the one who took Selly to the suit property where she had stayed since the year 1992. Esther further testified that Selly's children were born after Excyty's death and that she was only a caretaker to the deceased. Her witnesses, Hassan Kinii (PW2), a brother to the deceased, Francis Tuwi Sugut (PW3), a nephew to the deceased, Kipchirchir Arap Masai (PW4), Barnaba Arap Keino (PW6) and Noah Kiptoo Samoei (PW7) all expressed their incognizance of Selly's marriage through a ceremony known as 'Itook' although they indicated having seen her around the home of the deceased. (PW7) an expert on Nandi customs and culture testified on a marriage ceremony known as 'Toloch' that is performed to an engaged lady whose husband-to-be dies before marrying her. Unlike what happened in Selly's



case, the ceremony had to be performed in the presence of the mother of the deceased and presided over by a woman and a man. PW7 further indicated that he had never heard of a ceremony by the name 'Ittook'. To him, if a woman had been impregnated by a man before his death, and without engaging her, then the deceased's people were required to visit the family of the woman, establish that she had a child with the deceased, and if so undertake negotiations and engagement ceremony before the man is buried. After burial, the 'Toloch' ceremony is then performed.

28. The learned judge upon evaluating the foregoing evidence found that there was a valid marriage between Selly and Excyty by their custom. Notably, however, in making that finding the learned Judge relied on the determination of the 2<sup>nd</sup> respondent on the same issue. The 2<sup>nd</sup> respondent had noted;

'Points To Observe

1. Selly Jemutai to be awarded the disputed parcels of land because she belongs to the late son of Joseph Sugut, the late Kekisti who impregnated her and was brought home by the late Joseph Sugut who paid dowry to her home.
  2. When Joseph Sugut brought Selly Jemutai, he wanted to ignite the family's fire (customarily) because his only son had died without any other child and the dowry paid confirms the same.'
29. With respect to the learned Judge I am not persuaded that the evidence adduced before court lent itself to that conclusion. My view upon careful analysis of the record is that it does not bear evidence sufficient to establish on a balance of probability that Selly was married to Excyty posthumously. Looking at the testimony of both expert witnesses, that is PW7 and DW9, the evidence of the former on the supposed 'Ittook' ceremony is highly doubtful, particularly because he claimed to have attended one such ceremony 60 years ago! What would be more plausible is the 'Toloch' ceremony although elements of it were not established. It was upon Selly to call evidence to establish the 'Ittook' custom and this she did not do. She had a duty to establish the 'itook' custom with a measure of exactitude and I doubt that she did. I associate myself with the holding in *Ernest Kinyanjui Kimani Vs Muiru Gikanga And Another [1965] EA 735* as restated by Gicheru, JA (as he then was) in *Sakina Sote Kaitany & Another Vs Mary Wamaita [1995] eKLR*.
30. To summarise the position, this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity the customary law must be accurately and definitely established. The court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward the customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially, of the present apparent lack in Kenya of authoritative text books on the subject, or of any relevant case law, this would in practice, usually mean that the party propounding the customary law would have to call evidence to prove that customary law, as he would prove the relevant facts of his case.
31. Having failed to discharge that burden, I must respectfully conclude that Selly was not a wife to Excyty.
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. I concur with the learned Judge. Indeed, evidence was adduced by a majority of the witnesses to the effect that Selly had been residing on the suit land from as far back as the year 1992 and that she was a caretaker for the deceased.
34. The question that then arises is to what extent Selly and her children are entitled to the deceased’s estate. The learned Judge in her decision awarded the larger part of the suit land to Selly noting, ‘I have awarded the larger partition to the 1<sup>st</sup> defendant considering she has nowhere else to go having lived on the suit premises unlike the plaintiff who has alternative property’. With respect, I think the learned Judge fell into error in reaching such a conclusion. The claim that Esther had other property that belonged to the deceased but which she did not disclose was raised but never established. In fact, the learned Judge before distributing the property observed, ‘As I am bound by the pleadings, I will limit myself to the suit property as the only property of the deceased for purposes of these proceedings’.
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. Nonetheless, as I have determined that Selly and her children were dependants of the deceased, I am inclined to add Selly to the number of units eligible to benefit from the estate, making a total of 10 units. From the record, the total acreage of the suit properties is stated to be 24.388 acres. Divided by the 10 units, that would equal to 2.4388 acres per person. Selly’s entitlement would thus be 2.4388 acres only, and since she resides on parcel no Nandi/Lessos/469, it would be 2.4388 acres of that very parcel.
36. As to whether the confirmation of grant was properly revoked, it is crystal clear that my findings stated above would lead to a similar result. I therefore cannot fault the learned Judge in this respect. Consequently, the prayer for dismissal of Misc Civil application No 139 of 2005 is without merit.
37. Ultimately, my view is that this appeal should succeed in part. I would set aside the judgment of the High Court and substitute therefor orders that;
  - a. The orders of the trial court with respect to the 2<sup>nd</sup> respondent remain undisturbed.
  - b. The confirmation of grant awarding the suit properties to Esther is revoked with the properties redistributed in terms of order (c).
  - c. The suit parcels of land totaling 24.388 acres shall be divided among 10 units comprising of Esther as the surviving spouse of the deceased, her eight children and Selly as a dependant of



the deceased, with each person getting 2.4388 acres. Selly shall be apportioned her share from Parcel No Nandi/Lessos/469 where she resides.

- d. The Land Registrar, Nandi District to forthwith make appropriate corrections to the titles of the suit properties in accordance with order (c).
- e. Each party shall bear their own costs.

As Mumbi Ngugi and Tuiyott JJA agree, it is so ordered.

#### **JUDGMENT OF MUMBI NGUGI JA**

1. I have read in draft the judgment of my brother Kiage, JA with which I am in full agreement and there would be no utility in my adding anything thereto.

#### **JUDGMENT OF TUIYOTT, JA**

1. I have had the benefit of reading in draft the judgment of Kiage, JA, with which I am in full agreement and have nothing useful to add.

**DATED AND DELIVERED AT KISUMU THIS 17TH DAY OF FEBRUARY, 2023.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

