



REPUBLIC OF KENYA



KENYA LAW
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**Kambo v Mwangi (Civil Appeal 186 of 2017)
[2022] KECA 524 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KECA 524 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 186 OF 2017
DK MUSINGA, RN NAMBUYE & S OLE KANTAI, JJ
APRIL 28, 2022**

BETWEEN

FRANCIS GICHOHI KAMBO APPELLANT

AND

ESTHER WANJIKU MWANGI RESPONDENT

*(Being an appeal arising from the Judgment of the Environment and Land Court at Nyeri
(Hon. L. N. Waithaka, J.) dated 15th March, 2017 in Nyeri ELC Case No. 630 of 2014)*

JUDGMENT

1. This is a first appeal arising from the decree and judgment of the Environment and Land Court at Nyeri in ELC Case No. 630 of 2014 (formerly Nyeri HCCC No. 26 of 2012 (O.S.) (L. N. Waithaka, J.) dated and delivered on 15th March, 2017.
2. The background to the appeal is that the appellant took out an originating summons premised on Order 37 rules 1, and 2 of the *Civil Procedure Rules*, directed against the respondent. In it, the Court was invited to determine the following issues:
 - 1) Whether or not Ephantus Mwangi Waweru (deceased) was registered as proprietor of land parcel Nyeri/Watuka/622 (the precursor to the now land parcel Nyeri/Watuka/1569), to hold in trust for himself and for his nine other siblings namely:
 - i) Phyllis Njoki Kambo
 - ii) Susan Waithera Machohi
 - iii) Jerioth Nyambura Waweru (now deceased but represented by Simon Kibiro Kimani)
 - iv) Grace Muthoni Ngigi



- v) Rose Wachuka Ngigi
 - vi) Naomi Wambui Waweru
 - vii) Regina Wairimu Waweru (now deceased but represented by Charles Kariuki Gachoya)
 - viii) Mercy Wanjiru Waweru
 - ix) Jane Waitherero Waweru (now deceased)
- 2) Whether or not the nine siblings listed in (1) above together with the family of Esther Wanjiku Mwangi, the respondent, are entitled to an equal share of the now land parcel Nyeri/Watuka/1569, after the determination of the said trust.
 - 3) Whether or not the family of Jane Waitherero Waweru (deceased) is entitled to any further share of the said parcel of land after having acquired 1.62 hectares (approximately 4 acres) out of the said land which is now land parcel Nyeri/Watuka/1175.
 - 4) Who should be condemned to pay the costs of these proceedings.
3. The O.S. was supported by a supporting affidavit of Francis Gichohi Kambo, the appellant, and witness statements of Susan Waithira Machohi, Mercy Wanjiru Waweru, Njoki Kambo Mugecha and Grace Muthoni Ngige. In summary, the appellant and the respondent are joint administrators of the estate of one Ephantus Mwangi Waweru (Ephantus) in Nyeri P & A Cause No. 217 of 2008. The only asset in contest in the said succession proceedings is land parcel LR No. Nyeri/Watuka/1569 (the suit property) registered in the names of the deceased. The issue of a trust over the said suit property in favour of the appellant and the persons enumerated in item 1 of the O.S. arose in the said succession proceedings. The trial court advised parties to have the issue of a trust over the suit property determined separately, hence the filing of the O.S. whose determination resulted in the filing of the appeal under consideration.
 4. Cumulatively, it is the appellant's averments in his supporting affidavit as supported by witness statements of his witnesses that the deceased was an only son to one Samuel Waweru Karibii (Waweru). His siblings were nine sisters who are as enumerated under item 1 of the O.S. Waweru was the registered proprietor of land parcel number Nyeri/Watuka/622 (the original suit property). When Waweru passed on way back in 1978, Ephantus applied for succession to the estate of Waweru in the Chief Magistrate's Succession Cause No. 131 of 1989 allegedly to the exclusion and without the knowledge and or consent of his siblings who were all daughters of Waweru and therefore sisters to Ephantus. It is alleged only Jane Waitherero (Jane) who was at the material time an unmarried daughter of Waweru successfully objected to the said application and was subsequently joined both as a joint administrator and beneficiary of the estate of Waweru.
 4. Following the conclusion of the succession proceedings to the estate of Waweru, Ephantus was registered as owner of the original suit property. He caused it to be subdivided firstly into two portions namely, LR Nyeri Endarasha/1175 & 1176. Parcel 1175 being the bigger was retained by Ephantus while Parcel 1176 the smaller portion went to Jane. Ephantus subsequently subdivided his bigger portion into Nyeri/Watuka/1569, 1225, 1240, 1568 and 1507 respectively. Parcel number 1569 was retained in his name, while the rest were variously sold by Ephantus as follows: 1225 comprising 1 acre to Joseph Mwangi Waweru, 1240 comprising 14 acres to Joseph King'ori Thuita, 1568 comprising 3 acres to Joseph King'ori Thuita and lastly, 1507 comprising one acre to Jamleck Gicobi Kangana.
 6. According to the appellant, the above highlighted facts are a sufficient demonstration that the suit property has its roots in the original suit property to which both Ephantus and his nine (9) siblings



enumerated under paragraph 1 of the O.S. were entitled to inherit in equal shares. He therefore prayed for the suit property to be declared trust property, the trust to be terminated and the suit property shared equally between all the children of Waweru with the exception of Jane who had been given a portion of the original suit property by Ephantus.

7. The O.S. was opposed by a replying affidavit of Esther Wanjiku Mwangi, the respondent, sworn on 12th April, 2012 and supported by her own witness statement and that of Samuel Maina Gatuiri basically affirming the background information as already highlighted above. The only point of departure is her assertion that the issue as to who was or was not entitled to inherit the estate of Waweru having been finally determined in the Chief Magistrates' Court Succession Cause No. 131 of 1989, was a non-issue in the succession proceedings with regard to the estate of her late father, Ephantus.
8. The O.S. was canvassed through oral testimony. The appellant, Susan Waithera Machohi (Susan), Mercy Wanjiru Waweru (Mercy), Phyllis Njoki Kambo (Phyllis), and Grace Muthoni Ngige (Grace) gave evidence as PW1, 2, 3, 4 and 5 in support of the O.S. basically reiterating the background information set out above. In addition, and particularly in cross-examination, added that the appellant is a son to Phyllis, PW4. In 2003, Ephantus called him and told him that he (Ephantus) wished the suit property to be shared equally between him and his sisters. He was aware his mother Phyllis did not raise any objection in succession cause No. 131 of 1989 because she knew her brother would hold the land in trust for them, he was aware his mother and other aunties kept on protesting as to why their brother was selling land but took no legal action against him during his lifetime.
9. Susan concedes she was aware that Jane protested in the succession proceedings and she received a share of Waweru's estate. It was her wish that the land would be distributed fairly amongst all the children of Waweru. Her position was that their brother held the land in trust for them. She conceded she married in 1968 but went back to the suit land in 2008 after the death of her husband. She recalled that at one time, she and an unnamed sister raised a complaint with the area chief over their exclusion from inheriting Waweru's land and when they were told that daughters were not entitled to inherit their father's land they went away. Mercy said she got married in 1988, but went back home and was residing and tilling a portion of the suit land. Her sister Naomi was also residing and tilling a portion of the land. In her opinion, the land belonged to all Waweru's children although Waweru had not stated how the land was to be shared among them. Phyllis said she cultivates a portion of the land but does not live on it. She was aware Ephantus filed succession proceedings after the death of Waweru. She concedes only Jane protested during the succession proceedings of her late father's estate and she was given a share. She was aware of Mugecha Kambo who was a family member but denied being married to her. Grace's version was that she left the original suit property to get married in Nanyuki. The father said the land belonged to all his children, but would not mind if given 1 or 2 acres. She learnt of the succession proceedings much later and protested to her brother who became very abusive and she never pursued the matter further.
10. The respondent's testimony was that her father's estate is already subdivided and shared out amongst her siblings, her aunties are not entitled to a share of her late father's land as they never sought land from him during his lifetime, her late father administered her grandfather's estate and gave four (4) acres to her aunt Jane because Jane was unmarried. The other aunties were not given a share of the land because they were married. None of them challenged the succession proceedings or the distribution of her grandfather's estate. She was aware that her aunt Wangui who was not one of the witnesses resides on the suit property, having moved there after the death of her father. Phyllis stays at Mbaringo village. Phyllis children started cultivating the land after her father died. When cross-examined, she said she was born in 1978; only auntie Wambui stays on the land; Jane's family stays on their land; none of her aunts were using the land before her father died; all claims with regard to her grandfather's estate



should have been sorted out during her late father's lifetime; she did not agree that her late father was holding the suit property in trust for himself and his siblings.

11. DW2 said he is a son to Rose Wachuka a sister to Ephantus and the named siblings. She is married and has no claim to her brother's estate although he had nothing to show that his mother who was said to be suffering from dementia had no claim to the suit property. He was aware auntie Wambui who both resides and cultivates a portion of the suit property came to the land after the death of his uncle.
12. At the conclusion of the trial, the learned trial Judge analyzed the record and identified only one issue for determination namely, whether the registration of the respondent's father as the proprietor of the original suit property was subject to a trust in favour of his siblings.
13. The Judge took into consideration the decisions of this Court in the case of *Gituanja vs. Gituanja* [1983] KLR 575 and *Kanyia vs. Muthiora* [1984] KLR 712 both on the exposition of the Kikuyu Customary Law principle that under Kikuyu Customary Law, land belonging to a deceased Kikuyu man can only be inherited by sons and unmarried daughters. Widows have a life interest in the portions under their use and upon their demise these fall for inheritance by their male children.
14. Applying the above threshold to the rival positions before court, the Judge made observations on the evidence on the record that the original suit property indeed belonged to Waweru while the suit property was a resulting subdivision of the original suit property, inherited and registered solely in the names of Ephantus, and that all the daughters of Waweru with the exception of Jane did not contest the succession proceedings to Waweru's estate, neither did the appellant classify his claim to the suit property based on trust whether under customary law or otherwise. It was also the judge's observation that the appellant's evidence that it was his grandfather's wish that all his children should get a share of the original suit property in equal shares, was not alluded to by the other witnesses who gave evidence in support of the O.S., and neither was there any evidence adduced by the appellant and his witnesses to suggest that Waweru did not wish his land to be subjected to Kikuyu Customary Law.
15. The Judge also found that there was no evidence to demonstrate that the daughters of Waweru considered themselves to be entitled to a share of Waweru's land on equal footing with their brother Ephantus. In the Judge's opinion, their evidence was that they ceased using the suit land upon being married. They only returned to the suit land for purposes of cultivation after their marriages failed. Those who were still married like PWS told the court that they just wanted to inherit their father's land and did not mind whether they got one acre or two. According to the Judge, they were not therefore interested in an equal share of their father's land.
16. The Judge then rendered herself as follows:

“ 53. With regard to the claim that the respondent's father held the property in trust for his siblings, that claim should be gauged on the basis of the test enunciated by the Court of Appeal in the case of *Salesio Mitonga v. Mithara & 3 Others* (2015) eKLR thus:-

It is trite law that trust is a question of fact and has to be proved by evidence. In *Gichuki -vs- Gichuki* Civil Appeal No. 21 of 1981, this Court held that a party relying on the existence of a trust must



prove through evidence the existence of a trust.....We concur with the following findings by the High Court:-

Trust must be proved by credible evidence adduced by the person claiming that a trust exists. See *Wambugu vs. Kimani* [supra].

54. Upon review of the evidence adduced in this case and the law applicable to administration of the property herein, I find and hold that the plaintiff has failed to prove to the required standard that the deceased held the land in trust for himself and his siblings, more so the married ones. For that reason, I return a negative verdict to questions 1 and 2 of the originating summons herein.
 55. With regard to question 3, I find and hold that no case has been made for interfering with the sharing of the estate between the deceased person and his unmarried sister, Waitherero.
 56. With regard to costs, this being a family dispute, each party shall bear their own costs of the suit.”
17. The appellant was aggrieved and is now before this Court on a first appeal raising eight grounds of appeal which we find prudent to condense and rephrase as follows: the learned Judge erred in law and in fact when she failed to sustain the appellant’s O.S. as laid before the court against the evidence tendered in support of the O.S.
 18. The appeal came for hearing before this Court on 8th December, 2021. Learned counsel, Jessee Kariuki, appeared for the appellant, who was also present. There was no appearance for the firm of C. M. King’ori & Co. Advocates that is on record for the respondent or the respondent herself. The Court being satisfied that the respondent’s advocates had due notice of the hearing date, having been served electronically by the Deputy Registrar of this Court on 6th December, 2021 allowed learned counsel for the appellant to prosecute the appeal. Mr. Jessee Kariuki informed the Court that they had filed a consent herein on 19th November, 2021 endorsed by advocates for the respective parties herein to the effect that the appeal be heard by way of written submissions already filed on the record without the necessity of attendance and or oral highlighting by the parties’ advocates.
 19. Supporting the appeal, the appellant submits that the learned Judge fell into error when she failed to take into consideration the fact that the registration of Ephantus as proprietor of the suit property did not vest in him the absolute ownership of the suit property under Kikuyu Customary Law. The same was subject to the interests of his siblings. The Judge was also faulted for the failure to appreciate that Mercy Wanjiru Waweru had in fact been in actual possession and occupation of a portion of the suit property, even prior to the registration of the suit property in the name of Ephantus. The registration of Ephantus as proprietor of the suit property was, therefore, subject to the overriding interest rights of the house of Mercy Wanjiru Waweru which did not have to be noted on the register in terms of section 30(g) of the *Registered Land Act* Cap 300 of the Laws of Kenya (now repealed).
 20. The appellant cites the case of *James N. Kiarie vs. Geoffrey Kinuthia & Another* [2012] eKLR for the holding that occupation and or possession of land is a necessary ingredient for a trust to be established under customary law and submitted that what fell for crucial determination by the trial court was the nature of the holding of the suit property by Ephantus and the intention of the parties. According to the appellant, the evidence tendered demonstrated clearly that the holding of the suit property by Ephantus was for the benefit of himself and his siblings. A customary trust should therefore have been



- presumed by the trial Judge in favour of Ephantus siblings whether or not they are in the possession or actual occupation of any portion of the suit property or otherwise.
21. The appellant also relies on the decision of the Supreme Court of Kenya in the case of *Isack M'inanga Kiebia vs. Isaya Theuri M'linturi & Another* [2018] eKLR in which the Court set out tests for establishing a customary law trust over land namely:
- 1) The land in question was before registration, family, clan or group land.
 - 2) The claimant belongs to such family, clan, or group.
 - 3) The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
 - 4) The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
 - 5) The claim is directed against the registered proprietor who is a member of the family, clan or group.
22. In light of the above threshold, the appellant invited this Court to fault the trial Judge for her failure to properly appreciate and inquire into the circumstances under which Ephantus came to be registered as the proprietor of the suit property in order to determine whether a customary land trust was envisaged under those circumstances. Secondly, the trial Judge was also faulted for the failure to properly appreciate and note that the concept of a trust is inherent in African Customary Laws inclusive of the Kikuyu Customary Law.
23. The appellant also relied on sections 48, 51 and 59 of the *Evidence Act* both on judicial notice and resulting trust; the case of *Joseph Githinji Gathiba vs. Charles Kingori Gathiba* [2001] eKLR in which Khamoni, J. (as he then was) analyzed extensively parameters for the presumption of customary law trusts and which analysis the appellant adopts fully as the threshold for determining issues in controversy herein. He also relied on the proviso to section 28 of the *Registered Land Act* which according to the appellant enshrines the concept of the customary land law trust.
24. In light of the above summarized legal position, the appellant submitted that grounds 1, 2, 3, 4, 5, 6, 7, and 8 of the appeal are well-founded, both on the law and the facts, especially when it is explicit from the cited case law that Kikuyu Customary Law enshrines the concept of a trust or resulting trust. All that he was obligated to do as the party alleging the existence of such a trust and which according to him was fully satisfied was to give evidence of the existence of such a trust, a position he asserts was satisfied through the evidence tendered by him and his witness as already highlighted above.
25. The appellant, therefore, urges this Court to adopt the position taken by the Court in the case of *Alan Kiama vs. Ndia Mathunya & Others*, CA 42 of 1978 [UR] where it was held, *inter alia*, that: Customary Law overriding interests arising from occupation and or cultivation with the full knowledge of the registered proprietor are entitled to protection because they are equitable rights even if they are not listed in section 30 of the Registered Land Act; equity always protects the just rights of the oppressed; equity always prevents an injustice being perpetrated; equity sanctifies the administration of justice; cultivation of land is incidental and an appurtenance of an overriding interest in right only of possession or actual possession.
26. The appellant also cited *Kimani Gituanja vs. Jane Njoki Gituanja* [*supra*] for the holding that under Kikuyu Customary Law upon the death of the father, the eldest son is registered as proprietor of the land in his capacity as a “muramati” or Kikuyu Customary Law trustee on behalf of all the children of the deceased.



27. In rebuttal of the appellant's appeal, the respondent relied on the tests for establishing a customary law trust as crystallized by the Supreme Court of Kenya in *Isack M'inanga Kiebia vs. Isaya Theuri M'lintari & Another* [supra] and submitted that based on the evidence the appellant and his witnesses relied on in support of the O.S. all those tests are answered in the negative, firstly because the genesis of the title to the suit property as registered in the names of Ephantus was not family, clan or group land but a transmission to Ephantus following successful succession proceedings to Waweru's estate in which it was only him, (Ephantus) as the only son and an unmarried sister, Jane who were the contesting beneficiaries; secondly, because the appellant's claim of entitlement through his mother being a sister to Ephantus and therefore a daughter to Waweru does not hold as the mother did not qualify to inherit as she was not an unmarried daughter of Waweru; thirdly, because the issue of distribution of the estate of Waweru having been settled in succession proceedings undertaken in the Chief Magistrates' Succession Cause No. 131 of 1989 without any objection either from the appellant or his mother, the appellant's subsequent claim to the estate of Ephantus was in vain; fourthly, because since neither the appellant nor his mother qualified as a beneficiary to the estate of Waweru, no interest in the said suit property flowed from Waweru to Ephantus and then to the appellant; and also, because the deceased was registered in his own right as one of the beneficiaries to the estate of Waweru; and lastly, that the appellant is not a beneficiary to the estate of Ephantus.
28. This is a first appeal. Our mandate as a first appellate court is to re-evaluate and re-analyze the evidence so as to draw out our own inferences of fact and to arrive at our own independent conclusions thereon as explicitly provided for in rule 29(1) of the *Court of Appeal Rules*. In so doing, however, we are reminded by the applicable principles that we should be cognizant of the fact that unlike the trial court we did not have the benefit of hearing and seeing the witnesses testify and we should therefore give due consideration and defer to the learned trial Judge's factual findings, only to depart from them where there is demonstration that they are either based on no evidence, or that there is demonstrably on the record evidence of a misapprehension of the evidence, or where the findings of the Judge are not supported by the evidence. See *Selle vs. Associated Motor Boat Co Ltd & Others*[1968] E.A. 123.
29. We have considered the record in light of the above mandate and the rival positions. Only one issue falls for our consideration in the determination of this appeal namely, whether the impugned judgment of the trial Judge as regards the inference of trust is assailable.
30. It is common ground that the genesis of the litigation in the O.S. resulting in this appeal is land parcel No. Nyeri/Watuka/622 whose original proprietor was Waweru, father to both Ephantus and the persons enumerated under item 1 of the O.S. in their capacity as daughters of Waweru. Succession proceedings to Waweru's estate were taken out in the Chief Magistrates' Court Cause No. 131 of 1989 and concluded. There were only two contestants in the said succession proceedings namely, Ephantus and his sister, Jane, also deceased. Pursuant to the conclusion of succession proceedings to Waweru's estate, Waweru's land devolved to Ephantus. It is on record that following transmission of the original suit property to Ephantus, he subdivided it firstly into two portions with the lion's share going to himself as the only son of the deceased and a tiny portion going to Jane as an unmarried daughter, while the rest of the daughters of Waweru who were allegedly married and therefore not entitled to inherit Waweru's land under Kikuyu Customary Law received no share of the said land. It is evident from the record that although they were aware or subsequently became aware of those proceedings they did not contest the mode of distribution of Waweru's estate during the lifetime of Ephantus.
31. The reasons they gave for their non-participation in the succession proceedings to their late father's estate and which are varying are as already highlighted above.



32. In light of the above uncontested position on want of a protest by the other siblings of Ephantus during the pendency, or alternatively, after succession proceedings to the estate of Waweru, it is our position that it was correctly appreciated by the trial Judge that the appellant did not specify under which system of law he was laying his claim of trust over the suit property. Going by the evidence and submissions put forth by the appellant, it is evident that what the appellant sought from the court through the O.S. was a claim to the suit property based on a trust under Kikuyu Customary Law, which according to him, entitled him to a share of the suit property by virtue of being a son to Phyllis, PW4, a daughter of Waweru. That is why he has invited this Court to apply the threshold applied by Khamoni, J. (as he then was) in the case of *Joseph Githinji Gathiba vs. Charles Kingori Gathiba* [supra] as crystalized by the Supreme Court of Kenya in *Isack M’Inanga Kiebia vs. Isaya Theuri M’Linturi & Another* [supra].
33. It is common ground that Waweru died in the year 1978. By virtue of section 2(2) of the *Law of Succession Act* Cap 160 Laws of Kenya, whose commencement date was 1st July, 1981, estates of persons dying before the commencement of the said Act were subject to the deceased persons’ customary law. It provides:
- “The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”
34. In light of the above provision, it is our position that Waweru having died way back in 1978, the trial Judge properly appreciated and arrived at the correct conclusion that the law governing the issues in controversy before the trial court was Kikuyu Customary Law. The appellant does not contest this position. His contest is that the concept of Kikuyu Customary Law with regard to claims of this nature was not properly appreciated and applied by the trial Judge to the evidence tendered by the rival parties on record. It is the appellant’s position that had the trial Judge properly appreciated the evidence tendered before the court in light of the principles for presuming a customary law trust as enunciated in the case law assessed above, the Judge would have arrived at the only logical conclusion on the matter that Ephantus, being an only son of Waweru was registered not as an absolute owner of the original suit property but as “a muramati” or customary law trustee for himself and his siblings. Secondly, that the above presumed trust tainted the subsequent registration of the suit property in the sole name of Ephantus as an absolute proprietor as it formed a subdivision of the original suit property. In contrast, the respondent’s position, if we got her right is that the Judge cannot be faulted for holding that the crystallized position in law under Kikuyu Customary Law is that land falls for inheritance by male elements in the family and unmarried daughters.
35. We have applied the tests in the *Isaack M’Inanga Kiebie* case [supra] to the rival positions herein and proceed to make findings thereon as follows: The original suit property was family land before it was registered in the name of Waweru as an absolute proprietor. Upon Waweru’s demise in 1978, it fell for inheritance under Kikuyu Customary Law. The case law assessed above is explicit that under Kikuyu Customary Law land falls for inheritance by sons and unmarried daughters. In the instant appeal, the only male claimant to Waweru’s estate was Ephantus, while the only unmarried daughter contender was Jane. These two were the declared beneficiaries to Waweru’s estate as per the final orders issued by the Chief Magistrates’ Court in Succession Cause No. 131 of 1989, and which orders still stand to the present date.
36. It was pursuant to those orders that Ephantus subdivided the land between himself and his unmarried sister and subsequently also subdivided and sold portions thereof to some other persons who are not the deceased’s relatives. The appellant asserts that it was Waweru’s intention that the original suit property be shared equally amongst all his children. He does not however say under what



circumstances the alleged statement was made and before whom and the surrounding circumstances that triggered it. Neither does he say how old he was when the utterance was made or when Waweru passed on.

37. It is also our finding that the evidence tendered by Waweru's daughters on the alleged wish is contradictory as highlighted above. We find firstly that there is no proof that such a wish was ever made by Waweru during his lifetime and even if it was made it fell for consideration in the succession proceedings relating to Waweru's estate. It is also our finding that upon Ephantus being registered as the proprietor of a portion of the original suit property, he dealt with his portion as deemed fit and even sold portions of it. Apparently, the appellant and his fellow claimants learnt of the succession proceedings in respect of Waweru's estate during the lifetime of Ephantus and allegedly variously raised that issue with Ephantus, who apparently rebuffed them. No legal action was taken against him during his lifetime. Upon his death, the land formed his estate and therefore fell for distribution to his dependants as defined in section 29 of the Law of Succession Act namely, wife or wives and children, whether maintained as at the time of death or otherwise. Neither the appellant nor his co-claimants fell into the said category. They do not, therefore, qualify for the said property in terms of the rest of the tests enunciated in Isaack M'Inanga case [*supra*].

38. The upshot of the above assessment and reasoning is that we find no merit in this appeal. It is accordingly dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

