



REPUBLIC OF KENYA



**Olemo & another v Ogada & another (Civil Appeal E015 of 2023)
[2025] KEHC 726 (KLR) (31 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 726 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E015 OF 2023
DK KEMEL, J
JANUARY 31, 2025**

BETWEEN

EFFIE ACHIENG OLEMO 1ST APPELLANT

COLLINS OCHIENG OLEMO 2ND APPELLANT

AND

DOREEN AKOTH OGADA 1ST RESPONDENT

JOSEPH OGADA MUSUMBA 2ND RESPONDENT

*(Being an appeal against the ruling and order of Hon. P.J Nandi, SPM
delivered on 3rd July 2023 in Bondo SPM Succession Cause No. E032 of 2020)*

JUDGMENT

1. The appeal arises from the ruling and order of Hon J.P Nandi delivered on 3rd July 2023 in Bondo SPM Succession Cause No. E032 of 2020 wherein he held that one AA was sired by the deceased Joseph Olemo Olemo and therefore was a lawful dependant of the deceased's estate. The Appellants had earlier filed an application dated 3/6/2021 seeking for revocation of grant and which was allowed by the learned trial magistrate in entirety. The Appellants however were not satisfied by the trial court introducing something in the body of the ruling that had not been prayed for by them.
2. Dissatisfied by the aforesaid ruling, the Appellants filed their Memorandum of Appeal dated 13th July 2023 wherein they raised nine grounds of appeal which can be collapsed into one namely; that the trial magistrate erred in law and in fact in finding that the minor AA is a lawful dependent of the estate of the deceased Joseph Olemo Olemo yet such a prayer had not been sought by the parties herein.
3. This being a first appeal, the duty of this court is well settled namely, 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 its own independent conclusion. See *Selle Vs Associated Motor Boat Co Ltd* [1968] EA 123. I must consider



that the trial court had the advantage, which this court does not have, of seeing and hearing the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the magistrate failed to take any particular circumstance into account or that they were based on no evidence or were otherwise plainly wrong.

4. PW1 Effie Achieng Olemo testified that she is a student awaiting to join college. That the deceased is her father and that her mother was called Lilian Atieno Olemo who died in 2021. That she relied on the contents of her affidavit sworn on 3/6/2021 as her evidence in chief. She produced the documents annexed in her supporting affidavit as exhibit 1 -21. That there were only two children by her mother namely: Effie Achieng Olemo and Elsie Atieno Olemo. That she did not have a step mother and that she is not aware whether her father married another woman. That her father was buried in his ancestral home at Got Asembo.

On cross examination, she stated that she did not know who Doreen Akoth Ogoni was and that she has never stayed with her and that her father never married her. That she was aware that her father wrote his next of kin and beneficiaries but had never seen his TSC documents. She went further to say that Elsie Olemo is her young sister and that she does not know her father's signature. That her father only married one wife who was her mother. That Doreen was never married to the father. That the said Doreen was an imposter on the estate and that she is not aware if she had a child with her father. That she attended Nyamira Girls High School paid by her father.

5. PW2 Collins Ochieng Olemo testified that he is a businessman and a younger brother to the deceased. That he adopted his affidavit sworn on 3/6/2021, further affidavit on 7/9/2021 and supplementary affidavit sworn on 8/7/2021 as his evidence in chief. That he is not aware of his brother marrying Doreen nor that they had a child. That the only communication they got from TSC about the beneficiaries was a letter dated 26/7/2022-produced as exhibit 22.

On cross examination, he stated that he does not know Doreen Akoth. The deceased was stationed at Rambula secondary school and that he never visited him there. That he only visited him while he was in Eldoret. That he does not know who took him to hospital, and was not aware about the affidavit of marriage. That his elder brother was in South Sudan when the said alleged child AA was born. That he was not working with his brother all the time and does not know where the said Doreen got his brother's details.

On re-examination, he stated that the death certificate he has and that produced by Doreen are different.

6. DW1 Doreen Akoth Ogođa testified that she is a business lady and an instructor at a polytechnic. She adopted her replying affidavit sworn on 16/8/2021 as her evidence in chief. She stated that the deceased was her husband. She produced an affidavit of marriage as Exhibit-1 and birth certificate of AA as Exhibit 2. She adopted her replying affidavit sworn on 4/7/2022 as evidence and exhibits therein as D exhibit 3, 4 and 5 respectively. That the deceased took AA as his daughter though he was not the biological father to A. That dowry was paid to her parents by the deceased. That he reached out to the family of the deceased but they ganged up against her when she wanted to do succession. That she did not disclose to the court that Effie Achieng was not a minor.

That she got a burial permit from the assistant chief in Sigomere. That she was forced to sign the affidavit of marriage so that the deceased could take a loan for Effie's school fees. The affidavit was to confirm marriage to the financial institution.

7. I have considered the evidence tendered before the trial court. It is not in dispute that the Appellants had initially filed a summons for revocation of grant dated 3/6/2021 which was allowed by the trial court. It is not in dispute that the trial court established that the marriage between the 1st Respondent



and the deceased was not established. It is also not in dispute that the trial court in the body of its ruling made a finding that the child of the 1st Respondent herein had been sired by the deceased and thus a beneficiary of the estate. I find the issue for determination is whether or not the child AA is a dependant to the estate of the deceased Joseph Olemo Olemo.

8. The Law of Succession (Amendment) Act 2021 defines a dependent as the spouse(s) whether present or former and children of the deceased whether or not they were maintained by him immediately prior to his demise. The 1st Respondent herein Doreen Akoth produced a certificate of birth of the child AA. On the face of the said certificate, it shows the name of the deceased as the father to the minor. Under the law of evidence, this was a prima facie evidence that the child is a child of the deceased. However, the 1st Respondent upon intense cross-examination stated inter alia; that the deceased took the child AA as his own even though not his biological child; that dowry was paid by the deceased to her parents; that the affidavit dated 11/8/2015 was signed by the deceased alone. I have had the opportunity to carefully peruse all the pleadings relied upon by the parties herein before the lower court. It came out clearly that a tug of war ensued between the parties herein regarding the estate of the deceased. It is unusual for the 1st Respondent to have secured a birth certificate on behalf of her child Anjeline Akinyi wherein she indicated the deceased as her biological father yet in her own evidence she confirmed that the deceased was not the biological father of her child. This then raises serious questions regarding the authenticity of the document and goes on to water down her claim that her child should be treated as a dependant of the estate. It is instructive that the 1st Respondent did not call any of her family members to back her claim that dowry was paid by the deceased. Again, the purported affidavit allegedly sworn by the deceased was not signed by the 1st Respondent so as to give it a semblance of an affidavit in lieu of a marriage certificate. The 1st Respondent confirmed in her evidence that the said affidavit was meant for purposes of securing a loan from a financial institution and hence the same could not serve the purpose of proving a marriage. It is clear that the 1st Respondent went to great lengths to ensure that she got hold of the deceased's assets by all means. Looking at the entire evidence and the documents presented before the trial court, it is clear that the Appellants case against the 1st Respondent was quite convincing and hence the finding by the trial court in allowing the application dated 3/6/2021 in its entirety was quite sound. However, the learned trial magistrate went into error when he held that the 1st Respondent's child Anjeline Akinyi was a dependant of the estate. That finding was in error and must be interfered with.
9. In the result, it is my finding that the Appellants' appeal has merit. The same is allowed. The trial court's ruling dated 3/7/2023 vide paragraph 27 thereof declaring that the minor AA is a lawful dependant of the deceased's estate is hereby set aside and substituted with an order that the said minor AA is not a lawful dependant of the estate of the deceased. Each party shall bear their own costs of this appeal.

DATED, AND DELIVERED AT SIAYA ON THIS 31ST DAY OF JANUARY, 2025.

D. KEMEI

JUDGE

In the presence of:

Sumba.....for Appellants

N/A M/s Owenga.....for Respondents

Ogenda.....Court Assistant

