



REPUBLIC OF KENYA



In re Estate of Yohana Keverenge Imbahale (Deceased) (Succession Appeal E007 of 2023) [2025] KEHC 639 (KLR) (27 January 2025) (Judgment)

Neutral citation: [2025] KEHC 639 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
SUCCESSION APPEAL E007 OF 2023
JN KAMAU, J
JANUARY 27, 2025**

IN THE MATTER OF THE ESTATE OF YOHANA KEVERENGE IMBAHALE (DECEASED)

BETWEEN

EZARAH IMBAHALE KEVERENGE APPELLANT

AND

DERIKA AWINJA SHIVERENGE RESPONDENT

(Being an appeal from the Judgment of Hon S. Manyura (RM) delivered at Hamisi in Senior Principal Magistrate's Court Succession Cause No 189 of 2019 on 21st March 2023)

JUDGMENT

Introduction

1. In her decision of 21st March 2023, the Learned Trial Magistrate, Hon S. Manyura, Resident Magistrate, allowed the Respondent's Protest in opposition to the Petitioner's Summons for Confirmation of Grant.
2. Being aggrieved by the said decision, on 20th April 2023, the Appellant herein filed a Memorandum of Appeal dated 19th April 2023. He relied on six (6) grounds of appeal.
3. His Written Submissions were dated and filed on 2nd August 2024 while those of the Respondent were dated 3rd September 2024 and filed on 24th September 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.



5. This was aptly stated in the case of *Selle & Another vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
6. Having looked at the grounds of Appeal and the Appellants' Written Submissions, it appeared to this court that the only issue that had been placed before it for determination was whether or not the Learned Trial Magistrate erred in having allowed the Respondent's Protest.

Legal Analysis

7. Grounds of Appeal Nos (1), (2), (3), (4), (5) and (6) of the Memorandum of Appeal were therefore dealt with together as they were all intertwined and related.
8. The Appellant submitted that he had been in occupation of L.R. No Kakamega/Viyalo/xxx (hereinafter referred to as "the subject property") after his deceased father bequeathed it to him. He asserted that all the beneficiaries consented to his mode of distribution.
9. He asserted that the Respondent, who was his stepmother, introduced her children namely KIK, EMK, JKK, and EIK and one JIN yet her said children had already been bequeathed their portion of the subject property measuring 0.87 ha. He was emphatic that the Respondent was to share the said portion of land with her said children. He pointed out that the said children were minors when they were bequeathed the said portion of land. He added that the said JIN was a son to one DNK (deceased) who he had listed as a beneficiary of the deceased's estate.
10. He asserted that it was unfair for the Trial Court to distribute the subject property equally as he and other beneficiaries had already developed their portions of land. He submitted that the respondent ought to carve out portions for her said children from the 0.87 ha that had already been bequeathed to her. He further stated that the share belonging to DNK (deceased) be re-directed to his son, JIN.
11. He stated that it was only fair that the Appeal herein be allowed to prevent him and other beneficiaries from suffering damages and irreparable losses as the portions had already been developed.
12. On her part, the Respondent pointed out that the Appellant did not dispute that the beneficiaries who had been left out in the succession proceedings were the deceased's children. She asserted that it was mandatory for a person petitioning for letters of administration to list all the beneficiaries of a deceased person as provided in Section 71 of the Law of Succession and Rule 40 of the Probate and Administration Rules whether or not they wished to waive their right of entitlement to a deceased's estate. She was emphatic that the Appellant was the deceased's son and she was the deceased's widow.
13. She was categorical that the Trial Court made a correct determination that the Respondent assumed a higher priority in the administration of a deceased's estate in line with Section 66 of the Law of Succession. She urged this court to uphold that position and the fact that a deceased's estate ought to be distributed equally among the deceased's children and not equitably. She therefore contended that the Appeal therefore had to fail.
14. It was an undisputed fact that the Respondent was the deceased's wife and the Appellant's stepmother. There was no indication that the Respondent was opposed to the Appellant being an administrator to the deceased's estate despite her having priority of administration of the deceased's estate, a position



that was well articulated by the Trial Court. What appeared to have been in dispute was the mode of distribution of the deceased's estate.

15. Section 35 (5) of the *Law of Succession Act* Cap 160 (Laws of Kenya) stipulates that:-

“Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children (emphasis court).”

16. Section 39(1) of the Law of the Succession provides as follows:-

“Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority:-

- a. father; or if dead
- b. mother; or if dead
- c. brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares (emphasis court); or if none
- d. half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares (emphasis court); or if none
- e. the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares (emphasis court).”

17. Going further, Section 40 of the *Law of Succession Act* states that:-

“Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children (emphasis court).”

18. It was clear that the law relating to the distribution of a deceased's assets to his children was that it envisaged equality. The widow of a deceased person is also treated as a distinct and separate unit. This was not to disadvantage the house that had more children. In this regard, this court found and held that the Trial Court made a correct determination that the deceased's estate ought to be distributed equally amongst all the beneficiaries.

19. The fact that the deceased had already bequeathed his property as the Appellant had contended was immaterial as the said distribution had to comply with the provisions of the law. Even in the case of a will, a deceased had to make provisions for dependants. If the deceased failed to do so, the court could intervene and order reasonable provision for those dependants as it thought fit as provided in Section 26 of the Law of Succession.

20. The law regulated how a deceased distributed his assets to his or her dependants and beneficiaries of his estate. Property was not distributed how he or she wanted. A deceased who distributed his estate without due regard to the law did so to the detriment of his or her beneficiaries as the court could re-distribute his or her estate if there was merit to do so. The folly of not complying with the law could lead to beneficiaries suffering irreparable losses especially where property had already been developed



as was in this particular case. In such a case, the only option that beneficiaries had was to look for ways to collaborate to lessen or avoid any losses.

21. Without belabouring the point further, this court found Grounds of Appeal Nos (1), (2), (3), (4), (5), and (6) of the Memorandum of Appeal not to have been merited and the same be and are hereby dismissed.

Disposition

22. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was dated 16th February 2024 and filed on 19th February 2024 was not merited and the same be and is hereby dismissed.
23. As this was a family matter, this court hereby deviates from the general principle that costs follow the events and hereby directs that each party will bear its own costs of the Appeal herein.
24. As this was a succession matter, it ought not to have been filed as a Civil Appeal. However, this court dealt with the same on merit in view of its mandate to administer justice without undue regard to procedural technicalities as mandated by Article 159(2)(d) of *the Constitution* of Kenya. It is hereby directed that this file be transferred to the High Court Family Registry for proper closure of the file.
25. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 27TH DAY OF JANUARY 2025

J. KAMAU

JUDGE

