



REPUBLIC OF KENYA



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**In re Estate of Sarah Mbigula alias Sarah Migasa (Deceased) (Succession Appeal  
E008 of 2022) [2025] KEHC 1189 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1189 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
SUCCESSION APPEAL E008 OF 2022**

**JN KAMAU, J**

**FEBRUARY 27, 2025**

**IN THE MATTER OF THE ESTATE OF SARAH  
MBIGULA ALIAS SARAH MIGASA (DECEASED)**

**BETWEEN**

**EBBY KAVAYA JOEL ..... APPELLANT**

**AND**

**ROSEMARY NEKESA MWALE ..... 1<sup>ST</sup> RESPONDENT**

**HENRY LUPIA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal and cross-appeal from the Judgment of Hon S.O Ongeru (SPM) delivered at  
Vihiga in Senior Principal Magistrate's Court Case No 140 of 2017 on 18th November 2022)*

**JUDGMENT**

**Introduction**

1. In his decision of 18<sup>th</sup> November 2022, the Learned Trial Magistrate, Hon S.O Ongeru, Senior Principal Magistrate, entered Judgment in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as against the Appellant by allowing their Summons for Revocation dated 9<sup>th</sup> June 2022 in the following terms:-
  1. The Grant of Letters of Administration issued to Ebbay Kavaya on 1<sup>st</sup> May 2018 and confirmed on 4<sup>th</sup> June 2019 are hereby annulled and Certificate of Grant issued on 4<sup>th</sup> June 2019 revoked.
  2. The Title Deed for land parcel Kakamega/Kedoli/179 in the name of Ebbay Kavaya Joel be cancelled and revert to the name of Sarah Migasa the deceased.
  3. A fresh Grant shall be issued in the name of Petitioner and the 2<sup>nd</sup> Objector.
  4. Each party to bear his or her own costs.



2. Being aggrieved by the said decision, on 5<sup>th</sup> December 2022, the Appellant filed a Memorandum of Appeal of even date. She relied on six (6) grounds of appeal.
3. On 26<sup>th</sup> October 2023, the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents filed a Cross-Appeal dated 25<sup>th</sup> October 2023. They also set out six (6) Grounds of Cross-Appeal.
4. The Appellant's Written Submissions were dated 8<sup>th</sup> December 2024 while those of the 1<sup>st</sup> Respondent were dated 13<sup>th</sup> December 2024. They both did not bear a court stamp. However, in view of the fact that documents were being filed through the e-filing platform, this court admitted the same as there was a likelihood that the Registry may have omitted to stamp the same.
5. The Judgment herein is based on the said Written Submissions which both the Appellant and the 1<sup>st</sup> Respondent relied upon in their entirety.

### **Legal Analysis**

6. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.
7. 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 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.
8. Having looked at the Grounds of Appeal, Grounds of the Cross-Appeal and the respective parties' Written Submissions, it appeared to this court that some of the grounds raised were related and therefore the issues that had been placed before it for determination were as follows:-
  - a. Whether or not the Learned Trial Magistrate had jurisdiction to order cancellation of the title deed issued previously to the Appellant for Land Parcel No Kakamega/Kedoli/179 (hereinafter referred to as the "subject land");
  - b. Whether or not the Learned Trial Magistrate erred when he found that the 1<sup>st</sup> Respondent's husband was a grandson to the deceased hence a beneficiary;
  - c. Whether or not the Learned Trial Magistrate erred in law and in fact in disregarding the written Will of the deceased;
  - d. Whether the Learned Magistrate erred in directing that a fresh Grant be issued in the name of the Appellant and the 2<sup>nd</sup> Respondent without considering that the 1<sup>st</sup> Respondent and her husband had peacefully resided on the subject land for fifty (50) years without disturbance and were entitled as beneficiaries as per the written Will of the deceased.
9. The court deemed it prudent to address the issues under the following distinct heads.

### **I. Jurisdiction of the Trial Court**

10. Ground of Appeal No (1) of the Appellant's Memorandum of Appeal was dealt with under this head.
11. The Appellant submitted that the Trial Court erred when it cancelled the Title Deed of L.R. No Kakamega/Kedoli/ 179 (hereinafter referred to as "the subject land") that she was previously issued with as it did not have the jurisdiction to do so. She asserted that the 1<sup>st</sup> Respondent and her husband



- namely, Charles Mwale, were both claiming beneficial interest, in terms of their parental lineage and purchaser's interest in the subject land. She contended that the 1<sup>st</sup> Respondent's claim stood out as contradictory as issues of ownership ought to be handled by the Environment and Land Court (ELC).
12. She referred to Article 162(2)(b) of *the Constitution* of Kenya, 2010 and Section 13(2) of the *Environment and Land Court Act* and submitted that the Trial Court acted in excess of its jurisdiction when it cancelled the Title Deed on 18<sup>th</sup> November 2022 as it was already in her name having been issued on 2<sup>nd</sup> July 2019 and was not in the name of the deceased. She asserted that it was only the ELC that had jurisdiction to cancel the Title deed that was issued to her.
  13. She further averred that the 1<sup>st</sup> Respondent did not adduce any documentary oral evidence from her or witnesses to prove that her husband purchased the subject land from the deceased. She added that at the time the 1<sup>st</sup> Respondent and her husband were occupying the subject land, the deceased could not transfer any interest related to the said subject land as it was not registered in her name.
  14. She further submitted that as the 1<sup>st</sup> Respondent had claimed that her husband purchased the subject property, the question of ownership squarely fell within the jurisdiction of the ELC and not the High Court as was provided under Article 162(2) of *the Constitution* of Kenya as registration of properties and transfers were governed by the *Land Registration Act* No 3 of 2012 and the *Land Act* No 6 of 2012.
  15. In this regard, she placed reliance on the case of Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd [1989]eKLR where it was held that jurisdiction was everything and without it a court had no power to make one more step.
  16. On her part, the 1<sup>st</sup> Respondent argued that the Appellant ought to have raised a preliminary objection early into the hearing and could not purport to raise it after Judgment and while appealing. She pointed out that even so, the cancellation of the Title Deed by the Trial Court was right as the Appellant had never been the immediate beneficiary of the land. She asserted that the Appellant was just one of the over twenty (20) grandchildren of Timona and Sarah Migasa but transferred the subject land to herself contrary to the deceased's wishes which existed in a Will thus demonstrating greed on her part.
  17. Notably, the question herein was whether the Trial Court had jurisdiction to cancel a title upon revocation/annulment of a grant or not.
  18. In this regard, this court had due regard to Article 162(2) of *the Constitution* of Kenya which provides that:-
    - a. ....
    - b. he environment and the use and occupation of, and title to land."
  19. In compliance with the said Article, Parliament enacted, the *Environment and Land Court Act* 2011 which provides for the jurisdiction of the Environment and Land Court at Section 13 as follows:-
    1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land;
    2. In exercise of its jurisdiction under Article 162 (2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes;



- a. Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
  - b. Relating to compulsory acquisition of land;
  - c. Relating to land administration and management;
  - d. Relating to public, private and community land and contracts, chooses in action or other instruments granting any enforceable interests in land; and
  - e. Any other dispute relating to environment and land.”
20. On the other hand, the *Law of Succession Act* Cap 160 (Laws of Kenya) was enacted to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons and for purposes connected therewith and incidental thereto.
21. Section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules, 1990 granted a court dealing with succession matters inherent powers to make such orders as would be necessary for the ends of justice or to prevent abuse of the court process. Such powers included the cancellation of title deeds obtained through fraud or where there has been an abuse of the process of the court.
22. Section 47 of the *Law of Succession Act* provides as follows:-
- “The High Court shall have jurisdiction to entertain any application and determine any dispute under the Act and pronounce such decrees and make such orders therein as may be expedient; provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”
23. Rule 73 of the Probate and Administration Rules also provides:-
- “Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
24. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents had sought an order of cancellation of title that they alleged the Appellant had obtained fraudulently and irregularly. The power to do so was discussed in the case of *Santuzza Bilioti alias Mei Santuzza (Deceased) vs Giancarlo Falasconi* [2014]eKLR where it was held that the succession court had powers to order a title deed to revert to the names of a deceased person. This in effect amounted to cancellation of the title deed.
25. The Trial Court found that the choice of the Appellant as an administrator and the mode of distribution had been disputed by the 2<sup>nd</sup> Objector and Susan Mwenga Muya (hereinafter referred to as “PW 3”) hence the need to annul the Grant of Letters of Administration to bring all beneficiaries on board on an application for a fresh grant and/or distribution.
26. Although the 1<sup>st</sup> Respondent based her argument on her husband having bought the said subject land, which would have been subject of the ELC, she did not adduce any Sale Agreement herein to prove her claim. As such, her argument seemed to solely rely on the Will that she claimed was executed by the deceased and which purportedly bequeathed her late husband the subject land.
27. In the circumstances, it was this court’s view that the issue of revocation of the Certificate of Grant and reverting of the Title Deed to the deceased’s name was strictly under the purview of the Trial Court



handling the succession cause and not the ELC. Indeed as the Appellant had obtained the Title Deed of the subject land through a succession process, the Trial Court had jurisdiction and power not only to cancel the Title Deed but to also order that the same revert in the deceased's name before fresh distribution could be done. Cancellation of the Title Deed in succession proceedings was therefore not a preserve of the ELC.

28. In the case of *In Re Estate of Levi Khamisi Trisuma (Deceased)* [2023] KEHC 22954 [KLR], this very court cancelled the title deed therein and directed that the same revert to the deceased for distribution to the deceased's beneficiaries.
29. In the premises, Ground of Appeal No (1) of the Appellant's Memorandum of Appeal was not merited and the same be and is hereby dismissed.

## **II. Whether or not the 1<sup>st</sup> Respondent's Husband was a Grandson to the Deceased**

30. Grounds of Appeal Nos (2) and (5) of the Appellant's Memorandum of Appeal was dealt with under this head as they were both related.
31. The Appellant submitted that the 1<sup>st</sup> Respondent's name or her father's name did not appear anywhere so as to link the parental lineage of her husband, with the deceased. She asserted that if a DNA test were to be done, it would come out clearly that he was neither related to the deceased nor Timona Migasa, the deceased's husband.
32. She was emphatic that the Respondents' and their witnesses' statements were clear that the 1<sup>st</sup> Respondent's husband was never related to the deceased as the deceased only bore daughters. She was emphatic that Henry Mwale (sic), the 1<sup>st</sup> Respondent's husband's father was not the deceased's son. She added that the 1<sup>st</sup> Respondent did not represent that they were related to the deceased by blood or proved dependency.
33. On her part, the 1<sup>st</sup> Respondent submitted that the Trial Court was satisfied that that she and her husband were bona fide grandchildren of the deceased.
34. The 2<sup>nd</sup> Respondent testified that the Appellant was her cousin and that she commenced succession proceedings without their authority. He pointed out that his mother, Rose Muyoma, did not sell the subject land to the Appellant but that the owners of the said subject land were his grandparents, the deceased and her husband. He informed the court that he knew the 1<sup>st</sup> Respondent's husband, Charles Mwale, who was currently staying at the subject land.
35. He added that when the Appellant pursued succession proceedings, her mother and Margret Imili who were the deceased's daughters, were still alive. He pointed out that the two (2) should have taken out letters of administration instead of the Appellant herein.
36. In his cross-examination, he testified that he had a Title Deed to show that the 1<sup>st</sup> Respondent's husband had been staying on the subject land from 1960 but that his father was given the said subject land in 1970. He stated that the deceased had six (6) children who were daughters and that they were all in attendance when the Will was made.
37. He further stated that the deceased was the registered owner of the subject land before the Appellant took over. He identified the pictures of building as that belonging to the 1<sup>st</sup> Respondent's husband and added that he also planted crops on the said subject land as there was no one to stop him. He further testified that after the deceased's funeral, people went away leaving the 1<sup>st</sup> Respondent's husband on the subject land and that his grandfather's (Timona Mikasa) prayer was that the 1<sup>st</sup> Respondent's husband should stay there as his child.



38. The 1<sup>st</sup> Respondent told the Trial Court that her husband's father was called Aaron Mwale (sic). She said that she got married to her husband in 1977 and that they had lived on the subject land. She confirmed that the Appellant was the daughter of one of their aunts. She averred that the Appellant would occasionally stay with them until when they were informed about this case.
39. She pointed out that her husband bought the said subject land from the deceased through the Chief's office but that there was no agreement. She added that she buried her last-born child and grandchildren on the said subject land. She was categorical that their fathers signed (sic) that the subject land be given to Aaron Mwale (sic).
40. When she was cross-examined, she stated that the Appellant forged her name on the Title Deed. She was emphatic that the deceased told her that she gave the subject land to Aaron Mwale (sic).
41. Susan Mwenga Muya (hereinafter referred to as "PW 3") was the Appellant's sister. She testified that the Appellant did not involve her and her father and siblings in this succession process. She said that the Appellant was married to one Henry Kitula and they lived in Mombasa. She informed the court that the 1<sup>st</sup> Respondent and her husband lived on the subject land. She pointed out that the 1<sup>st</sup> Respondent's husband was her mother's step brother and that his father brought him to live in the subject land in 1960.
42. It was the Appellant's evidence that the 2<sup>nd</sup> Respondent was her first cousin and his mother was one Rose Umayoma. She said that they were summoned by the Chief and in the presence of the 1<sup>st</sup> Respondent, they were requested to choose the administrator of the estate. She pointed out that she was chosen as an administrator because her mother was to hold the subject land in trust. She added that the 2<sup>nd</sup> Respondent and her three (3) brothers were present. She denied knowing the 1<sup>st</sup> Respondent's husband or his father.
43. She further testified that PW 3's father was her stepfather and had an interest in the subject land. She was categorical that she initiated succession proceedings to administer the estate. She pointed out that she met the 1<sup>st</sup> Respondent's husband in the subject land in a semi-permanent house.
44. She admitted during cross-examination that her mother Salome was also PW 3's mother. She further said that the 1<sup>st</sup> Respondent's husband was summoned by the Chief after complaints about the subject land. She stated that her aunts agreed to give her the subject land and that having obtained letters of administration, there was no estate left to be administered.
45. She blamed the 1<sup>st</sup> Respondent for selling the subject land fraudulently as she pointed out that she had seen a Sale Agreement and an allegation that the 1<sup>st</sup> Respondent had been given Kshs 4000/=. She was emphatic that the subject land was not for sale as five (5) daughters were entitled to it but that she transferred the land to her name. She denied having transferred the same fraudulently as she followed the right procedure. When she was re-examined, she agreed that the 1<sup>st</sup> Respondent's husband had lived in the subject land for a long term.
46. Margaret Emali Atsiaya (hereinafter referred to as "DW 2") testified that the Appellant was the daughter to her sister called Salome. She denied knowing the 1<sup>st</sup> Respondent's husband. She told the court that the Appellant obtained the Title Deed so that they could get a share of the subject land. She was categorical that she was a beneficiary of the subject land and needed her share.
47. Emphraim Musembi Esanyanya (hereinafter referred to as "DW 3") also denied having known the 1<sup>st</sup> Respondent's husband.



48. Samson Sungu Luuya (hereinafter referred to as “DW 4”) testified that his mother was Loice, sister to the Appellant’s mother. He stated that in 1964, his grandfather died and that the subject land was transferred to the deceased who was his grandmother, who died in 1977. He testified that the Appellant and his mother stayed with the deceased as the Appellant attended school and took care of her.
49. He further stated that he attended the meeting at the Chief’s office where the 1<sup>st</sup> Respondent accepted that the Appellant takes the subject land. He was, however, not sure if the Appellant executed the agreement. He pointed out that he had heard that the 1<sup>st</sup> Respondent’s husband used to stay in the subject land but that he did not know when he started occupying the piece of land.
50. Shadrack Bwina (hereinafter referred to as “DW 5”) was the Chief of Busali Sub-location. He testified that he was related to the deceased. He said that his grandfather and the deceased’s husband were brothers. He stated that he was informed that the subject land had been sold but he was not aware as he did not get a copy of the Sale Agreement. He said that the subject land had been occupied by strangers who had stayed there for less than thirty (30) years. He was categorical that the 1<sup>st</sup> Respondent’s husband was not a member of the family subject of this succession cause.
51. Christopher Ogero (hereinafter referred to as “DW 6”) was the Chief of Ilegero Sub-location. He testified that he hailed from the locality and knew the family herein well. He stated that he knew that the 1<sup>st</sup> Respondent’s husband stayed in the subject land but he did not know his whereabouts. He also asserted that the 1<sup>st</sup> Respondent’s husband was not the deceased’s biological child.
52. He informed the court that he saw the Sale Agreement but that the siblings of the deceased disputed the same. He added that he signed the list of beneficiaries whereby the Appellant was chosen to be the administrator of the estate.
53. Peter Kibira (hereinafter referred to as “DW 7”) testified that he was born in 1943 and knew both the deceased and her late husband. He stated that the children born of the deceased were all daughters. He was categorical that the deceased’s husband had no other wife and did not sire children out of wedlock or cohabit with any other woman who bore him children while he was still married to the deceased. He pointed out that for the period the deceased and her husband were alive, he had never encountered anyone asserting that the late Timona was their father or grandfather.
54. He further testified that he knew Harun Mwale (sic) but that he was not the son of Timona Migasa. He averred that the 1<sup>st</sup> Respondent’s and his father were aliens to the deceased’s family. He stated that he was in the meeting where the Appellant had raised complaints over the illegal possession of her ancestral land by the 1<sup>st</sup> Respondent’s husband and that his assertions that he was of the deceased’s bloodline were refuted.
55. He added that the 1<sup>st</sup> Respondent’s husband then proceeded to produce a purported Sale Agreement claiming he was sold the land by Rosa Muyoma, a daughter of the deceased. He stated that parties in the said meeting agreed to initiate a succession cause whereby they all agreed that the Appellant would be the administrator since she would preserve the ancestral home and divide the land equally when called upon. He was emphatic that the father to the 1<sup>st</sup> Respondent’s husband was buried at his home in Kapsigak, Nandi.
56. A keen reading of the Trial Court’s Judgment indicated that the Trial Court determined that the 1<sup>st</sup> Respondent’s husband and 2<sup>nd</sup> Respondent herein were the deceased’s grandchildren although the 1<sup>st</sup> Respondent was not recognised as such. It did not specifically mention that the 1<sup>st</sup> Respondent’s husband was a grandson as the Appellant herein had alleged. It did not also give reasons why it arrived



at a conclusion that the 1<sup>st</sup> Respondent appeared to be a grandchild of the deceased. It seemed to have left the issue in hanging.

57. In the mind of this court, the inconclusiveness may have influenced it when it directed that the fresh grant be issued to the Appellant and the 2<sup>nd</sup> Respondent whose positions as grandchildren of the deceased had not been disputed as that of the 1<sup>st</sup> Respondent's husband.
58. The 1<sup>st</sup> Respondent's evidence was corroborated by PW 1 and PW 3 who stated that her husband was a step-brother to the Appellant's mother who was a daughter to the deceased. She produced photographs to show that she had build her home and planted crops on the subject land and had buried her child and grandchildren on the said subject land.
59. In her statement, the 1<sup>st</sup> Respondent pointed out that her husband was the Appellant's first cousin (sic). She further stated that the deceased was married to Timona Migasa (deceased) and they bore six (6) daughters namely, Elipar Mutiva, Loice Asumala, Rosa Muyoma, Deina Shilinji, Salome Arusa and Margret Imali.
60. She averred that the deceased's husband also bore two (2) sons with her other grandmother one Selida. The sons were Harun Mwale and Enos Shigadi. She pointed out that Harun Mwale started living with the deceased in 1960 as their firstborn son.
61. She averred that in 1972, when the deceased was sickly, her husband's father asked her husband to take care of the deceased. She said that he built a home in the homestead since all the deceased's daughters had been married and relocated to their marital homes.
62. This court noted that all the Appellant's witnesses denied that the 1<sup>st</sup> Respondent's husband was one of the members of the family. They termed him as a stranger. A Chief's letter to that effect was produced to show that the deceased only bore six (6) daughters.
63. However, none of the Appellant's witnesses addressed the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' evidence of how the 1<sup>st</sup> Respondent and her husband came to live in the said subject land.
64. The above notwithstanding, it was upon the 1<sup>st</sup> Respondent to prove that her husband was a grandchild to the deceased as it was trite law that he who alleges must prove. A mere assertion was not sufficient. Evidence proving the relationship between the 1<sup>st</sup> Respondent's husband and the deceased was critical as it was central to him being considered a beneficiary of the deceased's estate There was also no evidence to demonstrate that he was the deceased's dependent.
65. His relationship with the deceased was hotly contested. It was also not clear how he came to occupy the subject land. On the one hand, the 1<sup>st</sup> Respondent said that he was the deceased's step son while on the other hand, she said that he purchased the subject land. The fact that the 1<sup>st</sup> Respondent's child and grandchildren were buried in the subject land did not automatically mean that the 1<sup>st</sup> Respondent's husband was entitled to the subject land as its owner or that he was a grandchild of the deceased.
66. The dispute relating to his occupation of the land was best resolved in the case that was pending determination in the ELC. It was more prudent to have the issue resolved before the proceedings relating to the administration of the deceased's estate could proceed.
67. Grounds of Appeal Nos (2) and (5) of the Appellant's Memorandum of Appeal were therefore not merited and the same be and are hereby dismissed.



### III. Validity of the Written Will and Whether or not the Trial Court Erred in Disregarding the Same

68. Grounds of Appeal Nos (1), (2), (3), (4) and (5) of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Memorandum of Cross-Appeal were dealt with under this head.
69. The 1<sup>st</sup> Respondent submitted that through a written Will dated 8<sup>th</sup> March 1960, the deceased and her husband had agreed to give one Enos Shigadi and the father of the 1<sup>st</sup> Respondent's husband, the subject land. She contended that the Will was a filed document and available but was not mentioned in the Judgment as a finding or a document. She asserted that whilst making the Will, the testators personally executed by their thumbs in 1960 as they anticipated the current wrangles.
70. She added that the Appellant knew about the Will and did not oppose the same. It was her case therefore that the said Will was unopposed and admissible. She argued that that was the reason why none of them pursued the letters of administration of the estate from the time their parents died. She added that the deceased died in 1977 and her daughters who survived her were aware that her husband was in occupation of the subject land and did not evict him.
71. She contended that the deceased and her husband were of sound mind while making the Will and that there was no law guiding a person to provide for all his dependants equally proportionally or what proportion she could bequeath any dependant. To buttress her point, she placed reliance on the cases of Estate of Wilfred George Makunda Succession Cause No 1 of 2002 and Estate of Pratik Ramed Meiji Shah Nairobi Succession Cause No 2355 of 2013 (eKLR citations not provided) where the common thread was that the will of the departed must be honoured as much as possible.
72. She asserted that the Appellant's mother even warned her not to disturb her husband as the Appellant's sister told the Trial Court. She pointed out that the Appellant was not only way down in the tree of inheritance but also was a person of means and owned a lot of properties as was evidenced during trial. She was categorical that the Appellant was persistent in going against the will of her grandparents for purposes of disinheriting her despite living on the subject land for over fifty (50) years and solely depending on it for a living.
73. She further placed reliance on the case of In the matter of the Estate of Late Sospeter Kimani Waithaka Succession Cause 341 of 1998 (eKLR citation not provided) where it was held that the Will of the departed must be honoured as much as it was reasonably possible and that in construing the contents of a will, the first principle was to discover the intention of the testatrix.
74. She pointed out that at the time the testator was making the Will herein, he was of clear intention that he was not disinheriting anyone and that he knew that he had borne six (6) daughters and all of them were either married or would be married.
75. She asserted that during trial when the surviving daughter was asked if she knew about the existence of people on her father's land, she responded that she knew about it and had never attempted to evict them or file Letters of Administration to inherit the land. She faulted the court for disregarding an existing will when arriving at its final decision.
76. On her part the Appellant invoked Section 11 of the *Law of Succession Act* Kenya and submitted that the issue raised by the 1<sup>st</sup> Respondent about the will being disregarded by the Trial Court was misplaced as the said will was neither produced as evidence nor was it referred to as at the time the witnesses were testifying. She asserted that no evidence was provided to show that the executor of the will had filed a petition for grant of probate and that the said will had not been propounded. She asserted that it was not possible for this court to make a finding that the deceased left a valid written will at this stage.



77. She pointed out that the Trial Court in its wisdom found it not prudent to ask the parties to file a fresh grant and further found it justifiable to allow the joint administration of the estate of the deceased. It was her view that that would fast-track the matter in the event this court finds that the judgments delivered by the Trial Court had merit.
78. It was her case that the Trial Court did not have the jurisdiction to transfer the suit parcel of land in the name of the 1<sup>st</sup> Respondent's husband. She urged the court to dismiss the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Cross-Appeal and allow her appeal as prayed.
79. A perusal of the Judgment of the Trial Court indicated that the Trial Court did not refer to the said Will at any point during trial. Although, the 1<sup>st</sup> Respondent indicated that the same was filed as a document before the court, none of the witnesses during trial referred to it and/or adduced it as evidence in court.
80. Matters not canvassed by the parties and which a trial court did not get a chance to pronounce itself upon were not available for consideration by the appellate court. This court had due regard to the case of Republic vs Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & Others ex parte Tom Mbaluto [2018]eKLR where it was held that as has been stated time and again, there was a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricted the appellate court to consider the issues that were canvassed before and decided by the trial court. If that were not the case, the appellate court would become a trial court in disguise and make decisions without the benefit of the input of the court of first instance.
81. Having said so, the Trial Court could not be faulted for not holding that the subject land belonged to the 1<sup>st</sup> Respondent's husband by virtue of the said Will as the issue of the Will was not canvassed by parties and a determination made thereof. Be that as it may, a will that had bequeathed all the deceased's estate in exclusion of other beneficiaries as that of the one herein would always be subject of contention in court and could not be held as valid if proven that other dependents were left out. In addition, the said Will did not have an executor making this court find that the same may not have been a valid will and was open to contest as to who would have been the intended executor.
82. In the premises, this court could not belabor the point. Grounds of Appeal Nos (1), (2) and (3) of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Memorandum of Cross-Appeal were therefore not merited and the same be and are hereby dismissed.

#### **IV. Whether the Learned Trial Magistrate Erred by Directing that the New Grant be Issued in the Name of the Appellant and the 2<sup>nd</sup> Respondent**

83. Grounds of Appeal No (3), (4) and (6) of the Appellant's Memorandum of Appeal and Ground of Appeal No 6 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's Cross-Appeal were dealt under this head.
84. It was the 1<sup>st</sup> Respondent's case that the Trial Court erred in directing that the new Grant be issued in the name of the Appellant and the 2<sup>nd</sup> Respondent. She prayed that this court holds that as per the existing will, the Grant be issued to her.
85. She further submitted that in matters pertaining to land ownership, the actual act of occupancy was important. She argued that the Appellant was an elderly married granddaughter of the deceased who had a home in Mombasa where she lived with her family and had never occupied the subject land. She pointed out that she agreed with the Trial Court's holding that her husband was a grandson of the deceased and had been occupying the land for a period of more than fifty (50) years, a fact that the Trial Court ought to have taken into consideration.



86. In that regard, she placed reliance on the case of *Cheromei vs Muigai* [2024] KEELC 5604 (KLR) where it was held that the adverse character of the possession had been established where an applicant had claimed to have been in actual and exclusive possession of the suit property continuously for twenty-eight (28) years to the exclusion of the respondents.
87. She asserted that she had documents that proved that she had a permanent home on the subject land which was corroborated by her affidavit evidence which showed that she had lived therein since 1977 and had even buried her children and her grandchildren on the said subject land.
88. She was emphatic that the Trial Court had erred in disregarding the fact that she had peacefully resided on the subject land with her husband without any disturbance and most importantly vide a written will.
89. She further submitted that the 2<sup>nd</sup> Respondent had since consented to granting her his portion. She added that many of the Appellant's cousins were also willing to grant their share of the land to her. She was categorical that the Trial Court ought to have ordered for fresh letters of administration be applied without directing who to apply.
90. She was emphatic that the Appellant's attempt to indicate that the subject land was sold to her by one Rosa Muyoma was fiercely disputed as it was just a deviation and a false allegation by the Appellant. She added that she did not attach a sale agreement to prove the said allegation.
91. She further asserted that at the time the Appellant applied for the Letters of Administration, she admitted that the surviving children of the deceased knew about the said Letters of Administration but did not bother to apply for the same because their parents already had a Will in place.
92. She pointed out that she was the rightful person to inherit the subject land through the will which was unopposed. She added that the Appellant as a grandchild could not claim to own an estate bequeathed to her through a Will when the surviving children knew of it but did not contest.
93. She urged the court to find that the subject land belonged to her so that she could peacefully inter the remains of her late husband who had been deceased for two (2) months leaving her destitute. She prayed to bury him in the place where they had called home since 1977.
94. She stated that in the event this court did not find in her favour with regard to her submissions on the Will, then it should uphold the Trial Court's finding that her husband was considered a grandchild of the estate and allow her a 6 by 6 feet area out of the two (2) acres and next to the graves of her children and grandchildren for her to bury her husband and leave her and the Appellant to continue fighting another day in another forum. She urged the court to uphold her Cross-Appeal and dismiss the Appellant's appeal with costs.
95. As this court had found that it could not delve into the issues of the will as the same were not subject of the contention between parties at the Trial Court, it thus could not hold that the Grant be issued to the 1<sup>st</sup> Respondent as the question of whether the said Will was valid or not was not addressed during trial.
96. Be that as it may, a reading of the Trial Court's Judgment indicated that all the daughters of the deceased were dead. This court noted that DW 2 was a daughter to the deceased and was alive during trial. Bearing in mind the degree of consanguinity, then she ought to have been a co-administrator to the deceased's estate in priority to the Appellant and the 2<sup>nd</sup> Objector herein. However, if she was the deceased's sister, she may have been elderly leading the court to appoint younger administrators of the deceased's estate.



97. The Trial Court was therefore well within its mandate under Rule 73 of the Probate and Administration Rules to choose at least two (2) beneficiaries to administer the deceased's estate. There were over twenty (20) beneficiaries which could have portended difficulty on agreeing on the administrators of the deceased's estate. He also acted correctly when he did not include the 1<sup>st</sup> Respondent's husband as an administrator because his relation to the deceased was vehemently opposed.
98. It was important to point out that being an administrator to the estate did not mean that the administrator was entitled to the deceased's property to the exclusion of other beneficiaries. The revoking of the Grant of Letters of Administration and cancellation of the Title Deed from the Appellant's name to the deceased's name and the fact that there was an ELC matter that was pending hearing and determination was a good life line for the deceased's beneficiaries including the 1<sup>st</sup> Respondent to ventilate agree on who the real beneficiaries to the deceased's estate before the subject land was distributed.
99. This court did not want merely to give the 1<sup>st</sup> Respondent's husband to be buried for the sake of it. Indeed, being in occupation of land or constructing buildings or burying people was not proof of ownership of land. His occupation on the subject land was an issue that was best resolved by the ELC or a court dealing with a burial dispute as evidence would be adduced explaining how he came to be in occupation of the subject land. Indeed, his presence on the subject land was not well articulated in the proceedings of the lower court to enable this court make a concrete finding on his entitlement of the subject land. This court was apprehensive that giving a determination relating to the occupation of the 1<sup>st</sup> Respondent in the subject land would throw the ELC off balance and could embarrass it if it was to arrive at a different conclusion from this court.
100. In the premises, Grounds of Appeal No (3), (4) and (6) of the Appellant's Memorandum of Appeal and Ground of Appeal No 6 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's Cross-Appeal were not merited save on the ground on issuing the Grant to the Appellant and the 2<sup>nd</sup> Respondent.

### **Disposition**

101. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Memorandum of Appeal dated and filed on 5<sup>th</sup> December 2022 and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Cross-Appeal dated 25<sup>th</sup> October 2023 and filed on 26<sup>th</sup> October 2023 were both not merited and the same be and are hereby dismissed.
102. For avoidance of doubt, the Judgment delivered on 18<sup>th</sup> November 2022 by Hon S. O. Ongeru (SPM) be and is hereby upheld.
103. As this was a family matter this court deviated from the general rule that costs follow events. It is hereby directed that each party will therefore bear his/her costs of this Appeal and this Cross-Appeal.
104. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 27<sup>TH</sup> DAY OF FEBRUARY 2025**

**J. KAMAU**  
**JUDGE**

