



REPUBLIC OF KENYA



KENYA LAW
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**Ayoki v Ayoki & another (Family Appeal E007 of 2023)
[2025] KEHC 4890 (KLR) (25 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4890 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
FAMILY APPEAL E007 OF 2023**

**DK KEMEL, J
APRIL 25, 2025**

BETWEEN

MARY SYLVIA AYOKI APPELLANT

AND

RESEMARY AYOKI 1ST RESPONDENT

PHOEBE ATIENO AYOKO 2ND RESPONDENT

(Being an appeal arising from the ruling and order of Hon. J. Ong'ondo (PM) delivered on 30th April, 2020 in Siaya PMCC No. 204 of 2019, in the matter of the estate of Tobias Ayoki Kew)

JUDGMENT

1. This appeal arises from the ruling and order of Hon. J. Ong'ondo (PM) delivered on 30th April, 2020 in Siaya PMCC No. 204 of 2019 wherein he ordered all the properties of the deceased including homes to be divided equally among the three wives of the deceased. The Appellant being aggrieved with the decision has filed a memorandum of appeal dated 25th July, 2023 wherein she has raised the following grounds: -
 1. That the learned magistrate erred in law and fact by delivering a ruling that is going to cause chaos and infighting in the family of Tobias Ayoki Kew in ordering that all properties (home included) be divided equally among the three wives when the deceased had left his four wives having settled each in their own homes.
 2. That the learned magistrate erred in law and fact in his ruling when he ruled that the hospital bill is not payable by the estate of the deceased and failed to state the person who was to pay the mortuary bill at Star Hospital.
 3. That the learned trial magistrate erred in law and fact in confirming the grant when there was no proper application for confirmation before the court as the court ought to have heard oral



evidence to establish the truth or send the case to mediation under the court annexed mediation and further monies in accounts and other properties had not been included.

4. That the trial court failed to consider the fact that title deed on land parcel South Sakwa/Barkowino/4568 belonging to Nicholas Ogutu B. Oganga as security for the payment of mortuary bills at Star Hospital Kisumu and that the estate of the deceased had a responsibility to meet the charges.

5. That the trial magistrate was completely biased in his decision making.

The Appellant therefore prayed that the appeal be allowed and that the ruling of the trial court dated 30/4/2020 be set aside and that the matter be heard before another trial magistrate preferably at Kisumu. The Appellant also sought for costs of the appeal.

2. The appeal was canvassed by way of written submissions. Both parties complied. The Appellant's submission are dated 8/11/2024 whereas the Respondent's submissions are dated 27/1/2025.

3. The Appellant submitted that the learned magistrate erred in law and fact by delivering a ruling that is going to cause chaos and infighting in the family of Tobias Ayoki Kew when he ordered that all properties (home included) be divided equally among the three wives when the deceased had left his four wives having settled each in their own homes. The Appellant reiterated the grounds set out in the Memorandum of Appeal and urged the court to allow the appeal. The Appellant further urged the court to take into account the averment in the plaint, documents tendered by herself, the defence and oral testimony of the parties and come to the inescapable conclusion that the Appellant had proved her case in the subordinate court.

4. The Respondents opposed the appeal and submitted that the trial court correctly applied the provisions of section 40 of the *Law of Succession Act* and that the properties were distributed according to the number of houses which was fair in the circumstances and that the appeal should be dismissed.

5. I have given due consideration to the record of appeal as well as the submissions filed. As the first appellate court, its duty is to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive examination before drawing an independent conclusion as to whether or not the judgment of the lower court should be upheld. The court has to take into consideration of the fact that it did not have an opportunity to see and hear the witnesses first hand as they testified. See Section 78 of the *Civil Procedure Act* as well as the case of *Selle Vs Associated Motor Boat Company Ltd* [1968] EA 123. It is not in dispute that the Appellant and the Respondents herein had filed a joint summons for confirmation of grant dated 14/8/20219 in which the Appellant declined to sign the supporting affidavit as well as the consent to distribution. It is not in dispute that the Appellant later filed her own summons for confirmation of grant dated 20/1/2020 and filed on 22/1/2020. It is also not in dispute that the trial court later ordered the properties be distributed equally among the Appellant and the Respondents. I find the issue for determination is whether the Appellant's appeal has merit.

6. A perusal of the lower court record reveals that the learned trial magistrate did observe on the 20/5/2019 that the orders sought by the parties can only be granted upon concurrence by the widows in viva voce presentation in court. The court directed the Advocates to avail the widows in court. The parties later sought for time to reach a settlement but it appears they did not succeed and thus opted to prosecute their rival summons for confirmation of grant. The trial court on 23/1/2020 directed the parties to file submissions to justify their mode of distribution. Apparently, the trial court seems to have forgotten its earlier directions that the parties do proceed by way of viva voce evidence but instead directed them to file and exchange written submissions. There was indeed a point of divergence over the



issue of distribution of the estate of the deceased and that the issue before the trial court was whether the distribution was to be equally among the Petitioners as proposed by the Respondents or unequally as proposed by the Appellant. Indeed, the parties had been given an opportunity to reach out a settlement but they were unable to agree and thus they had to tough it out in court. I find that it was proper for the trial court to direct the parties to present viva voce evidence so that the witnesses are cross-examined and thereafter have the issues in controversy thrashed with finality. I find that the affidavit evidence was not sufficient without the deponents being subjected to cross-examination so as to test the veracity of their testimonies. Had the trial court stuck with its earlier directions that the matter proceeds by way of viva voce evidence, it would have had the benefit of the versions of the parties herein and could have arrived at an informed decision in the matter. The parties were thus denied an opportunity to ventilate their rival claims. It is instructive that the directions to canvass the rival applications by way of written submissions were given by the trial court and not by consent of the parties herein and hence the parties were not given an opportunity to ventilate appropriately their rival claims before the court could come up with a determination. Further, it is noted that the matter was an emotive one which required oral evidence to be presented and the witnesses cross-examined at length. To that extent, iam satisfied that the eventual decision arrived at by the trial court was made in error and that the same must be interfered with. The parties must be directed to go back to the drawing board and present their rival claims via viva voce evidence before the trial court presided over by another magistrate.

7. In view of the foregoing observations, it is my finding that the Appellant's appeal has merit. The same is allowed. The ruling by Hon Ong'ondo delivered on 30/4/2020 is hereby set aside and substituted with an order that the rival summons for confirmation of grant dated 14/8/2019 and 20/1/2020 be heard by way of viva voce evidence before another magistrate other than Hon Ong'ondo. As parties are family members, I order each party to bear their own costs.

DATED AND DELIVERED AT SIAYA THIS 25TH DAY OF APRIL, 2025

D.KEMEI

JUDGE

In the presence of :

M/s Okeyofor Appellant

N/A Anymba.....for Respondents

Mboya.....Court Assistant

