



REPUBLIC OF KENYA



In re Estate of Jackton Oluoch Ombonya (Deceased) (Family Appeal E004 of 2024) [2025] KEHC 7086 (KLR) (30 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7086 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
FAMILY APPEAL E004 OF 2024**

**DK KEMEL, J
MAY 30, 2025**

BETWEEN

GRACE ASENGO OLUOCH PETITIONER

AND

ALFRED MAWINDA OFULA RESPONDENT

(Appeal from the ruling of the Chief Magistrate Court at Siaya in Succession Cause No. 222 of 2019 dated 17/4/2024 by Hon. Lester Simiyu (SPM))

JUDGMENT

1. The appeal herein arises from the ruling of Honourable Lester Simiyu (SPM) in Siaya CM's Court Succession Cause No. 222 of 2019 delivered on 17/4/2024 wherein she allowed summons for confirmation of grant dated 9/2/2024 as prayed.
2. Aggrieved by the said ruling, the Petitioner filed a Memorandum of Appeal dated 6/5/2024 wherein she raised the following grounds of appeal.
 - i. The learned magistrate erred in law and facts in allowing the Objector to be given a portion of the deceased's estate.
 - ii. The learned magistrate erred in law and fact by inviting the third party in the estate of the deceased one Jacktone Oluoch Ombonya.
 - iii. The learned magistrate erred in law and fact by failing to find that the alleged agreement does not meet the required standard under the *Evidence Act*.
 - iv. The learned magistrate erred in law and fact in finding that the Respondent herein was at liability to the estate.



- v. The learned magistrate erred in law and fact by failing to consider the fact that the suit land is ancestral land and all the dependants of the deceased with interest in the property ought to have consented to the sale agreement.
- vi. The learned magistrate erred in law by failing to consider the fact that the Appellant herein was acting in person and did not attest the application for confirmation and or mode of distribution of her own deceased husband.
- vii. The learned magistrate erred in law by failing to consider the fact that the Appellant was not present at the time of the alleged agreement and further there was no witness to the same.
- viii. The learned magistrate erred in law and fact by failing to consider the fact that the Respondent failed to strictly prove the reasons as to why he has not been in occupation of the suit land from the date of the alleged agreement.

The Appellant therefore prayed that the appeal be allowed and that the ruling dated 17/4/2024 be set aside and judgment be entered against the Respondent in favour of the Appellant. That the costs of the appeal and the lower court be awarded to the Appellant.

- 3. This being the first appellate court, its duty is to re-evaluate the evidence tendered before the lower court and subject it to an independent analysis so as to arrive at an independent conclusion as to whether or not to uphold the decision of the trial court. See *Selle vs. Associated Motor Boat Company Limited* [1968] EA 123.
- 4. The case before the lower court is that the Objector had objected to the Petitioner proceeding with the succession without involving him yet he was a creditor/liability to the estate. The trial court directed that the objection be canvassed by way of oral evidence.
- 5. The Objector George Aggrey Omondi Aketch (PW1) testified that the deceased herein approached him as he needed assistance after his property (land) was set for auction by Agricultural Finance Corporation (AFC) as he had offered the same as security for a loan. That he entered into a Sale Agreement dated 29/3/1994 where he paid him a deposit of Kshs10,000/= and then settled the outstanding debt with AFC of Kshs17,700/=. That he started using the land measuring 2 ½ acres (0.9HA) out of LR No. South Gem/Gombe/1X6. That the said agreement was witnessed by the deceased relatives. He produced the said sale agreement and receipts of payment. That the Petitioner herein was present during the said sale transaction but that she did not sign the agreement. That he also helped the deceased son who was pursuing a course in Nairobi by paying for his fees.
- 6. Joseph Ojonya Ouda (PW2) testified that he knows all the parties in the matter and that the deceased was his cousin. That deceased had taken a loan and he later approached him as he was unable to pay and that they managed to get the Objector who agreed to clear the outstanding loan arrears. That he witnessed the sale agreement over the land. That the Objector helped the deceased to clear the loan and that the two became good friends whereby the Objector took the deceased eldest son to Nairobi to undergo some training on carpentry skills.
- 7. Willis Owiti (PW3) testified that he witnessed the sale transaction between the deceased and the Objector. That the Petitioner who was wife to the deceased was not present during the meeting.
- 8. The Objector closed his case.
- 9. Grace Osengo Oluoch (DW1) testified that the claim by the Objector has no basis since he has not brought witnesses. That she does not agree with the Objector's claim because she does not know how the Objector and the deceased transacted.



10. Erick Oketch Oluoch (DW2) stated that he is the son to the deceased. That his mother did not sign the agreement. That he and the siblings did not sign, that as far as he is concerned it is a requirement of the ventor must sign any sale agreement.
11. Fredrick Omondi Oluoch (DW3) stated that he is the 3rd born child of the deceased. That the deceased did not inform them that he had sold land to the Objector.
12. Benard Oduol Oluoch stated that he is the 5th son of the deceased. That the deceased did not tell them that he had not sold land. That he has never seen the evidence of the alleged sale.
13. Wycliffe Odhiambo Oluoch (DW5) testified that he is the 4th born son. That the deceased did not disclose sale agreement with the Objector. That the deceased never informed him of any sale. That he only came to learn about the sale in 2019.
14. Wilson Otieno Oluoch (DW6) testified that he is the eldest son of the deceased. That he does not know if the deceased took a loan with AFC. That he is not aware of any payments. That if a search is conducted at AFC it will not show that the deceased took a loan. That he is not aware of any repayments of a loan to anybody or directly to the bank. That he is not aware of any agreement at the officer of the Advocate by the name John Wanyanga. That the Objector was a brother to his father. That he visited their home, that he does not know any transactions.
15. Morris Ngesa Oluoch (DW7) testified that he does not know anything about the sale, that he only came to learn about the transaction much later but that his father did not inform him about it.
16. The Petitioner closed her case.
17. The learned trial magistrate upon consideration of the evidence as a whole, ruled in favour of the Objector vide the ruling dated 17/4/2024 where she ordered that the Objector and the Petitioner be made as joint administrators and further proceeded to distribute the estate comprising of LR No. South Gem/Gombe/1X6 between the two administrators in which the Objector was allocated 0.9HA while the Petitioner was allocated the remainder of 3.70 HA. This then precipitated this appeal.
18. The appeal was canvassed by way of written submissions.
19. The Appellant's submissions are dated 24/4/2025. It was submitted that the suit land South Gem/Gombe/1X6 is ancestral land and that the Appellant's family has been in constant use before and after the death of the deceased. That the alleged agreement made on 29/3/1994 was 14 years at the time of the demise of the deceased. That the execution of the agreement on 15/10/2019 was defective in view of the provisions of the Limitations of Actions Act and should not have been used as an exhibit or evidence before any court of law. It was submitted that a contract of agreement over land should not take more than six (6) years under Section 4(a) of the *Limitation of Actions Act*. It was also submitted that the dependants of the deceased were not consulted over the alleged sale before the deceased died and therefore the same raises suspicion on the agreement. That no witness was called from the firm of Wanyanga & Co. Advocates to produce the alleged sale agreement. That the Objector did not discharge his burden of proof under Section 107 of the *Evidence Act*. That the Objector did not bother to process the alleged sale agreement even after the death of the deceased by citing the Appellant and her family. That the Objector did not take possession of the land upon the execution of the agreement. That the wife of the deceased or his family did not give their consent to the said transaction. The Appellant's counsel sought that this appeal be allowed as prayed.
20. The Respondent started off by stating that there was a ruling dated 29th of November 2023 on an objection by the Respondent to which the trial court correctly found that the late GEORGE AGGREY OMONDI OKETCH (also deceased) through whom the Respondent is claiming through



as the legal representative, had bought two and a quarter acre of the subject property from Deceased (Jacton Oluoch Ombonya) and therefore the estate of the late GEORGE AGGREY OMONDI OKETCH was a liability as a purchaser to the estate subject of this succession proceedings and thus the Respondent being the personal representative of the late GEORGE AGGREY OMONDI OKETCH was to be included in the distribution of the subject property. This ruling of the 29th November 2023 has never been challenged and the same stands to date. It is also worth noting that it was on the basis of the trial courts finding in the ruling of the 29th November 2023 that the court ordered for the distribution of the estate particularly Land Parcel No. SOUTH GEM/GOMBE/1X6 in the manner it did vide its ruling/orders of the 17th April 2024 which the subject of the instant appeal.

21. It was submitted that although the Appellants have set forth nine (9) grounds of appeal in her Memorandum of Appeal, they will argue all the grounds together. That in her ruling/orders dated 17th April 2024, being the subject of this appeal, it is apparent that the learned Senior Principal Magistrate confirmed the distribution of the Deceased estate giving a portion of the subject property to the Respondent ostensibly because in her prior findings and ruling on an objection by the Respondent vide the court's ruling dated 29th November 2023 she had established that the estate of the late GEORGE AGGREY OMONDI OKETCH was a liability as a purchaser in the instant estate of the Deceased herein. It was submitted that the ruling was never challenged or vacated and at the time of confirming the grant on the 17th April 2024 by the trial court the same was still a valid findings and orders of the court, thus the trial court was proper in allocating the purchasers share in the subject property to the Respondent. Learned counsel submitted that a cursory reading of the Appellant's Memorandum of Appeal leads to the conclusion that the Appellant while disguising to be challenging the trial court's orders of the 17th April 2024, in the actual sense is challenging the findings of the trial court in its ruling of the 29th November 2023 and thus it follows that the attempt by the Appellant to challenge the ruling of the trial court delivered on the 29th November 2023 while purporting to be challenging the ruling/orders of the trial court dated 17th April 2024 is a misadventure, an afterthought and is in the same vein unprocedural, irregular and incurably defective hence the same must not be entertained by this Honorable Court.
22. It was further submitted that even if the parties were to go by the grounds that the Appellant has raised in her Memorandum of Appeal in regards to the trial courts ruling of 17th April 2024, the evidence as presented by the Respondent would point to the probability that indeed the Respondent's father entered a sale and purchase agreement with the Deceased. It was pointed out that there is direct evidence of payments on account of the Deceased by the Respondent's father and consequently, the Respondent's father taking possession of the portion of the Subject Property and which is not contested. That from the above evidence tendered, one can clearly decipher the intention of both the deceased who was the seller and the Respondent's father who was a bonafide purchaser. It was thus submitted that it then follows that the portion that was bought is not now a free property of the Deceased rather a liability to the estate and as such it was respectfully submitted that the learned trial magistrate correctly found the same. Counsel placed reliance in the case of *Re Estate of George Gikundi (Deceased) (2019) eKLR* in which the court held as follows: "As I have observed the above suit land in this cause though comprises properties registered in the name of a deceased person is not considered "free property" as defined under Section 3 (1) of *Law of Succession Act* but a liability to the estate. When a creditor to an estate has a claim over the estate of a deceased person particularly where the claim was admitted by the deceased, such a claim can be lodged vide a Succession Cause in this court sitting as a probate court because it has jurisdiction to determine it. It is of course different where the claim was denied by the deceased directly or through his actions. In that case the claim becomes a land dispute that can only be adjudicated by ELC as established by Article 162(2) of *the Constitution* of Kenya. In this instance the deceased clearly sold his parcel of land after subdividing it and proceeded to the Land



- Control Board with the Applicant and obtained the requisite consent to transfer the suit land to the Applicant. Besides that, he allowed the Applicant to take free occupation and develop it. That conduct in my view clearly indicates that the deceased gave out his parcel willingly to the Applicant (purchaser) for value.”
23. It was also submitted that whether the Appellant or any of the Deceased family members was made aware of the said sale by the Deceased is immaterial as at the time of the said transaction there was no requirement in law for spousal consent or any other consent from the vendor’s family members. Counsel placed reliance in the case of *Re Estate of George Gikundi (Deceased) (2019) eKLR* in which the court stated as follows: It is true that spousal consent is now a legal requirement before a married person disposes land as postulated under Section 28 of *Land Registration Act* No. 3 of 2012. However, the legal requirement came into force on 2 nd May 2012 and the transaction here took place in 2001. Furthermore it is assumed that before that Land Control Board gave consent to the transaction between the deceased and the Applicant herein, some of the factors that must have been considered is the interests of the spouse and the children. But more fundamentally is that the law passed in 2012 requiring spousal consent cannot obviously be applied retrospectively.
 24. The Respondent further submitted and urged the court to look at the record of the trial court and that the same will also bear witness that prior to the trial court making the decision of 17th April 2024 being the subject of this appeal, the Appellant had been on several occasions accorded an opportunity to file an alternative mode of distribution but for whatever reasons best known to her, she did not. It was submitted that the Appellant having been accorded the opportunity but decided to squander the same, she can not then use these appellate proceedings to ventilate on issues that could have been addressed at the lower court. In that regard, counsel submitted that the learned trial Magistrate properly directed herself in law and fact in making the foregoing findings and holdings in her contested ruling/orders.
 25. The Respondent finally submitted that the Appellant herein has not demonstrated any wrongdoing, excesses or omission on the part of the trial court to warrant this Honourable Court setting aside the decision of the trial court since as a matter of fact, the trial court’s decision was well reasoned and based on the law hence the instant appeal is without merit rather it is an afterthought simply actuated by greed. The counsel for the Respondent urged the court to dismiss the appeal with costs.
 26. I have considered the record of appeal and the submissions filed. The issue for determination is whether the Objector proved his case in the lower court on balance of probability.
 27. It is noted from the rival evidence presented, the bone of contention is whether the deceased entered into a sale agreement with the Objector over a portion of his land Parcel South Gem/Gombe/1X6. The Appellant who was the Petitioner vociferously denied the existence of a sale agreement between her late husband and the Objector. She called her entire household as witnesses and that all of them backed her claim that the deceased did not inform them about the alleged sale agreement and that they had never been shown the said document. It was the contention of the Appellant that her consent and that of her family members was required before the transaction could be entered into. The Objector called several witnesses some of whom witnessed the sale agreement between the Objector and the deceased. From the evidence of the Objectors witnesses and the exhibits produced by the objector it is clear that a sale agreement indeed took place between the deceased and the objector. I have perused the said sale agreement dated 29/3/1994 prepared by the firm of Wanyanga & Co. Advocates which was duly signed by the parties. Learned counsel for the Appellant has contended that no witness was called on the said law firm to come and produce the sale agreement. It is noted that during the hearing of the matter that particular document had been shared between the parties and that the Appellant did not object to its production on the basis that the maker ought to have been called. Hence the Appellant’s submission at this stage is not convincing because the document was properly admitted in the evidence. The Objector



bore the burden of proving his claim against the estate of the deceased and thereafter come out as a creditor/liability to the estate and thereafter be considered in the distribution. The Objector called Joseph Onjonya Ouda (PW2) who was a cousin to the deceased and who stated that the deceased had first approached him for help when the bank auctioned his parcel of land over non-payment of a loan. The witness further added that the deceased approached the objector who agreed to offset the loan and in return be given the land measuring 2 ½ acres. The witness further stated that it was the objector who bailed out the deceased and that he was present during the sale transaction as a witness. Further, the Objectors witness Willis Owiti (PW3) testified that he witnessed the transaction. After critically analyzing the evidence of the objector and his witnesses, I have no doubt whatsoever that indeed the deceased entered into a sale agreement with the objector. The particular agreement is also backed by payment which was made by the Objector to the bank and the advocate. This was confirmed by the receipts which were presented as exhibits.

28. Turning to the Appellants evidence presented before the lower court together with her witnesses, I find that the same was full of mere denials. All the witnesses including the Appellant denied the existence of a sale agreement between the deceased and the objector. Even after being shown a copy of the agreement and the receipts, they did not present rival evidence to controvert the contents of the agreement. If indeed the Appellant felt that the agreement was a forgery created by the objector after the demise of her husband, then she was expected to take the appropriate steps such as lodging a complaint with the police for investigations into the authenticity of the said document. Again, the trial court received an application by the Objector seeking to be made a creditor or liability of the estate by virtue of being a purchaser of part of the suit land, the Appellant (Petitioner) did not present credible opposition thereto. The trial court vide its ruling dated 29/11/2023 held that the Objector was indeed a creditor/liability to the estate and was to be included in the distribution of the suit property. It is instructive that the Appellant (Petitioner) has not appealed against the said decision of the trial court and hence the objector remains a creditor/liability of the estate and that position was taken up by the court in its decision dated 17/4/2024.
29. The Appellant's counsel has submitted that the purported sale agreement between the deceased and the Objector should have been consented to by the Appellant by virtue of being the spouse of the deceased. It is instructive that the sale transaction took place in 1994 and at that time, there was no requirement for spousal consent. The law regarding spousal consent came into force in the year 2012 following the enactment of the *Land Registration Act*. In the case of *Re Estate of George Gikundi (Deceased) (2019) eKLR* supra in which the court stated as follows:

“It is true that spousal consent is now a legal requirement before a married person disposes land as postulated under Section 28 of the *Land Registration Act* No. 3 of 2012. However, the legal requirement came into force on 2nd May 2012 and the transaction her took place in 2001. Furthermore, it is assumed that before that Land Control Board gave consent to the transaction between the deceased and the Applicant herein, some of the factors that must have been considered is the interest of the spouse and the children. But more fundamentally is that the law passed in 2012 requiring spousal consent cannot obviously be applied retrospectively.”

It is therefore clear that the ground of appeal regarding lack of spousal consent to the transaction must fail.

30. The Appellant has maintained that the purported land sale agreement must be rejected in view of the fact that any claims brought over the same is in violation of the provisions of the Limitation of Action Act more particularly Section 4 (a) thereof that an action found on a contract cannot be brought after 6



years whereas it is a legal position it is noted that the Appellant and the Respondent had litigated in the lower court regarding the question whether the objector is a creditor/liability to the estate and that the court vide a ruling dated 29/11/2023 held that the objector was indeed a creditor/liability to the estate. It is noted that the Appellant has not sought for a review of the said ruling or even preferred an appeal thereto. That being the position, the issue of whether the objector's claim is outside the Limitation of Action Act does not arise at this stage. The Appellant in her grounds of appeal has maintained that the Objector has never taken position of the land since entering into the sale agreement. I find the fact that the Respondent (Objector) has not taken possession of the land does not of itself oust his legal/legitimate expectation of ownership over the land. It could be possible that the objector was taking his time or that the Appellant and her family had been hostile to him. Absence of physical occupation of land does not imply that that particular person is not the owner thereof. The Appellant or any other person is at liberty to move to court and seek orders of ownership by way of adverse possession. Hence the Appellant's ground of appeal in that regard must fail.

31. In view of the foregoing observations, it is my finding that the Appellants appeal lacks merit. The same is dismissed. Each party to bear their own costs.

DATED AND DELIVERED AT SIAYA THIS 30TH DAY OF MAY, 2025.

D. KEMEI

JUDGE

In the presence of:

Matete for the Appellant

Otieno for the Respondent

Okumu Court Assistant

