



REPUBLIC OF KENYA



**In re Estate of Owe Owuor (Deceased) (Family Appeal E010 of 2024)
[2025] KEHC 7497 (KLR) (30 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7497 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
FAMILY APPEAL E010 OF 2024**

DK KEMEL, J

MAY 30, 2025

IN THE MATTER OF THE ESTATE OF OWE OWUOR (DECEASED)

BETWEEN

DANIEL OSE OGAMBI 1ST APPELLANT
COSMAS OWE OGAMBI 2ND APPELLANT
MORRIS OGAMBI 3RD APPELLANT
JOHN AKUKU OGAMBI 4TH APPELLANT
GERSHON OTOKE OGAMBI 5TH APPELLANT
PHECKO ODUOR OGAMBI 6TH APPELLANT

AND

PETER MUGA OWE RESPONDENT

*(Being an appeal from the decision of the Principal Magistrate
at Madiany Honourable Eric Malesi (PM) dated 14/8/2024)*

JUDGMENT

1. This appeal arises from the judgement of the trial magistrate Honourable Eric Malesi (PM) in Madiany Succession Cause No. E113/2023 dated 14/8/2024 wherein he dismissed the Appellants' affidavit of protest and allowed the Respondent's summons for confirmation of grant dated 7/6/2024 as prayed.
2. Aggrieved by the said decision, the Appellants filed a Memorandum of Appeal dated 2/9/2024 wherein they raised the following grounds of appeal:
 1. That the learned trial magistrate erred in law and fact by misconceiving the factual matrix leading to the dispute in the matter that was before him.



2. That the learned trial magistrate erred in law and fact by relying solely on Section 38 of the Law of Succession Act as the only legal provision to support his decision.
3. That the learned trial magistrate erred in law and fact by failing to consider the chief's letter which indicated all the beneficiaries.
4. That the learned trial magistrate erred in law and fact by failing to consider the resolution given by the mediator in the Mediation Agreement filed in court.

The Appellants therefore prayed for an order setting aside the whole of the subordinate court's judgment dated 14/8/2024 in its entirety.

3. This being the first appellate court, its duty is well spelt out namely; to re-evaluate and analyze the evidence of the trial 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 lower court record reveals that the Respondent filed summon for confirmation of grant dated 7/6/2024 and served them upon the Appellants which generated a protest from the Appellants wherein they objected to the mode of distribution of the estate by the Respondent and went ahead to give their rival proposed mode of distribution. The respective parties filed and exchanged rival affidavits wherein they gave their respective standpoints. The court referred the matter to mediation where it was agreed that the grants will be given to Peter Owe before it is confirmed, whom shall add other administrators, representatives of all the three deceased brothers' families inter alia; Syprose Okene Ogambi and Seline Atieno Ogambi, Reuben Owiyo OPenji amongst his siblings, Peter Muga Owe and Pamela Akinyi Odongo. It was further agreed that land of the late Owe Owuor shall be surveyed and subdivided amongst his four late sons' families namely Alex Ogambi Owe, Patrick Openji Owe, Peter Muga Owe (alive) and George Odongo Owe based on the current existing settlements and farming land arrangements. There seems to have arisen a dispute between the parties and therefore the mediation agreement did not sail through and was not adopted by the court. That being the position, the trial court directed the parties to canvass the said protest by way of written submissions. The learned trial magistrate analyzed the matter and agreed with the proposed mode of distribution by the Respondent vide his ruling dated 14/8/2024. This precipitated the present appeal.
5. The appeal was canvassed by way of written submissions. Both parties duly complied.
6. The Appellants' submission are dated 26/3/2025 while those of the Respondent are undated.
7. The Appellants raised two issues for determination namely; whether the Appellants qualify as beneficiaries of the deceased's estate and whether they have made out a case for setting aside the judgment of the lower court.
8. As regards the first issue, it was submitted by the Appellants that the Appellants being grandchildren of the deceased as described in Section 29b of the Law of the Succession Act, are entitled to the sharing of the estate of the deceased in equal measure just as the Respondent. Further, they submitted that they have a right to step in to the shoes of their deceased parents and seek to defend the portions of lands in their possession as given to them by their parents. That the decision of the lower court has the effect of rendering them homeless yet they were comfortable before the deceased died and which is a violation of their rights under Article 40 of the Constitution.
9. The Appellants further submitted that the lower court failed to factor the decisions arrived at during the Mediation Settlement Meeting between the parties. According to counsel, the trial court should have taken into consideration the issues raised in the mediation agreement and that the trial court



should have called for a survey to be conducted and a report to be given to the court so that the court can get a clear picture of how the beneficiaries was settled on the ground. Further, it was submitted that the trial court did not consider the contents of the chief's letter dated 22/5/2024 which listed all the beneficiaries of the estate and therefore had that been done, a separate outcome would have been arrived at by the trial court. The counsel finally urged the court to allow the appeal.

10. The Respondent opposed the appeal and adopted his earlier submissions dated 5th August 2024 which were filed in the trial court and formed part of the Record of Appeal herein. We therefore make these submissions to supplement the same and submitted that the learned Principal Magistrate properly directed himself in law and fact in making the foregoing findings and holdings in his contested ruling.
11. It was further submitted that the 3rd Appellant proposed mode of distribution was not anchored in law hence this appeal is without merit. It was pointed out that it is not disputed and indeed the Appellants admit in their pleadings that they are the grandchild of the deceased whose estate is subject of these proceedings. In the same breath, it is also undisputed and that the learned magistrate found as such that indeed the Deceased during his lifetime, was blessed with four children to which the Respondent is one of them. Further, it is also undisputed that all these four sons of the deceased are also having children who are also grandchildren of the Deceased just as the Appellants herein. It is also undisputed that in the contested ruling, the Appellants herein have been provided for a share in the deceased's estate to the extent of their father's share therein which has been allocated to their mother by the name Seline Atieno Ogambi to whom they are at liberty to have their shares from.
12. It was submitted that the Respondent mode of distribution that was confirmed by the learned trial magistrate is anchored in law and is fortified by the provisions of Section 38 of the [Law of Succession Act](#) which provides as follows:
 38. Where intestate has left a surviving child or children but no spouse;

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.
13. It was submitted that Section 38 of the Act is the first stop shop for the guide in distributing the intestate estate of a deceased person who died intestate. It provides in no uncertain terms that the estate of a deceased person intestate shall devolve subject to the provisions of Sections 41 and 42 to the surviving child if there be only one or equally divided among the surviving children. That is the gist of the impugned ruling of the trial court that is subject of this appeal.
14. It was submitted that the following were the Deceased children forming part of the four households as was identified in the introduction letter by the chief:
 - a. Patrick Openji Owe
 - b. Peter Muga Owe
 - c. George Odongo Owe
 - d. Alex Ogambi Owe

It was submitted that out of the four, three are deceased but left behind surviving spouses and children while only the Respondent survived the Deceased as at the time of filing the succession proceedings.

The confirmed and the mode of distribution annexed thereto that is subject of this appeal distributes the Deceased estate as below:



Assets	Beneficiaries	Share
LaNd Title No. Siaya/ ramba/1473	1 st Household Peter Muga Owe	Equal Shares
	2 nd Household (family of Alex Ogambi Owe) Syprosa Okune Ogambi Seline Atieno Ogambi equally	
	3 rd Household (family of Patrick Openji Owe) Reuben Owiyo Openji	
	4 th Household (family of George Odongo Owe) Pamella Akinyi Odongo	

15. It was submitted therefore that the impugned ruling conforms and upholds the provisions of sections 38 of the *Law of Succession Act*. Further, it worth noting that the Appellants belong to the 2nd Household in the above table. They are all children of the late Alex Ogambi Owe and Seline Atieno Ogambi. Their share in the deceased estate has been provided for to which will devolve to their mother (Seline Atieno Ogambi).
16. It was the view of the Respondent that the Appellants are entitled to the Deceased estate only the share of their father who was the son of the deceased is premised on the above-mentioned provisions of Section 38 of the *Law of Succession Act*. The same is further fortified In Re Estate of Florence Mukami Kinyua (Deceased) (2018) eKLR where the learned Judge stated:

“A grandchild is a direct heir to the estate of the grandparent where the parent predeceased the grandparent. The grandchildren get into the shoes of their deceased parents and take the parent’s share in the estate of the grandparents. This was stated in Re Estate of Wahome Njoki Wakagoto (2013) eKLR where it was held: -

“Under Part V, grandchildren have not right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents’ indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”



It then follows that the Appellants are only entitled to the share that would have gone to their father which the Respondent has unconditionally provided to their mother (in the 2nd Household in the mode of distribution above) from which they can they can have their shares from. Other households of the four units have also been provided for in equal measure and are since contented with the same. It is intriguing and inconceivable that only the Appellants herein are dissatisfied and would agitate to be allocated for more to the detriment of other beneficiaries when in fact they are aware that the law provides for equal distribution of Deceased estate among his four children.

17. It was submitted that that even if the Appellants were to be provided for individually since they are all adults, then it is only their fathers share in the Deceased estate that should be shared equally among all the children of their father. It is untrue that the Appellants have established homes on the subject parcel and furthermore the same was not raised at the trial in their protest hence did not form part of the issues at the trial. Raising the same at this stage is an afterthought which this honorable court ought not to give credence to. It is also worth noting that the family and the household of Patrick Openji Owe are currently not occupying nor using the any portion of the subject parcel yet they are also entitled to the same.
18. It was submitted that as regards the Appellants' complain that trial magistrate did not consider the Mediation Settlement Agreement between the Appellants herein and Respondent, that the same was not raised at the trial court in their Appellants' Affidavit of protest and any attempt to bring up the same at this stage of appeal is fatally unprocedural and a misadventure which this Honourable Court must not countenance at all. Even if it was to be considered, it was submitted that it will not hold as the same settlement agreement did not capture the wishes and input of all the beneficiaries from the four units of the deceased's family but rather it was only between the Appellants and the Respondent only.
19. It was finally submitted that the Appellants herein have 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. 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 and that the Appellants are actuated by greed and expansionist motive. In this regard, the same should be dismissed with costs.
20. I have considered the record of appeal as well as the rival submissions. I find the issue for determination is whether the trial court's dismissal of the Appellants' affidavit of protest was proper.
21. It is noted that it was the 3rd Appellant herein who had filed the affidavit of protest and went ahead to propose his mode of distribution of the estate as he was opposed to that of the Respondent. Indeed, the said 3rd Appellant confirmed that he was coming in as a grandchild of the deceased and was then agitating the case on his own behalf and on behalf of the rest of the Appellants. According to the said 3rd Appellant, the distribution should be made equally among the beneficiaries whose names have been captured or listed on the chief's letter dated 22/5/2024. Indeed, the said letter by the chief contained all the names of the deceased children as well as the grant children both dead and alive. However, according to the chief's letter dated 2/8/2023, the deceased's wife Petronila Agutu Owe is deceased, while one of the children namely Peter Muga Owe is alive and the other three namely Alex Ogambi Owe, Patrick Openji Owe and George Odongo Owe are deceased. The chief indicated the names of the respective family members who are to represent the deceased family members. It is from this letter that the Respondent prepared the schedule of distribution of the estate in which he proposed equal distribution among the four children of the deceased. The Appellants who were of a contrary view through the 3rd Appellant filed the protest and sought the assistance of the court to direct the said chief to write another letter listing all the family members. Indeed, the said chief complied and wrote another letter dated 22/5/2024 where he listed all the family members. A perusal of the said chief's



letter dated 22/5/2024 clearly shows that the names of the beneficiaries have been listed in accordance with the houses of the children of the deceased. Other than the Respondent herein who is the surviving son, the rest of the sons are all deceased and that the family members of the deceased son who include the Appellant herein are listed. It is not in dispute that the Appellants who are children of the sons of the deceased are for all intents and purposes grandchildren and therefore if they are to agitate any claims under the estate of the deceased herein, they should do so under their parents. It is not dispute that the Appellants admit in their pleadings that they are the grandchildren of the deceased whose estate is subject of these proceedings. It is also not in dispute that the learned magistrate agreed with the Respondent and the Appellants that indeed the deceased during his lifetime, was blessed with four children to which the Respondent is one of them while the Appellants are all grandchildren. By the same token, it is also not in dispute that all these four sons of the deceased are also having children who are also grandchildren of the Deceased just as the Appellants herein. The proposed mode of distribution by the Respondent was accepted by the trial court as being appropriate. However, the Appellants appear not satisfied about the arrangement since according to them the estate should be distributed equally among the names listed by the chief in the letter dated 22/5/2024. It would appear to me that the intention of the Appellants in seeking to have the estate shared equally among the surviving son of the deceased as well as the sons who have died and the grandchildren is to ensure that the grandchildren are elevated to the status of being made to rank in equality with the sons of the deceased. This proposal is absolutely improper because the Law of Succession Act provide that the estate of a deceased person should be shared equally among his children. This is provided for under Section 38 of the Act which provides as follows;

38. Where intestate has left a surviving child or children but no spouse;

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

It is noted that the Appellants have been provided for their share in the deceased's estate to the extent of their fathers' share therein which has been allocated to their mothers by the name Syprosa Okune Ogambi, Seline Atieno Ogambi and Pamela Akinyi Odongo to whom they are at liberty to have their shares from.

22. Looking at the ruling of the trial magistrate, it is clear that he was in agreement with the Respondent's mode of distribution which is anchored in law and is fortified by the provisions of Section 38 of the Law of Succession Act (supra).

As per the chief's letter dated 2/8/2024 and noted in the preceding paragraphs, the deceased left behind four children one of whom is still alive while the rest are all deceased as follows;

- i. Patrick Openji Owe
- ii. Peter Muga Owe
- iii. George Odongo Owe
- iv. Alex Ogambi Owe

Further to the aforesaid chief's letter, the said chief wrote another letter pursuant to court's summons wherein he listed all the children of the deceased as well as the respective children from each of the sons' families as well as spouses both surviving and deceased.

In as much as the Appellants seek to share the estate equally, I find that the law does not permit grandchildren to rank equally or in priority to the children of the deceased. It is instructive that the



Respondent herein is the only surviving son of the deceased while the rest have died and that there are surviving spouses or children of those deceased sons who should be in a position to share the portion due to them upon distribution. The mode of distribution that was proposed by the Respondent is in my view quite proper and in accordance with the provisions of Section 38 of the Act in that the estate should be shared equally among the children of the deceased. I do not understand why the children of the deceased's sons of the deceased are opposed to an equal distribution of the estate. It seems the Appellants agenda is to get more than the share of other families and which supports the Respondent's contention that the Appellants are motivated by sheer greed. It may very well be that some of these Appellant and grandchildren could be occupying more land on the ground and are now feeling uneasy and uncomfortable to have the status quo interfered with. I find that is the real reason behind the protest yet the law requires that each child of the deceased should have an equal share and not more not less. The proposal by the Respondent is therefore in tandem with that legal position. Hence, the draft schedule herein below was rightly accepted by the learned trial magistrate.

ASSETS	BENEFICIARIES	SHARE
LAND TITLE NO. SIAYA/ RAMBA/1473	1 st Household PETER MUGA OWE	EQUAL SHARES
	2 nd Household (family of ALEX OGAMBI OWE) SYPROSA OKUNE OGAMBI SELINE ATIENO OGAMBI equally	
	3 rd Household (family of PATRICK OPENJI OWE) REUBEN OWIYO OPENJI	
	4 th Household (family of GEORGE ODONGO OWE) PAMELLA AKINYI ODONGO	

The shares of the Appellants and other grandchildren should therefore fall within the above schedule. The ruling of the trial court conforms and upholds the provisions of Sections 38 of the [Law of Succession Act](#). The Appellants as per the chief's letter dated 22/5/2024 belong to the 2nd Household in the above table and are all children of the late Alex Ogambi Owe and Seline Atieno Ogambi. Their share in the deceased's estate has been provided for to which will devolve to their mother (Seline Atieno Ogambi). The Appellants will then arrange on how to share the portion which has been allocated to their family now being held by Seline Atieno Ogambi. It must also be noted that all the other grand children seem to be okay with the mode of distribution proposed by the Respondent as they have not teamed up with the Appellants to oppose the same. It would then appear that majority of the family members are in agreement with the Respondent.



23. The issue of grandchildren pursuing succession matters from estates belonging to their grandfathers is not new. There are instances where grandchildren initiate succession proceedings where their parents are deceased in order to get their entitlements under the estate. This stems from the description given to them by the *Law of Succession Act* under Section 29 (b) thereof which provides as follows:

“such of the deceased’s parents, step-parents, grand-parents, grandchildren, stepchildren, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and...”

It was the view of the Appellants counsel that the Appellants being grandchildren should be entitled to the estate directly where their own parents are deceased since they require to step into the shoes of their parents. However, it was the view of the Respondent’s counsel that the Appellants are only entitled to the deceased’s estate which is the share of their father who was the son of the deceased and which is premised on the above-mentioned provisions of Section 38 of the *Law of Succession Act*. In the case of *In Re Estate of Florence Mukami Kinyua (Deceased) (2018) eKLR* the court held:

“A grandchild is a direct heir to the estate of the grandparent where the parent predeceased the grandparent. The grandchildren get into the shoes of their deceased parents and take the parent’s share in the estate of the grandparents. This was stated in *Re Estate of Wahome Njoki Wakagoto (2013) eKLR* where it was held: -

“Under Part V, grandchildren have not right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents’ indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”

From the foregoing, that the Appellants are only entitled to the share that would have gone to their father which the Respondent has unconditionally provided to their mother (in the 2nd Household in the mode of distribution above) from which they can have their shares from. It is noted that other households of the four units have also been provided for in equal measure and who are contented with the same. Clearly, the distribution proposed by the Respondent is fair and in accordance with the law of Succession.

24. The Appellants have maintained that the proposed mode of distribution by the Respondents would lead to problems since they are likely to be disturbed as they have established their homes in the property and that they stand to be rendered homeless. It was the view of their learned counsel that the trial court ought to have considered the settlement reached during the mediation. The Respondent’s counsel however, maintains that that the Appellants should be contented with the mode of distribution and should handle it within their household. Learned counsel for the Respondent further contends that even if the Appellants were to be provided for individually since they are all adults, then it is only their fathers share in the deceased’s estate that should be shared equally among all the children of their father. It was further contended that the Appellants’ claim that they have established homes on the subject parcel should be rejected since the issue was not raised in the trial court through their protest and hence did not form part of the issues at the trial. It was the view of counsel that raising the same at this stage is an afterthought which this honorable court ought not to



give credence to. It was further pointed out that some of the beneficiaries especially the family and the household of Patrick Openji Owe are currently not occupying nor using any portion of the subject parcel yet they are also entitled to the same.

25. As regards the Appellants' contention that the trial magistrate did not consider the Mediation Settlement Agreement between the Appellants herein and Respondent, it is noted that the same was not raised at the trial court in their Appellants' Affidavit of protest and that any attempt to bring up the same at this stage of appeal is fatally unprocedural. I have perused the record and confirmed that indeed the parties were referred to mediation but it seems the parties did not reach an agreement. The partial agreement reached in terms of paragraph 1 and 2 did not resolve the issue of distribution. Vide Clause 2 of the said Mediation Agreement, it was agreed that the land would be surveyed and subdivided amongst the four sons of the deceased based on the current existing settlement and farming land arrangements. Even if it was to be considered, the same would not have led to an equal distribution of the estate of the deceased because the law required that the property be shared equally between the four children of the deceased. Hence, if it turned out that any of the Appellants or other grandchildren are occupying more land, then they must be prepared to part with the extra portion in order to ensure equal distribution of the estate. Indeed, the 3rd Appellant who was the Protestor in the trial court came up with a proposal on the distribution which was not equal. As long as the proposal by the said 3rd Appellant was against the directions of Section 38 of the Act, the same would not have passed muster. The learned trial magistrate appears to have seen the intention of the 3rd Appellant which was to go against equal distribution and thereby rejected it and ruled in favour of the Respondent. It is instructive that the settlement agreement was not adopted by the parties herein. If that is the position, the Appellants cannot revisit the same yet they had the opportunity to do so and to ensure that the same was anchored in the trial court proceedings and were to be used by the parties while ventilating their respective cases. It seems the Appellants abandoned the mediation settlement agreement and went for the chief's letter dated 22/5/2024 as they sought to bring on board all the grandchildren of the deceased. It is further noted that a majority of the said grandchildren have not contested the proposal by the Respondent to have the estate shared equally among the four children of the deceased. The Appellants attempt to have the estate shared unequally must be rejected because the same is not in tune with the principles of Equality which should apply to all the children of the deceased and the grandchildren. There is no evidence to the effect that the deceased had made some gifts inter vivos or distributed his property prior to his death and that none of the Appellants raised the same with the court. It is clear that the Appellants are interested in having more land than the other family members and this seems to support the Respondent's view that the Appellants are motivated by greed. Finally, it is noted that the trial court having based its decision on Section 38 of the Law of Succession Act, I find the same was properly made and must be upheld.
26. In view of the foregoing observations, it is my finding that the appeal lacks merit. The same is dismissed. As parties are members of one family, I order each party to meet their own costs.

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

D. KEMEI

JUDGE

In the presence of

M/s Owenga.....for the Appellant

Otieno.....for the Respondent

Okumu.....Court Assistant

