In re Estate of Ruth Gathoni Gachuki (Deceased) (Family Appeal 22 of 2023) [2025] KEHC 6906 (KLR) (27 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6906 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

FAMILY APPEAL 22 OF 2023

DKN MAGARE, J

MAY 27, 2025

IN THE MATTER OF THE ESTATE OF RUTH GATHONI GACHUKI (DECEASED

BETWEEN

JOSEPH MWANGI MACHANG'A ..... APPELLANT

AND

HELLEN WARIMA NDERITU ..... 1ST RESPONDENT

ANASTASIAH WANGARI KIBIRA ..... 2ND RESPONDENT

(Being an appeal from the judgment of Hon. Naomi Wanja (Ms.) (RM) delivered on 3rd November, 2023 in Principal Magistrate's Court at Othaya in Succession Cause No. 36 of 2020; Estate of Ruth Gathoni Gachuki (deceased))

JUDGMENT

1. This is an appeal from the judgment of the Hon. Naomi Wanja (Ms) (RM) delivered on 3rd November, 2023 in Principal Magistrate's Court at Othaya in Succession Cause No. 36 of 2020; Estate of Ruth Gathoni Gachuki (deceased). The Appellant filed the appeal herein and set the following grounds:

    a. The learned trial magistrate erred in law, and in fact by dismissing the proposed mode of distribution of the estate by the Appellant.

    b. The Honourable trial Magistrate erred in law, and in fact by unfairly, and inequitably distributing a part of the estate of the deceased, namely LR. No. Othaya/Kihugiru/3025, by ordering that it be divided in halves (equally) between the Appellant, and the Estate of Mary Nyawira represented by the 1st Respondent.

    c. The learned trial Magistrate erred in her estimation of both the oral and documentary evidence presented in court by finding them not useful in the distribution of the estate of the deceased.

d. The learned trial magistrate erred in law, and in fact by refraining from distributing and or making a finding in respect of the other property in the estate i.e. Land Parcel Number Othaya/ Kihugiru/3024, when-

1. It has found in its previous orders of the 07/03/2023 that the property was part of the estate,

2. The 2nd protestor's case was heard in open court by viva voce evidence, when it was apparent that she could not show proof of having acquired the property through purchase.

e. The learned trial magistrate erred in law and in fact by failing and or avoiding to take Judicial Notice of its own very useful record and or proceedings being Othaya Succession Cause No. 46 of 2016, in the Estate of Godfrey Nderitu Gichohi alias Godfrey Nderitu Gichohi, and therefore failing to appreciate that the 1st Respondent and her siblings had been sufficiently provided for therein.

f. The learned trial magistrate erred in law and in fact by admitting, and or being persuaded by the 1st Respondent's (1st Protester as she was then) case which was based on speculations.

g. The learned trial magistrate erred in law and in fact by failing to determine the issue of distribution of the estate of the deceased based on the merit of the separate cases presented before her, and instead broadening her interpretation of principles on universal considerations, which in return proved punitive, prejudicial and discriminatory against the Appellant.

h. The learned trial magistrate erred in law, and in fact by generally failing to appreciate both the facts of the case, the evidentiary affidavits and submissions by the Appellant herein.

2. Hellen Warima Nderitu, filed the succession proceedings in the lower court on 2.07.2020. She indicated that Joseph Mwangi Machang'a, the Appellant was a surviving son, since her mother Mary Nyawira Machang'a was deceased. She disclosed that the late Mary Nyawira Machang'a (deceased) was survived by the following children:

a. Beth Wambui Nderitu

b. Paul Gachuki Nderitu

c. Ruth Gathoni Irua

d. Hellen Warima Nderitu

e. Florence Wangui Nderitu

f. Susan wanjiru nderitu

3. The Appellant objected to making of the grant. The court found that the Appellant had believed that he was the only surviving child of the deceased and ranked in priority to the 1st Respondent. In a well-reasoned ruling of the court, the court dismissed the objection. In doing so, the court rightly relied on the decision by Hon. Musyoka J. In Re Estate George Ragui Karanja (Deceased) [2016] Kehc 6519 (Klr), he posited that:

25. The order of preference set out in section 66 of the *law of succession act* is not binding to the court. It is discretionary. Section 66 refers to it as 'a general guide.' the court can appoint administrators without following the order of preference. Priority is given to surviving spouses, followed by the other beneficiaries entitled in intestacy as set out in part v of the act, then the public trustee and creditors.

The persons entitled in intestacy according to part v, in their order of preference, include children (and grandchildren where their own parents are dead), parents, siblings, half-siblings and other relatives who are in the nearest degree of consanguinity up to and including the sixth degree.

4. The court found the objection incompetent and struck the same out on the basis of the decision in In re Estate of Caleb Oluchina Opuka, Deceased, [2019] KEHC 1058 (KLR) where, W. Musyoka, J posited as follows:

   Objections under section 68 of the *Law of Succession Act* can only be filed before the grant is made. It would an objection to the grant being made. The filing of the objection should thereafter be followed by the filing of an answer to the petition and a cross-petition. A close reading of sections 67, 68, 69 and 70 of the *Law of Succession Act*, will reveal that such an objection follows the publication of the cause in the Kenya Gazette inviting objections. The objection ought to be filed within the period given in the Gazette Notice. A grant is to be made only after the objection has been disposed of.

5. After striking out the objection, court directed that both the Appellant and first Respondent to petition for letters. However, whoever does not wish to apply can await to make a valid objection after issuance of the Kenya gazette notice but before making of the grant. The grant was issued to the Appellant and the 1st Respondent. On 9.03.2022, Mr. Muchangi, for the Appellant appeared before court alone with the protestor. They agreed that land parcel number be listed as part of the assets of the estate if the protestor was willing to cater for costs. The court recorded a consent between the Appellant and the protestor in the absence of the 1st Respondent. The matter was adjourned to allow the 1st Respondent's advocates, to file notice of appointment as only a law clerk was in court from the said firm.

6. When the matter came to court next the Appellant sought to have the consent entered earlier to form part of the summons for confirmation of grant by way of an amendment. Different directions were given. The court thereafter, on 8.4.2022 gave directions on hearing the 1st Respondent's protest via viva voce evidence. The matter was unsuccessfully referred to mediation.

7. The matter proceeded for hearing, on essentially matters of the 1st Respondent's dependency. Given that this is a succession matter, it is unnecessary to summarize the evidence. This is because succession is not a matter of right but grace. This means it is unmerited blessing to the progeny. It is unnecessary, in absence of a will to estimate how important or close one was with the deceased as it is irrelevant.

8. Hardworking persons, helpful ones and even scoundrels are equal when it comes to intestate succession. This means, that in absence of a will there is nothing one can do to increase or decrease their share unless with consent of others. There is only one exception, that is not applicable to this matter, which is the slayer rule or forfeiture rule under section 96 of the Succession Act. The said section provides as follows:

   1. Notwithstanding any other provision of this Act, a person who, while sane, murders another person shall not be entitled directly or indirectly to any share in the estate of the murdered person, and the persons beneficially entitled to shares in the estate of the murdered person shall be ascertained as though the murderer had died immediately before the murdered person.

   2. For the purpose of this section the conviction of a person in criminal proceedings of the crime of murder shall be sufficient evidence of the fact that the person so convicted committed the murder.

9. PW2 a grandson of the deceased testified giving a lengthy history with the suit land. PW3 was a sister-in-law to the deceased's sister-in-law since their husbands were brothers/cousins. She stated that the deceased told her that the land was to be divided between the families of the deceased's children. PW4

was another relative of the deceased. He testified that that the deceased had given part of the land to Paul Gicheru. PW6 was equally a clan member. He stated that the deceased had given Paul a portion of land and it was surveyed.

10. The Appellant called several witnesses. The first was Paul Machanga Mwangi, the Appellant's son. He testified that his grandfather had two wives and had subdivided the land before his death. He further stated that the 1st Petitioner did not conduct succession proceedings while the deceased was still alive. He also referred to proceedings in Succession Cause No. 138 of 2010, where property was divided among the wives of the Appellant's grandfather. This included the deceased. Additionally, he mentioned that the 1st Respondent's mother was married, although this was being denied.

11. The petitioner testified the Appellant called several witnesses. The first was Paul Machang'a Mwangi, the Appellant's son. He testified that his grandfather had two wives and had subdivided the land before his death. He further stated that the 1st Petitioner did not conduct succession proceedings while the deceased was still alive. He also referred to proceedings in Succession Cause No. 138 of 2010, where property was divided among the wives of the deceased. Additionally, he mentioned that the 1st Respondent's mother was married, although this was being denied. That the deceased subdivided land and gave Paul Gicheru land and it was left as it was. He prayed that subdivision be as per his proposal. AW3 testified as a childhood friend of the Appellant. He stated that in a Kikuyu home a female cannot be the head of the home. He stated that Paul Gicheru was given a portion measuring 100 x 100 for the children of Nyawira. The children of late Mary Nyawira Machang'a (deceased) were married.

12. The other Protestor, Anastasia Wangari Kibira testified that her husband bought Othaya/Kihugiru/3024 from the deceased and first petitioner. She stated that there was a consent on record regarding the property. Moses Kibati Advocate was called to testify on the documents by the 2nd protestor/Respondent. He stated that he knew the agreement but did not know the cash receipts. He stated that the land parcel number was sold by the Appellant herein where a deposit of Ksh 350,000/= initial deposit was paid. Anastacia was recalled and stated that the payment of Ksh 350,000/= was made and the balance was by building houses for the deceased.

13. The court delivered a detailed judgment. She set forth the proposals by both parties.

    a. The Appellant sought to have land parcel number Othaya/Kihugiru/3025, be shared with ¼ an acre going to the estate of the late Mary Nyawira (deceased) to be inherited by the six children.

    b. On the other hand, the Respondent proposed equal division between the estate of Mary Nyawira (deceased) and the Appellant.

    c. The Appellant sought to have land parcel number Othaya/Kihugiru/3024, be given to Anastacia subject to conditions of payment of the entire purchase price.

    d. The 1st Respondent stated that the money in Taifa Sacco account and a sum of Ksh. 2,200,000 be distributed equally. The Appellant wanted none of this.

14. The court found that the ascertained properties be shared equally between the two units of the children of the deceased. The court found useful guidance in postponing the confirmation of grant until, the Environment and Land Court determines the case.

Analysis

15. The Appellant filed a humongous Memorandum of Appeal which is repetitive contrary to Order 42 Rule 1 of the Civil Procedure Rules, which provides as follows:

(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

16. The Court of Appeal had this to say about compliance with Rule 86 [now rule 88] of the Court of Appeal Rules (which is pari materia with Order 42 Rule 1 of the Civil Procedure Rules) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
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> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the Appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

17. The court abhors repetitiveness of grounds of appeal which tend to cloud the key issues in dispute for determination by the court. In the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the court of appeal observed that : -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:
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> "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

18. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time. The questions that the court will have to deal with are:

a. Whether the court erred in distribution.

b. Whether the court erred in refraining from distributing Land Parcel No. Othaya/Kihugiru 3024,

c. Whether the court erred in not taking judicial notice of Othaya Succession Case No. 46 of 2016, in the Estate of Godfrey Nderitu Gichohi alias Godfrey Nderitu Gichohi.

19. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In the case of Mbogo and Another vs. Shah [1968] EA 93 the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

20. The duty of the first appellate court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the Judges held as follows:

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

21. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In the case of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> "It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

22. Two of the competing principles in succession is equity and equality. Equality is enshrined in *the constitution* and the Act. Article 27 of *the constitution* is not a decoration. It is an article with full force of the grundnorm of the country. It is consonant with various declarations starting with the Universal Declaration of Human Rights. There has never been a law in this country barring girls from inheriting. It was also in the mind in the case of Rono v Rono & another 437 of 2001; [2002] KECA 198 (KLR); [2008] 1 KLR (G & F) 80959, where the Court of Appeal, sitting at Eldoret, stated as doth:

The deceased in this matter died in 1988, while the Succession Act which was enacted in 1972, became operational by Legal Notice No. 93/81, published on 23.06.1981. I must therefore hold, as the Act so directs, that the estate of the deceased falls for consideration under the Act. Section 2(1) provides: -2.(1)Except as otherwise expressly provided in the Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of

intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.

23. The disputes that hide viscous fights over inheritance most of the time revolves around either disinheriting the dependents of the deceased. In re Estate Nyamoringo Okinyi (Deceased) [2024] KEHC 3001 (KLR), this court posited as follows:

> 14. One of the questions that has bedevilled the world is the use of black letter law to perpetuate oppression. Even in the Third Reich in Germany, atrocities were committed in the name of the law. In a judgment that paved the way to the Nuremberg trial in 1946 the courts found the black letter statutes were, "contrary to the sound conscience and sense of justice of all decent human beings."
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> 15. If there was a culture degenerating one set of human beings, that culture is repugnant to good conscience and good order. To that extent it is anathema to Kenya's stand as a constitutional democracy. In any case, as I shall show shortly, customs are irrelevant when it comes to inheritance. Customs used to apply when people had large swathes of land and marriage was almost compulsory. Acquiring new parcels was not by purchase but by sheer brute force. You own the right to use that portion you cleared.
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> 16. This was before the agrarian revolution as addressed in 'Tenants of the crown: Evolution of agrarian law and institutions in Kenya' by Prof. Okoth-Ogendo, HWO. A reading will save parties' papers in filing such shallow responses.

24. I shall deal with each of the issues seriatim.

Whether the court erred in not taking judicial notice of Othaya Succession Case No. 46 of 2016, in the Estate of Godfrey Nderitu Gichohi alias Godfrey Nderitu Gichohi

25. The estate herein is the estate of Ruth Gathoni Gachuki. The court sitting as a succession court can only consider one estate at a time. The 1st Respondent is entitled to inherit in the estate of both her mother and father. She will also be a subject of inheritance in her husband's home and any former husband or husbands. That is purely the providence of grace. She may even inherit under a will from a friend or a benefactor. That is for beneficiaries of those estates. Introducing prior inheritance is otiose and cavalier.

26. Therefore, whether they inherited from the estate of their father or step father is an irrelevant issue. Inheritance is like an Easter party. So long as Christ has died and risen from the dead, parties will continue cerebrating. It does not mean, that is the end of Easter cerebrations. The question is thus not worth consideration since the first respondent is entitled to inherit from her grandmother though her mother Mary Nyawira (deceased).

whether the court erred in distribution

27. The next question is whether the court erred in ordering sharing equally. The law regarding intestate succession is set out in Part V of the *Law of Succession Act*. Sections 35, 38 and 40 provide for equal distribution and nothing else. The Act does not provide for philanthropy, greed, mercy, compassion or arbitrariness. The only time the Act deals with inequality, is where it allows renunciation. For those who do need to inherit, renunciation is in favour of the estate not an individual. The stories relating to what the deceased wished are good but do not at all have a place in the intestate succession. This is more so where the stories are only unilateral, told to one side only. Parties must elect whether they are dealing with testate or intestate succession. Otherwise the general rule is that sharing is equal in an

intestate estate amongst the children of the deceased. In Re Estate Of John Musambayi Katumanga – (Deceased) [2014] KEHC 7506 (KLR), W. Musyoka posited as follows regarding equal sharing of properties:

> 27. The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is "equally" as opposed to "equitably". This is the plain language of the provisions. The provisions are in mandatory terms – the property "shall ... be equally divided among the surviving children." Equal distribution is envisaged regardless of the ages, gender and financial status of the children.

28. Further, in Christine Wangari Gachigi v Elizabeth Wanjira Evans & 11 others [2014] KECA 150 (KLR), the Court of Appeal posited as follows on the qualification to get a share under section 38 of the *law of succession act*:

> 1. Under section 38 of the Act; all that one needed to establish in this cause was to show that they were either children or grandchildren of the deceased. Matters of failure to participate actively in the litigation proceedings should not have been a disentitling consideration in respect of the 2nd, 3rd and 4th cross appellants, in the absence of their renounciation of respective claims to the estate.
>
> 1. ...
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> 1. The principle of equality as enshrined in section 38 of the Act is the key principle which ought to have guided the learned Judge in the distribution exercise. We affirm that it is the same principle that will guide our redistribution exercise. In doing so, we find it fit not to treat the eligible grandchildren of the deceased as single units, but to reroute them back to benefit as such through their deceased parents house hold units.

29. Having found that the first respondent and her siblings, being children of the late Mary Nyawira Machang'a (deceased), there is nothing wrong with the court decision, sharing the property equally. There was no other legal way of doing so.

Whether the court erred in refraining from distributing Land Parcel No. Othaya/Kihugiru 3024,

30. This court deals only with the deceased's free property. Land Parcel No. Othaya/Kihugiru/3025 was found to be property of the estate and distributed accordingly. However, Land Parcel No. Othaya/Kihugiru/3024, has a claim by the second respondent. That claim has not been dismissed. The court rightly held that the same be held in abeyance. In re Estate of Lucy Muthoni Obat (Deceased) [2021] eKLR, A O Muchelule, as he then was, stated as follows:

> 10. Secondly, under section 3 of the *Law of Succession Act* (Cap 160) upon the death of a deceased person his estate means his free property when he was living. His free property refers to the property that the deceased was legally competent freely to dispose of it and in respect of which his interest has not been terminated by his death. Where administrators of the estate of the deceased say that a certain property belonged to the deceased and there is a third party laying claim to it, such dispute has to be determined by the Environment and Land Court under section 13 of the Environment and Land Court and Article 162(2)(b) of *the Constitution*.

31. The court could not thus distribute that which was under contention. However, the court could have ex abundanti cautela, given an indication in order to avoid greed, skulduggery and subterfuge. It cannot be doubted that should there be any money payable to the estate from the sale of Land Parcel

No. Othaya/Kihugiru/3024, the same must be shared equally. Further, once the court determines the fate of the said parcel of land, then any benefit falling or also accruing must also be shared equally. Therefore, the parties must await the decision of the Environment and Land Court on the ownership of Land Parcel No. Othaya/Kihugiru 3024. Subsequently, if it belongs to the estate, the two units will be shared equally. This includes any costs ordered for or against the estate herein.

32. Having found no merit in the three issues raised, the best order available is to dismiss the appeal. The next question is who is to bear costs of the appeal. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

33. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> " It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

34. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

35. The matter has been fairly acrimonious. The parties will have to live side by side for eternity. The appellant is the only maternal uncle the 1st respondent has. The court has a chance to add fuel to the fire or create reproachment. The court is inclined towards preserving relationships. In the English Court in the case of West (H) & Son Ltd v Stephard [1964] AC 345, the court addressed itself that money cannot renew a physical frame that has been battered and shattered. However, I note that in family relationships, money can shatter even the delicate ones that have yet not broken. Mending relationship starts with the court recognising the close nature and the sacrosanct duty it has to renew unity in this family. Healing starts today, by my order that each party shall bear their own costs.

36. In the circumstances the appeal is dismissed with each party bearing its costs.

Determination

1. The upshot of the foregoing is that I make the following orders:
    a. The appeal is dismissed as it lacks merit, save for the clarification in (b) below.
    b. Once the Environment and Land Court determines the fate of Land Parcel Number No. Othaya/Kihugiru 3024, then the parties shall share any benefit falling or and costs for or against the estate equally between the two units, that is the Appellant and the estate of the late Mary Nyawira Machang'a (deceased).
    c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 27TH DAY OF MAY, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Changi for the Appellant

Ms. Wangeci for the 1st Respondent

No appearance for the 2nd Respondent

Court Assistant – Michael