Away v Ochung' (Succession Cause E005 of 2023)
[2025] KEHC 9067 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9067 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

SUCCESSION CAUSE E005 OF 2023

MS SHARIFF, J

JUNE 26, 2025

BETWEEN

FANICE AYUMA AWAY ..... APPELLANT

AND

CATHRINE OCHUNG' ..... RESPONDENT

(Appeal from a decision of the trial Court, in Bungoma CMCSC No. E249 of 2021, delivered on 29th September 2023.)

JUDGMENT

1. The appeal herein arises from a decision of the trial Court, in Bungoma CMCSC No. E249 of 2021, delivered on 29th September 2023. The grounds of appeal revolve around: the trial court holding that the Appellant herein failed to demonstrate that she is the widow of the deceased herein and given the fact that Appellant is not a widow of the deceased, there was absolutely no need to include her as an administrator of the estate of the deceased. The Appellant would like the said decision set aside, and substitution of the same with an order allowing the Appellant's application in the lower Court dated 21st February 2022.

2. The impugned ruling held that the Appellant averred that she was the 1st wife and widow to the deceased and proceeded to attach only a chief's letter to corroborate her evidence and nothing more. On the other hand, the Respondent contended that she was the only widow to the deceased and attached a certificate of marriage to corroborate the same. In addition, the Respondent availed minutes of the ceremony performed three days after the burial wherein it was noted that the deceased herein had only one wife and that it was the Respondent herein and that the Appellant was mentioned as one of the mothers to the various children born out of wedlock by the deceased and not a widow of the deceased.

3. Vide Summons for Annulment of Grant, the Appellant herein averred that she is the 1st widow of the deceased and that the petitioning process with regards to the estate of the deceased herein was

conducted by way of concealment of material facts and to her exclusion. She swore an Affidavit in support of the Summons wherein she averred that the availed copy of letter from the Chief Sirare Location and Assistant County Commissioner Nalondo Division listed her as the 1st widow of the deceased herein. She also wore a Further Affidavit wherein she averred that the deceased herein married her under the Luhya customary law where the formalities to the celebration and dowry was duly paid. She proceeded to attach letters to that effect. She told the Court that their union bore two issues and both birth certificates indicated the deceased as the father. Further, she averred that the deceased had indicated her as a dependent in his medical cover with Kenya Ports Authority and she had subsequently listed him as her husband in her NSSF documents. Finally, she argued that she was separated from the deceased herein but they were never divorced.

4. In response to the Summons, the Respondent swore a Replying Affidavit wherein she averred that she is the sole widow of the deceased herein and availed a marriage certificate to that effect and she deposed that as the deceased never resided within the Chief's jurisdiction, the Chief lacked the ability to conclusively attest to the facts regarding the marriage of the deceased to the Appellant. She also deposed that three days after the burial of the deceased, the Luhya customary "lufu" ceremony was conducted wherein the widow, children, any other beneficiaries, assets and liabilities of the deceased were duly identified and listed down and it was clear from the minutes availed that the Appellant was not considered a widow.

5. Directions were given on 15th October 2024, for disposal of the appeal, by way of written submissions. Only the Appellant had filed her respective written submissions.

6. In a nutshell, she submitted that as per Section 3(1) and 29 (a) of the *Law of Succession Act*, she was the 1st wife of the deceased married under customary law and should therefore be included as a dependent of the deceased and the issued Grant of Letters of Administration dated 10th January 2022, be revoked and fresh one be granted to both her and the Respondent as the widows of the deceased herein. She also relied on the case of *Hortensia Wanjiku Yawe v The Public Trustee Civil No. 13 of 1976*. She argued that she had a blissful union with the deceased and she was even enlisted as a dependant on his medical cover and she listed deceased herein as her husband in all her official documents, including the National Social Security Fund registered in 1993. She submitted that she acknowledges the Respondent herein is also the wife of the deceased and that they got married in 2008. She submitted that as per the *Judicature Act* Section 3(2), Customary law is acknowledged as a source of law in Kenya and urged this Court to be guided by the Bukusu Customary Laws on Marriage and burial rites which the Appellant, Respondent and the deceased herein subscribed to. Finally, she submitted that the letter dated 30th November 2021, from the Ministry of Interior and Coordination of National Government, for the payment of the Deceased person's pension to the Dependents noted that the deceased had at the time of his demise on 25th March 2021, two widows and seven children, and that four of these children were born out of wedlock.

7. The Appellant submitted that since the petitioning process in this matter was marred by concealment of material facts of all the beneficiaries it will be in the interest of justice for the Grant of Letters of Administration issued on 10th January 2022, be revoked pursuant to Section 76 of the *Law of Succession Act* and a fresh on one be issued to the Appellant and the Respondent. The Appellant relied on the cases of Albert Imbuga Kisigwa v Recho Kavai Kisigwa Succession Cause No. 158 of 2000; Kamau & 5 Others v Ngugi [2023] KEHC 20526 (KLR); In re Estate of Nyamita Owala (Deceased) [2024] KEHC 4067 (KLR) and In re Estate of Imoli Luhatse Paul (Deceased) [2023] KEHC 23006 (KLR).

8. Upon consideration of the record of appeal as well as the Appellant's submissions, I find the issues for determination in this instant appeal are:

i. Whether the Appellant was a wife of the deceased.

ii. Whether this Court should revoke the Grant of Letters of Administration issued on 10th January 2022.

9. This being a first appellate Court, it was held in Selle v Associated Motor Boat Co [1968] EA 123 that:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

10. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyze the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

11. However, in Peters v Sunday Post Limited [1958] EA 424, it was held that:

> " Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual

case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

12. It was therefore held by the Court of Appeal in Ephantus Mwangi and another v Duncan Mwangi civil appeal No 77 of 1982 [1982-1988] 1KAR 278 that:

> " A member of an appellate court is not bound to accept the learned judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

13. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person. See Section 107 of the *Evidence Act*.

14. In Lewis Waruiro v Moses Muriuki Muchiri (2012) CA 106, it was held that:

> " All cases are decided on the legal burden of proof being discharged (or not). Lord Brandon in Rhesa Shipping Co SA v Edmunds remarked-: 'no Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."

15. On the 1st issue of whether the Appellant was the wife of the deceased, the commencement point is that whoever desires any Court to give judgment as to any legal right or liability, depending on the existence of fact which he asserts, must prove that those facts exist. It is imperative to note that the Appellant alleged to have married the deceased under Bukusu Customary Law. Vide her sworn Further Affidavit filed on 8th March 2022, she averred that she was married in 1986 or thereabout to the deceased herein and all the formalities ancillary to the celebration and dowry payment in lieu of their union were observed. She availed copies of letters from the elders acknowledging dowry receipt marked as FAA1(a) and FAA1(b). In the further affidavit the Appellant annexed the eulogy of the deceased (FAA6) which stated that she was the wife of the deceased and that they got married in 1986 and were blessed with 3 children. Annexed to the Further Affidavit was the letter from the Babuya Clan (FAA9) chaired by Patrick S. Kanisio who wrote to the area chief giving a clear picture of the deceased person's dependants. Lastly, vide her Supporting Affidavit she annexed the letter dated 30th November 2021, from the Ministry of Interior and Coordination of National Government, for the payment of the Deceased person's pension to the Dependents noted that the deceased had at the time of his demise on 25th March 2021, two widows and seven children, and that four of these children were born out of wedlock (FAA2b). The Respondent in her Replying affidavit denied the averments of the Appellant in her affidavits and noted that the "lufu" ceremony which was conducted 3 days after the burial of the deceased, the minutes clearly indicate his widow(s), beneficiaries, assets and liabilities of the deceased and the same only captured the Respondent herein as the sole widow of the deceased.

16. It is clearly noted that the Appellant separated from the deceased but they never divorced as per the cultural dints of the Bukusu Customary Law. The Respondent did not avail any evidence to that effect.

17. I have considered the Affidavit evidence brought before me and the annexures thereto. In my view, the Appellant has established her claims on a balance of probabilities and that the evidence of the Appellant was more credible and worthy of belief. The finding by the learned trial magistrate was therefore unsound and must be fall.

18. On the second issue, having answered the first issue in the affirmative, it is clear that the Grant issued 10th January 2022, was issued as a result of making of a false statement or by the concealment from the Court of something material to the case. Circumstances under which a rant may be revoked as provided under Section 76 of the *Law of Succession Act* and stated thus:

> " The third general ground is represented by section 76(e), and it is about the grant becoming useless or inoperative due to subsequent circumstances or events. It is presupposed that the grant was obtained in a proper and procedural manner, but then an event happens which renders the grant useless or inoperative, such as where the sole holder of the grant dies leaving the estate without an administrator, or the sole administrator is adjudged bankrupt thereby losing the legal competence to administer an estate."

19. That being the case, I find that the Appellant has proved on a balance of probability that the Grant issued to the Respondent ought to be revoked as per the dints of Section 76 (b) of the *Law of Succession Act*. The judgment of this Court is as follows:-

    a. That the Grant issued to Cathrine Ochung in respect of this estate in Bungoma Chief Magistrate's Court Succession Cause No. E249 of 2021 issued on 10th January 2022, is hereby revoked.

    b. That a Grant is hereby issued in respect of this estate to Fanice Ayuma Aywa and Cathrine Ochung'

    c. The administratrices hereby ordered to apply for confirmation of the new grant before the expiry of 6 months from the date hereof.

    d. That pending the Confirmation of the Grant of Letters of Administration, the 2nd Administrator, Cathrine Ochung' by herself, her employees, servants, agents and/or any other person acting on her behalf is restrained from selling, collecting, transferring, administering and/or other manner dealing with the estate of the deceased.

    e. The Appellant's application dated 12th February 2022, in the lower Court is allowed.

    f. Each party to bear it's Costs in the lower court and in this appeal.

    Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 26TH DAY OF JUNE 2025.

M.S.SHARIFF

JUDGE

In the presence of:

Alusa H/b For Ms Cheloti For Appellant

N/A for Respondent

Peter Court Assistant