



**Mbuor & another v Marienga (Civil Appeal E089 of 2022)
[2024] KEHC 3120 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3120 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E089 OF 2022
KW KIARIE, J
MARCH 20, 2024**

BETWEEN

EUNICE AKUMU MBUOR 1ST APPELLANT

SILFANUS OGALO OUNO 2ND APPELLANT

AND

MAURICE OPANY MARIENGA RESPONDENT

*(Being an Appeal from the ruling and order in Homa Bay Chief Magistrate's
Succession Cause No.170 of 2020 by Hon. R.B.N. Maloba – Principal Magistrate)*

JUDGMENT

1. On the 14th of October 2021, Hon. R.B.N. Maloba delivered a ruling where it was ordered that a grant be issued to Maurice Opany Marienga, the respondent herein and Silfanus Ogalo Ouno, the 2nd appellant. The appellants were aggrieved by the said ruling and filed this appeal. The firm of Mong'eri, Kinyanjui & Company Advocates represented them. They raised the following grounds of appeal:
 - a. That the learned magistrate erred in law by failing to have due regard, consider and appreciate the substantive legal issues of law and fact raised by the appellant during the hearing of the appellants' objection.
 - b. That the learned magistrate erred in law and fact in disregarding the fact that the appellant's level of consanguinity and affinity was much closer to the deceased than that of the respondent.
 - c. That the learned magistrate erred in law and fact by failing to recognize that the 1st appellants ranked higher on the consanguinity and affinity scale than the respondent and went on to equate them to a similar degree.



- d. That the learned magistrate erred in law and fact by failing to appreciate that by placing the respondent and the appellants on the same degree of consanguinity when, in actual sense, they are not and allowing him to petition for letters of administration intestate will open up the estate to other claims by other relatives with equal priority the respondent thus reducing the appellants' rightful share of the inheritance.
 - e. That the learned magistrate erred in law and fact by disregarding the fact that by inheriting and/or marrying Suslia Onono, the mother of the 1st Appellant's late husband and the 2nd appellant, the deceased effectively adopted her children and that as stepchildren they rank higher on the consanguinity and affinity chart, therefore eliminating the respondent's claims.
 - f. That the learned magistrate erred in law and fact by failing to appoint the 1st appellant as one of the estate's administrators despite her applying, ranking, and/or having equal priority.
 - g. That the learned magistrate erred in law and fact by failing to appreciate and distinguish the substantive issues of law and fact raised in the submissions, authorities and other documents on records.
 - h. That in all the circumstances of the case, the learned magistrate failed to render justice to the appellants.
2. The firm Nancy Nyarige & Company Advocates represented the respondents. The appeal was opposed on the following grounds:
 - a. That the appeal is frivolous and an abuse of the court's process.
 - b. That it is intended to delay the finalization of this matter.
 3. This Court is the first appellate court. I know my duty to evaluate the entire evidence on record, bearing in mind that I had no advantage in seeing the witnesses testify and watching their demeanour. I will be guided by the pronouncements in the case of *Selle vs Associated Motor Boat Co. Ltd.* [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its conclusions in the matter.
 4. The chief's letter of introduction described Maurice Opany Marienga as a nephew of Nyomuga Likung, the deceased in this succession cause. In Form P. & A. 5, he described himself as the sole beneficiary of the deceased's estate.
 5. The deceased's relationship to the appellants did not come out clearly. However, it is not in doubt that the respondent conceded that they have equal priority with them. This, therefore, means that the respondent's averment in Form P. & A. 5 and the chief's introductory letter were not truthful.
 6. Section 76 of the Law of Succession provides:

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

 - (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

In the instant case, the learned trial magistrate ought to have annulled the entire process so that the parties could address their issue on a clean slate. The grant that was issued was already tainted.
 7. This matter appears to be convoluted if the degree of consanguinity and affinity is applied as provided in section 39 of the [Law of Succession Act](#).



8. Ordinarily, this court would have addressed the issue of who ranks higher in priority. However, other assets of the deceased have been mentioned, namely Kanyada/Kanyango/1854, Kanyada/Kanyango/1715, and Kanyada/Kanyango/1106, in addition to Kanyada/Kanyango/1744. This issue must be addressed with finality and cannot be dealt with properly in the instant appeal.

9. I set aside the trial magistrate's ruling and allow the objection. Each party is to bear its costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 20TH DAY OF MARCH 2024

KIARIE WAWERU KIARIE

JUDGE

