



REPUBLIC OF KENYA



**Okoth & another v Agito (Civil Appeal E060 of 2023)  
[2024] KEHC 3119 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3119 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CIVIL APPEAL E060 OF 2023  
KW KIARIE, J  
MARCH 20, 2024**

**BETWEEN**

**SALOME APIYO OKOTH ..... 1<sup>ST</sup> APPELLANT**

**EDWARD OBONYO OKOTH ..... 2<sup>ND</sup> APPELLANT**

**AND**

**VALENTINE ABONGO AGITO ..... RESPONDENT**

*(Being an Appeal from the ruling and order in Oyugis Senior Principal Magistrate's Succession Cause No.39 of 2019 by Hon. B.O. Omwansa –Senior Principal Magistrate)*

**RULING**

1. On the 19<sup>th</sup> of October 2022, Hon. B.O. Omwansa delivered a ruling recognizing the respondent herein as a beneficiary. The respondent staked her claim by being the deceased's nephew. He contended that the deceased held the land in trust for him. The learned magistrate agreed with him. The appellants were aggrieved by the said ruling and filed this appeal. The firm of Modi & Company Advocates represented them. They raised the following grounds of appeal:
  - a. That the learned magistrate erred in law and, in fact, in holding and/or finding that the deceased held land in trust for the respondent.
  - b. That the learned magistrate erred in law and, in fact, in holding and/or finding that the respondent is entitled to a share LR. No. East Kasipul/Kojwach/Kamioro/1222 with Edward Obonyo Okoth
  - c. That the learned magistrate erred in law and, in fact, in holding and/or finding that the respondent is entitled to share equally LR. No. East Kasipul/Kojwach/Kamioro/1222 with Edward Obonyo Okoth



- d. That the learned magistrate erred in law and, in fact, in holding and finding that the respondent is entitled to share the estate with his offspring.
  - e. That the learned magistrate erred in law and fact and did not consider all the evidence on record.
2. The firm O.H. Bunde & Company Advocates represented the respondents. The appeal was opposed on the following grounds:
    - a. The deceased recognized the respondent and took him as his own.
    - b. The appellants have acknowledged the same; their only issue was the distribution mode.
  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 v Associated Motor Boat Co. Ltd.* [1965] EA 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. In their proposal, the appellant had proposed that the respondent be given a quarter of an acre. This, in my view, was recognition of his right to inherit. Had they raised an issue that he was a stranger to the estate, then this matter ought to have been referred to the Environment and Land Court to determine the issue of the right to land. The Constitution at Article 162 (2) (b) provides
    - (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
      - (b) b) the environment and the use and occupation of, and title to, land.The learned trial magistrate had jurisdiction to determine the mode of distribution.
  5. Whenever parties make rival proposals on the mode of distribution in an intestate estate, the court evaluates them and agrees with one with or without modifications or disagrees with all the proposals. If the court finds all the proposals unreasonable, they apply the provisions of the Law of Succession Act, whichever is applicable in the circumstances.
  6. The learned trial magistrate applied the facts of this case appropriately and opted for the best distribution mode. I have no reason to interfere with his ruling. The appeal is dismissed.
  7. Since this is a family matter, each party will bear its costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 20<sup>TH</sup> DAY OF MARCH 2024**

**KIARIE WAWERU KIARIE**

**JUDGE**

