



**In re Estate of Sawe Maina (Deceased) (Succession Cause  
E350 of 2015) [2025] KEHC 6849 (KLR) (26 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6849 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE E350 OF 2015  
RN NYAKUNDI, J  
MAY 26, 2025  
IN THE MATTER OF THE ESTATE OF SAWE MAINA (DECEASED)**

**BETWEEN**

**PAUL KIPKOSGEI MAINA ..... 1<sup>ST</sup> APPLICANT**

**ISAAC KIPKORIR MAINA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**SUSAN CHEPTEPKENY MAINA ..... RESPONDENT**

**RULING**

1. The pending application for determination before this court is that of the 2<sup>nd</sup> Petitioner dated 7<sup>th</sup> August, 2024 expressed under the provisions of Order 45 of the [Civil Procedure Rules](#). The applicant seeks orders as follows:
  - a. Spent
  - b. That survey exercise be stopped pending the hearing interparties and the determination of the application
  - c. That survey exercise to take into consideration or factor the occupation of the land on the ground by the beneficiaries and particularly the area occupied by the 2<sup>nd</sup> petitioner as per the attached sketch B, G measuring 27.1 Acres and 0.4 acres at the centre plots.
  - d. The costs of the application be costs in the cause.
2. The application is anchored on grounds that the deceased had demarcated the area the beneficiaries were to occupy before he died in 2012. That the 2<sup>nd</sup> petitioner/applicant was assigned plots B, G and 0.4 acres at the centre plots. Further that the surveyor has moved into the ground and efforts to have



- him adhere to the beneficiaries' occupation of the land on the ground have been ignored. The applicant deposed that the surveyor has stated that he can only do so if the honourable court directs him to do so.
3. Finally, the applicant raised a ground that the applicant has undertaken immense development on the land he occupies as per the directions/wishes of the deceased and this honourable court abhors unjustified disruptions. There is therefore need to honour the wishes of the deceased and the decision of the honourable court as much as practicable and not to destroy the developments undertaken by the beneficiaries on the area they have been occupying and utilizing.
  4. In response to the application, the 2<sup>nd</sup> Respondent raised a preliminary objection on grounds that this honourable court lack jurisdiction to entertain the summons since there is a pending 5(2)(b) application by the applicant herein before the Court of Appeal filed on 20<sup>th</sup> May, 2025.
  5. The parties filed their written submission in support and opposition of the instant application, which have been summarised as hereunder:

### **Applicant's submissions**

6. The applicant through learned counsel Mr. Momanyi who submitted that none of the parties has challenged the assertion and factual position taken by the applicant regarding his possession utilization and development he has carried out on parcel number B&G. He submitted that in view of the foretasted the factual position remains unchallenged and the only issue for determination is whether or not there is anybody who will be adversely affected if the position and occupation of the land is as much as practicable is respected. That as a matter of practice to the contrary that has been the practice of the court.
7. It is submitted for the applicant that the lives of the parties ought not be disrupted as much as practicable respecting the prevailing status on the ground so long as the same is in conformity with the distribution of the honourable court.
8. In support of his submissions, learned counsel cited the decisions in [\*In Re Estate of the Late Siwanyang Ngilotochi \(deceased\)\*](#) (2021) eKLR and [\*In Re Estate of Kaga Kimaru Gathua \(deceased\)\*](#) Succession Cause No 42 of 2015 (2024) KEHC 2750 (KLR)

### **Respondents' submissions**

9. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents through learned counsel Mr. Mwangi Mandere couched two issues for determination:
  - a. Whether the application has met the threshold of Order 45 Rule 1 of the [\*Civil Procedure Rules\*](#).
  - b. Whether the court can entertain review application when an appeal is lying before the Court of Appeal on the same decision.
10. In addressing the first issue, learned counsel Mr. Mandere submitted that Order 45 provides for three circumstances under which an order for review can be made. That to be successful, the applicant must demonstrate to the court that there has been discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree passed. That a party may successfully apply for review, secondly, if he can demonstrate to the court that there has been some mistake or error apparent of the face of the record. That the third ground for review is worded broadly: an application for review can be made for any other sufficient reason.



11. Learned Counsel while submitting on these three elements and citing various authorities concluded that the applicant has failed to meet threshold on the discovery of new evidence, similarly on an error apparent on the face of the record and has not demonstrated sufficient reason to warrant a review. In support of these submissions learned counsel cited the decisions in *In Re Estate of Kwasila Lubaro (deceased)* (2020) eKLR, *In Re Estate of Simoto Omwenje Isaka (deceased)* (2020) eKLR, *Paul Mwaniki v National Hospital Insurance Fund Board of Management* (2020) eKLR, *Republic v Cabinet Secretary for Interior and Co-Ordination of National Government Ex parte, Abullahi Said Sald* (2019) eKLR. Counsel prayed that the application be dismissed with costs to the Respondents.

### **Analysis and Determination**

12. I have carefully gone through the application before me, the written submissions filed by the parties, and the authorities cited in support of their respective positions. The matter before me raises key questions about the proper administration of estates and the balance between legal procedure and practical considerations affecting beneficiaries who have established their lives on inherited property.
13. In responding to this application, the respondent has raised a preliminary objection challenging this court's jurisdiction to entertain the matter in light of the pending appeal before the Court of Appeal filed on 20<sup>th</sup> May, 2025. According to the Respondent, the existence of an appeal operates to deprive this court of any jurisdiction to proceed with the present application.
14. The law is well settled that once an appeal is lodged and properly before an appellate court, the trial court is generally functus officio and cannot revisit or vary the decision under appeal. The question is therefore whether the present application constitutes an impermissible attempt to circumvent the appellate process or represents a legitimate exercise of this court's supervisory jurisdiction over estate administration.
15. I need not mention that the law is clear that no appeal operates as a stay of execution except in so far as the court appealed from may order, or unless a stay is specifically granted by the appellate court. The respondent has not demonstrated that any stay order has been issued by the Court of Appeal in respect of this court's orders.
16. In the absence of a stay order, this court's orders as reflected in the Certificate of Confirmation of Grant dated 25<sup>th</sup> April 2024 remain operative and binding. The filing of an appeal does not suspend the implementation of lawful court orders, and parties cannot seek refuge behind pending appeals to frustrate the execution of validly made orders. The present application does not seek to vary or set aside the substantive orders of this court, but rather seeks directions on the practical implementation of those orders through the survey exercise. Such supervisory jurisdiction remains with this court notwithstanding the pendency of an appeal, provided no stay has been granted.
17. The applicant seeks orders directing that the survey exercise factor in his occupation of plots B and G measuring 27.1 acres, 10.0 Acres plus 0.4 acres at the centre plots, totalling 37.5 acres. The Certificate of Confirmation of Grant dated 25<sup>th</sup> April 2024 reflects that Gilbert Kiplimo Maina was allocated a total of 37.5 acres from L.R.N. 8515/5. The relief sought by the applicant falls squarely within his lawful entitlement as determined by this court. He is not seeking to claim land in excess of his allocation, but rather praying that the survey exercise recognizes his occupation of specific portions within his overall share. This is a reasonable request that aligns with the practical implementation of this court's orders.
18. I therefore find merit in the applicant's position that the survey exercise should reflect the practical reality on the ground, provided this is consistent with the lawful distribution as determined by this court. The applicant has occupied and developed the land in question, and there is no evidence that



recognizing this occupation would prejudice any other beneficiary or result in any party receiving less than their allocated share.

19. The guiding principle in implementing succession orders must be to ensure that each beneficiary receives exactly what has been allocated to them - nothing more and nothing less. The survey exercise should therefore be conducted in a manner that gives effect to the Certificate of Confirmation of Grant while respecting practical arrangements that do not disturb the overall distribution scheme.
20. Accordingly, I find that the application has merit to the extent that it seeks implementation of this court's orders as reflected in the Certificate of Confirmation of Grant. The survey exercise should proceed on the basis that each beneficiary is entitled to receive their allocated share as determined by this court, with due consideration given to existing occupation patterns where these do not conflict with the lawful distribution, unless the Court of Appeal has issued specific directions to the contrary in this matter.
21. In the end, the following orders do abide:
  - a. The survey exercise shall proceed in accordance with the Certificate of Confirmation of Grant dated 25<sup>th</sup> April 2024.
  - b. The surveyor is directed to ensure that each beneficiary receives their exact allocation as specified in the Certificate of Confirmation of Grant; nothing more and nothing less.
  - c. In conducting the survey, the surveyor may take into consideration the existing occupation of the land by beneficiaries, including the area occupied by the applicant, provided such consideration does not result in any beneficiary receiving more or less than their lawful entitlement.
  - d. No costs are awarded given the nature of the proceedings.
22. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA EMAIL AND CTS AT ELDORET ON THIS 26<sup>TH</sup> DAY OF MAY 2025**

.....

**R. NYAKUNDI**  
**JUDGE**

