



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Josphat Irungu Kanyi (Deceased) (Succession Cause
25 of 2014) [2025] KEHC 10360 (KLR) (17 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10360 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
SUCCESSION CAUSE 25 OF 2014**

**EM MURIITHI, J
JULY 17, 2025**

BETWEEN

MARGARET WAMBUI IRUNGU PETITIONER

AND

AGNES WANJIRU KANYI PROTESTOR

SUBSTITUTED BY ANN ROSE WANJIRA IRUNGU ON 4/11/2021

RULING

1. This is a ruling on a Preliminary Objection dated 6/3/2025 on jurisdiction of the Court on the ground of the principle of *res judicata* taken against an application dated 27/2/2025 seeking stay of execution and review of the Judgment of the Court (Gitari, J.) delivered on 18th October 2019.

Judgment of the Court

2. By the Judgment delivered on 18/10/2019 the suit property was taken to be part of the deceased estate and shared among his beneficiaries as follows:

“ 19. I am inclined to agree with my Brother and Sister’s Judges Kimondo, Koome (as she then was), Mumbi Ngugi and Makau in the cases cited above that the distribution under Section 40 of the Act is unfair and discriminatory. For failing to consider the contribution by the 1st wife who has been married for many years and contributed to the acquisition of the property only to be equated with the children including those of the 2nd or 3rd wife and the wives who have come to the property long after they were acquired. For the court to apply Section 40 Act strictly and fail to address the cry for justice by windows who have contributed to acquisition without giving an extra-share in recognition of their contribution is to perpetrate an injustice from the seat of



justice on the basis of Section 40 of the Act. Hallmark of decision making is the exercise of unfettered discretion. The discretion of the court must be exercised fairly. As Justice Ngugi stated courts should not abdicate their constitutional duty to do justice. I am of the view by considering the contribution by the 1st wife in the distribution of the estate of a deceased who was polygamous the court would be able to address the unfairness, injustice and discrimination which would result from applying Section 40 of the Act strictly.

20. A lot has been stated in the above cited cases to show that Section 40 of the Act is unfair to windows who are not supposed to get an extra share and are equated to children without giving any consideration to their contribution. I echo the sentiments by my brothers and sisters Judges that the Act should soon be corrected so that the distribution of the estate of the deceased takes into consideration the contribution of the window(s) so that their shares are considered differently from that of the children. Before that happens there is no harm in the court exercising discretion while considering the contribution by the window depending on the circumstances of each case.
21. In this case the petitioner filed the petition without even involving the protestor who was a lawfully wedded wife of the deceased. The protestor ought to have been a co-petitioner.
22. The protestor testified that she got married to the deceased in 1975 and they bought land parcels No 727 & 726. The petitioner was not candid as to when she got married. What she stated was that she stated that she was with him from 1986 but she came to live at Murindiko in 1996. This means she came into the union 21 years after the protestor and the deceased married. The protestor was a Teacher and there can be no doubt that she contributed into the acquisition of the two properties. She is entitled to a bigger share of the estate. She has lived on Land Parcel No Gichugu/Settlement Scheme/727 and is where her matrimonial home is. I find that it is fair and reasonable that she gets the whole share of this property Gichugu/Settlement Scheme/727.
23. It would seem land parcel No Gichugu/Settlement Scheme was sub-divided and a certificate of official search and title deed shows that the deceased is registered on Land Parcel No Gichugu/Settlement Scheme/2470. While Parcel No 2469 is in the name of the petitioner. The land parcel is not in the name of deceased. It should go to the petitioner Margaret Wambui Kanyi under Section 42 of the *Law of Succession Act* which provides that:-
“Where -
 - (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
 - (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.



24. Parcel No Gichugu/Settlement Scheme/2470 be shared equally among all the beneficiaries listed at Para 2 of the affidavit of the petitioner in support of application for confirmation of grant. The grant be confirmed on those terms. The protestor shall be joined in as co-petitioner/administratrix together with the petitioner.

Each party will bear its own costs.

Dated at Kerugoya this 18th Day of October, 2019.

L. W. GITARI

JUDGE”

[emphasis added]

The application

3. The applicant, who is an advocate of the High Court, on behalf of her deceased protestor/mother presents a claim that the suit property was matrimonial property to which the original protestor contributed in acquisition thereof, as follows:

“Chamber Summons

Under section 3A *Civil Procedure Act* Cap 21 laws of Kenya, Order 45 rule 1(a) and rule 2(2) *Civil Procedure Rules* of 2010, section 93 *Land Registration Act* 2012 and section 14(a) *Matrimonial Property Act* 2013.

Take notice that this honorable court shall be moved on the 18th day of March 2025 at 9.00 O'clock or soon thereafter as the respondent may be heard for orders that:

1. There be a stay of execution of judgement issued by this honorable court on 19th October 2019.
2. That the court be pleased to review the judgement herein and apply Sec. 14(a) Married Women Property Act as the applicable law in this suit.
3. The cost of this application be provided for.”

4. The grounds of the application are set out in the application as follows:

- “1. The High Court of Kenya at Kerugoya gave its judgement of the above mentioned case on 4th October 2019.
2. The 2 deceased persons (husband and wife) herein had celebrated a Christian monogamous marriage on 13th Dec. 1975 and the same had not been dissolved till their demise on 13th July, 2012, and 22nd Sept. 2021 respectively.
3. That the law in *Land Registration Act* was enacted into law on 2nd May 2012, and later on 2013 the same was copied into sec.14(a) *Matrimonial Property Act*.
4. The law on Matrimonial Property clearly states that where property is acquired during marriage there shall be a rebuttable presumption that the said property is held in trust for the other spouse.



5. The deceased husband died on 13th July 2012 after the law on land registration had been enacted on 20dMay 2012 thus it is the applicable law in this instance.
6. That the above mentioned provisions of the law are applicable but not the succession law.
7. That the case was erroneously filed under succession as the widow of the deceased herein was still alive then and had taken over from her deceased husband as per the provisions of section 93, land registration act 2012.
8. That in May 2013 the above mentioned provisions of L.R.A was adopted into sec. 14 (a) Matrimonial Property Act
9. That the above mentioned provisions of the law are applicable but not the succession law.
10. That the petitioner's grandchildren amongst other beneficiaries were being supported by their late grandmother and have been left destitute and are suffering since her passing on.
11. That this case has a very high probability of success.”

Preliminary Objection

5. Counsel for the Petitioner filed a Preliminary Objection dated 6/3/2025 raising the issue of *res judicata* as follows:

““Notice of Preliminary Objection

Take Notice Thatthe Petitioner herein Margaret Wambui Irungushall, at the hearing raise a preliminary objection in limine on the grounds that:

1. The application herein offends the *res judicata* rule under Section 7 of the Civil Procedure Act, Cap 21 of the laws of Kenya.
 2. The application herein is fatally defective and ought to be struck out.”
6. The Counsel for the Protestor subsequently filed an Affidavit sworn on 19/3/2025 entitled “Affidavit Showing The Deceased Protestor's Contribution Towards Acquisition Of The Estate Of The Deceased Herein As Per The Hon. Justice Mwongo's Directions Given On3/12/2024”, in terms as follows:

“affidavit Showing The Deceased Protestor's Contribution Towards Acquisition Of The Estate Of The Deceased Herein As Per The Hon. Justice Mwongo's Directions Given On 3/12/2024

1. The deceased protesters were government employed primary school teachers. Thus from her salary, as the o. Lady Justice rightly held, she must have financially contributed towards the acquisition of the suit property Annexed herein is a certificate of teacher education marked AW2.
2. That raising children has been recognized as a form of contribution and the deceased protestor had 3 children with the deceased husband.



3. The deceased protestor sold her land which she had bought before getting married and used the proceeds therefrom to develop her newly bought land.
4. That in February 1981 the deceased protestor took a loan from the Barclays Bank of Kenya and use the proc.ee therefrom to purchase land title G.S.S 727 Annexed herein is bank slip from the Barclays Bank of Kenya marked AW4
5. That as a wife the deceased protestor used to perform household duties which has been recognized as a form of contribution.
6. That the petitioner in her testimony never claimed to have contributed anything towards the acquisition of the estate herein. In fact the house she resides in was built by the late protestor as part of rental houses to boos her income as a primary school teacher.
7. That the petitioner never denied the late wife's contribution toward the acquisition of the estate but only said that the suit property belonged to the late husband.”

Hearing

7. When the Preliminary Objection came up for hearing on 4/6/2025, Counsel for the applicant urged that “the matter is not *res judicata* as I was directed by Mwongo, J. to file an answer. I filed the Answer dated 19/3/2025 and served on Mr. Mwangi (Counsel for the Petitioner) on 21/3/2025.”
8. Counsel for the Petitioner confirmed that he had been served with the Affidavit, and the Counsel for the parties then urged the court to consider the Preliminary Objection, the Judgment and ruling of the court, the application and affidavits filed thereunder, and give a ruling on the Preliminary Objection.
9. Ruling was reserved for 17/7/2025.

Determination

10. It is clear from the record that there was no appeal from judgment of the Court delivered on 18/10/2029.
11. The Protestor seeks review of the judgment. There is a clear distinction on the scope of review and appeal and the appropriate procedure herein. The Court of Appeal in [*William Karani & 47 others v William Wamalwa Kijana*](#) discussed the respective scopes of the processes of appeal and review as follows:

“Both section 80 and order XLIV commence by explaining the fundamental nature of review. It is to be a means of curing gross or obvious errors when an appeal is allowed by the Act, from a decree or order, but no appeal has been preferred; and secondly in cases where no appeal is allowed at all. The broad division then is between the appeal procedure as the general method of curing errors, with its scope to deal with errors of evidential fact or law, or mixed fact and law, and the review procedure, to cure a narrower compass of defects, which cannot be allowed to stand in justice, simply because there is no appeal.”

See also and [*National Bank of Kenya Limited v Ndungu Njau*](#) [1997] eKLR.



12. In this case, the issue of the protestor's entitlement to share in the estate of her deceased husband on a proportion higher than the other beneficiaries was considered by the judgment of 18/10/2019 and the subsequent ruling on 3/12/2024 on application for stay of execution dated 13/7/2022.
13. There is nothing on record of the Court to indicate that the learned Judge invited the applicant to file any answer as contended, and it would be irregular for the Court to have called for any further proceedings to be filed after it had already made a final ruling dismissing an application for stay of execution of the judgment.
14. There is record that the Court asked the protestor to file any Answer of any kind upon delivery of the ruling on 3/12/2024. The record of this Court on the date of delivery of the ruling on Chamber Summons dated 13/7/2024 is simply as follows:

“ 3/12/2024

Before Hon. R. Mwangi, Judge

C/Assistant Murage

Kamuga holding brief for R. Mwangi for petitioner.

Annrose Protestor present in person.

Court:

Ruling read and signed.

R. Mwangi J.

03/12/2024

Court:

Mention on 27/2/2025.

R. Mwangi, J

3/12/2024.”

Discovery of new facts

15. There has not been alleged any discovery of new facts in terms of section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules* to support an application for review on the facts. A matter of law or application of the correct law cannot be a subject of an application for review.
16. If the applicant considers, as appears to be the case, that the courts were wrong in the failure to apply section 14(a) of the *Matrimonial Property Act*, her remedy lies with an appeal on the merits, as clearly held in *National Bank Of Kenya Limited v Ndungu Njau* [1997] eKLR as follows:

“ A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”



17. The Court does not find merit in the application for review, which with respect, in the circumstances of this case is not properly found in law.

Res judicata

18. The Supreme Court has settled the application of the principle of *res judicata* in the leading case of *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* [2021] KESC 39 (KLR) as follows:

- “ 59. For *res judicata* to be invoked in a civil matter the following elements must be demonstrated:
- a) There is a former judgment or order which was final;
 - b) The judgment or order was on merit;
 - c) The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
 - d) There must be between the first and the second action identical parties, subject matter and cause of action.

(See *Uhuru Highway Developers Limited v Central Bank of Kenya & others* [1999] eKLR and see the decision of the Court of Appeal in *Nicholas Njeru v Attorney General & 8 others* Civil Appeal 110 of 2011 [2013] eKLR)

....

81. We reaffirm our position as in the *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another* Motions 42 & 43 of 2014; [2016] eKLR (Consolidated)(Muiri Coffee) case that the doctrine of *res judicata* is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of *res judicata* prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”
19. The Court having previously determined finally and on the merits, the very issue of entitlement to the suit property between the Petitioner and her co-wife, the deceased Protestor in the application (now represented by her daughter), and (there being no appeal, which in any event would not be to this Court), the application for review being not well founded on the facts of this case, as there is no discovery of new facts but on an issue of law, the application for review must be struck out for being *res judicata*.
20. Moreover, the application for review of the Judgment was also considered by this Court (Mwongo, J.) in the ruling on a previous application herein dated 13/7/2021, when the Court ruled on 3/12/2024 as follows:

“ Analysis and Determination

20. What is before this court is a chamber summons application in which the Protestor seeks is stay of the execution of the judgment delivered on 18th



October, 2019. The application is unopposed despite the petitioner being duly served in time and being ordered by the court to file her replying affidavit.

21. The deceased died intestate on 13th July 2012, He was survived by one wife and 3 children. He had married one Agnes Wanjiru Kanyi, with whom he had celebrated a Christian wedding on 13th December, 1975 and had three children, all grown up. Together as a couple they had acquired 3 pieces of properties namely Gichugu/Settlement/Scheme 727, Gichugu/Settlement/Scheme 776- which was later subdivided into Gichugu/Settlement/Scheme 2470 and 4269 and a plot at Gathoge.
22. The protestor submits that the deceased died on 13th July, 2012 so the provisions of Land Registration Act which became law on 2nd May, 2012 are the ones applicable, and which Act provides that:
 23. Section 93 of the Land Registration Act provides as follows:

“Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act.”
 24. The petitioner submits that the protestor has failed to provide sufficient evidence to support her claim regarding the wrongful allocation of land parcels Gichugu/Settlement/Scheme/2470 and Gichugu/Settlement/Scheme/727.
 25. In the present case. the trial court allocated Land Parcel Gichugu/Settlement/Scheme/727 to the Protestor. On the other hand, the petitioner was given Land Parcel No Gichugu/Settlement/Scheme 2469 as it was in her name.
 26. Section 42 of the Law of Succession Act provides that:

“Where—

 - (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
 - (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.
 27. Finally, according to the Court’s judgment aforesaid and parcel No Gichugu/Settlement/Scheme 2470 was to be shared equally among all the beneficiaries listed at paragraph 2 of the affidavit of the petitioner.



Distribution of the suit property

28. The protestor submits that the suit properties should form part of the estate of the deceased protestor since the deceased husband died in July, 2012 and was followed by the wife on 22nd September, 2021.
29. However, the trial court allocated land parcel No Gichugu/Settlement/Scheme/727 to her since her matrimonial home is situated there.
30. Section 14(a) of the Matrimonial Properties Act provides: Where matrimonial property is acquired during marriage-
 - “ a) In the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse.”

Conclusion and Disposition

31. In the present case, however, there is no evidence that all the deceased's properties were acquired by the deceased and the protestor before the petitioner entered the marriage. That issue was not dealt with in the aforesaid judgment, nor has evidence been taken on the point.
32. What was decided was that land parcel No.Gichugu/Settlement/Scheme 2469 is in the name of the petitioner. It is not in the name of the deceased. It was allotted by the Court to the Petitioner.
33. Thus, Section 93 of the *Land Registration Act* will not apply in this case as there is no evidence of joint ownership of the deceased estate between the deceased and the protestor.
34. Further, the deceased subdivided land parcel No Gichugu/Settlement/Scheme 776 during his lifetime and the protestor did not oppose the subdivision. Hence, it could not form part of the matrimonial property.
35. In light of the foregoing, nothing has been placed before this Court in respect of the application to persuade the court to allow it. The application seeks stay of execution on substantive grounds. There is, however, no appeal or application for review of the judgment sought to be stayed.
36. Accordingly, the chamber summons dated 13th July 2021 is dismissed.
37. This being a family matter each party shall bear its own costs.

Delivered at Kerugoya this 3rd Day of December, 2024

R. MWONGO



JUDGE”

21. There is clearly an issue estoppel on the question of application of section 14(a) of the Matrimonial Property Act and section 93 of the Land Registration Act, which is raised for the second time in this application, the Court having ruled on it in the Ruling of this Court of 3/12/2024. If it is contended that the Court Judge Mwongo was wrong in the holding that “Thus, Section 93 of the Land Registration Act will not apply in this case as there is no evidence of joint ownership of the deceased estate between the deceased and the protestor” [and that] the deceased subdivided land parcel No Gichugu/Settlement/Scheme 776 during his lifetime and the protestor did not oppose the subdivision, Hence, it could not form part of the matrimonial property, then the remedy is according to NBK v Njau, supra, not in the review court.
22. The Preliminary Objection dated 6/3/2025 will be allowed.

Orders

23. Accordingly, for the reasons set out herein, the Court finds merit in the Preliminary Objection by the Petitioner herein dated and it is allowed.
24. Consequently, the application for stay of execution and review of the judgment of the Court herein dated 27/2/2025, is declined.
25. The costs of the application shall be costs in the cause.

Order accordingly.

DATED AND DELIVERED THIS 17TH DAY OF JULY 2025.

EDWARD M. MURIITHI

JUDGE

Appearances

Ms. Annrose Wanjira Irungu for the Protestor/Applicant.

Mr. Raphael Mwangi for the Petitioner/Respondent.

