



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Andagal Adolwa (Deceased) (Succession Cause
113 of 2008) [2025] KEHC 10185 (KLR) (15 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10185 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 113 OF 2008
RN NYAKUNDI, J
JULY 15, 2025
IN THE MATTER OF THE ESTATE OF ANDAGAL ADOLWA (DECEASED)**

RULING

Coram: Before Justice R. Nyakundi

M/s Rodah Ikonga Andakalu

1. Before this court is an application dated 25th day of June 2025 expressed be brought pursuant to section 71 of the *law of succession Act*, Rule 40 (1) of the *Probate and Administration Rules* in which the Applicant is seeking the following orders:
 - a. That, this court be pleased to review, set aside, vary and/or vacate the orders issued on the 15th April, 2024 dismissing the cause for want of prosecution
 - b. That, the succession cause herein be reinstated and fixed for hearing of the summons for confirmation of grant. As per the attached summons for confirmation and the revised mode of distribution annexed to this application
 - c. That, the grant of letters of administration issued on 28/1/2010 by this Honorable court to Elizabeth Mwenywa Andakal and Rodah Ikonga Andakalu of P.O Box 10 Kesses be confirmed
 - d. That the deceased's estate be distributed as indicated in paragraph six (6) of the supporting affidavit of Rodah Ikonga Andakalu in support of this application
2. The Application is based on the grounds among others that:-
 - a. This succession cause was filed on the 30th of July 2008 by Jacob Korir Sugut and Joseph K. Sille
 - b. That the grant of letters of administration with respect to the subject estate was issued on 28/01/2010
 - c. It is more than six years since the letters of administration were issued to the petitioners
 - d. The petitioners have been desirous of fixing this matter for confirmation of grant



- e. The petitioners visited the courts Registry and were informed that the cause was dismissed by the honorable court on the 15th April 2024 for want of prosecution
 - f. That it is in the best interest of justice that this application be allowed as prayed and the annexed summons for confirmation be deemed as duly filed and set down for hearing at the earliest opportunity
 - g. A period of over six (6) months has lapsed from the date when the grant of administration was made to Elizabeth Mwenywa Andakal And Rodah Ikonga Andakalu
 - h. That one of the administrator Elizabeth Mwenywa Andakal is now deceased and I do hereby pray that the said name be removed from the grant of letters of administration and the said grant be amended.
 - i. The beneficiaries/liabilities herein have agreed to the mode of distribution as indicated in paragraph six (6) of the supporting affidavit of Rodah Ikonga Andakalu.
 - j. It would be in the interest of justice that this application for confirmation of grant be granted as prayed.
3. The Application is supported by the annexed affidavit dated 25th June 2025 sworn by Rodah Ikonga Andakalu who avers as follows;
1. That I am the administrator to the estate of the late Andagal Adolwa, who died on the 27th April, 2003 pursuant to a grant of letters of administration issued to us in this matter on 28/1/2010.
 2. That we waited for too long and recently in the year 2025 we visited the Court Registry with a view to establishing the actual position of the file from the court file.
 3. That we were shocked to note that our matter was dismissed for want of prosecution.
 4. That we humbly pray that this honorable court reviews, sets aside, varies, and/or vacates the orders made on the 7th July 2019 dismissing the cause for want of prosecution, reinstate the matter and confirm it as per the reviewed mode of distribution.
 5. That we undertake to move the court appropriately and cooperate to see to it that confirmation is done within the earliest opportunity granted.
 6. That it is in the interest of justice that this application is allowed.
 7. That the other dependants has no objection to the Grant being confirmed.
 8. That the deceased herein was survived by the following dependant: Jacob Korir Sugut
 9. That the identification and shares of all persons beneficially entitled to the said estate have been ascertained and determined as follows

Asset	Beneficiary	ID No.	Acres
U/g Bindura Settlement Scheme/66	Jacob Korir Sugut	XXXXXXXXXX	Whole



10. That no application for provision for dependants is pending.
11. That swear this Affidavit in support of the Summons for Confirmation of grant aforesaid

Decision

4. The predominant issue for the determination is whether this intestate estate should be distributed house to house or equally among the members of the deceased family. Therefore, the consideration here will be the rights of the surviving spouses on the rights of children in equal measures. With the regard to rights of surviving spouses the principles of law advanced include the following:

The *Law of Succession Act* grants certain rights to the surviving spouse. These are set out in sections 35(1), 36(1) and 37 of the *Law of Succession Act*. Cases numbers 121,122 and 246 deal with the rights of a surviving spouse.

Section 35(1) provides:

‘Subject to the provisions of section 40, where an intestate has left a surviving spouse and a child or children, the surviving spouse shall be entitled to:

- a. The personal and household effects of the deceased, absolutely; and
- b. A life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon remarriage.’

Section 36(1) provides:

Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled out of the net intestate estate to:

- a. The personal and household effects of the deceased absolutely; and
- b. The first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater; and
- c. A life interest in the whole of the remainder:

Provided that if the surviving spouse is a widow, the life interest shall be determined upon her remarriage to any person.

Section 37 provides:

‘A surviving spouse entitled to a life interest under the provisions of section 35 or 36, with the consent of all co-trustees and all children of full age, or with the consent of the court, may, during the period of the life interest, sell any of the property subject to that interest if it is necessary for his own maintenance:

Provided that, in the case of immovable property, the exercise of that power shall always be subject to the consent of the court.’

5. As the law forgotten the rights of inheritance of children of the marriage. The answer is very explicit in the same Act as provided for:
 - a. The rights of children are encapsulated in sections 35(2) (3) (5) and 38 of the *Law of Succession Act*. Section 35(2) (3) (5) provides as follows:



- i. ‘35(2) A surviving spouse shall, during the continuation of life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.
- ii. (3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.
- iii. (5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children?’

Section 38 provides as follows:

‘Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.’

6. For purpose of this succession section 40 provides the key parameters but drawing inspiration from the above cited provisions namely section 35, 36, 37, 38 of the same Act. The court in the case of *Re Estate of Kimitei Cherop (deceased)* (2021) eKLR, where the court in applying section 40 of the *Law of Succession Act* stated as follows;

“... I now turn my attention to the final issue, whether the estate should be divided equally between the two houses or equally amongst the 9 children and the surviving widow. It is manifest therefore that, guided by the provisions of section 40(1) of the *Law of Succession Act*, the estate herein ought to be distributed equally amongst the 9 children of the deceased and the surviving widow, thus making 10 units....”

7. Similarly in *Stephen Gitonga M'murithi v Faith Ngira Murithi* the court made the following observations:

“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried.

Section 40 on the other hand enjoins the inclusion of a surviving spouse as an additional unit to each house hold of a polygamous deceased. Applying the above principles..... it is our finding that the learned trial Judge fell into an error when he failed to accord equal distribution to all the children of the deceased in violation of section 38 of the *Law of Succession Act* by discriminating against the married daughters of the deceased...”

8. I have reviewed the petition which was file way back on 30th July 2008. The introduction letter by the Area Chief one Julius Limo dated the same day positively identified the following beneficiaries surviving the deceased:



This is to certify that the above mentioned was a resident of my location. He had two (2) wives, he had twenty (20) children. Their names are as follows:

Wife (1) Mrs. Elizabeth Mwemwa Adakalu had the following children:

1. Rasoha H. Ndatamwa -1962
2. Reuben Mwanje -1964
3. Deresina Kangahi – 1966
4. Raheli Odali – 1969
5. Naume Nale – 1971
6. Ruth Khalahi – 1973
7. Leah Itengetenge – 1975
8. Nuhu Likhakha – 1978
9. Yohana Luvimbo – 1980
10. Mathia Kinandi – 1982
11. Halon Amuchiba – 1985

Wife (2) Mrs. Rodah Ikonga Andakalu

1. Julia Shing'ore – 1964
2. Firi Ndatamwa – 1968
3. Egoni Ashilima – 1971
4. Taburotha Kabahi – 1972
5. Benjamin Adolwa – 1974
6. Joseph Phwonya – 1976
7. Oropa Isalanywa - 1978
8. Musa Ikala – 1980
9. Kefa Jaika -1982

9. There are 4 issues preceding the summons of confirmation of grant dated 30th June 2025.
10. First and foremost is whether the applicant has satisfied the criteria under section 80 of the *law of succession Act*, Rule 73 (1) of the *Probate and Administrations Rule* as construed with Order 45 Rule 1. The gist of the applicant concern is whether the dismissal order for want of prosecution issued by this court on 15th April 2024 can be reviewed and set aside to pave way for determination of the issues on the merit. In her explanation the subject case docket went missing from the registry until 2025 when it was traced and made available to the parties. There is no contestation about that material evidence.
11. In our jurisdiction a review of a ruling can be sought based on errors of fact or law. A review is a re-examination of a case by the same court that made the original decision, and is distinct from an appeal. The grounds or review are generally outlined in section 80 of the *Civil Procedure Act* and Order 45



of the *Civil Procedure Rules*, which include the discovery of new and important evidence, mistakes or errors apparent on the record, or “any other sufficient reason”.

12. The court in *Republic v Cabinet Secretary for Interior and Co-Ordination of National Government Ex Parte Abullabi Said Sald* [2019] eKLR, the court observed, with respect to any other sufficient reason as follows:

“A court can review a judgment for any other sufficient reason. In the case of *Sadar Mohamed vs Charan Singh and Another* [19] it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter. Mulla in the Code of Civil Procedure [20] (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that the expression ‘any other sufficient reason’...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out..., would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement. [21]

13. It goes without saying that the applicant has made the threshold for this court to exercise discretion to review and quash dismissal order of the suit issued on 15th April 2024 for want of prosecution
14. The second issue for determination is whether this court should proceed to confirm the distribution of the estate to the beneficiaries. For the benefit of this discussion I have brought to the attention of the parties on the applicable law when it comes to distribution of the estate in a polygamous set up. From the filings of the necessary instruments towards the making of certificate of confirmation of grant the assets to be shared are referenced as U/G Bindura Settlement Scheme/66 measuring 2.6 Ha. The beneficiaries survived to the deceased from the two house if the current record is authentic is about 22 legitimate right holders. As a consequence I take the view of having this estate held in trust at the interim period by Rodah Ikonga Andakalu and Reuben Mwanje for the rest of the beneficiaries to file a detailed consent on how best section 38 & 40 of the *law of succession Act* can be accommodated to ensure fairness, equity and proportionate transmission of inheritance rights notwithstanding that position as a certificate of confirmation of grant shall be issued to the above named administrators as one Elizabeth Mwenywa Andakal’s appointment as an administrator by reason of her demise by dint of section 76 of the Act she ceases to be an administrator. I make no orders as to costs of this application being a family matter.

DATED SIGNED AND PUBLISHED VIA CTS AT ELDORET THIS 15TH DAY OF JULY 2025

.....
R. NYAKUNDI

JUDGE

