



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njoki v Ngai (Substituting Sicilia Magwi Kivuti (Family Appeal  
E002 of 2024) [2025] KEHC 11126 (KLR) (23 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11126 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
FAMILY APPEAL E002 OF 2024  
RM MWONGO, J  
JULY 23, 2025**

**BETWEEN**

**AGUSTA NJOKI ..... APPELLANT**

**AND**

**RIBERATA NGAI (SUBSTITUTING SICILIA MAGWI KIVUTI. RESPONDENT**

*(An appeal from the Ruling of Hon. S. Ouko in Runyenjes SPM  
Succession Cause No. 146 of 2017 delivered on 15th January 2024)*

**JUDGMENT**

**The Appeal**

1. The appellant filed a memorandum of appeal dated 07<sup>th</sup> February 2024 seeking that the following orders:
  - a. That the appeal be allowed;
  - b. That the ruling of the learned trial magistrate dated 15<sup>th</sup> January 2024 be set aside and in place the court do give a general direction that a beneficiary of the estate who has developed part of the estate should have a share of 1.66 acres excised from the portion they have improved; and
  - c. That this being a family matter each party to bear its own cost.
2. The appeal is premised on 8 grounds which are the following:
  1. That the learned trial magistrate delivered a judgment that left the beneficiaries in disharmony, acrimony and disagreement rather than settle the issue afflicting the beneficiaries;
  2. That the trial magistrate erred in law and fact by delivering a judgment that left beneficiaries at the whelms and distinct (sic) of the respondent who was the administrator of the estate of the deceased instead of encouraging the beneficiaries to discuss the precise position each



beneficiaries was to take granted that some beneficiaries had developed some particular part of the estate;

3. That the learned trial magistrate erred in law and fact by failing to direct that a beneficiary that had cultivated and developed a certain portion of land of the suit land should be distributed that particular portion;
4. That the learned trial magistrate erred in law and fact by failing to appreciate that the appellant right from when she was in upper primary school was cultivating LR: Kyeni/Kigumo/675 and she has various properties thereon and as such it was fair and just that a share of 1.66 acres was carved from the portion she had cultivated for many years;
5. That the learned trial magistrate erred in law and act by dismissing the appellant witnesses who gave evidence to the effect that the appellant was cultivating LR;Kyeni/Kigumo/675 for long time and she had therein coffee trees banana plants, gravellier trees, mango trees and she cultivated a subsistence crops on a precise part of LR. Kyeni/Kigumo/675 and as such as matter of fairness and justice a share of 1.66 ACRES should be excised to cover the portion she had developed;
6. That the learned trial magistrate fell into error and omission by failing to give a guidance directive that people with development with the suit land should have the entitlement on the portions that have developed and particularly Edda Wangu a widow who reside and live on LR. Kyeni/Kigumo /675 and she has houses thereon; and
7. The learned trial magistrate fell into error by delivering a ruling that left two purchasers of the estate of the deceased before confirmation of grant to occupy and enjoy the portion that the appellant had cultivated from time immemorial thus making the appellant suffer tremendous loss and injustice;
8. That the learned trial magistrate erred in law and fact by failing to exercise her discretion as donated by Rule 73 of Probate and Administration Rules to make such orders that would meet the end of justice.

### **The Grant**

3. A grant of letters of administration was issued to Sicilia Magwi Kivuti (deceased) (the administrator) in the estate of the deceased on 14<sup>th</sup> April 2016. Thereafter, she filed summons for confirmation of grant in which she proposed that the estate of the deceased which comprises of land parcel numbers Kyeni/Kigumo/675 and Kyeni/Kigumo/1223, each measuring 5 acres, be distributed as follows:
  - a. Riberata Ngai Josphat, Kunjeta Muthanje and Edda Wangu to each get 1.66 acres of parcel number Kyeni/Kigumo/675.
  - b. Augusta Njoki, Sara Wanja and Emilio Muringo to each get 1.66 acres of Kyeni/Kigumo/1223.
4. In the summons for confirmation of grant, the administrator indicated that all the named beneficiaries were daughters of the deceased except Emilio Muringo who is a son. Edda Wangu was indicated as a daughter-in-law being the widow of Aloise Ireri, the deceased's son.

### **The Protest**

5. The appellant filed an affidavit of protest contesting the mode of distribution proposed by the administrator. The list of beneficiaries and properties was agreed between the parties and the protestor did not contest the fact that all the beneficiaries were getting 1.66 acres of the land. The appellant's



issue was that she should not be given a part of Kyeni/Kigumo/1223 yet she had extensively developed Kyeni/Kigumo/675.

6. She stated that when the deceased was still alive, he allowed her to develop the land by planting 200 coffee stems, 3 mature avocado trees, 3 mango trees, which have since been uprooted by Geoffrey Ndwiga and Juliet Njura who purportedly purchased a part of the land, a transaction that was nullified by the court. She had also planted 50 mature banana stems. The purported purchasers of the land built a permanent house on the portion of the land which the deceased had given to the appellant.
7. The purported sale was done by the deceased administrator because of differences she had with the appellant's husband. The appellant contended that there was no reason why she could not be given a part of the land she had already developed. Instead, she was given another piece of land which she did not develop, forcing her to have to start developing it afresh. She stated that the purported sale of a portion of the land was done while the confirmation of grant was pending, hence it was an illegal sale. She proposed that the land be distributed, switched around as follows:
  - a. Edda Wangu Agusta Njoki and Emilio Muringo to each get 1.66 acres of parcel number Kyeni/Kigumo/675
  - b. Riberata Ngai Josphat, Kunjeta Muthanje and Sara Wanja to each get 1.66 acres of Kyeni/Kigumo/1223

### **The Hearing of the Protest in the trial Court**

8. The protest was heard viva voce. PW1 was the appellant. She reiterated that her problem with the distribution was that she has been removed from the land which she had developed. She produced documents and photographs as proof that she had developed the land. She also stated that she had lived on the land since she was young and even after her marriage, the deceased allowed her to develop the land.
9. PW2 was Eddah Wangu, the appellant's sister-in-law. She stated that it is true that the appellant cultivated land parcel number Kyeni/Kigumo/675 before and after she got married. She stated that the land has since been sold by the children of the deceased in different portions. The purported buyers of the land still live on it.
10. PW3 was Nyaga Ndathi who stated that the appellant is his friend's wife. He testified that the appellant was cultivating the land before and after she got married with the permission of the deceased.
11. DW1, the respondent, testified that the property should be distributed according to the mode proposed in the summons for confirmation of grant. That the mode provides for all the beneficiaries and the appellant is the only one with a problem. According to her, the coffee belonged to the deceased even though the appellant used the land from the time she was in primary school. She stated that no part of the land was sold and there are no buyers settled on the land. That the land is to be distributed in the manner that the deceased wished, and that he had said that the appellant gets a portion of Kyeni/Kigumo/675.
12. It was her evidence that the deceased and the appellant never got along and he had forbidden her from going to that land parcel number Kyeni/Kigumo/675. That it was the appellant's mother who sold a part of the land where the appellant had farmed. PW2 has a store on that land where she keeps her farm produce.
13. DW2 was Sara Waya, the deceased's daughter. She stated that she did not understand why the appellant wanted a portion of Kyeni/Kigumo/675, part of which was sold by their mother when she was sick.



She knew the buyers. She stated that PW2, the wife of one of the sons of the deceased, has a home on that land and that is where she has been living. She said that none of the beneficiaries sold the land since it had already been sold by the deceased and his wife.

### **Findings of the Trial Court**

14. The trial court considered the evidence adduced and found that the administrator's proposed distribution of the estate was fair and lawful. The Court stated that the specific allocation of the properties on the ground is beyond the scope of the court. The protest was dismissed and the summons for confirmation of grant was allowed as prayed.

### **Parties' Submissions on the appeal**

15. The appellant filed submissions dated 14<sup>th</sup> October 2024 without any directions having been issued do so. The court struck out those submissions from the record through its further order issued on 26<sup>th</sup> November 2024. The court gave further directions on 19<sup>th</sup> February 2025 that the parties do file their written submissions. Only the respondent complied with these directions.
16. The respondent submitted that the distribution of the estate was in line with section 38 of the *Law of Succession Act* and that the trial court had no obligation to offer preferential allocation of Kyeni/Kigumo/675 to the appellant. She relied on the case of *In re Estate of Alice Mumbua Mutua (Deceased)* [2017] KEHC 8289 (KLR) and argued that the only mandate of the succession court is to determine the lawful beneficiaries and ensure equitable distribution of the estate. She urged the court to dismiss the appeal.

### **Issue for Determination**

17. The core issue for determination is whether the appeal is merited.

### **Analysis and Determination**

18. The role of an appellate court is to re-examine the evidence adduced at the trial and come up with its own conclusions while keeping in mind the findings of the trial court. In the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

19. There is no dispute as to which properties constitute the estate of the deceased and who the beneficiaries to that estate are. The only issue is that the appellant is uncomfortable with the portion of land she was given on Kyeni/Kigumo/1223, because it is not where she had initially developed. She prefers to be allocated on parcel number Kyeni/Kigumo/675. It was her case that the administrator of the estate sold a part of the land which she had developed, while the succession proceedings were ongoing.
20. From the evidence adduced, the witnesses stated that the appellant was, indeed allowed to farm the land. DW1 denied that the land was ever sold during succession. She stated that PW2 lives on that land



and has been occupying it for a long period of time and she also farms it. DW1 and DW2 stated that part of the land was sold to purchasers by the deceased and his wife but the rest of it is still intact.

21. Through the mode of distribution proposed by the respondent, the appellant was given a portion of Kyeni/Kigumo/1223 which she is dissatisfied with. The appellant herself stated that the crops she had planted on the said land were removed by the purchasers of the land who are still living there.
22. The role of the court in succession case is limited to determining the rightful beneficiaries of the estate and ensuring that estate is equitably distributed according to the *Law of Succession Act*. This was the position held in the case of *In re Estate of Mukhobi Namonya (Deceased)* [2020] KEHC 9045 (KLR) where the court stated that:

“Distribution of an estate is the responsibility of the court, guided by the provisions of the *Law of Succession Act* and customary law, where the latter is applicable.”

23. It is often difficult for the court to distribute the estate with mathematical precision, given the circumstances of each case (see the case of *Justus Thiora Kiugu & 4 others v Joyce Nkatha Kiugu & another* [2015] KECA 886 (KLR). The position of the actual matters on the ground in the estate, coupled with other factors for instance the siting of the locale, the geography of the land, and beneficiaries’ personal preferences, may tempt the court to step out of its assigned mandate in succession. However, it is risky, indulgent self-defeating, and time-consuming to do so.
24. Under the *Law of Succession Act*, it is the role of the administrator to identify the estate and the beneficiaries for purposes of distribution by the court. It is at the point of filing the summons for confirmation of grant that these circumstances shape the distribution. All the while, the court is limited to the provisions of the *Law of Succession Act* or any other applicable customary law to achieve equitable distribution of an estate.
25. When distributing an estate, a court is not swayed by the fact that some properties were developed by certain beneficiaries. What matters is that an equal distribution of the estate is achieved. In any event, the developments made by the appellant to the land she endears, have been removed (wholly or in part) according to her testimony. The court considers the overall effect of interfering with the distribution such that the preferences of the appellant are met and those of other parties are not. In the case of *In re Estate of Jared Koita Cheteri (Deceased)* [2025] KEHC 5074 (KLR), the court held:

“The court recognizes and acknowledges that some beneficiaries have established their habitual residences on portions of these properties and have invested in constructing permanent structures. However, this fact alone cannot override the legal principle of equitable distribution...”

26. In this case, the deceased left children but no spouse. The distribution of this estate is to be guided by section 38 of the *Law of Succession Act* 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 shall be equally divided among the surviving children” [Emphasis added]

27. Going by this provision, the estate ought to be distributed equally amongst the surviving children of the deceased. The law does not dictate how to achieve this where there are several properties; whether it is by casting lots or by any other method. Keeping this in mind, the mode proposed by the respondent



is flawed because it, seemingly, caters for the preferences (spoken or unspoken) of other beneficiaries, while denying the preferences of others.

28. The mode disinherits some beneficiaries from parcel number Kyeni/Kigumo/1223 and others from parcel number Kyeni/Kigumo/675. Further, the mode proposed in the protest also does the same thing, and is not any better. The modes proposed in by either party cannot achieve equitable distribution of the estate since the guiding provision of the Law of Succession Act makes it mandatory that the estate be distributed equally amongst the children of the deceased. The best case scenario in distribution is achieved when the parties all agree upon a mode of distribution which is then put forward by the administrator for adoption by the Court.
29. The court discussed equitable vis a vis equal distribution as provided for under the Law of Succession Act in the case of In the case of In Re Estate of John Musambayi Katumanga – (Deceased) [2014] KEHC 7506 (KLR) where it was held thus:

“The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is “equally” as opposed to “equitably”. This is the plain language of the provisions. The provisions are in mandatory terms – the property “shall ... be equally divided among the surviving children.” Equal distribution is envisaged regardless of the ages, gender and financial status of the children.” [Emphasis added]
30. The present case similarly envisages equal distribution irrespective of personal preferences of beneficiaries. Equal distribution will achieve proper statutory distribution, in line with section 38 of the Law of Succession Act. In other words, all the 6 beneficiaries are entitled to all the properties of the deceased in equal shares. When it comes to preferences, the beneficiaries may discuss amongst themselves to exchange, or howsoever, deal in their inherited portions of the estate, outside the court. Should the parties agree outside Court, on a mode of distribution, the Court is eager to adopt the same.
31. It appears, obliquely, that a part of the estate may have been sold to third parties. This issue was however not placed before this court clearly for determination. The parties ought to and were at liberty to clarify and fully litigate this issue before the Court but did not. Accordingly, this Court will not enter into that aspect. As far as this court is concerned, the properties belong to the estate of the deceased.

### **Conclusions and Disposition**

32. The properties Kyeni/Kigumo/1223 and Kyeni/Kigumo/675 both measure 5-acres each. The list of beneficiaries is uncontested. Therefore, in light of the foregoing discussion, and the statutory principle of equal distribution, the estate should be distributed as follows with each beneficiary getting an equal share in each property.
  - a. Riberata Ngai Josphat, Kunjeta Muthanje, Edda Wangu, Agusta Njoki, Sara Wanja and Emilio Muringo to each get a share in parcel number Kyeni/Kigumo/675 in equal shares (subject to road reserves); and
  - b. Riberata Ngai Josphat, Kunjeta Muthanje, Edda Wangu, Agusta Njoki, Sara Wanja and Emilio Muringo to each get a share in parcel number Kyeni/Kigumo/1223 in equal shares (subject to road reserves);
33. Accordingly, the appeal has merit and the following orders are hereby issued:



- a. The trial court's judgment is hereby set aside.
- b. The certificate of confirmation of grant issued on 16<sup>th</sup> January 2024 is set aside;
- c. A fresh certificate of confirmation of grant shall be issued reflecting the distribution of the estate as follows:
  - i. Parcel number Kyeni/Kigumo/675 to be distributed in equal shares (subject to road reserves) to Riberata Ngai Josphat, Kunjeta Muthanje, Edda Wangu, Agusta Njoki, Sara Wanja and Emilio Muringo.
  - ii. Parcel number Kyeni/Kigumo/1223 to be distributed in equal shares (subject to road reserves) to Riberata Ngai Josphat, Kunjeta Muthanje, Edda Wangu, Agusta Njoki, Sara Wanja and Emilio Muringo.
- d. There shall be no order as to costs this being a family matter.

34. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 23<sup>RD</sup> DAY OF JULY, 2025.**

**R. MWONGO**

**JUDGE**

Delivered in the presence of:

1. E. Njiru for Respondent
2. Francis Munyao - Court Assistant

