



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Ngero Nginga alias Ngeeru Ngiinga (Deceased) (Succession Appeal  
30 of 2023) [2025] KEHC 12991 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12991 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
SUCCESSION APPEAL 30 OF 2023  
RC RUTTO, J  
SEPTEMBER 19, 2025**

**BETWEEN**

**STEPHEN NGUMO NGERU ..... 1<sup>ST</sup> APPELLANT  
HUMPHREY MWANGI NGERU ..... 2<sup>ND</sup> APPELLANT  
PAUL GACANJA NGERU ..... 3<sup>RD</sup> APPELLANT  
LAWRENCE NGERU KIGUTA ..... 4<sup>TH</sup> APPELLANT**

**AND**

**ROSE MWIKALI NGIINGA ..... 1<sup>ST</sup> RESPONDENT  
WILLIAM WAKAGWI NGERU ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Ruling delivered by Hon. B.M Ekhubi (PM) delivered  
on 30<sup>th</sup> April 2020 in Thika Succession Case Number No. 406 of 2012)*

**JUDGMENT**

1. This is an appeal against part of the ruling delivered by Hon. B.M. Ekhubi (PM) on 30<sup>th</sup> April 2020 in Thika Succession Cause No. 406 of 2012. In the trial court, a grant was confirmed on 23<sup>rd</sup> May 2016 allowing for the subdivision of the deceased's estate, namely parcels Ngenda/githunguchu/708, ngenda/githunguchu/T.350, and Ngenda/githunguchu/T.351, among all the beneficiaries. However, on 25<sup>th</sup> November 2016, it was brought to the attention of the court that not all beneficiaries had agreed to the proposed subdivision of Ngenda/githunguchu/708 (hereinafter referred to as "the subject property"), which measures approximately 1.57 hectares.
2. In response, on 13<sup>th</sup> March 2017, the court directed the Gatundu Government Surveyor to visit the land, advise on the suitable mode of division of the property, and file a report. These direction were reiterated on 29<sup>th</sup> January 2018. The subdivision was thereafter approved by the Thika District



Surveyor on 1<sup>st</sup> March 2018 and on 16<sup>th</sup> May 2018, the District Surveyor recommended that the registered/government planner assist in preparing a formal sub-division plan.

3. On 31<sup>st</sup> January 2019, after several unsuccessful attempts to reach an agreement, the Gatundu Physical Planner was summoned on the recommendation of the District Surveyor to assist with the subdivision of the subject property. The Physical Planner advised the court that the earlier proposed subdivision plan was untenable due to non-compliance with plot ratio and road size requirements. He then proposed that the plan be redesigned, to which the parties raised no objection. The Physical Planner subsequently drew a new proposed subdivision plan and filed it on 14<sup>th</sup> February 2019. The trial court proceeded to make a ruling on the actual subdivision of the subject property and noted that the proposal by the Government Physical Planner had not been challenged by any other expert. Consequently, the court adopted the proposed subdivision plan by the Physical planner.
4. Aggrieved by the Ruling of the trial court, the Appellants filed this appeal on the grounds that the Learned Magistrate erred in adopting the plan of subdivision of parcel number Ngenda/githunguchu/708 to be done horizontally and not vertically as the majority of beneficiaries wanted; erred in not taking into account that by having the sub-division done horizontally it was only giving one beneficiary the benefit of access to the main road; erred in not taking into account the fact that the land taken by the access road made on the land should have been shared by the beneficiaries and it wasn't necessary; erred in not accepting the subdivision to be done vertically which would have given every beneficiary an access to both the main road and to the river. The Appellants prayed that the appeal be allowed with costs.
5. The appeal was canvassed by way of written submissions. The Appellants' filed their submissions dated 19<sup>th</sup> June 2024 while the 2<sup>nd</sup> Respondent's filed their submissions dated 1<sup>st</sup> July 2024. The record indicates that the 1<sup>st</sup> Respondent did not participate in the appeal proceedings and, at the time of writing this judgment, no submissions had been filed on her behalf.

### **Appellants' submissions**

6. The Appellants argued all grounds of appeal collectively and identified a single issue for determination: whether the suit property, Ngenda/githunguchu/708, should be subdivided horizontally or vertically. They submitted that the land ought to be subdivided vertically for the following reasons: each beneficiary would have direct access to the road without passing through another beneficiary's portion; there would be no need for an access road, meaning that land that would otherwise be used for the road would instead be shared among all beneficiaries; only the Respondents, who are in the minority, prefer horizontal subdivision, whereas the majority favor vertical subdivision; the land slopes downward, giving those at the top an advantage over those at the bottom; and, finally, no vehicle can use the proposed access road in the horizontal plan due to the hilly nature of the land.
7. In conclusion, the Appellants submitted that vertical subdivision would be the most equitable and practical solution, and would best serve the interest of justice.

### **2nd Respondent's submissions**

8. The 2<sup>nd</sup> Respondent began his submissions by outlining the background of the matter as outlined in the earlier sections of this judgment. He then identified the main issue for determination as whether the decision of the lower court to adopt the proposed subdivision by the Gatundu Physical Planner was valid notwithstanding the opposition by the majority of the beneficiaries.
9. The 2<sup>nd</sup> Respondent argued that the Appellants' contention is without merit. He emphasized that the most critical consideration in succession matters is that each beneficiary receives an equal share of



the land, regardless of proximity to the road or the river. he cited Sections 48 and 49 of the *Evidence Act*, which recognize and give weight to expert opinions. He submitted that the plan prepared by the Gatundu Physical Planner constituted expert evidence in the field of physical planning, and the trial court was justified in relying on it to guide the subdivision of the deceased's estate. Accordingly, he urged the court to uphold the ruling of the trial court.

10. On the issue of costs, the 2<sup>nd</sup> Respondent relied on the case of Cecilia Karuru Ngayo v Barclays Bank of Kenya & Another [2016] eKLR, submitting that the Appellants should bear their own costs.
11. In conclusion, the 2<sup>nd</sup> Respondent urged the court to consider his submissions and render a decision that would accord the parties a just outcome.

### **Analysis and Determination**

12. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence presented before the trial court and make its own conclusions. It must, however, remain mindful that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. The foregoing duty was succinctly stated by the Court of Appeal in the case of *Selle v Associated Motor Boat Company Ltd (1968) EA 123* and *Peters v Sunday Post Limited [1985] EA 424*.
13. Upon careful review of the record of appeal and both the Appellants' and 2<sup>nd</sup> Respondent's submissions, the major issue for determination is Whether the trial court erred in adopting the sub-division plan of the subject property (Ngenda/githunguchu/708) as proposed by the Gatundu Physical Planner, which provided for horizontal subdivision instead of vertical subdivision as desired by the majority of the beneficiaries.
14. The Appellants contend that the learned magistrate failed to consider the majority's preference for vertical subdivision and instead adopted a plan for horizontal subdivision prepared by the Gatundu Physical Planner. They argue that the adopted horizontal plan disadvantages some beneficiaries by limiting direct access to the main road and river, and further contend that the horizontal design necessitates an access road that occupies land that would otherwise form part of the beneficiaries' shares. Their main position is that vertical subdivision would ensure fairness, with each beneficiary enjoying independent road access without relying on others.
15. On the other hand, the 2<sup>nd</sup> Respondent submits that the trial court decision to adopt the physical planner's proposal was not erroneous. He submits that, the planner's opinion constitutes expert evidence, which is admissible and persuasive under Sections 48 and 49 of the *Evidence Act*. He emphasizes that the key consideration in distributing the estate is ensuring equal shares among beneficiaries rather than prioritizing road or river access. He argues that the physical planner's proposal was informed by technical and planning standards and was therefore appropriate.
16. The record, shows that the trial court summoned the Physical Planner following a recommendation from the District Surveyor's as conveyed in a letter dated 16<sup>th</sup> May 2018. For clarity. The letter read;  
  
“.. It is our view that the interested parties seek help of a registered/government planner on how to sub-divide the land amongst themselves. As surveyors we can only implement what is already agreed upon by fixing/demarcating land as per the provided scheme plan”.
17. In response, the Physical Planner subsequently redesigned the plan and filed it in court on 14<sup>th</sup> February 2019. The trial court noted that this plan was not challenged by any alternative expert opinion and proceeded to adopted it as the basis for the subdivision.



18. The key question, therefore is whether the trial court acted within its discretion in adopting the expert's plan over the beneficiaries' preference. To begin with, I beg to cite and reference the decision of the court in the case of *Stephen Kinini Wang'ondu vs The Ark Limited* [2016] eKLR, where the court highlighted the guidelines for assessing an expert report like the one beforehand. The court stated thus;

“While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. [Huntley (also known as Hopkins) (a protected party by his litigation friend, McClure) v. Simmons [2010] E.W.C.A. Civ 54]. Four consequences flow from this. Firstly, expert evidence does not “trump all other evidence”. [Abringer v Ashton {1873} 17 LR Eq 358 at 374]. It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with mathematical precision. [Evan Bell, *Judicial Assessment of Expert Evidence*, *Judicial Studies Institute Journal*, 2010 Page 55] Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be “artificially separated” from the rest of the evidence. To do so is a structural failing. [Jakto Transport Ltd. v. Derek Hall [2005] E.W.C.A Civ. 1327] A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence. Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred. Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones. [Jakto Transport Ltd. v. Derek Hall [2005] E.W.C.A Civ. 1327] A further criteria for assessing an expert's evidence focuses on the quality of the expert's reasoning. A court should examine each expert's testimony in terms of its rationality and internal consistency in relation to all the evidence presented. In *Routestone Ltd. v. Minorities Finance Ltd. and Another* [Same v. Bird and others [1997] B.C.C. 180] Jacob J. observed that what really mattered in most cases was the reasons given for an expert's opinion, noting that a well-constructed expert report containing opinion evidence sets out both the opinion and the reasons for it. The judge pithily commented “[i]f the reasons stand up the opinion does, if not, not.”

19. The above is clear that expert opinions are valuable and do not automatically override other forms of evidence. A court should not simply accept an expert's conclusion at face value without requiring the expert to demonstrate the reasoning and process that informed that conclusion. In situations where expert opinions conflict on a material issue, the court is required to explain why it prefers one opinion over the other by examining the supporting material and rationale behind each.
20. In the present case, the Physical Planner's proposal for horizontal subdivision was adopted by the trial court without any competing expert evidence being presented by the appellants. The planner's reasoning, was based on compliance with planning standards, plot ratio, and road size requirements, was placed on record and was not challenged. Since no alternative expert plan was provided to dispute or offer a different approach, the trial court was justified in adopting the only expert plan available.



- 21. It is settled law that courts are not bound by parties’ preferences especially where such preferences conflict with statutory or technical requirements. In succession proceedings, the court’s primary duty is to ensure equitable distribution of the estate in accordance with Section 38 of the Law of Succession Act while also considering practicality and legality in land subdivision. The argument that a majority of beneficiaries preferred vertical subdivision cannot override planning regulations or render a technically sound plan invalid.
- 22. In view of the foregoing, I find that the trial court acted within its discretion and did not err in adopting the physical planner’s unchallenged proposal. Accordingly, the appeal lacks merit and is hereby dismissed.
- 23. Given the familial nature of the dispute, each party shall bear its own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 19<sup>TH</sup> SEPTEMBER, 2025.**

**RHODA RUTTO**

**JUDGE**

In the presence of;

.....Appellant

.....Respondent

Selina Court Assistant

