



REPUBLIC OF KENYA



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**In re Estate of Ben Kugwa alias Kugua (Deceased) (Succession Appeal
E026 of 2023) [2025] KEHC 12549 (KLR) (3 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12549 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
SUCCESSION APPEAL E026 OF 2023
RC RUTTO, J
SEPTEMBER 3, 2025**

IN THE MATTER OF THE ESTATE OF BEN KUGWA ALIAS BEN KUGUA- DECEASED

BETWEEN

JOSEPH MAINA KIMANI APPELLANT

AND

JANE NYAMBURA KIMANI RESPONDENT

*(Being an appeal from the Ruling delivered by Hon. Atiang Mitullah
(SPM) on 30th August 2022 in Thika Succession Cause No. 143 of 2000)*

JUDGMENT

1. This is an appeal challenges the Ruling of Hon. Atiang Mitullah (SPM) delivered on 30th August 2022 in Thika Succession Cause No. 143 of 2000. In the trial court, the Appellant had filed an application dated 18th May 2021 (“the Application”) seeking review of the grant of confirmation orders issued on 17th December 2020 by Hon. A.M. Maina (SPM). The Application was based on the grounds that the court did not appreciate the Appellant’s proposed mode of distributing the deceased estate, specifically concerning Land Parcel No. LOC.16/Ndunyu Chege/277 and Land Parcel No. LOC.16/Ndunyu Chege/T.66.
2. Regarding Land Parcel No. LOC.16/Ndunyu Chege/277, the Appellant stated that his intention was for the land to be shared equally between himself, as the administrator and his now deceased brother, Harun Nganga. His proposal was that he would retain half of the parcel Land Parcel No. LOC.16/Ndunyu Chege/277, while the remaining half would be shared equally between his brother’s widows, Jane Nyambura Kimani and Joyce Njeri.
3. As for Land Parcel No. LOC.16/Ndunyu Chege/T.66, measuring 0.20 acres, the Appellant explained that he had already established his homestead on the land. To compensate the two widows he proposed to cede 0.1 acres from his half share of Land Parcel No. LOC.16/Ndunyu Chege/277 to them.



4. In response the Respondent, filed a Replying Affidavit sworn on 1st November 2021 opposing the application. She argued that the Application did not meet the legal threshold for review. Additionally she claimed that the Appellant, together with one Jane Njeri, was attempting to have a second bite at the cherry, yet all issues had already been canvassed and conclusively determined in the court's ruling delivered on 17th December 2019. In that ruling the court distributed the estate as follows: i.) Land Parcel No. LOC.16/Ndunyu Chege/277, to be shared equally among Joseph Maina Kimani, Jane Nyambura Kimani, and Joyce Njeri; ii.) Land Parcel No. LOC.16/Ndunyu Chege/7.66, to Joseph Maina Kimani exclusively; and iii.) Kandara Investment shares, to Hellen Nduta Kuria exclusively.
5. After reviewing the parties' submissions, the trial court dismissed the Application on the ground that it did not meet the requisite threshold for review. The court further observed in the impugned ruling of 30th August 2022 that the Application had been filed after an inordinate delay.
6. Aggrieved by the Ruling delivered on 30th August 2022, the Appellant filed this appeal on the grounds that the Learned Magistrate erred and failed to appreciate the gist of the application being appealed against; failed in not finding there was an apparent error in law and in fact in the confirmed grant; failed to find that the grant as confirmed was contrary to the *Law of Succession Act* in that the law clearly stipulates the estate should be divided equally between the Appellant and the two widows of his late brother; failed to appreciate the error in distribution of the estate as per the law of succession in that the confirmed grant the Appellant was allocated one third of the deceased estate which mainly comprised Land Parcel Land Parcel LOC.16/Ndunyu Chege/277 while awarding two thirds to the two widows of his late brother Harun Nganga Kugwa namely Jane Nyambura Kimani and Joyce Njeri; failed to appreciate and act on the affidavit of Joyce Njeri one of the widows in which she supported the appellant's proposal that the parcel be divided equally, with the appellant ceding 0.1 acres from his half share to compensate them for his exclusive occupation of Land Parcel LOC.16/Ndunyu Chege/T.66 measuring 0.2 acre; failing to review the grant in accordance with the *Law of Succession Act* thereby causing an injustice to the Appellant; that it is only fair and just that this Honourable court review the confirmed grant dated 17th December 2019 and to have said grant tally with the *Law of Succession Act* and to reflect the actual occupation of the estate and equitable distribution of the estate.
7. Consequently, the Appellant prayed that the ruling of the subordinate court delivered on 30th August 2022 be set aside and that the court redistribute the estate of the deceased in accordance with the *Law of Succession Act* such that; the Appellant will get half share of Land Parcel LOC.16/Ndunyu Chege/277 and voluntarily cede 0.1 acre out of his half share to the widows of his late brother Harun Nganga Kugwa to compensate them for his taking Land Parcel LOC.16/Ndunyu Chege/T.66 and that the two widows of Harun Nganga Kugwa do share equally their half share of Land Parcel LOC.16/Ndunyu Chege/277.
8. The Appeal was canvassed by way of written submissions pursuant to the consent of the parties recorded on 24th June 2024. The Appellant's submissions are dated 7th November 2024. At the time of writing this judgment, the Respondent had not filed any submissions.

Appellants submissions

9. The Appellant began his submissions by outlining the background of the matter and the proceedings before the trial court that led to the present appeal. He identified a single issue for determination, that is, whether the Learned Magistrate erred in law and in fact by failing to appreciate the error in the distribution of the estate by awarding the Appellant one-third of the deceased's estate and two-thirds to the widows of the Appellant's deceased brother.



10. The Appellant argued that in the ruling dated 17th December 2019, the court correctly acknowledged that the late Harun Nganga had two wives, namely, Joyce Njeri and Jane Nyambura Kimani. However, the court erroneously proceeded to direct that the Respondent, Joyce Njeri, and the Appellant should each receive an equal share of the estate of their father. According to the Appellant, the correct approach should have been to allocate one-half of the estate to him and the other half to his late brother, Harun Nganga, which would then devolve to Harun's two surviving widows in equal shares. The Appellant contended that the ruling effectively introduced new beneficiaries into the estate of his late father, Ben Kugwa, contrary to the provisions of the [Law of Succession Act](#). The Appellant urged the court to rely on the case of *Selle & Another v Associated Motor Boat Co. Ltd & Another* [1968] EA 123 and re-examine the evidence afresh and to find in his favour
11. The Appellant further submitted that the Chief's letter dated 10th April 2000 listed the deceased's survivors as Virginia Wambui Kugwa (wife), Harun Nganga Kugwa (son), Hannah Njeri Kuria (daughter-in-law), and Joseph Maina Kimani (son). He urged that the mode of distribution adopted in the court's ruling of 17th December 2019 wrongly treated the Respondent and her co-wife as children of the deceased, rather than daughters-in-law. Referring to on Section 29 of the [Law of Succession Act](#), the Appellant emphasized that daughters-in-law are not recognized as dependants within the statutory definition of dependants, except in specific circumstances such as where they step into the shoes of a deceased beneficiary. In such cases, he urged, they must obtain grant ad litem to safeguard the interests of the deceased beneficiary in their parent's estate. The Appellant further contended that the court, upon observing the similarity in surnames between himself and the Respondent, erroneously categorized them as siblings and consequently ordered equal distribution of the property despite there being no legal basis for treating.
12. The Appellant relied on Section 38 of the [Law of Succession Act](#) in submitting that Land Parcel No. LOC.16/Ndunyu Chege/277 should have been shared equally between himself and his late brother. He asserted that the wives of his late brother should then pursue succession proceedings for their husband's estate, which would include his half share of Land Parcel No. LOC.16/Ndunyu Chege/277 as part of his assets.
13. On the question of whether the application for review is merited, the Appellant cited Section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 of the Civil Procedure Rules. He submitted that an application for review may only be granted under three circumstances: (i) discovery of new and important evidence that was not within the applicant's knowledge at the time of the decision despite the exercise of due diligence; (ii) an error or mistake apparent on the face of the record; or (iii) any other sufficient reason. The Appellant maintained that there was an error apparent on the face of the record justifying the review. He relied on the case of *Muyodi v Industrial and Commercial Development Corporation & Another* (2006) 1 EA 243 arguing that the court had wrongly ordered equal distribution to individuals who were not children of the deceased. He claimed that the error was contrary to the court's intention and had caused him significant prejudice as it has effectively disinherited him.
14. In conclusion, while invoking Article 165(7) of [the Constitution](#) of Kenya, the Appellant urged this Court to allow the appeal with costs and to redistribute the estate so that he receives one-half share of Land Parcel No. LOC.16/Ndunyu Chege/277 while the remaining half is held in trust by the widows of his late brother for the benefit of his brother's estate.



Analysis and Determinations

15. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind 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).
16. Upon careful consideration of the record of appeal and the Appellant’s submissions, the major issue for determination is;
 - a. Whether, in an appeal against the dismissal of a review application, this Court may re-open the merits of the distribution orders made on 17th December 2019 or is confined to examining whether the trial court properly declined review on 30th August 2022.
 - b. Whether the applicant’s motion for review dated 18th May 2021 met the threshold under Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules and whether it was made without inordinate delay.
17. This is an appeal arises from the refusal to grant a review not a direct appeal against the original distribution orders of 17th December 2019. Accordingly, the appellate scope is limited; the court must determine whether the trial court misapplied the legal principles governing review or exercised her discretion improperly. If the complaint goes to the correctness of the 2019 distribution on the merits, that is a matter for appeal, not for review as review cannot be used as a substitute for appeal simply because a party is dissatisfied and or aggrieved with the outcome.
18. Did the review application therefore meet the Order 45 threshold? The first test is whether there is an error apparent on the face of the record. Such an error must be self-evident and not require extensive argument or re-analysis of contested facts. in this case the appellant, alleged that the 2019 ruling improperly allocated equal shares in Land Parcel LOC.16/Ndunyu Chege/277 to the Appellant and to two widows of his late brother, thereby, elevating daughters-in-law to the status of direct beneficiaries of their father-in-law’s estate. This contention raises substantive succession law questions regarding the status of daughters in law, and treatment of “houses” and would require the court to re-interpret the facts and legal framework that underpinned the 2019 ruling. That is not a facial, arithmetical, or clerical slip; it is a merits challenge. As such, it is not an “error apparent on the face of the record” within the meaning of Order 45 of the Civil Procedure Rules. Therefore, the trial magistrate was correct in rejecting the review on this ground.
19. The second threshold, concerns the discovery of new and important matter. The applicant did not present any new evidence that was unavailable at the time of the 2019 ruling. Instead, he reiterated his preferred mode of distribution and his proposal to cede 0.1 acres from his share after receiving Land Parcel LOC.16/Ndunyu Chege/T.66. These were not newly discovered facts; but rather arguments that could have been raised on appeal. The trial court correctly found that no new matter had been demonstrated.
20. As for the third ground, any other sufficient reason, the Appellant’s essentially invited the court to re-balance the equities of the 2019 distribution proposing a 50/50 split between himself and his late brother’s household with the widows sharing their half. while the proposal may appear equitable, “sufficient reason” under Order 45 should be tethered to an omission, mis-recording by court or oversight. None was demonstrated. The trial magistrate’s refusal to invoke review on this open-ended ground was sound and discloses no misdirection.



- 21. Was there delay as had been suggested by the court in the impugned ruling of 30th August 2022? The court’s record reveals that the application for review was filed on 18th May 2021 and the Ruling that the court was invited to review was delivered on 17th December 2019. The trial court treated the delay as inordinate. On the material placed before it, that was a discretionary call grounded in the record. Therefore, no basis has been laid to conclude the discretion was exercised capriciously or on wrong principle. Even if delay was to be disregarded, the application still failed to meet the substantive threshold for review.
- 22. Based on the above, this appeal is without merit and is hereby dismissed. The ruling of the subordinate court delivered on 30th August 2022 dismissing the review application for not meeting the Order 45 of the Civil procedure Rules threshold and for delay is upheld.
- 23. This being a family matter and in the interest of preserving family ties, each party to bear their own costs of the appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 3RD DAY OF SEPTEMBER, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....for Appellant

.....for Respondent

Selina Court Assistant

