

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
(CORAM: R. MWONGO, J.)
FAMILY APPEAL NO. E003 OF 2025
IN THE MATTER OF THE ESTATE OF EZEKIEL KAREKO ALIAS EZEKIEL KAREKO
KANG'ETHE (DECEASED)

ALFRED NYAGA EZEKIEL NJIRU..... APPELLANT

-VERSUS-

GILBERT NJERU NYAGA.....RESPONDENT

*An appeal from the Ruling of Hon. C.K. Kisiangani, PM in Runyenjes MC Succession
Cause No. 31 of 2005 delivered on 18th February 2025*

JUDGMENT

The Memorandum of Appeal

1. The memorandum of appeal herein dated 19th February 2025 seeks that the Ruling dated 18th February 2025 by Hon. C.K Kisingiani PM in Runyenjes MC Succession Case No. 31 of 2005 be set aside and it be substituted with a Judgment with the following orders: -
 - a) That the Appellant/executive officer/Court Administrator of Runyenjes Magistrate Court execute all the relevant documents to facilitate transmission to Gilbert Njeru Nyaga of land parcel number Kyeni/Mufu/11474 measuring 0.40HA.
 - b) Costs of the Appeal.
2. The appeal is premised on grounds that:
 - 1) That the learned trial magistrate erred in law and fact by failing to consider the vital documents, evidence and information, that was duly adduced by the Appellant in his Replying Affidavit dated 26th September 2024, which noted that the Respondent herein one Gilbert Njeru Nyaga was only entitled to 0.40Ha from Land Parcel No.Kyeni/Mufu/965;
 - 2) That the learned trial magistrate erred in law and fact by directing the Court Administrator to execute all the relevant documents to facilitate transmission

of land parcel number Kyeni/Mufu/11474 measuring 0.80 HA to the Respondent herein one Gilbert Njeru Nyaga in complete disregard of the uncontroverted evidence as adduced by the Appellant that the Respondent was initially entitled to receive two shares of 0.40Ha each from Land Parcel No. Kyeni/Mufu/965 after he had paid for the said two shares of 0.40Ha each but the Respondent only paid for one share, which is why he is only entitled to receive only one share of 0.40Ha;

- 3) That the learned trial magistrate erred in law and fact by failing to consider that the Respondent herein one Gilbert Njeru Nyaga failed to honour his obligation by paying for the second share of 0.40Ha and instead filed an application demanding for the execution of the transmission documents of land parcel No.Kyeni/Mufu/11474;
- 4) That the learned trial magistrate erred in law and fact by failing to consider the Respondent misrepresented himself to the rest of the beneficiaries by convincing them that he would pay for the remaining share of 0.40Ha after the Grant is confirmed, making it a total of 0.80Ha but subsequently failing to;
- 5) That the learned trial magistrate erred in law and fact by granting the Respondent herein one Gilbert Njeru Nyaga 0.80 HA of land parcel number Kyeni/Mufu/11474 rather than 0.40 HA which effectively and illegally allowed the Respondent to disinherit the true beneficiaries of the Estate of the deceased;
- 6) That the learned trial magistrate erred in law and fact by putting into consideration the averments of the Respondent who in any case is not a survivor of the deceased and/or dependant of the deceased; and
- 7) That the learned trial magistrate erred in law and fact by awarding costs in a family succession matter contrary to well-laid-down principles in law.

Background to the Case

3. A grant of letters of administration was issued in the estate of the deceased to the appellant on 02nd June 2005. The grant was confirmed and a certificate of confirmation of grant was issued on 11th May 2023. According to the certificate of confirmation of grant, the respondent is named as a beneficiary of 0.80Ha out of land parcel number Kyeni/Mufu/965.

4. The distribution was meant to be implemented by the appellant through subdivision of the said land which was the only estate of the deceased. Contention arose from the respondent who asserts that his portion of the land is yet to be transmitted to him because the appellant refuses to facilitate such transfer. Since confirmation of the grant, the deceased's estate has mutated into 21 portions of land and the respondent's interest lies in land parcel number Kyeni/Mufu/11474 now measuring 0.81ha.

Summons for Revocation of Grant dated 17th May 2024

5. One of the beneficiaries namely Hellen Nthereru Ezekiel filed summons for revocation of the grant dated 17th May 2024 on the grounds that the respondent's interest in land parcel number Kyeni/Mufu/11474 is only limited to the 0.40Ha which he paid for. She sought revocation of the certificate of confirmation of grant under section 76 of the Law of Succession Act.
6. The respondent filed a preliminary objection to the summons for revocation on grounds that there is no legal provision under which a certificate of confirmation of grant can be revoked. The trial court on 05th September 2024, delivered a ruling on the preliminary objection, striking out the summons for revocation of grant since there is no legal basis for granting the prayers sought.

Applicant's Notice of Motion dated 25th September 2024

7. The appellant and Hellen Nthereru Ezekiel filed a notice of motion dated 25th September 2024 seeking the following orders:
 - 1) that this Honourable Court be pleased to certify the instant Application as urgent and service of the same upon the Respondent be dispensed with in the first instance to avoid the object of this application being defeated.
 - 2) that this Honourable court be pleased to set aside, review and or/vary the confirmation orders made on 11th May, 2023 and order the Respondent's share in Land Parcel No. L.R. KYENI/MUFU/965 be altered to 0.40Ha instead of 0.80Ha.
 - 3) that this Honourable Court be pleased to fix the instant matter for hearing and grant leave to the Applicants to produce new and important evidence that has arisen after the time of the hearing of the summons of confirmation of grant and rectify the error made on the face of the record by the Applicants.

- 4) that pending the hearing inter-parties of this application the Honourable Court be pleased to grant a temporary order of stay of the execution of its orders made on the 11th day of May, 2023 and all consequential orders thereof.
 - 5) that the Honourable Court be pleased to issue further orders which endeavor to meet the ends of justice.
8. The respondent opposed this application by a replying affidavit through which he stated that the court had already determined the issues raised though its ruling determining the summons for revocation of grant. He urged the court to find that the application was, in fact an abuse of the court process and calculated at denying him his right to the part of the estate he is entitled to according to the certificate of confirmation of grant.
9. This application was determined through a ruling of the trial court delivered on 19th December 2024 and which analyzed the application of Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. The court stated that it found no reason to review the certificate of confirmation of grant because the appellant failed in ensuring that the distribution proposed was without error. That the portion allocated to the respondent was not an error for the court to correct through review/rectification. The court also added that the applicants had participated in the confirmation proceedings and they gave their consent, consequently, the confirmation orders cannot be reviewed. The application was therefore dismissed.

Respondent's Summons Dated 13th May 2024

10. The respondent filed summons dated 13th May 2024. It sought orders that the Executive Officer of the Court be authorized to execute all the relevant documents to facilitate the full administration and implementation of the grant and certificate of confirmation of grant issued by this Court. In particular, it sought that the transmission of land parcel number Kyeni/Mufu/11474 measuring 0.81ha in favor of Gilbert Njeru Nyaga the applicant herein and that the costs of the application be provided for.
11. The summons was premised on grounds that the confirmed grant in the estate of the deceased was meant to be implemented through subdivision of land parcel number Kyeni/Mufu/965 into 21 portions for purposes of transmission to

beneficiaries. According to the respondent, when it came time for transmission, his parcel of land culminating from the subdivision, namely Kyeni/Mufu/11474, was not transferred to him, and the appellant refused to sign the relevant paperwork to enable him take up his land. He stated that he lives on the land and he has extensively developed it.

Replying Affidavit

12. The appellant filed a replying affidavit in opposition of the summons by the respondent. He stated that the indication that the respondent was entitled to 0.80Ha in the certificate of confirmation of grant was a mistake since according to the sale agreement, he purchased 0.40Ha and not 0.80Ha. He produced a copy of the sale agreement signed on 26th October 2012, which indicates that the respondent paid the deceased for only 1 acre of the land parcel number Kyeni/Mufu/965. He stated that the respondent wanted to take a bigger portion of the land than the one he paid for, fraudulently so, even though at some point he said that he would pay the deceased's estate for the other 0.40Ha but he did not do so.

13. The appellant stated that he refused to execute the transfer documents due to this unscrupulous behavior he had observed from the respondent whose intention was to dupe the other beneficiaries unknowingly. According to him, the respondent should only be given the 0.40Ha which he paid for, and in that case, he will sign the relevant transfer forms. That until the respondent's portion is corrected, he will not be able to sign the whole of parcel Kyeni/Mufu/11474 measuring 0.80Ha to the respondent because it is bigger than what he paid for.

Ruling of the Trial Court

14. In its ruling delivered on 18th February 2025, the trial court noted that it had already determined the issues raised in its ruling delivered on 19th December 2024 through which the review application was determined. The application was allowed as prayed and the Court Administrator directed to sign the transmission documents transferring all of parcel number Kyeni/Mufu/11474 measuring 0.80Ha to the respondent. This judgment is the subject of that ruling.

Submissions on the appeal.

15. The appeal was canvassed by way of written submissions.

16. The appellant urged the court to wholesomely re-examine the evidence adduced before the trial court to reach its finding and he relied on the case of **Karinga v Karinga & 2 others [2024] KEELC 5650 (KLR)**. He argued that the trial Magistrate failed to focus on the evidence and instead focused on technicalities which resulted in errors in law. He argued that the portion of land that the respondent is entitled to is only 0.40Ha of parcel number Kyeni/Mufu/965 for which he paid the deceased, Thus, anything more than that will result in disinheritance of the bona fide beneficiaries. This is why the impugned order of the trial court is greatly flawed as it hands the estate to an undeserving party. He relied on the case of **In re Estate of Priscillah Cherono Chepkwony (Deceased) [2021] KEHC 5316 (KLR)**. He prayed for costs.
17. The respondent submitted that he should be given the 0.80Ha which he is entitled to according to the certificate of confirmation of grant and there is no error in that. That the issue has been entertained by the trial court severally and determined in his favour, hence there was need to issue the impugned orders compelling the Court Administrator to facilitate transmission of the property to him as the rightful beneficiary. He stated that the deceased's land has since mutated into 21 portions of land and that parcel number Kyeni/Mufu/11474 is to be transmitted to him. he urged the court to find no merit in the appeal.

Issue for Determination

18. The issue for determination is whether the appeal has merit.

Analysis and Determination

19. In an appeal, the first appellate court is required to re-examine all the evidence on record in order to reach its own conclusion. This was echoed in the case of **Williamson Diamonds Ltd and another v Brown [1970] EA 1**, where the court held that:

“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”

20. The respondent is a purchaser for value of a portion of parcel number Kyeni/Mufu/965 from the deceased herein. According to the sale agreement produced as evidence, he paid the deceased for 1 acre of the said land. It was HCFA No.E003 of 2025 Estate of Ezekiel Kareko (Decsd) {Judgment} [R. Mwongo, J] Page 6 of 13

argued that this 1 acre translates to 0.40Ha. When the grant was issued, the appellant, who is the administrator of the estate of the deceased, filed amended summons for confirmation of grant dated 23rd March 2023 which was accompanied by an affidavit proposing the mode of distribution of the estate. This mode indicated that the respondent was entitled to 0.80Ha of the estate. A certificate of confirmation of grant was issued indicating this mode of distribution as proposed.

21. The appellant, through summons for rectification of grant dated 23rd April 2024, moved the court seeking rectification of the grant as to the provisions of the certificate of confirmation. According to the affidavit in support of the summons for rectification, the respondent's share of the estate had been reduced to 0.04Ha. This application was heard on 14th May 2024 and according to the court's record, the appellant had not seen the respondent. The application was dismissed.
22. At that point, the distribution had already begun and the deceased's estate was under subdivision. This is when the summons for revocation of grant were filed the following month. It is noted that the summons for rectification of grant dated 23rd April 2024, summons for revocation of grant dated 17th May 2024 and notice of motion dated 25th September 2024 were all premised on the common ground that the portion of the estate given to the respondent through the certificate of confirmation of grant is bigger than what he paid the deceased for.
23. Part of the administrator's role is to protect and preserve the estate of a deceased person such that it will not be wasted or lost into the hands of persons besides the bona fide beneficiaries. The role of an administrator of an estate was well discussed by the court in the case of **In re Estate of Makokha Idris Khasabuli (Deceased) [2019] KEHC 257 (KLR)** as follows:

“The primary roles of administrators are several. The first is collection or gathering or getting in of the assets of the estate. The second role is the protection or preservation of the assets collected or gathered or gotten in. The third one is payment of debts and liabilities of the estate from the assets gathered and preserved. Finally, is the distribution of the estate after all the debts and liabilities have been settled. Collection or gathering or getting in of assets may require filing of suits to recover estate property. Payment of debts would include clearing any loans the deceased had with any banks or other persons,

and where assets are encumbered by charges and mortgages, by having such encumbrances removed through settlement of debts and liabilities, for such encumbered assets cannot possibly be distributed at confirmation before the encumbrances have been cleared.”

(Emphasis added)

24. The appellant, while discharging his role as administrator, filed summons for confirmation of grant but he soon learned that there was an error as to the portion that the respondent was entitled to. At that point, he was obliged as part of his role, to gather in the estate and know what the deceased had disposed of and what remains. He may or may not have seen the sale agreement of land between the deceased and the respondent. Either way, he moved fast to try and fix the problem by filing summons for rectification and the other applications mentioned hereinabove.
25. These applications were all determined against him and it all trickled down to the respondent's final application through which he wanted the full 0.80Ha of the estate, now lying in parcel number Kyeni/Mufu/11474 after mutation, given to him. This history is necessary because the impugned order herein has not arisen in a vacuum, but from contribution of the various decisions of the trial court. It is, therefore, necessary to have all these factors in mind before determining whether the trial court erred in directing the Court Administrator to execute the transfer documents for purposes of transmitting the 0.80Ha to the respondent.
26. When determining summons for rectification of grant dated 23rd April 2024, the trial court stated that it found no reason to review the portion of land given to the respondent to 0.40Ha. This summons was dismissed and an attempt to have that order reviewed was also dismissed by the trial court on grounds that the appellant ought to have known better before advising the court to issue a certificate of confirmation of grant indicating a faulty mode of distribution.
27. There is no doubt that the administrator did indeed make a mistake. He learned of the mistake and promptly moved the court for rectification. To err is human and mistakes are not a new occurrence during court proceedings.. In the case of **Laban v Kiriimi; Kiriimi (Interested Party) [2022] KEELC 15111 (KLR)** the court stated:

“Mistakes are bound to happen and once they happen, a court of law is bound to consider all circumstances obtaining at each specific case.”

28. The arguments made in the summons for rectification of grant dated 23rd April 2024, the summons for revocation of grant dated 17th May 2024, and the notice of motion dated 25th September 2024 were all founded on the fact that the respondent is pushing to receive a portion of land that is larger than the one he had purchased from the deceased. The circumstances leading to the certificate of confirmation of grant were very clear but later it became evident that there was an error that should have been corrected by the court having capacity to do so.
29. It is kept in mind that the trial court had already determined the review application finding no ground to make the amendment on the certificate of confirmation of grant. However, the error appearing is one which hinders fair distribution of the estate of the deceased and it has a possibility of disenfranchising the bona fide beneficiaries. Even though it was dismissed, by the time the notice of motion dated 25th September 2024 was being filed, the sale agreement between the respondent and the deceased had been made available to the court as evidence through the appellant's replying affidavit dated 26th September 2024.
30. The agreement indicates that the deceased received Kshs.520,000/= from the respondent for one (1) acre of his land namely parcel number Kyeni/Mufu/965. With this knowledge, the trial court ought to have considered this piece of evidence as “any other sufficient reason” to review the certificate of confirmation of grant on the strength of Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. Unfortunately, this did not happen and the application was dismissed. That decision is not on appeal herein but it has a direct bearing on this particular appeal.
31. Was the trial court, therefore, in error in allowing transmission of 0.80Ha of the deceased's estate to the respondent who only purchased 1 acre (0.40Ha)? The answer is affirmatively, yes. Noting the full circumstances of this case before the trial court, it would amount to an injustice to allow the respondent to receive a portion of land which is more than that which he purchased before the deceased died, simply because the administrator made a mistake in his proposed mode of distribution at the point of confirmation of grant.

32. The role of a court in succession causes is to facilitate distribution of the estate of the deceased to the rightful beneficiaries in a just and fair manner. This includes determining what constitutes that estate, who are the bona fide beneficiaries, and what is the right mode of distribution. Whether or not a succession cause is contested, the role of the court is constant and it is limited to ensuring that the estate is inherited by the bona fide beneficiaries, nothing more. This was discussed in the case of **In re Estate of Stone Kathuli Muinde (Deceased) [2016] KEHC 3725 (KLR)**, where the court held thus;

“Succession causes are not ordinary suits in the sense where there are two rival claimants, asserting certain rights. Rather, it is a cause designed for the sole purpose of facilitating succession to the estate of a dead person. The ultimate goal being distribution of the estate amongst the persons, if they are more than one”.

33. Article 165(3)(a) of the Constitution gives the High Court unlimited original jurisdiction in criminal and civil matters. Article 165(3)(e) of the Constitution provides that the High Court has any other jurisdiction, original or appellate, conferred on it by legislation. According to section 50 of the Law of Succession Act, an appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court thereon shall be final. This jurisdiction of the High Court demands that the court must exercise its powers in dispensation of justice in such a way that the administration of the estate of a deceased person is achieved in a just manner. Moreover, Section 47 of the Law of Succession Act provides for the jurisdiction of the High Court thus:

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient...”

Conclusions and Disposition

34. It is on the basis of the expansive jurisdiction of this court that it now becomes necessary for the certificate of confirmation of grant to be reconsidered so as to limit the respondent's interest in the estate of the deceased to only the 1 acre (which translates to 0.40Ha) he purchased from the deceased in the land parcel number Kyeni/Mufu/965. It is noted that throughout the proceedings, the HCFA No.E003 of 2025 Estate of Ezekiel Kareko (Decsd) {Judgment} [R. Mwongo, J] Page 10 of 13

respondent did not confirm or deny having bought 0.40Ha of the land through the sale agreement but he always argued that the portion measuring 0.80Ha was given to him through the certificate of confirmation of grant, and that the grant should be upheld.

35. This means that the veracity and contents of the sale agreement cannot be tested by a succession court owing to lack of jurisdiction since the acquisition of that land can only be determined by an ELC court. However, for purposes of identifying the portion to be held by the respondent from the deceased's estate, the succession court is well equipped to consider the sale agreement as was exhibited as good evidence for its purpose.

36. In light of the foregoing, the appeal has merit and it should be allowed. The appeal is therefore hereby allowed and the following orders are made:

1) The Ruling delivered 18th February 2025 by Hon. C.K. Kisingiani PM in Runyenjes MC Succession Case No. 31 of 2005 is hereby set aside and substituted with the following order:

- i. Immediately following this judgment, and within a period of four (4) months, the appellant as Administrator of the estate, shall facilitate hiving out of 0.40 Ha out of land parcel number Kyeni/Mufu/11474 and have the same forthwith transferred to the respondent Gilbert Njeru Nyaga. The remaining portion of the named land to be returned to the estate, valued and sold at its prevailing/current value and the purchase price be paid into the estate. The proceeds of this sale shall be distributed equally amongst the beneficiaries named as (a)-(m) in the supporting affidavit to the summons for confirmation of grant;
- ii. Alternatively, should the Administrator delay in taking the actions directed in (i) above, the Court Administrator, Runyenjes Magistrates Court shall execute all the relevant documents to facilitate transmission of a part of land parcel number Kyeni/Mufu/11474 measuring only 0.40HA or 1 acre to the Respondent herein one Gilbert Njeru Nyaga within 30 days after the period stated in (i) above. The remaining portion of the named land to be returned to the estate, valued and sold at its prevailing/current value and the purchase price be paid into the estate account. The proceeds of this sale shall be distributed equally amongst

the beneficiaries named as (a)-(m) in the supporting affidavit to the summons for confirmation of grant;

- 2) The certificate of confirmation of grant issued on 11th May 2023 is hereby set aside. An amended certificate of confirmation of grant shall issue forthwith amending item (v) therein to state that the portion of land due to Gilbert Njeru Nyaga is 0.40Ha and not 0.80Ha. The amended certificate of confirmation of grant to indicate that the remaining portion of 0.40Ha in land parcel number Kyeni/Mufu/965 to be sold and the proceeds shared equally amongst the beneficiaries named as (a)-(m) in the supporting affidavit to the summons for confirmation of grant;
- 3) The respondent to pay the appellant costs of the trial court and of this appeal with interest at court rates.

37. Orders accordingly.

Delivered, dated and signed at Embu High Court this 8th day of October, 2025.

**R. MWONGO
JUDGE**

Delivered in the presence of:

1. Ms. Muturi – for Applicant
2. Mr. Githinji holding brief for N. Ithiga for Respondents
3. Francis Munyao - Court Assistant

