



REPUBLIC OF KENYA



KENYA LAW
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**Kisaina v Kisaina & 3 others (Succession Appeal E005 of 2023)
[2025] KEHC 17620 (KLR) (27 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17620 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION APPEAL E005 OF 2023
S MBUNGI, J
NOVEMBER 27, 2025**

BETWEEN

MARK DELDAR KISAINA APPELLANT

AND

NELSON MARTIN KISAINA 1ST RESPONDENT

KEFA MUKUSA KISAINA 2ND RESPONDENT

GRACE MUYOKA NASSIUMA 3RD RESPONDENT

BEATRICE SAONA KISAINA 4TH RESPONDENT

(An appeal from the ruling of the Honourable Magistrate J.R. Ndururi (P.M.) delivered on 2nd March 2023 and in Kakamega SUCC NO.195 of 2020 and the grant confirmed on 22nd June 2023, the parties being Grace Muyoka Nassiuma vs. Mark Deldar Kisaina & 3 others)

JUDGMENT

1. The appeal refers to the estate of the late Laban Kisaina, who died intestate on 5th February 2010. The Respondents herein had applied for letters of confirmation of the grant at the chief magistrate's court in succession cause No. 195 of 2020 in relation to the estate.
2. The letters of administration by consent of the beneficiaries had been granted to Mark Deldar Kisaina, Nelson Martin Kisaina, Kefa Mukusa Kisaina and Beatrice Salano Kisaina.
3. According to the chief's letter dated 15th June 2020, the deceased left behind the following parcels of land;
 - a. S/Kabras/Chesero/2702
 - b. S/Kabras/Chesero/2144



- c. S/Kabras/ Chesero/2143
 - d. S/Kabras/ Chesero/2146
 - e. S/Kabras/ Chesero/2147
 - f. S/Kabras/ Chesero/2678.
4. He was buried in S/Kabras/Chesero/2702.
5. The deceased had two wives –Cyrillian Achieng Kisaina and Eseri Anunda Kisaina. He left the following children:-
- a. Mark Deldar Kisaina-1st Administrator
 - b. Nelson Martin Kisaina-2nd Administrator
 - c. Kefa Mukusa Kisaina-3rd Administrator
 - d. Beatrice Salano Kisaina(daughter)-4th Administrator
 - e. Dinah Khavayi Kisaina
 - f. Priscilla Nasuma Amanya (deceased)
6. The liabilities were listed as follows;
- a. Daniel Musava Murwa
 - b. Thomas Bendera Mukabwa
 - c. Hezron Onkoba Miyienda
 - d. Julius Jomo Shichi
 - e. Geoffrey Ongoya Omurende
7. The administrators applied for the letters of confirmation of the grant on 13th October 2021. Their mode of distribution was opposed by the appellant herein claiming that he never consented to the mode of distribution and that the deceased estate was not fairly distributed. He submitted that the deceased had two families and that the deceased he had two parcels of land being S/Kabras/Chesero 1771 measuring 31.76 acres and S/Kabras /Chesero 2702 measuring 32 acres. He avers that the deceased had already subdivided the first portion to his sons, and the remainder was sold off to interested parties. For the second parcel, the family had a meeting, and it was shared among the deceased children.
8. The trial court, in its ruling dated 1st December 2021, allowed the protest and ordered the petitioners to revise their mode of distribution to ensure the deceased children get the fair share of what is owed to them.
9. In its judgment dated 2nd March 2023, the trial court addressed the protest to the mode of distribution. On the 1st application, which sought the Kakamega County Land Surveyor to visit the Land parcel No. South Kabras/ Chesero/2702 to verify the acreage occupied by the 1st, 2nd and 3rd petitioner and Cyrilla Achieng Kisaina and stay of the execution of the ruling made on 1st December, the court admitted that it had made an error from Land Parcel No. South Kabras/ Cheseno/ 2702 instead of South Kabras/ Cheseno/2207, which amended and further addressed the issue that it did not deal with the entire estate, but only the portion that was issued to Grace Muyoka Nassiuma(granddaughter)



10. In relation to the protest by one of the liability Geoffrey Ongayo Omurende, the trial court held that his claim of the deceased estate was from a sale between himself and the deceased's son, not the deceased, and thus he had intermeddled and thus dismissed his claim.
11. On the 1st petitioner's claim that Grace Muyoka Nassiuma had been allocated the 2.80 Ha of the Land Parcel No. South/ Kabras/ Cheseno/2147, which should be his, the trial court held that the land was already distributed by the deceased during his lifetime, and what was in dispute was Land Parcel No. South Kabras/ Cheseno/2702, which the court noted that Grace Nassiuma and her siblings had inherited the 0.5 Ha, which was part of their mother's share, and were equally entitled to the inheritance as the deceased daughter.
12. The trial court held that the petitioners' protest was misplaced as it had been agreed by the beneficiaries that the 4th Petitioner exchange the quarter acre of her entitlement outside the homestead with Grace and her siblings' quarter acre instead of the homestead so that the petitioner was to get 1 ½ acres of the land, same as Grace and her siblings.
13. The trial court dismissed the claim that the petitioner should inherit more than his siblings for this meant disinheriting his late sister's children, yet they have a rightful claim to the estate. They are entitled to inherit their deceased mother's share.
14. The trial court further addressed the protested acreage of the land, stating that what was distributed was 9.93 Ha, while the correct acreage was 10.34 Ha according to the county Surveyor's report. The total acreage of the land Parcel No. South / Kabras/ Cheseno/ 2702 was 12.62, and instead of dismissing the entire proposed mode of distribution, the court directed that the petitioners adjust the mode of distribution. The court dismissed the claim by the 1st petitioner that he was entitled to 2.0 acres, yet his other siblings got the same share and further noted that the 1st petitioner had already sold off his part of the estate to other third parties, such as Geoffrey Ongayo Omurende, who was intermeddling, and found that the 1st petitioner had been fully and fairly considered.
15. The court ordered a site visit by the Land surveyor for the Land Parcel No. South Kabras/ Cheseno/2702 to determine the right acreage, and the variance will be distributed equally among the beneficiaries.
16. The appellant, being dissatisfied with the ruling by the Honourable magistrate, filed this amended memorandum appeal dated 3rd July 2023, objecting to the ruling and confirmation of the grant based on the following grounds;
 - a. That the learned magistrate erred in law and in fact by including the liabilities during the confirmation of the grant
 - b. That the learned trial magistrate erred in law and in fact in confirming the grant in the absence of the appellant, who is also the administrator, being Mark Delar Kisaina
 - c. That the learned magistrate erred in law and in fact in ignoring the liabilities that have been residing on the parcel of land for the past 10 years.
 - d. And for being allocated a portion less than what they bought and what they occupy on the ground
 - e. That the learned magistrate erred in law and in fact by confirming the grant using the county surveyor's report, who had indicated less acreage by 2 acres as compared to the ground.



- f. That the learned magistrate erred in law and fact by confirming the grant and leaving out part of the properties of the deceased being L.R. NO S/Kabras/Chesero/2704
 - g. That the signatures relied upon in consenting were forged and not all beneficiaries appended their signature, in particular, the appellant denies that he ever signed the consent
 - h. That the learned magistrate erred in law and fact by allowing buyers to be included in the succession process.
 - i. A declaration that the sale of the estate before obtaining a grant of letters of administration is null and void.
 - j. That the learned magistrate erred in law and fact when he relied on impartial report by the surveyor.
 - k. He prays that the impugned ruling and confirmation of the grant be set aside and the estate be re-distributed fairly
17. In his submission dated 1st November 2024, the appellant avers that he did not consent to the mode of distribution despite being one of the administrators. He recognised one liability, Kaskon Mwakha, whom he claimed bought his share from the deceased, while the rest of the liabilities bought their shares from the beneficiaries and avers that they should all be left out.
 18. That the other administrators forged his signature in the consent form. He claimed that some acres were left out for there is discrepancy between what was on the ground and what the county surveyor had indicated on the sketch plan. And that his concerns raised with the county surveyor were dismissed.
 19. He claimed that the mode of distribution that the lower court relied on had left out two of the deceased daughters, Ruth and Beatrice and that from the meeting chaired by Enock Imbuye, the family did not agree on the mode of distribution.
 20. He further submitted some assets were omitted and that he was not present when the grant was heard and determined.
 21. The respondents filed their submissions on 26th October 2024. Where they aver that the appeal is an abuse of the court's process, since the appellant had already filed for a review of the ruling delivered on 31/08/2023 by the trial court. They cited the case of Serephen Nyasani Munge vs. Rispah Onsare (2018) eKLR and relied on section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules 2010.
 22. According to the respondent, a party cannot seek a review and an appeal in respect of the same ruling order or judgment since seeking both an appeal and a review is an abuse of the court's process and amounts to forum shopping.
 23. Without prejudice in case the court admits the appeal, they raised one issue as to whether the appellant was heard and whether there was a fair distribution over the land parcel South/Kabras/Chesero/2702.
 24. They relied on the appellant's application dated 29th December 2022, together with the protest by Geoffrey Ongaya Omurende and relied on the court's analyses, which stated that the appellant was given a bigger share than was due to their late sister's children.
 25. They submitted that from the ruling, the court noted there was a discrepancy in the acreage at page 129 and made reference to the fact and directed the administrators to adjust the proposed shares accordingly.



26. They submit that the appellant seeks to be granted a larger share than the other beneficiaries to the detriment of their late sister's children and their two siblings, despite him having sold part of his share to Geoffrey Ongaya, which amounted to intermeddling.
27. They believe that the trial court handled the issues raised by the appellant, and on the issue of acreage, it can be dealt with by this court without going back to the drawing board
28. They hold that the findings by the trial court were fair and the appellant would not be disenfranchised in any way, and prays that the appeal be dismissed with costs.

Analysis and determination.

29. It is a cardinal principle of appellate review that an appellate court will not lightly interfere with findings of fact by a trial court unless it is shown that such findings were based on no evidence, were arrived at by considering irrelevant matters, or where the court plainly misdirected itself.
30. In the case of *Peters v Sunday Post Ltd* [1958] EA 424, the Court stated that an appellate court should exercise caution and defer to the advantage enjoyed by a trial court, which sees and hears the witnesses directly
31. I have analysed the Memorandum of appeal, record of appeal and the parties' submissions and I isolate the following issues for determination;
 - a. Whether the appeal is procedurally competent given the review application;
 - b. Whether allegations of fraud/forgery of signatures were proved.
 - c. Whether the trial court erred in finding that there was intermeddling;
 - d. Whether the trial court dealt with and considered the appellant's complaints on the mode of distribution, acreage and omitted parcels.
 - e. Whether reliance on the County Surveyor's report and the ordered site visit was appropriate.
 - f. Whether the appeal should succeed
32. The first issue for determination is whether the appeal was unprocedural, as the appellant had first filed a review raising the same issues and the lower court rendered a determination.
33. The respondents contend that the appeal is an abuse of process, as the appellant had filed an application for review dated 9th March 2023 against a ruling in the same cause, invoking sections 80 of the *Civil Procedure Act* (Cap 21) and Order 45 of the Civil Procedure Rules, 2010. They rely on the case of *Serephen Nyasani Menge v Rispah Onsare* [2018] eKLR, where it was held that simultaneous pursuit of review and appeal on the same decision amounts to forum shopping and an abuse of process.
34. In *Olayo v Olayo (Succession Appeal E007 of 2022)* [2024] KEHC 5958 (KLR), the court affirmed that a party who elects to appeal forfeits the right to seek review of the same order, and vice versa, to prevent multiplicity of proceedings.
35. Similarly, in *In re Estate of the Late Kibet Sang (Deceased) (Succession Cause E002 of 2023)* [2025] KEHC 2736 (KLR), it was held that dissatisfaction with a reviewed decision must be redressed by appeal, not a further review.
36. The law on review and appeal is clear under section 80 of the *Civil Procedure Act*. One must not pursue both remedies in respect of the same order or judgment since that would amount to forum



- shopping and an abuse of process. The Court must guard judicial resources and prevent multiplicity of proceedings.
37. I find that the appeal is against the ruling of the review Application.
 38. In his appeal, the appellant avers that he never signed the consent to the mode of distribution, despite being one of the administrators of the estate. The signature said to be his is a forgery, therefore the confirmation of grant was obtained fraudulently. Therefore this warrants revocation of the confirmed grant under Section 76 of the Laws of Succession Act (cap 160) of the *Law of Succession Act*.
 39. Section 76 of the Act allows the court to revoke a grant where it was obtained through false statements or concealment of material facts. In *In re Estate of Stephen Kirubi Gatu (Deceased) (Succession Cause E014 of 2023) [2025] KEHC 6434 (KLR)*, the court revoked a grant where a beneficiary's signature on a consent for confirmation was forged, holding that such fraud vitiates the entire process.
 40. Similarly, in *re Estate of Kipsoi Cheramgoi (Deceased) (Succession Cause 123 of 2023) [2024] KEHC 15382 (KLR)*, an allegation of forged consent to rectify a grant was upheld upon forensic evidence, leading to vacation of the confirmation.
 41. Serious allegations of fraud and forgery require cogent proof. The law is well settled under sections 107-109 of the *Evidence Act*: "He who alleges must prove." Thus, the burden of proof that his signature was forged lay on the appellant. It was his duty in support of this serious claim to call upon an expert handwriting analyst who would compare both signatures, he could have even brought witness to support his claim that he was not present when the consent to the mode of distribution was being signed however a mere assertion that he was not present and that he did not sign the consent is insufficient as it lacks corroboration.
 42. The lower court record shows the grant issued by consent on 13th October 2021, with all four administrators listed, and protests addressed thereafter. The appellant participated in proceedings, including the survey, without raising forgery until this appeal. In the absence of cogent proof, I find no basis to disturb the consents. This ground fails.
 43. The other issue that was raised was that the trial court had ignored the liabilities that had been residing on the parcel of land for 10 years and allocated less land than what they had bought.
 44. I note that the trial court, in its ruling dated 2nd March 2023, addressed the protest by one Geoffrey Ongayo Omurende, holding that he bought his share from the appellant. He purchased a total of 1.6 Ha and was allocated 0.8 Ha.
 45. The appellant protests the inclusion of liabilities such as Daniel Musava Murwa, Thomas Bendera Mukabwa, Hezron Onkoba Miyienda, Julius Jomo Shichi, and Geoffrey Ongoya Omurende in the distribution, claiming they purchased from beneficiaries after the deceased's demise, constituting intermeddling under section 45 Law of Succession. He recognizes only Kaskon Mwakha, stating that he bought his share before the deceased's demise.
 46. Section 45 prohibits intermeddling and renders unauthorised dealing of the deceased estate null and void. In *in re Estate of Ndegwa Warui (Deceased) (Succession Cause 347 of 2019) [2024] KEHC 791 (KLR)*, the court held that a purchaser's interests from an intermeddler are unprotected, and such sales are null.
 47. Similarly, in *In re Estate of David Kipkenei Chelal (Deceased) (Succession Cause 56 of 2023) [2025] KEHC 12859 (KLR)*, pre-confirmation purchases were declared invalid, with the estate reverting for redistribution.



48. The chief's letter of 15th June 2020 lists these as liabilities, implying acknowledged claims. The trial court dismissed Geoffrey Ongoya's claim as intermeddling in a sale by a son, not the deceased, but adjusted the distribution to account for occupations. The appellant himself sold portions to third parties, including Ongoya, admitting intermeddling on his part. Section 82 LSA prioritises settling liabilities such as debts and valid claims before distribution. Under the *Land Registration Act, 2012*, Long occupation alone does not confer title without a valid transmission. However, equity may protect bona fide occupants if they brought the property from the deceased. I find that the trial court was right in excluding the liabilities that purchasers of the estate have from the administrators as opposed to the deceased.
49. On whether the trial court erred in its impugned ruling by relying on the surveyor's report and exclusion of some of the deceased properties to the detriment of the beneficiaries.
50. In his appeal and submissions, the appellant challenges the report and sketch map by the county surveyor, stating that it left out some of the deceased's acreage of land. He avers that the title deed South/Kabras/Chesero/2704 reads 0.42 Hectares, yet on the surveyor's list it reads 0.88 hectares. He further avers that the county surveyor's report indicates 10.34 Ha versus 12.62 Ha total for L.R. No. S/Kabras/Chesero/2702, alleging irregularities and 2 acres of the land were still left undistributed and accounted for.
51. The determination of acreage and boundaries is, by its nature, a fact-sensitive exercise. In this, the trial court relied on the County Surveyor's report, which indicated a discrepancy between the sketch's acreage and actual measurement. Where a professional officer's report is placed before the court, the court is entitled to rely on it unless it is shown to be plainly wrong.
52. In *in re Estate of Pila Musa Ang'aha alias Pila Ang'aha (Deceased) (Succession Cause 78 of 2022) [2025] KEHC 2252 (KLR)*, an unchallenged survey report on acreage was relied upon for distribution.
53. In *Amunze & Another v [Opponents] (Environment & Land Case 123 of 2022) [2025] KEELC 6848 (KLR)*, the court upheld a surveyor's report prepared per court order, dismissing discrepancy claims without expert rebuttal.
54. The trial court noted the discrepancy being 9.93 Ha distributed against the 10.34 Ha, a total of 12.62 Ha per report. To remedy the discrepancy, the court ordered an independent site visit to ascertain the correct acreage and directed that any variance be distributed equally. This is a measured and proper remedy that seeks to rectify any error while preserving the rights of beneficiaries. The appellant's on-site presence is undisputed, but his unsubstantiated dismissal by the surveyor does not impugn the report. He did not file a counter report to rebut the county surveyor's initial report stating the 16 meters by 48 meters by 60 meters of the Land Parcel South / Kabras/ Chesero/2702, which he claimed was ignored by the surveyor.
55. On whether the trial court addressed the appellant's objections on distribution despite his being absent as one of the administrators. The appellant avers that the confirmation on 22nd June 2023 proceeded without his presence, despite being a co-administrator, violating natural justice.
56. Under Rule 73 of the Probate and Administration Rules, notice of confirmation must be served on all administrators and beneficiaries. However, section 71 Act empowers the court to confirm a grant where the estate is identified and distribution proposed justly. In *In re Estate of Amos Muthui Theuri (Deceased) (Succession Cause 45 of 2024) [2025] KEHC 12774 (KLR)*, confirmation was upheld despite one administrator's absence, as they had notice and failed to appear without justification; the process concerns proper identification, not unanimous presence.



57. The trial court record indicates that the trial court made considered findings on the mode of distribution, such as recognising that there was a typographical error that was made from land parcel No. South Kabras/Cheseno/2702 instead of South Kabras/ Cheseno/2207.
58. The trial court also noted that there were certain portions distributed by the deceased in his lifetime and that the family members had even made some adjustments to what was initially meant for the 4th petitioner and exchanged it with the deceased grandchildren for equality purposes.
59. The court equally acknowledged that there was a disparity in the acreage and noted that Land parcel South Kabras/ Cheseno/2147 was not included in the proposal, although the distribution was not in dispute. The court equally noted from the sketch plan the disputed acreage that was not accounted for was to be shared equally among the deceased daughters who had been left out in the distribution and thus the appellant who had been allocated 1.2 Ha claimed he is entitled to 1.6 Ha which was more than the other beneficiaries although the record indicate that he had already sold part of his share to a third party.
60. The appellant sought to be allocated a larger portion than other children and to disinherit or diminish the shares of his late sister's children. The trial court carefully examined the family meeting records, exchanges and the evidence of prior allocations. It was accepted that some minor exchanges had been agreed by the family and that the grandchildren's rights flowed from their deceased mother's share. The magistrate, therefore, refused to allocate the appellant more than his lawful share.
61. The appellant's complaint that he was not heard, or that the trial court confirmed the grant in his absence, is not supported by the record: the proceedings and the magistrate's notes indicate the appellant participated by filing protests and applications, and the court addressed his grievances in the ruling. The trial court's directions for correction of the draft distribution show active engagement with contested points. The record indicates the appellant had notice via the protest hearings and his application of 29th December 2022. His absence appears self-induced, possibly tactical. No prejudice is demonstrated, as his objections were substantively addressed. This ground lacks merit.
62. This court has made an overall analysis of the issues raised by the appellant and the respondent and observes that the trial court conducted a careful and granular analysis of the contested matters. It identified and corrected errors, directed further factual inquiries that included the site visit to determine the actual acreage of South Kabras/Cheseno/2702 and made orders that would ensure equitable distribution of any discovered surplus or shortfall.
63. Further, I note that the appellant's claim of forgery and fraud was not supported by evidence of the kind required to displace the court's reliance on the documentary record and the family's own admissions.
64. That there was indeed intermeddling by third parties, and the court was right in declining to validate unlawful transactions and protect the estate.
65. The appellant's plea for a larger share lacks legal merit in the absence of proof that the deceased intended such preferential treatment or of binding family agreements that overrode statutory entitlements.
66. In the foregoing, I find that the appeal lacks both procedural and substantive merit.
67. For the reasons given above, I make the following orders:
 - a. The appeal is dismissed in its entirety.
 - b. The ruling of the Principal Magistrate delivered on 2nd March 2023, and the confirmation of grant dated 22nd June 2023 in Kakamega Succession Cause No. 195 of 2020 are hereby upheld



- c. The directions contained in the trial court's ruling regarding the site visit by the County Surveyor and the equal distribution of any variance shall be implemented forthwith by the administrators of the estate. The administrators are directed to comply with the trial court's directions and to file a compliance report to the trial court within 30 days of this judgment showing the steps taken and the results of any site visit and adjustment of shares.
- d. Mention 15.1.2026 before the trial court for further directions.
- e. This being a family dispute, each party shall bear their own costs.
- f. It is so ordered
- g. Right of Appeal 30 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 27TH DAY OF NOVEMBER, 2025.

S.MBUNGI

JUDGE

In the presence of:-

CA: Angong'a

Appellant present .

Respondent present.

Mr Magina for the Respondent absent.

Obura for the Appellant absent.

