

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
SUCCESSION APPEAL NO. E013 OF 2024
IN THE MATTER OF THE ESTATE OF NAOMI MUEKE
NGEI ALIAS MUEKE NGEI (DECEASED)

BETWEEN

PATRICK MUTUA NGEI.....APPELLANT

AND

CECILIA MBINYA KASYOKI

MALAIKA KIOKO

JOSEPHINE LUNDE MATHEKA.....

RESPONDENTS

(Being an appeal from the ruling of Hon. D.N Sure (Principal Magistrate) delivered on 29th October 2024 in MCSUCC Case No. E094 OF 2022 at the Chief Magistrates Courts Kangundo Law Courts)

RULING

Background

1. This appeal arises from the ruling in MCSUCC Case No. E094 of 2022 in which the appellant contends that the learned trial magistrate sanctioned an unequitable distribution of the Estate of the Late Naomi Mueke Ngei alias Mueke Ngei. Seeking to set aside the ruling, the appellant filed a memorandum of appeal dated 18th

November 2024 raising five (5) grounds reproduced verbatim as follows. That:-

- 1. The learned trial Magistrate erred in fact and law by failing to consider values of the different sections of the property as per the valuation report hence arriving at a wrong conclusion.**
- 2. The learned trial Magistrate failed to appreciate that after removing the area occupied by Mausoleum, parties could not get 2.47 Ha.**
- 3. The Learned trial Magistrate failed to consider equity and fairness and only relied on size without considering the value of each property.**
- 4. The court heard and determined a matter without Pecuniary Jurisdiction as the value of the estate is 47.5 as per the valuation report which was neither controverted.**
- 5. The learned trial Magistrate erred in law and fact in relying on conjecture, supposition and on extraneous matters.**

2. Consequently, the appellant prays that the decision of the subordinate court to be set aside and vacated, the protest be allowed, such other relief as this court may deem just be

granted. The appellant also seeks costs of both the lower court proceedings and this appeal.

3. The appeal was canvassed through written submissions. The appellant filed submissions dated 30th May 2025 in support of the appeal, while the respondents' filed submissions dated 30th May 2025 in rebuttal. A summary of these submissions are set out below.

Appellant's Submissions

4. The appellant contests the proposed mode of distribution in relation to two specific properties namely Kangundo/Mbilini/7 and Muputi/Kiima Kimwe/1761.
5. With respect to Kangundo/Mbilini/7, the appellant submits that the Summons for Confirmation of Grant proposes to allocate each beneficiary 2.47 Ha. He contends that the proposal fails to take into account that a portion of this property hosts the mausoleum of the Late Honourable Paul Ngei, which has been declared and gazetted as a monument, thereby vesting ownership in the Government. He argues that the area occupied by the mausoleum measures approximately 0.223 Ha, yet it has been included in the portion proposed for allocation to the appellant. He maintains that this area, occupied by the mausoleum, should

first be excluded from the distributable acreage before any equitable division among the beneficiaries is undertaken.

6. The appellant further submits that the respondents have allocated themselves the most prime and commercially strategic portions of the property, specifically those parcels fronting Mbilini Market. He urges that this constitutes a clear inequity and undermines the principle of equal and fair distribution among all beneficiaries, which is contrary to the requirements in Section 71 of the Law of Succession Act (Cap 160).
7. Regarding Muputi/Kiima Kimwe/1761, the appellant submits that the property has been encroached upon by squatters. He urges that the situation should first be thoroughly investigated and the land lawfully restored to the Estate of the Deceased before any subdivision is undertaken. In support of his submission, he relies on the decision in **Re Estate of Johana Ochesa Mbeba (Deceased) (Succession Cause 241 of 1999) [2022] KEHC 13496 (KLR)**.
8. The appellant also submits that the trial court lacked pecuniary jurisdiction to determine this matter. He contends that the valuation report, duly prepared and submitted by a certified valuer unequivocally places the total gross value of the Estate of the Deceased at Kshs. 47,500,000 (Kenya Shillings Forty Seven Million Five Hundred Thousand) of which report was submitted without objection.

9. It is his case that this figure clearly exceeds the statutory pecuniary jurisdictional limit of the Magistrate's Court as prescribed under Section 48 of the Law of Succession Act as read with Section 7 of the Magistrates' Court Act. He relies on the decisions in **Owners of the Motor Vessel "Lilian S" vs Caltex Kenya Limited [1989] KLR 1, Kenya Ports Authority vs Modern Holding [EA] Limited [2017] eKLR and Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & Others (2012) eKLR** to buttress this submission.
10. In conclusion, the appellant urges this court to allow his appeal and award him costs of the appeal.

Respondents' Submissions

11. The respondents submit on the grounds raised in the memorandum of appeal. On the first ground, they support the conclusions of the trial court asserting that the entirety of L.R. No. Kangundo/Mbilini/7 was prime land, including the portion allocated to the protestor's/appellant's family.
12. The respondents contend that the valuation report by Verity Management Limited was of no probative value. They urged that it was not intended to assist the trial court to arrive to a just, fair and equitable decision, but rather to advance the protestor/appellant personal interests at the expense of the expense of the other beneficiaries of the estate. They emphasised that the valuation report was not

binding on the court and the court could deviate from it. To support this submission, they rely on the decision in **George & another v Babu (Civil Appeal E130 of 2023) [2024] REHC 5986 (KUR) (24 May 2024) Judgment**.

13. On the second ground, the respondents submit that the appellant and his counsel, failed, ignored and/or refused to heed the directions given by the trial court regarding the acreage of the mausoleum of the late Hon. Paul Joseph Ngei. They noted that the trial court found the two surveyors reports on the mausoleum acreage to be inaccurate, as they included areas that ought not to have included.
14. On the third ground, the respondents reiterate that the trial court was not bound by the valuation report, which it rightly found to be of no probative value.
15. On the fourth ground, the respondents submit that they do not understand what 47.5 refers to. They maintain that the estate of the deceased was valued at kshs 7 Million and point out that the pecuniary jurisdiction of a Principal Magistrate is kshs 10 Million. Accordingly, they urge that the matter was properly within the pecuniary jurisdiction of the trial court. They further contend that the issue of the jurisdiction of the court was not raised at the trial of the succession cause and cannot now be raised as a ground for appeal. It is their case that the appellant is engaged in forum shopping noting that he himself signed the affidavit in support of the petition wherein he deponed that the value of

the Estate of Naomi Muoko Ngei (Deceased) was Ksh. 7 Million. They, therefore, urge that he is estopped from asserting that the trial court lacked jurisdiction.

16. On the last ground, the respondents submit that magistrate relied on both fact and law in reaching her decision, which they describe as fair, just and equitable in the circumstances of the case before her. They argue that the appellant failed to discharge the burden of proof required to substantiate the allegations in his affidavit of protest. In their view, no concrete grounds have been advanced to warrant this court to interfere with the decision of the trial court.

17. The respondents conclude by urging this court to dismiss the appeal with costs.

Analysis and Determination

18. I have considered the grounds of appeal, examined the record of appeal and reviewed the submissions of both parties. The issues that arise for determination are whether the trial court acted without jurisdiction, and whether the trial court failed to consider fairness and equity in distribution of the estate.

19. This is a first appeal the principles are well settled. As articulated in **Selle v. Associated Motor Boat Co. Ltd [1968] EA**, a first appellate court has a duty to examine matters of both law and facts and subject the whole of the

evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis. However, the court must bear in mind that it did not have the advantage of seeing and hearing the witnesses first hand.

20. I now turn to the issues for determination. The appellant contends that the trial court lacked jurisdiction because the total gross value of the Estate of the Deceased was Kshs.47,500,000 (Kenya Shillings Forty Seven Million Five Hundred Thousand) whereas the pecuniary jurisdiction of a principal magistrate is capped at Ksh.10,000,000. The respondents on the other hand maintain that the value of the deceased's estate is Ksh.7,000,000 a figure which the appellant himself deponed to, in the trial court.

21. The pecuniary jurisdiction of a principal magistrate is expressly stipulated in the Magistrates' Court Act in section 7 (c) which provides that:

**"A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed-
(c) ten million shillings, where the court is presided over by a principal magistrate"**

22. Further, the Succession Act provides in section 48 (1) that:

"Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of

section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under section 7 of the Magistrates' Courts Act (Cap 10)."

23. The Supreme Court, in **Macharia & another v Kenya Commercial Bank Ltd & 2 others [2012] KESC 8 (KLR)**, pronounced itself on jurisdiction in the following terms:

"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

24. In the instance case, the appellant challenges the jurisdiction of the trial court based on a valuation report prepared by Verity Management Limited dated 12th November 2023. At page 19, the report outlines 7 parcels of land under L.R. No. Kangundo/Mbilini/7 assigning them a cumulative value of Ksh 47,500,000. It is noteworthy that the valuers of this report were instructed by the appellant.
25. Equally significantly, is the affidavit in support of petition for letters of administration intestate, dated 1st

August 2022 in which all parties in this matter deponed that the entire estate of the deceased comprising Kangundo/Mbilini/2, Kangundo/Mbilini/18, Kangundo/Mbilini/7 and Muvuti / Kiima Kimwe / 1761 had a total estimated value of Ksh 7,000,000.

26. It is therefore curious why the appellant, upon receiving the valuation report did not raise the issue of jurisdiction before the subordinate court. This lends credence to the respondents' allegation that the appellant is forum shopping. The appellant cannot approbate and reprobate at the same time. Be that as it may, I note that the trial court considered this report by Verity Management Limited and concluded that it was not clear why it was claimed the property occupied by Simon Muthusi was more prime than the rest. Indeed, the trial court opted to conduct a site visit on 2nd October 2024 to ascertain the true state of affairs. In her judgment, she observed that without the site visit, the evidence and exhibits would not have shed light on ground realities. It is therefore evident, that the trial court did not accord the valuation report any probative value. Coupled with the fact that the appellant had deponed and signed the affidavit in support of petition for letters of administration intestate, declaring the value of the estate as Ksh 7,000,000 conclusion am satisfied that the trial court acted within jurisdiction.

27. The second issue is whether the trial court failed to consider fairness and equity in distribution of the estate. It is worth noting that all parties in this appeal are the grandchildren of the deceased representing the respective families of the four children of the deceased.
28. From the record, the deceased subdivided her land to her sons in the late 1950's, while she was still alive, and they each settled on their respective portions and established homesteads. This fact was not disputed by the appellant.
29. Having re-evaluating the evidence, I am persuaded that the land was subdivided equally among the beneficiaries with due consideration given to where each beneficiary had settled. I further note that these subdivisions have existed for over seven decades without dispute. None of the deceased's children ever raised concerns about their portions being less prime. Indeed, they lived peacefully and the appellant's father, Hon. Paul Ngei did not disturb his brothers, in his lifetime.
30. Moreover, when the trial magistrate conducted the site visit, she considered the features on the ground and concluded that no beneficiary would agree to relocate their permanent features (whether vacant area or developed areas) just to appease the appellant particularly given that his father, Hon. Paul Ngei had not disturbed his brothers, in his lifetime.

31. On the appellant allegation that the respondents allocated themselves the most prime and commercially valuable parcels I note the following;
32. During the site visit, the trial magistrate found that the shops allegedly making the respondents portion more prime, were not shown to the court.
33. She observed that instead of commercial properties she only saw two occupied bungalows. Having raised the issue with both the county and private surveyor, she concluded that the entire land was prime depending on developments.
34. I am inclined to agree with the trial magistrate. I would expect the homestead of Hon. Paul Ngei to be considered more prime because of the mausoleum. I therefore find no merit in the appellant's contentions that the trial court failed to consider equity and fairness in the distribution of the estate.
35. On the issue of the mausoleum, although the appellant contends that the learned trial magistrate failed to appreciate that after removing the area occupied by Mausoleum, parties could not get 2.47Ha, I note that the trial court observed,

“However, and most probably with the consent of the protester and the rest of his siblings, they consented to their mother's remains being buried next to the Hon. Paul Ngei. They seem to have

agreed to have the area fenced. There is also another fenced area within the fenced burial site where a son of Hon. Paul Ngei has been buried. All these areas were included by both surveyors as part of the mausoleum and this is erroneous. What the surveyors should have measured is the structure containing the grave of Hon. Paul Ngei. This should not have been extended to his wife or the area where the son was buried. By extension, I find the measurement given by Dw1 to be erroneous since he included a structure and fence that was outside the mausoleum. That area containing the structure containing the grave, and fenced to include the remains of his wife is the only area that can be considered a mausoleum. The area containing the house, garage, tanks, unrelated structures, and open space forms part of the estate of Hon. Paul Ngei."

36. In my considered view, the trial court correctly found that both surveyors' measurements of the mausoleum were inaccurate, as they included unrelated structures. The mausoleum properly constituted only the area containing the grave structure and fenced to include the remains of his wife.
37. My understanding therefore, is that once the acreage of the mausoleum has been accurately established, it should

be subtracted and the remaining acreage divided equally among the four children of the deceased.

38. Before concluding, I note that the appellant has raised the issue of squatters on of Muputi/Kiima Kimwe/1761. This should not delay the distribution because even the respondents agree that the appellant is free to take an equal portion in that property that has not been invaded by squatters. I reiterate the statement of the trial court finding that it is the duty of the administrators to file the appropriate case in court since the title deed shows the land belonged to the deceased.

39. In conclusion, I find no reason to interfere with the decision of the trial court save to clarify that once the acreage of the mausoleum has been established, this being the area containing the grave structure, and fenced to include the remains of his wife, the same should be subtracted and the remaining acreage divided equally among the four children of the deceased.

40. Since this is a family matter each party to bear its own costs.

It is so ordered.

Dated, signed and delivered at Machakos this 14th day of January 2026.

RHODA RUTTO
JUDGE

In the presence of:

.....for Appellant

.....for Respondent

Selina Court Assistant

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