

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

(CORAM: R. MWONGO, J.)

FAMILY APPEAL NO. E018 OF 2025

IN THE MATTER OF THE ESTATE OF WANGIRI KAVOTE (DECEASED)

CATHERINE WAWIRA WAMBETI.....1ST
APPELLANT/APPLICANT
DAVID KARIUKI.....2ND APPELLANT/APPLICANT
VERSUS
MARGARET WANGARI.....RESPONDENT

R U L I N G

The Application dated 18th September 2025 (First Application)

1. The applicant filed a notice of motion dated 18th September 2025 seeking orders that:
 - 1) Spent;
 - 2) This Honourable Court be pleased to set aside and stay the execution of the Ruling entered on 03rd September 2025 in Embu Chief Magistrates Court Succession Case No. E219 of 2021 pending Hearing and determination of this application;
 - 3) This Honourable Court be pleased to stay the execution of the Ruling entered herein on 03rd September 2025 in Embu Chief Magistrates Court Succession Case No. E219 of 2021 pending Hearing and determination of the Appeal;
 - 4) Spent (by consent);
 - 5) A prohibitory Order be issued directing the Embu West Sub County District Land Registrar to restrict the Respondent herein, her servants, agents and/or any person authorized by her from any further dealing, mutation or transferring any portion out of Land Parcel no Gaturi/Githimu/7377 pending hearing and determination of the appeal;
 - 6) This Honourable Court be pleased to issue an Order calling for the file in Embu Chief Magistrate's Court Succession Cause No. 219 of 2021 in respect to the estate of Wangiri Kavote-(Deceased) and examine the issue of Pecuniary jurisdiction of the Resident Magistrate who handled the suit and find

that section 7 of the Magistrate's Court Act No. 26 of 2015 was contravened and quash all Orders issued thereto, order for fresh hearing, determination and final disposal of the same by a different court since the estate was valued more than Kshs.15,000,000.00(Fifteen million Kenya shillings) at the time of filing the suit. The Hon Resident Magistrate did not possess the requisite Jurisdiction as she had a Pecuniary Jurisdiction of only Kshs.5.000,000.00 (Five million Kenya shillings only); and

- 7) The costs of this application be provided for.
2. The application was supported by the grounds set out on its face and in the supporting affidavit thereof.
3. The applicants, who are grandchildren of the deceased, deposed that the estate of the deceased comprises of land parcel number Gaturi/Githimu/7377 valued at Kshs.15 million. That the trial court, while lacking pecuniary jurisdiction, determined this estate and disinherited them as bona fide dependants in light of section 29 of the Law of Succession Act.
4. That even though the respondent admitted to omitting the names of these dependants, the trial court created more confusion in the matter and failed to revoke the grant as it should have done. They stated that the trial court failed to pay regard to their arguments in giving the whole estate to the respondent who is in the process of scouting for a buyer for the said property. That the respondent does not care that the burial site of their kin on the property is of intrinsic value to them. This is why they seek stay of execution of the trial court's decree.

Replying Affidavit

5. Through her replying affidavit dated 29th September 2025, the respondent stated that the 1st applicant and her siblings are children of her late sister called Wambeti Kaboti. That the deceased gave gifts of land parcel numbers Gaturi/Githimu/ 7379, to Wambeti Kaboti. The 2nd applicant was given land parcel number Gaturi/Githimu/7381. That she is the only child of the deceased who did not receive any property from the deceased. For that reason the 2nd applicant supported her to file the succession cause at the trial court in order to enable her to inherit land parcel number Gaturi/Githimu/7377.
6. She stated that the 1st applicant failed to inform the court that her late mother was given parcel number Gaturi/Githimu/7379 by the deceased as a gift *inter vivos* which she and her siblings inherited through Embu MC Succ. Cause No. E232 of 2024. She denied that the value of the property is Kshs.15 million, and stated that the trial court had jurisdiction to determine the matter before it. She argued that the

burial site is on the 2nd respondent's portion of the land and that the matter of the sentimentality of the burial site has only been raised on appeal for the first time. She also denied that the grandchildren of the deceased were also her dependants.

The Application dated 31st October 2025 (second application)

7. At the point of issuing interim orders in the first application, the court also ordered that the applicants file a formal application on valuation. In compliance, they filed a notice of motion dated 31st October 2025 seeking the following orders:
 - 1) Spent;
 - 2) That the Court be pleased to admit the new evidence regarding the valuation of the suit property land parcel No Gaturi/Githimu/7377, which reveals that the property is valued at Kshs.15 million;
 - 3) That the Court be pleased to grant leave to the Applicants to produce, rely upon and introduce into evidence the annexed valuation report/evidence of the value of land parcel No Gaturi/Githimu/7377 (suit property);
 - 4) That the Court be pleased to admit this new evidence as it was not availed by the Respondent at the time of the filing and hearing of the initial proceedings at the trial court and is crucial to the just determination of the appeal;
 - 5) That the Court be pleased to process this application and grant such further relief as it may deem just and fit in the circumstances; and
 - 6) The costs of this application be provided for.
8. The application is premised on grounds set out on its face and facts deposed in the supporting affidavit thereof.
9. It is the applicants' case that the valuation report indicating that the suit property is valued at Kshs.15 million, evidence that was not available at the time of the trial but it has now become available. That this evidence will have a bearing on the outcome of the appeal especially in determining the issue of the trial court's jurisdiction. They stated that when petitioning for the grant, the respondent misled the trial court by stating that the property was valued at Kshs.2 Million. That this additional evidence is crucial in determining the appeal, hence the orders sought are necessary

Replying Affidavit

10. Vide replying affidavit dated 01st November 2025, the respondent opposed the second application and deposed that the land's value as at 2025 was Kshs.6 Million. That at the time of the trial, the respondent's brother sold half of the land for Kshs. 2.5 Million, which amount informed the quoted value of the land. She stated that the application does not meet the legal threshold for admission of new

evidence on appeal and she referred to the case of **Mahamud v Mohamad & 3 others [2018] KESC 62 (KLR)**.

11. That the valuation report depicts the value long after the succession proceedings at the trial court had been concluded. The value does not reflect the value of the neighbouring properties over the years. She also deposed that the applicants did not raise the issue of the property value when they applied for revocation of the grant even though that was an opportunity to do so. It was her case that the application is a fishing expedition since there is no basis for claiming that the valuation report was new evidence at this stage.

Parties' Submissions

12. The applicants submitted that the trial court acted without pecuniary jurisdiction as endowed to it under section 8 of the Magistrates Court Act. They relied on the cases of **Mahamud v Mohamad & 3 others (supra)**, **Dorothy Nelima Wafula v Hellen Nekesa Nielsen & Paul Fredrick Nelson [2017] KECA 654 (KLR)**, **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR)** and **Rwimbo v Gachagua [2025] KEHC 5130 (KLR)**. They submitted that the trial court's lack of pecuniary jurisdiction created a fundamental error on the part of the court hence its orders amount to a nullity.
13. The respondent relied on the case of **Mahamud v Mohamad & 3 others (supra)** on introduction of new evidence at the appeal stage. She argued that the applicants have not demonstrated that they had difficulty in obtaining the valuation report before the trial court such that the report could only be availed at this stage. That the valuation report is misleading and a sham since it was conducted 4 years after filing of the succession cause at the trial court. According to her, the applicants are using this tactic to firm up their weak appeal. She also placed reliance on the case of **Gutu v Njururi [2025] KEELC 3604 (KLR)** and urged the court to apply section 78 of the Civil Procedure Act before admitting new evidence on appeal.

Issue for Determination

14. The issues for determination are as follows:
 - a) Whether new evidence on valuation of the suit property can be admitted at this stage, and
 - b) Whether an order of stay of execution should be made.

Analysis and Determination

15. Section 78 of the Civil Procedure Act provides for the power of an appellant court as follows:

“(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require the evidence to be taken;

(e) to order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

16. On production of additional evidence on appeal, Order 42 Rule 27 of the Civil Procedure Rules provides that:

“(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if—

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or

(b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admission.”

17. The guidelines for adducing additional evidence on appeal were summarized by the Supreme Court in the case of **Mahamud v Mohamad & 3 others (supra)**, as follows:

“79. Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing

principles on allowing additional evidence in appellate courts in Kenya as follows:

(a) the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;

(b) it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;

(c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;

(d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;

(e) the evidence must be credible in the sense that it is capable of belief;

(f) the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;

(g) whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;

(h) where the additional evidence discloses a strong prima facie case of willful deception of the Court;

(i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.

(j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.

(k) The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.

80. We must stress here that this Court even with the Application of the above-stated principles will only allow additional evidence on a case-by-case basis and even then sparingly with abundant caution.”

18. The applicant seeks to produce a valuation report as evidence at the stage of appeal to prove that the value of the property making up the estate of the deceased was higher than the trial court's pecuniary jurisdiction. In these circumstances the court should apply the test given by the Supreme Court, namely; 1) whether the evidence could have been obtained with reasonable diligence for use at the trial and 2) whether it was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence. There is no doubt that the applicants in this case had the capacity at the time of trial, to challenge the jurisdiction of the court at any time before issuance of the grant. Even if this opportunity did not present itself, they filed summons for revocation of grant in the very court where the grant was issued to the respondent. However, they did not at the time challenge the jurisdiction of that court on the issue of pecuniary jurisdiction. Nothing has been placed before this Court to show why the valuation could not have been availed in the lower Court.
19. In the same manner that they have approached this court with the valuation report, they could easily have approached the trial court because valuation services were available even then. The amount of diligence reasonably needed to get the valuation done in first instance in the lower court, is the same as the diligence reasonably exercised in the present application.
20. In this case, it appears that since the trial court did not revoke the grant, the applicants needed a new strategy to discredit the grant considering all circumstances. It seems that they want to use this intended new evidence to fill in gaps in the applicants' case. As cautioned by the Supreme Court, that is not the purpose of allowing new evidence at the appeal stage. Therefore, there is no basis for allowing production of the valuation report at this stage. The appeal can be heard and determined on its merits without the additional evidence.
21. On the issue of stay of execution Order 42 Rule 6(2) of the Civil Procedure Rules provides as follows:
- “(2) No order for stay of execution shall be made under subrule (1) unless—***
- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”***

22. The impugned judgment was delivered on 03rd September 2025 and the stay application was filed promptly on 25th September 2025 without delay. It is also important that the subject matter of the appeal be preserved in the interest of justice.

Disposition

23. Ultimately, I am satisfied that the new evidence sought to be availed cannot be adduced at this stage in appeal. In the circumstances:

- a) Prayers 3 and 5 of the first application for the stay of execution and issuance of prohibitory order should be allowed as prayed. They are so allowed.
- b) Further, the first part of prayer 6 thereof was partially allowed by the court for calling for the trial court file. The 2nd part of prayer 6 stands resolved through determination of the second application. There are no orders on costs in the first application.

24. The second application is hereby dismissed in entirety with no order as to costs.

25. Orders accordingly.

Delivered, dated and signed at Embu High Court this 25th day of February, 2026.

**R. MWONGO
JUDGE**

Delivered in the presence of:

1. Gachoki for the Applicants
2. Muriithi for Respondents
3. Francis Munyao - Court Assistant