



REPUBLIC OF KENYA



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**Makara v Kirichu & 7 others (Civil Appeal 76 of 2020)
[2025] KECA 1221 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1221 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 76 OF 2020
JW LESSIT, A ALI-ARONI & GV ODUNGA, JJA
JULY 4, 2025**

BETWEEN

STANLEY KIRICHU MAKARA APPELLANT

AND

JOEL KOBIA KIRICHU 1ST RESPONDENT

HARRIET MWENDWA MOSES 2ND RESPONDENT

TERESIA KANANA MOSES 3RD RESPONDENT

JERICA KIRITU KIRICHU 4TH RESPONDENT

HELLEN KARIMI MOSES 5TH RESPONDENT

JACOB MURANGIRI MOSES 6TH RESPONDENT

MAGDALENE MAMI KIRICHU 7TH RESPONDENT

PETER MUGAA KIRICHU 8TH RESPONDENT

(Being an appeal from the Ruling and Orders of the High Court of Kenya at Meru (Mabeya, J.) dated 14th April, 2020 in H.C. Succ. Cause No. 499 of 2011)

JUDGMENT

1. Stanley Kirichu Makara has appealed against the ruling and orders of the High Court at Meru (Mabeya, J.) delivered on the 14th April, 2020 in Succession Cause No. 499 of 2011.
2. The Succession Cause related to the estate of Kirichu Makara (deceased). During his lifetime, the deceased subdivided his parcel of land known as Ithima/Ntunene/148 measuring 11.40 acres into seven (7) subdivisions Ithima/Ntunene 1722 – 1728. He bequeathed Ithima/Ntunene/1722 (1 acre) to the 1st respondent; Ithima/Ntunene/1723 (3 acres) to one Peter Kimani, Erastus Kirichi (deceased);



Ithima/Ntunene/1725 to 8th respondent; and Ithima/Ntunene/ 1726 to Moses Ithabu (deceased). The deceased did not allocate Ithima/Ntunene/1723 (0.81 ha), Ithima/Ntunene/1727 (0.54 ha,) and Ithima/Ntunene/1728 (0.02 ha).

3. In the judgment dated 30th May, 2019, Mabeya, J. found that the three subdivisions that were left were intended for those who had not received any portion and that even if that was not the case, there was evidence that the three; the appellant, 4th and 7th respondents were the only children of the deceased who were not catered for during the lifetime of the deceased and proceeded to allocate them Ithima/Ntunene/1723, Ithima/1727 and Ithima/Ntunene/1728 respectively.
4. Aggrieved and dissatisfied with the said judgment, the 1st, 3rd, 4th and 8th respondents along with Peter Kimani Kirichi, on the 20th June, 2019 lodged a notice of appeal dated 14th July, 2019. Subsequently, the 1st, 2nd, 3rd, 4th and 8th respondents under certificate of urgency filed a chamber summons application dated 24th December, 2019 seeking the following orders:
 - “2. That the honorable court be pleased to issue an order of stay of execution of the judgment delivered on 30th May, 2019 pending the hearing and determination of this application.
 3. That the honorable court be pleased to review and set aside the judgment of 30th May, 2019 and provide for the beneficiaries as per paragraph 11 of the supporting affidavit of 1st respondent.
 4. That the costs of this application be provided for.”
5. The application was premised on grounds that the proceedings in court commenced and concluded secretly without their knowledge; the appellant misled the court that he had not been provided for yet he had been given parcels Ithima/Ntunene/1727 and 1728; most of the beneficiaries namely; Peter Kimani, the appellant, 1st, 4th and 8th respondents had built and settled on land parcel Ithima/Ntunene/1723 since it was the only property that could be occupied as the other two Ithima/Ntunene 1725 and 1726 were on a steep slope and therefore no construction could be done there; the appellant had threatened other beneficiaries and the children of Moses Ithabu (deceased) of eviction and on instances destroyed their property; and, that there was no justification for giving parcel Ithima/Ntunene/ 1723 exclusively to the appellant while some of the beneficiaries had not been provided for. They thus proposed the identification and sharing of all persons beneficially entitled to land parcels Ithima/Ntunene/1723, 1725 and 1726.
6. In opposition, through his replying affidavit sworn on 23rd January, 2020, the appellant contended that the application was incompetent since the 1st to 4th and 8th respondents had already preferred an appeal against the impugned judgment, and thus they could not pursue the remedy for review and an appeal at the same time. He averred that when he filed the Succession Cause, the court distributed parcels of land Ithima/Ntunene/1723, 1727 and 1728 to him and denied that parcel no. 1727 and 1728 were gifted to him by the deceased during his lifetime. He averred that it was illogical that the deceased could have given him the said lands yet the deceased died in the year 1992 and the parcels were registered in his name in the year 2012 during the course of the Succession Cause. He further averred that there were objections and protests filed during the succession proceedings. The protest was heard and concluded vide judgment which ordered that plot no. 1723 was to be distributed to him while Ithima/Ntunene/1727 and 1728 were to go to his sisters, the 4th and 7th respondents respectively.
7. The appellant denied lying to the court and stated that plot no. Ithima/Ntunene/1726 had always belonged to their late brother Moses, a position confirmed by some of the respondents, and noted that



Moses children have always had full and exclusive possession and enjoyment of the same. The appellant also averred that the court in its judgment rightly observed that once the deceased divided his property amongst his children, they were expected to move each to the parcel allocated to them. He further averred that contrary to the assertions by the respondents, they are the ones who attacked him and his family and even caused damage to his property and also illegally harvested his crops.

8. The appellant contended that he realized that Peter Kimani transferred to himself and their late brother Erastus Kirichiu parcel No. Ithima/Ntunene/1724 in the year 2012 well after the demise of the deceased, without issuance of a grant and/or a confirmed grant and also that their brother was at that time dead. He also contended that his brother Peter Kimani and the 8th respondent did not reside on and had not built on parcel No. Ithima/Ntunene/1723. In conclusion, therefore, the appellant averred that save for the late Moses Kirichiu's parcel No. Ithima/Ntunene/1726, which was the share due to him and which devolved to his heirs, the judgment on distribution should be maintained.
9. In the ruling dated 14th April, 2019, Mabeya, J. found that the court had jurisdiction to deal with the application and further that the application seeking review of the judgment had not exclusively been filed by the applicants. According to him, since the 2nd and 3rd respondents were neither objectors in the previous proceedings nor did they prefer an appeal against the judgment, the caveat in Order 45 of the Civil Procedure Rules which applies to those who had applied, was not applicable. The learned Judge held that applying the principle would prejudice the 2nd and 3rd respondents who were not parties to the offending notice of appeal. Further, it was held that the notice of appeal had been withdrawn by a notice of withdrawal dated 31st January, 2020, thus no appeal could be deemed to have been preferred.
10. On the merit of the application, the learned Judge found that the appellant did not deny that the children of his late brother Moses Ithabu were living on plot no. Ithima/Ntunene/1723 and that he had admitted to not involving them in the lodging and prosecution of the case. Learned Judge found that the appellant as the administrator of the estate had lied to court on the distribution of the estate since he did not disclose that parcels Nos. Ithima/Ntunene/1727 and 1728 had been registered in his name and therefore, had the court known about the registration, it would have distributed the estate otherwise than it did. In conclusion therefore the learned judge found that there was sufficient reason to review the judgment dated 30th May, 2019. The learned Judge reviewed the judgment and rectified the Certificate of Grant and distributed the estate as follows:
 - a. Ithima/Ntunene/ 1723 – 0.81 Ha.
 - i. Harriet Mwendwa Moses Teresia Kanana Moses Hellen Karimi Moses Jacob Murangiri Moses - 1.1 acres.
 - ii. Stanley Kirichiu Makara - 0.2 acres.
 - iii. Jerica Kiritu Kirichu - 0.4 acres.
 - iv. Joel Kobia Kirichiu - 0.2 acres.
 - b. Ithima/Ntunene/1727 – 0.54 Ha.
Stanley Kirichu Makara - Whole
 - c. Ithima/Ntunene/1728 – 0.2 Ha.
Magdalene Mami Kirichu - Whole
 - d. Ithima/Ntunene/1725 – 0.54 Ha
Peter Mugaa Kirichiu - Whole



- e. Ithima/Ntunene/1726 – 0.542 Ha.
 - i. Harriet Mwendwa Moses Teresia Kanana Moses Hellen Karimi Moses
Jacob Murangiri Moses - 0.4 acres.
 - ii. Stanley Kirichiu Makara - 0.2 acres.
 - iii. Jerica Kiritu Kirichiu - 0.3 acres.
 - iv. Joel Kobia Kirichiu - 0.2 acres.
 - v. Peter Mugaa Kirichiu - 0.2 acres.
11. Aggrieved and dissatisfied by the ruling, the appellant lodged a notice of appeal dated 27th April, 2020. In his memorandum of appeal dated 23rd June, 2020 the appellant faults the learned Judge of erring in law and facts on the following grounds:
1. In holding that the court had jurisdiction to entertain an application under Order 45 of the Civil Procedure Act.
 2. In holding that the respondents had satisfied the mandatory conditions set out under Order 45 of the Civil Procedure Act.
 3. In failing to properly evaluate, appreciate and apply the appellant’s evidence on record.
 4. In holding that the appellant had lied on oath.
 5. In failing to properly consider and apply the provisions of Section 42 of the Law of Succession Act in re-distributing the estate of the deceased.
 6. In discriminating against the appellant in his ruling and order.
 7. Failing to consider and appreciate that the appellant was in occupation and use of land parcel no. Ithima/Ntunene/1723 before re- distributing it.
 8. Failing to fairly distribute land parcel no. Ithima/Ntunene/1723.
 9. Failing to consider the properties given to some of the beneficiaries by the deceased during his lifetime.
 10. Re-distributing the estate in an unfair and unlawful manner.”
12. The appellant asks this Court for orders that; the appeal be allowed, that the orders of 14th April, 2020 be set aside and the estate be distributed per the judgment dated 30th May, 2019.
13. At the hearing on 28th January, 2025, learned counsel Mr. Haron Gitonga appeared for the appellant whereas learned counsel Ms. Onyango held brief for Ms. Aketch for the respondents, when they both briefly highlighted their respective written submissions.
14. In appellant’s submissions dated 20th November, 2024 Mr. Gitonga raised three principle arguments. First, he asserted that the High Court erred in entertaining a review application despite the existence of a valid and subsisting notice of appeal. He explained that the notice had not been procedurally withdrawn in accordance with rule 83(1) of the Court of Appeal Rules, which required formal withdrawal to be marked by the Registrar. Hence, he argued, the High Court lacked jurisdiction to review the matter, rendering its decision invalid.



15. Secondly, he argued that the application for review failed to meet the mandatory conditions set out under Order 45 of the [Civil Procedure Rules](#). He emphasized that there had been no discovery of new and important evidence, no demonstrable error on the face of the record, and no sufficient reason that would justify invoking the court’s review powers. He contended that the application merely sought a second bite at the cherry without meeting the legal threshold for review.
16. Thirdly, Counsel submitted that the reviewed distribution was substantively unfair to the appellant. Citing section 42 of the [Law of Succession Act](#), he argued that the trial court failed to consider inter vivos gifts to certain beneficiaries. As a result, those who had already been gifted property were unfairly allocated additional shares from the remaining estate, thereby diminishing the appellant’s portion. He specifically highlighted land parcel 1723, noting that while other beneficiaries received up to one acre of habitable land, the appellant was given only 0.20 ha of sloped, inhabitable land. He also noted that the trial judge unfairly stripped the appellant of land he had previously occupied.
17. The Court sought clarification from Mr. Gitonga who admitted that not all respondents had filed notices of appeal and that those who had filed attempted to withdraw the notice of appeal improperly bypassing the necessary procedural steps. He further conceded that the respondents who applied for review were not aware of the succession proceedings but challenged its truth noting that their father had already received property during the deceased’s lifetime. Mr. Gitonga acknowledged that the original distribution failed to recognize the unequal quality of the land parcels, but maintained that the subsequent redistribution was unjust to his client. Lastly, Mr. Gitonga denied any concealment of parcel no. Ithima/Ntunene/1727 by the appellant, and argued that the trial judge could not have allocated it in his judgment if it had truly been concealed. Ultimately, Mr. Gitonga maintained that the court’s review jurisdiction had been improperly invoked and, alternatively, that the redistribution was inequitable. He therefore prayed that the reviewed ruling be set aside and that the original judgment be reinstated.
18. On their part, the respondents did not file written submissions. However, Ms. Onyango expressed that she would be relying entirely on the respondents’ pleadings filed at the trial court. The gist of their pleadings was that the appellant had been adequately provided for with two parcels of land Ithima/Ntunene/1727 and 1728 during the lifetime of the deceased, yet he misled the court that he had not been provided for; yet some of the beneficiaries of the estate had not been provided for and were not included in the proceedings for the grant of letters of administration intestate; some of the beneficiaries such as Peter Kimani, the appellant, 1st, 4th and 8th respondents had built and settled on land parcel Ithima/Ntunene/1723 and therefore there was no justification for giving the said land exclusively to the appellant; and, the remaining parcels of land Ithima/Ntunene/1725 and 1726 are on steep slope and no construction can be done thereon. For those reasons the respondents contended that they were entitled to the orders of review of the judgment of 30th May, 2019 as sought and which judgment was reviewed.
19. We have considered the appeal in accordance with our mandate. See *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 and also [Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co Advocates](#) [2013] eKLR. In the latter case, the Court pronounced that the primary role of the Court in a first appeal is:

“...to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”



20. We are also aware and have cautioned ourselves appropriately that we will only depart from the findings by the trial Court if they were not based on the evidence on record; where the said court is shown to have acted on wrong principles of law as held in *Jabane v Olenja* [1986] KLR 661; or if its discretion was exercised injudiciously as held in *Mbogo & Another v Shah* [1968] EA.
21. The learned Judge was considering an application for review of his judgment dated and delivered on the 30th May, 2019. The basis of the application for review were cited on the face of the chamber summons as well as in the affidavits sworn by Harriet Mwenda Musa and Joel Kobia Kirichiu, the 1st and 2nd respondents in this appeal, who were the 1st and 2nd respondents in the application. We have already summarized the arguments of the parties for and against the application and how the learned Judge ruled. In the main, the respondents position was that the appellant failed to disclose to the learned Judge in his application for confirmed grant that he was among those gifted with land by the deceased inter vivos, before his demise, the land being Ithima/Ntunene/1727 and 1728. Secondly, that the effect of the judgment of the learned Judge was to dispossess the respondents of the land where they had settled and constructed their homes during the life time of the deceased, being Ithima/Ntunene/1723; and that the parcels of land remaining Ithima/Ntunene/1725 and 1726, were on steep slope where no construction could take place.
22. The appellant's position was the trial Judge erred to entertain the application for review since there was on record notices of appeal that were un-procedurally withdrawn; secondly the application for review failed to meet the mandatory conditions set out under Order 45 of the *Civil Procedure Rules* and finally the reviewed distribution was substantively unfair to the appellant as the trial Judge failed to consider inter vivos gifts to particular beneficiaries as a result, those who had already been gifted property were unfairly allocated additional shares from the remaining estate, thereby diminishing the appellant's portion.
23. Before us for determination are three issues as follows:
 - i. Whether the application for review was properly before the trial court;
 - ii. Whether there were grounds to review the impugned judgment; and,
 - iii. Whether the distribution was fair.
24. On whether the review application was properly before the trial court. This issue was considered by the learned trial Judge who ruled thus:
 11. The issues for determination are; does the application lie in light of the Notice of Appeal lodged against the impugned judgment? Is the judgment amenable to review in the circumstances of this case?
 13. In the present case, the objectors filed a Notice of Appeal against the impugned judgment. The Notice of Appeal was not exclusively filed by the present applicants. The 2nd and 3rd applicants were neither objectors in the previous proceedings nor did they prefer an appeal against the said judgment.
 14. For the reason that two of the present applicants were not involved in the subject Notice of Appeal, the caveat in Order 45 against those who have appealed is not applicable in the present case. This is so because, inviting and or applying the said principle, in this matter, would prejudice the 2nd and 3rd applicants who were not party to the offending Notice of Appeal.



15. In any event, the Notice of Appeal and Notice of Intention to appeal were both withdrawn by a Notice of Withdrawal dated 31/01/2020 and filed in Court on the same day. That being the case, no appeal can be deemed to have been preferred.
16. ... Accordingly, I hold that this Court has jurisdiction to deal with the present application. The filing and subsequent withdrawal of the Notice of Appeal is no bar to the present application for review.”
25. The appellant has urged that the notices of appeal were not withdrawn procedurally, urging that there was no proof that the withdrawal was made in compliance with rule 83 of the Court of Appeal Rules which required that the Registrar must mark the appeal as withdrawn. This issue was not raised before the trial Judge. Similar arguments as in this case were made in *I. C. Kamau Ndirangu v Commercial Bank of Africa Limited* [1994] KECA 86 (KLR) and in answering the same, this Court expressed itself as hereunder:

“With regard to grounds 1, 2 and 3, Mr. Gatonye, for the appellant referred to the two main reasons which had persuaded the learned judge to rule against a review. The first reason that had been relied upon was the filing of the notice of appeal on 1st July, 1987. The judge had found that according to order 44 rule 1(i)(a) of the *Civil Procedure Rules*, the review application was available only in respect of a decree or order from which an appeal is allowed but from which no appeal has been preferred. Therefore, in this case as a notice of appeal had been filed and was still in existence no right to an application for review lay. Mr. Gatonye submitted that the judge had erred because in the first place the notice of appeal had been withdrawn by a letter dated 22nd January, 1993, addressed to the Deputy Registrar of the High Court and copied to the Deputy Registrar of the Court of Appeal of Kenya. We would observe that there is no provision either in the Civil Procedure Rules or in the Court of Appeal Rules which allows a notice of appeal, once filed in the Court of Appeal, to be withdrawn in this manner viz: by writing a letter to the Deputy Registrar of the High Court and/or the Deputy Registrar of the Court of Appeal. We would, however, draw attention to rule 82(a) of the Court of Appeal Rules which provides that if a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and shall, unless the Court otherwise orders, be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.

However, Mr. Gatonye is on a much stronger pitch in his other reason which is supported by a decision of this Court in Civil Appeal No 122 of 1992 *Yani Haryanto v ED & F Man (Sugar) Ltd* (unreported) that a mere filing of notice of appeal did not constitute preferment of an appeal. The learned judge had clearly erred in holding that the appellant had by virtue of order 41 rule 4(4) of the Civil Procedure Rules preferred an appeal by filing his notice of appeal. Order 41 rule 4(4) of the *Civil Procedure Rules* is confined only to the purpose of staying execution.”

26. In *Yani Haryanto v E. D. & F. Man. (Sugar) Limited* Civil Appeal No. 122 of 1992 the Court held that:

“The facility of review under Order 44 of the Civil Procedure Rules is available to a person who is aggrieved by an order or decree which is appealable but from which no appeal has been preferred or from which no appeal is allowed, and who from the discovery of new and important matter or evidence or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review. A notice of appeal apart from manifesting a



desire to appeal, appears to have a two-fold purpose; one of the purposes is apparent from the rules that follow up to and including rule 79. The other purpose is to enable the High Court to entertain an application for stay of execution before the appeal is filed ... What rule 4(1) of Order 41 of the *Civil Procedure Rules* prescribes for is an exception to the rule relating to the actual filing of the appeal which is rule 81(1) of the *Court of Appeal Rules*. The exception is the deeming of the appeal to be filed for the purposes of rule 4 of Order 41 only on the giving of the notice of appeal. Therefore despite the lodging of a notice of appeal the court has jurisdiction to entertain an application for review... An appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry, fees paid and security lodged as provided in rule 58 and the inclusion of a memorandum of appeal.”

27. On the authority of the above decisions, the notice of appeal could not be deemed as withdrawn on the mere intimation to do so. However, nothing turns on that point as the mere fact of the filing of the notice of appeal did not bar the court from entertaining an application for review before the appeal was filed. In addition, the notice of appeal was not filed by all the applicants and therefore the bar to the filing of the notice could not extend to the parties who had not filed notices of appeal.
28. Regarding whether there were grounds to review. The respondents have shown that there was ground to support the application for review. Their complaint was, inter alia twofold; first, the appellant had not disclosed that he had been provided for by the deceased, who had gifted him with parcels Nos. 1727 and 1728 inter vivos; and, the court in distributing the estate assigned parcel No. 1723 to the appellant, bringing the number of his parcels to three. The respondents also stated that all of them had constructed their homes and were living on the parcel No. 1723 even before the demise of the deceased. They complain that the last two unallocated parcels of the deceased’s estate and allocating the same to the appellant, left them.
29. The respondents established that the parcels Nos. 1727 and 1728 belonged to the appellant as evidenced by a certificate of search filed in respect thereof. The appellant did not contest the same. Neither did he contest the respondents’ claim that parcel Nos. 1725 and 1726 were on a steep slope on which no construction could take place.
30. Bearing in mind that the suit arose from a Succession Cause, we find that good grounds existed for review of the learned Judge’s judgment on the basis of material none disclosure that could affect the outcome of the suit, the court having jurisdiction under sections 47 and 73 of the *Law of Succession Act* to grant any order necessary to meet the ends of justice.
31. The final issue is whether the distribution post the review was fair. We have considered the impugned ruling and find that the learned Judge considered all the relevant factors, the sizes of the various parcels of land forming the estate of the deceased and their location. In part the learned Judge observed:

“23. c. parcel nos. 1727 and 1728 were in the name of the petitioner having been so registered as such on 26/02/2013 and he admitted that fact.

26. In this regard, I find the foregoing to be sufficient reason to review the impugned judgment. The petitioner had lied to this Court which lies the Court relied on to distribute the estate. Had the Court known of the matters aforesaid, it would have distributed the estate otherwise than it did.

28. In rectifying the grant, the Court will have regard to the fact that Joel Kobia, Peter Kimani Kirichiu, Erastus Kirichiu, Stanley Kirichiu Makara have properties registered in their own names. These are parcel nos. 1722, 1724 and 1728, respectively. The Court has also noted the area of the said properties.



29. In redistributing the estate, the Court will take into consideration that plot No. 1723 seems to be one fought over and that plot No. 1726 is on a sloppy area.”

32. We are satisfied that the learned Judge did take into account all the relevant factors as stated hereinabove. Upon that careful consideration, he came to the correct judgment, re- distributing the estate in a manner that was fair to all the beneficiaries.

33. We find that the learned Judge came to the correct conclusion that there were good grounds to review the judgment dated 30th May, 2019. He also fairly distributed the estate as per the order he made in the ruling, the subject matter of this appeal.

In the circumstances, we find that this appeal has no merit and is dismissed in its entirety.

34. In conclusion, the ruling and order of the trial Judge dated 14th April, 2019 is upheld. We make no order on costs, this being a family matter.

DATED AND DELIVERED IN NYERI THIS 4TH DAY OF JULY, 2025.

J. LESIIT

JUDGE OF APPEAL

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ALI - ARONI

JUDGE OF APPEAL

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G. V. ODUNGA

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

