



**In re Estate of David Ndua Thuo (Deceased) (Succession Cause E093 of 2021) [2023] KEHC 1092 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1092 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
SUCCESSION CAUSE E093 OF 2021  
MM KASANGO, J  
FEBRUARY 23, 2023  
IN THE MATTER OF THE ESTATE OF DAVID NDUU THUU  
(DECEASED)**

**BETWEEN**

**GODFREY ALFRED HINGA NDUU ..... APPLICANT**

**AND**

**WAMIKEY ESTATE LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**VIRGINIA WAIHERA ..... 2<sup>ND</sup> RESPONDENT**

**THUU NDUU ..... 3<sup>RD</sup> RESPONDENT**

**MAINA NDUU ..... 4<sup>TH</sup> RESPONDENT**

**FAITH WANJIKU NDUU ..... 5<sup>TH</sup> RESPONDENT**

**CHARLES MBUGUA NDUU ..... 6<sup>TH</sup> RESPONDENT**

**JOSEPH KIHANYA NDUU ..... 7<sup>TH</sup> RESPONDENT**

**MARY GACHERI ..... 8<sup>TH</sup> RESPONDENT**

**KENNEDY NG'ANG'A NDUU ..... 9<sup>TH</sup> RESPONDENT**

**RULING**

1. This court had occasion to deliver a ruling in this matter on May 5, 2022. By that ruling, this court granted Virginia Waithera Ndua a grant *ad colligenda bona* which was limited to permitting her to collect and preserve the estate income and to pay expenses of some of deceased's estate properties; to pay salaries; and to operate bank accounts. Before court now is the application dated July 26, 2022.



That application is filed by Godfrey Alfred Hinga Ndua (Godfrey) son of the first wife of deceased. The first wife predeceased the deceased hereof.

2. The application has a total of 12 prayers. The main prayer is for this court to review the orders made by the ruling of May 5, 2022 and to grant the prayers sought by his application dated March 2, 2022. The ruling of May 5, 2022 determined that application dated March 2, 2022.
3. The grounds presented by Godfrey why the ruling of May 5, 2022 should be reviewed are:-
  - i. That the court did not have an opportunity to hear my advocate's submissions to the application.
  - ii. That the court failed to consider its earlier decisions wherein Lady Justice Maureen Odero on March 2, 2022 granted an order for '*status quo*' to be maintained so as to preserve and protect the estate from sale, sub-division, leasing, construction and/or any other way dealing with the estate properties pending hearing and determination of the suit.
  - iii. That this honourable court also failed to consider its decision delivered on September 13, 2021 where it declined to grant the application for limited grant dated August 31, 2021.
  - iv. That it is therefore surprising that this honourable court would then turn to allow that very same application without the respondents moving the court.
  - v. That the court even went further to grant prayers which had not been sought for in the application which was before it.
  - vi. That the respondents have not formally produced the original will of the deceased in court and yet this honourable court directed parties at the hearing of the main trial to address the validity of the will.
  - vii. That the honourable court should have allowed counsel time to submit on the application before making its decision to dismiss the application for preservation dated March 2, 2022.
  - viii. That the status of the estate properties at present is concerning because there is ongoing sale, subdivision, construction, leasing, fencing and up-rooting of coffee plantations.
  - ix. That the respondents have also not been forthcoming in the dealings on the property and have failed to disclose the partnership reached with the developers known as Finsco Africa Ltd and Heri Homes Ltd who are currently marketing for sale residential units on LR No 92/6 Kamiti (Wamikey Estate Ltd).
4. Review of judgment or order is provided for under order 45 rule (1) of the [Civil Procedures](#). That rule is in the following terms:-
  - “(1) Any person considering himself aggrieved—
    - a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
    - b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or



for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay’.”

5. A party seeking revision needs to show discovery of new important matter; or evidence not within his knowledge or on account of some mistake or error apparent on the face of the record; or for any other sufficient reason. As these grounds hereabove for review are considered it is important to note that a party cannot seek an appeal disguised as a revision. In this regard i refer to the case *Republic Vs Procurement Administrative Review Board & 2 Others* (2018) eKLR as follows:-

- “ 13. It is also important to distinguish grounds of appeal and grounds for review. Guidance can be obtained from the case of *National Bank Of Kenya Ltd Vs Ndungu Njau* where the court held:-

‘In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue? In my opinion the proper way to correct a judge’s alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose.’ (Emphasis added).

14. In *Abasi Belinda vs Fredrick Kangwamu and another* the court held that:-

‘a point which may be a good ground of appeal may not be a good ground for review and an erroneous view of evidence or law is not a ground for review though it may be a good ground for appeal’.”

6. The grounds provided by Godfrey as he seeks revision, which grounds are reproduced above are tantamount to Godfrey seeking to appeal the decision of May 5, 2022. This is obvious when one considers Godfrey faults the court for not considering his advocate’s submissions, for failing to consider earlier rulings, amongst others. Such grounds are what would make an appeal not a revision.
7. It is for the above reason that I find that the pryaers for revision are unmerited.
8. Godfrey sought the production of the original will in this cause. I can confirm that on my perusal of this court file, I did find an original will filled.
9. Finally, I wish to state that there is no statutory requirement for a Will to be read out to the deceased’s family. The failure to read it to the family does not invalidate the will.
10. Godfrey also alleged that Virginia defrauded the company Wamikey Estate Limited. This is because the senior assistant registrar of companies by a letter wrote and stated the deceased’s 98 shares in that company were allocated to Waithira Ndua after the deceased’s death. It cannot be a basis for revision.



11. In my view, there is need for such forfeiture of deceased's shares to be part and parcel of the viva voce hearing in proof of validity of the deceased's will. I decline to entertain that evidence at this stage.

**Disposition**

12. In summation of the affidavit, evidence and submission, I order the notice of motion dated July 26, 2022 be and is hereby dismissed with costs being in the cause.

**RULING DATED and DELIVERED at KIAMBU this 23<sup>RD</sup> day of FEBRUARY, 2023.**

**MARY KASANGO**

**JUDGE**

Coram:

Court Assistant : Julia

Instructed by Wahome & Akedi Advocates for the Applicants:- Ms. Akedi

Instructed by Byron & Partners Advocates for the Respondent: Mr. Muriithi

**COURT**

*Judgment* delivered virtually.

**MARY KASANGO**

**JUDGE**

