



REPUBLIC OF KENYA



In re Estate of the Late Henry Nzioka Mulli (Deceased) (Succession Cause 53 of 2017) [2023] KEHC 19694 (KLR) (30 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19694 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 53 OF 2017**

MW MUIGAI, J

JUNE 30, 2023

IN THE MATTER OF THE ESTATE OF THE LATE HENRY NZIOKA MULLI (DECEASED)

BETWEEN

BENDETTA MUTUNGE MULI 1ST APPLICANT

FAITH MUTHEU MULI 2ND APPLICANT

AND

ANN ITUMBI MULI & 4 OTHERS RESPONDENT

AND

TAMANI CONSTRUCTION CO. LTD INTERESTED PARTY

RULING

Background

1. Vide a petition received on 27th November, 2017, in which the petitioners Ann Itumbi Muli, Bendetta Mutunge MULI and Faith Mutheu Muli petitioned this Honorable Court for a grant of Letters of Administration intestate of the estate of Henry Nzioka Mulli (deceased) who died on 6th July, 2015 as per death certificate domiciled in Kenya at Musuni, Kangundo.
2. Pursuant to the Affidavit in support of Petition for Letters of Administration Intestate, the deceased died intestate and left the following surviving him;

Deceased's 1st family unit

- a. Faith Mutheu mulli- daughter
- b. Andreas Macher- grand son

Deceased's 2nd family unit



- a. Ann Itumbi Mulli – widow
- b. Monica Gomes- daughter
- c. Harrison Mutua Mulli- son (deceased)
- d. James Mutuku Mulli- son
- e. Benjamin Munyao Muli- son

Deceased 3rd family unit

- a. Bendetta Mutunge Mulli-widow
- b. Jacinta Mwendu Mulli- daughter
- c. Veronica Muneu Mulli- daughter
- d. Consolata Mumbua Mulli- daughter
- e. Boniface Muindi Mulli- son
- f. Mary Kalekye Mulli- daughter
- g. Moses Nthenge Mulli- son

3. All the above named dependents are adults.

4. The Affidavit in support of Petition for Letters of Administration Intestate mentioned properties left by the deceased at the date of his death as follows:

- a. L.R No. 37/254/33 situate in city county of Nairobi
- b. L.R No. 3734/389 situate in city county of Nairobi
- c. L.R No. Kangundo/kikabuani/507 situate Machakos County
- d. L.R No. 139 situate Machakos County
- e. Plot No. 237 situate Machakos County
- f. L.R. No. Kangundo/ isinga/1460 situate in Machakos County
- g. L.R No. 139/17 Ithanga Tana Ranch situate in Machakos County
- h. Motor vehicle Reg No KBE 054R
- i. Motor vehicle Reg No KAK 168K
- j. Motor vehicle Reg No 951
- k. Shares held at mulli academy
- l. Shares at Kangundo Filling Station
- m. Shares at Matungulu Farmers' Co-operative Society Limited
- n. Shares at East African Breweries Limited
- o. Coffee Growers Registration Certificate No. BF 0042
- p. Coffee Pulping Station License BF 0042- Kyuli, Registration Number 000602



5. Vide the Chief's letter dated 13th June, 2016 confirmed that Henry Nzioka Mulli (deceased) hailed from Kikambuani sub-location, Kanzalu location in Kangundo Division and that he (deceased) was survived by the heirs as named in the affidavit in support of the petition for letters of administration intestate.
6. That the Court be pleased to order all proceeds forming the deceased estate being from L.R No. 37/254/33 in Nairobi County, L.R 3734/389 IN Nairobi County, Mulli Academy and Kenol-kobil petrol station on Plot No.273 Kangundo town be deposited in court until grant of letters administration and certificate of confirmation is issued.
7. Vide the Gazette notice dated 9th April, 2021, Monica Gomes, Bendetta Mutunge Mulli and Faith Mutheu Mulli all of P.O Box 1246-90115 Kangundo in Kenya the deceased's widows and daughter was gazetted for grant of Letters of Administration intestate to the estate of Henry Nzioka Mulli who died at Muisini, Kikanbuani sub-location, kanzalu location, Kangundo on 6th July, 2015.
8. Grant for Letters of Administration made on 28th May, 2021 and issued by this Court on 28th May, 2021 to Monica Gomes, Bendetta Mutunge Mulli and Faith Mutheu Mulli as personal representatives of the deceased's estate to render a just and true account thereof as required by law.
9. Vide summons dated 15th January, 2021, the Applicant therein Tamani Construction limited sought orders inter alia that that this Court grants leave to join Tamani Construction Company Limited as an interested party in the suit; that upon grant of prayer one (1) this Court expunges L.R. NO 37/254/33 situated along Gandhi Road in Nairobi West from the schedule assets as listed in the succession cause; that this Court upon granting prayer two (2) set asides the orders issued on the 4th June, 2019 as against L.R. NO 37/254/33 situated along Gandhi Road in Nairobi West.
10. The summons was premised on the ground that the proposed interested party has a claim and an interest in L.R. NO 37/254/33 situated along Gandhi Road in Nairobi West by dint of the fact that on the 18/7/2018 it entered into the agreement for sale with the first respondent through the 4th respondent who had a donated power of attorney from the 1st respondent to acquire the subject property for a sum of KSHS 67,000,000/=; that the proposed interested party then paid the 1st respondent through the 4th respondent the sum of 13,400,000 as a commitment deposit being 20% of the purchase price; that unfortunately the 1st respondent was unable to complete the sale as contracted despite being indulged by the proposed interested party; that the proposed interested party filed a suit against the 1st respondent in Milimani HCCOMM suit No. E057 of 2019 Tamani Construction Company Limited Vs Annah Itumbi Mulli and obtained an interlocutory judgment against the 1st respondent for decretal sum of KSHS 20,100,00/= plus interest and costs and was issued with a decree on the 31/5/2019.
11. Supporting affidavit of one Daniel Mburu sworn on behalf of the proposed interested party regurgitated what was sought in the summons.
12. The summons of the proposed interested party was opposed by the 1st Applicant and the 2nd Applicant stating inter alia that the application was misconceived, bad in law, frivolous and incompetent for all purpose and an abuse of court process; that the Ruling dated 4/6/2019 in this matter is binding as same has not been appealed against and as such the court is functus officio; that the interested party is neither a creditor nor a beneficiary of the estate of the deceased person; that the alleged vendor Ann Itumbi Mulli was the 2nd wife of the deceased whom this cause pertains thus setting in a polygamous marriage; further that the interested party has no locus standi to be joined in these proceedings within the meaning of Rule 41 (3) Probate and Administration Rules; that this Court on 4/6/2019 dismissed a similar application to expunge property L.R. NO 37/254/33 from the list of Assets in the estate of



the deceased which Application was dated 24/9/18 filed by the 1st respondent herein; averring that the Probate Court lacks jurisdiction to examine the status/ownership of the title and has directed parties to file their claim at the Environment and Land Court per the ruling dated 4/6/2019 stating that the interested party is a stranger to the succession proceedings and this court lacks jurisdiction to execute the proposed interested party's decree for liquidated claim.

13. The matter was canvassed by written submissions of the parties.
14. Vide a Ruling dated 26th September, 2022 by this Court, the Application dated 15/1/2021 was dismissed, orders by Hon Justice Kemei shall remain in force until proceedings for summons for Confirmation; the interested party may enforce interlocutory judgment and decree on the person of the 1st Respondent Anne Itumbi Mulli for the refund of 20% deposit or execution against her properties but not estate of the deceased. The earliest the interested party's claim may be considered is during confirmation of grant proceedings.

The Application for Review

15. Pursuant to summons dated 25/10/2022 and filed on 27/10/2022 the 3rd interested party herein sought orders that this Court to review and vary the Ruling delivered on the 26/9/2022 by this Court declining to delist L.R. NO 37/254/33 situated along Gandhi Road in Nairobi West from the schedule of ascertainable assets belonging to the Estate of Henry Nzioka Mulli (deceased) and subsequently dismissing the Applicant's application dated 15/1/2021; that this Court allocates a priority date for the inter parties hearing of this application.
16. The application was premised on the grounds that:
 - a. there was an error apparent on the face of the record following a glaring omission by the court to note that the Respondent Annah Itumbi Mulli to date remains the sole registered proprietor of the suit property
 - b. The suit property devolved upon the said Anna Itumbi Mulli as the sole surviving joint Proprietor on the 6/7/2015 following the death of her husband Henry Nzioka Mulli with whom they owned the suit property as joint tenants and upon her notification to the registrar of lands of her deceased joint proprietor's death.
 - c. Subsequently, on 24/5/2018 the deceased Henry Nzioka Mulli's Certificate Death No 0310075 was registered against the title for the suit property using Form LRA 38 as stipulated under Rule 54 (1) of the [Land Registration Act](#) (General) Regulations, 2017 where upon Annah Itumbi Mulli became the registered sole proprietor once the Land Registrar effected the transfer in her name
 - d. The name of Henry Nzioka Mulli (deceased) was removed from the property register on the 24/5/2018 whereupon Annah Itumbi Mulli was left as the sole registered proprietor of the suit property with the particular registration remaining valid to date as it has not been challenged or cancelled in any court of law.
 - e. That this is a plain error which is so obvious and substantial that any failure to correct it would infringe on the Applicant's due process and that this honorable court remedy this apparent error on the face of the record by exercising its jurisdiction of review.
17. Vide supporting affidavit dated 25/10/2022, and sworn by counsel Anthony Gikaria, it was deposed inter alia that: there was an error apparent on the face of the record following glaring omission by the court to note that Annah Itumbi Mulli to date remains the sole Registered proprietor of the suit



property; deposing that the suit property automatically devolved upon the said Anna Itumbi Mulli as a sole surviving joint proprietor having been joint tenants with the deceased; averring that on 24/5/2018 the deceased Henry Nzioka Mulli's Certificate Death No 0310075 was registered against the title for the suit property using Form LRA 38 as stipulated under Rule 54 (1) of the Land Registration Act (General) Regulations, 2017. This was captured as entry Number 29 on the Certificate of Title Number I.R 12675 (annexed and marked AG2) copy of the duly registered Death Certificate; it was deposed that the name Henry Nzioka Mulli (deceased) was removed from the property register on the 24/5/2018 whereupon Annah Itumbi Mulli was left as the sole registered proprietor of the suit property with the particular registration remaining valid to date as it has not been challenged or cancelled in any court of law; stating that suit property is vested in Annah Itumbi Mulli's name hence unavailable for transmission to the beneficiaries of the estate of the deceased person.

Replying Affidavit

18. Vide replying Affidavit dated 23/11/2022 and filed on 29/11/2022 sworn by Bendetta Mutunge Mulli, she deposed that the application dated 25/10/2022 was frivolous, vexatious, fatally defective and an abuse of the court process; stating that the Applicant herein has failed to disclose to court that there is yet another pending case in Milimani High Court being High Court Civil Case No. E057 of 2019 against the 1st Respondent, the 2nd wife of the deceased who had illegally purported to sell land parcel L.R. NO 37/254/33 and intentionally declined to defend the said case such that it proceeded to trial undefended; deposing that L.R. NO 37/254/33 is an asset of the estate of the deceased herein which the applicant has sought to sell by public auction necessitating the objection proceedings in order to save the property; that when the matter came up on 27/6/2022 the court directed that the matter be held at abeyance pending the outcome of the application herein the subject of review, and on 16/11/2022 the Court extended the said orders until the determination of the application herein; it was deposed that the Applicant herein is hell bent on auctioning the property of the deceased's estate in order to meet a liability incurred by a single beneficiary while completely declining to pursue the liable beneficiary personally; further it was stated that the Applicant insists on having the Property L.R. NO 37/254/33 delisted from the list of the assets of the deceased herein so that it can proceed and sell the same to meet the liabilities incurred by Annah Itumbi Mulli to the detriment of the estate of the deceased and beneficiaries herein; stating further that unless the honorable court dismisses the application herein, the assets of the estate of the deceased will be in danger of being sold hence beneficiaries will be disinherited thereby leaving them destitute; deposing that court did not make any error in arriving at its decision in its ruling delivered on 26/9/2022 hence the application dated 25/10/2022 is functus officio.
19. Vide grounds of opposition dated 25/11/2022 by Faith Mutheu Mulli 3rd administrator opposed the said application on the following grounds:
 - a. The application is misconceived, bad in law, frivolous and incompetent for all purposes and is an abuse of the court process.
 - b. The application is void and is for striking out as the advocate affiant is not a party to or a proposed interested party as envisaged under order 45 of the Civil Procedure Rules.
 - c. The advocate for the 3rd interested party has no locus standi to bring such an application;
 - d. The declaration of ownership of property is the preserve of the Environment and land Court.
 - e. This Honorable court has properly addressed itself conclusively on the matters in question and the Applicant's only recourse is an appeal.
 - f. That the orders sought purport to distribute the estate before confirmation of the grant.



- g. That the application dated 25/10/2022 is an appeal disguised as a review
 - h. The orders sought purport to illegally appeal the orders given by Hon. Justice Kemei on 4/6/2019 maintained in the Ruling of 26/9/2022. She prayed that the Application be struck out with costs.
20. The application was canvassed by way of written submissions of both parties.

Submissions

3RD interested party/ applicant's submissions

21. The 3rd interested party vide its written submissions dated 30/12/2022 and filed on 12/1/2023, submitted that it is plainly discernible based on ample irrefutable evidence that the suit property lawfully vests in the name of Annah Itumbi Mulli which glaring fact is self-evident and does not require an elaborate argument to be established, neither are there two opinions with regard to the issue of ownership of the suit property.
22. It was the position of the 3rd interested party that it is logical that an error apparent on the face of the record when the Honorable Court inadvertently omitted to note and address this fact in its ruling yet the same had been framed and brought to the court's attention through the applicant's pleadings and submissions with the honorable court being in a position to confine its adjudication to the factual information and material which was available at the time of its decision.
23. Contending that the decision in question might have been based on plain error on the face of the record and which is so obvious and substantial and forms an absolute good basis for review of the court's decision. Opining that any failure to correct it would infringe on the Applicant's due process rights and damage the integrity of the judicial process.
24. It was urged that the law defines a mistake or an error apparent on the face of the record as a mistake or an error which is prima facie visible and does not require any detailed examination. The case of *Nyamogo & Nyamogo vs Kogo* (2001) EA 174 was quoted in which the court observed that:
- An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case.
- The court further observed that there is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out.
- An error which as to be established by a long-drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record.
25. Similarly, reliance was made on the case *Francis Origo & Anor Vs Jacob Kumali Mungala* (C.A Civil Appeal No. 149 of 2001) (unreported), the Court held that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Further, reliance was made on the case of *Abasi Belinda vs Fredrick kangwana & anor* (1963) E.A 557, the court held that "A point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal."



26. It was the contention of the Applicant that it believes that it also has sufficient reasons to have the ruling delivered on the 26/9/2022 reviewed based on the fact that the suit property had already been lawfully attached by a court of competent jurisdiction which information is factual and does not require discovery through a long process of reasoning. Urging that this is one of the exceptional instances when obvious injustice would be occasioned to the Applicant if the suit property is not delisted from the schedule discernable assets belonging to the deceased person.
27. It was the Applicant's case that suit property being held in joint tenancy is not available for transmission to the beneficiaries of estate of the deceased person and that will be unjust to subject the applicant to a long wait for the conclusion of the confirmation proceedings in respect of which it has no control neither is it a beneficiary or creditor of the subject estate. Urging that the matter can be conclusively determined before the confirmation proceedings.
28. It was submitted by the applicant that this Court has power to review its decision and it is in the interest of justice that it proceeds with the said exercise in light of the Applicant having managed to point out the error apparent on the face of the record and further satisfied the criteria established for such review. Urging that it has tendered sufficient reasons meriting the review.
29. It was the contention of the Applicant that the supporting affidavit sworn by the Advocate on behalf of the 3rd IP in support of the summons application dated 25/10/2022 which was an issue raised by the 3rd administrator/respondent was that the said Advocate had the authority of the Applicant to swear the subject affidavit as the same raised issues of law and fact which were within the knowledge of the Advocate who has been handling the matter on behalf of the applicant. Urging that the said affidavit remains sustainable in law as there is absolutely no error or mistake in the affidavit which can render it defective. Reliance was placed on the case of Jane Jaoko Owino Vs Blueshield Insurance Co Ltd HCC 359/200, Tunoi J held that:

“An affidavit sworn by an advocate on matters which are not in dispute and supported by the court record is not defective.....”
30. It was 3rd IP's argument that the Honorable court ought to remedy the apparent error on the face of the record, patent mistake and glaring omission in its ruling delivered on the 26/10/2022 by exercising its unfettered discretion power of review.

3rd Administrator/ 2nd Applicant's Submissions To The Proposed Interested Party's Summons Dated 25/10/2022

31. 3rd Administrator vide her submissions dated 24/1/2023 and filed on 25/1/2023, raised issues in which one of the issues was:
 - a. Was there an error apparent on the face of the record?
32. As regards the above issue or question, reliance was made on the case of Kenya Orient Insurance vs Zachary Nyambane Omwenga (2021) eklr in which Justice Ongeri cited the definition of what constitutes “error on record” as follows: -

“The Supreme Court of Uganda in Edison Kanyabwera versus Pastori Tumwebaze (2005) UGSC 1, provided for what constitutes an error apparent on the face of the record, it stated as follows;

“it is stated that in order that an error maybe a ground for review, it must be one apparent on the face of the record, i.e. an evident error which does not require any extraneous matter to



show its incorrectness. It must be an error so manifest and clear that no court would permit such an error to remain on the record. The error maybe one of fact, but it is not limited to matters of fact, and includes also error of law.”

33. It was the case of the 3rd Administrator that the Applicant alleges this Honorable court failed to note that the 1st Respondent is now the proprietor of the subject property and the advocate’s supporting affidavit gives a narration of evidence of a joint tenancy and events following that after the death of the late Henry Nzioka Mulli, the 1st respondent registered the death certificate on 24/5/2018 against the certificate of Title. Urging that the court accurately addressed itself on all matters pleaded and concluded giving reasons in its determination that the 3rd IP could not be joined in the matter at this stage.
34. Submitting that the ruling given on 26/9/2022 maintained the orders of the Court given on 4/6/2019 for the purpose of ensuring the administrators carry out their mandate of collating and collating assets of the deceased’s estate. A process that is still ongoing.
- b. Whether the Applicant’s Advocate has the authority or is competent to swear the affidavit in the application.
35. On this issue it was contended that the averments in the Affidavit sworn by the Advocate Anthony Gikaria particularly on paragraph 4, 5, 6 and 7 are evidential in nature. The affidavit fails to cite the source of such evidence. The documents produced are evidence that if need be would called for cross examination. Urging that the Advocate cannot be a litigant at same time and is not envisaged agent in Rule 9 (Advocates practice rules). This was the observation of the court in *Magnolia Pvt Limited vs Synermed Pharmaceuticals (k) Ltd (2018) eklr*.
36. Similarly, reliance was placed on the case of *Barrack Ofulo Otieno Vs Instarect Limited (2015) eklr*, Mabeya J observed as follows:

The learned authors of Halsbury’s Laws of England, 3rd Edition, Paragraph 845 say as follows with regard to affidavits: -

“Affidavits filed in the High Court must deal only with facts which the witness can prove of his own knowledge, except that, in interlocutory proceedings or with leave, statements as to a deponent’s information or belief are admitted, provided the sources and grounds thereof are stated...For the purpose of this rule, those applications only are considered interlocutory which do not decide the rights of the parties but are made for the purpose of keeping things in status quo till the right can be decided, or for purpose of obtaining some direction of the court as to the conduct of the cause.”

However, under our law (Advocates Practice Rules) Rule 9 Advocates are not permitted to swear Affidavits in contentious matters. The issue of whether security for costs should be paid is a contentious matter. I think it was improper for Counsel to have sworn the Supporting Affidavit.

37. Further, in the case of *Regina Waithira Mwangi Gitau vs Boniface Nthenge (2015) eklr*, Aburili J Stated: -

On issue number one, the established principle of law is that advocates should not enter into the arena of the dispute by swearing affidavit on contentious matters of fact. By swearing an affidavit on contentious issues, an advocate thus makes himself a viable witness for cross examination on the case which he is handling merely as an agent which practice is



irregular. In *Simon Isaac Ngugi vs Overseas Courier Services (K) Ltd 1998 e KLR* and *Kisya Investments Ltd & Others vs Kenya Finance Corporation Ltd*, it was held that.

“...it is not competent for a party’s advocate to depose to evidentiary fact at any stage of the suit?”.

In addition, Rule 9 of the Advocates Practice Rules prohibit advocates from appearing as an advocate in a case wherein he might be required to give evidence either by affidavit or even orally. By swearing an affidavit on behalf of his client where issues are contentious, an advocates affidavit creates a legal muddle with untold consequences.

38. Contending that the advocate ought not to have sworn the affidavit that had evidential matters where an advocate can become a potential witness. Urging that the summons dated 25/10/2022 be struck out. 1st Applicant’s written Submissions to the proposed interested party’s application dated 25/10/2022.
39. Vide her written submissions dated 25/3/2023, the 1st Applicant raised the following issues for determination:
- a. Whether the court is *functus officio*
 - b. Whether the orders issued by this court vide its ruling delivered on 26/9/2022 should be varied or set aside
 - c. Who should bear the cost of the application.
40. On the issue of Whether the court is *functus officio*, reliance was placed on the case of *Re Estate of Kinuthia Mahuti (deceased) (2018) eklr*, the court citing with approval several other authorities on the subject stated the following in regard to the doctrine;

“The Supreme Court in *Raila Odinga vs. IEBC* cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, *The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law?* (2005) 122 SALJ 832 in which the learned author stated;

“...The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter? The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.?”

In the current instance, the High Court presided by Musyoka, J previously deliberated on this matter and as such this court cannot purport to alter the learned judge’s decision as this would be tantamount to an appeal. An appeal against an order granted by the High Court can only be heard and determined by the Court of Appeal by dint of Article 164(3)(a) of *the Constitution* of Kenya. As such, the court is *functus officio* in this regard.

A court is *functus* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus*, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the



court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”

41. It was the 1st applicant’s case that the court had already dealt with the issue of reviewing or setting aside of its ruling delivered on 26/9/2022 as such the court cannot be called upon to reopen that issue as doing so will go against the *functus officio* doctrine.
42. Urging that the application does not meet the requirements of review as the issue had already been determined neither does the application invoke the necessary legal provisions on which an application for review should be brought. Contending that whether or not L.R NO. 37/254/33 formed part of the estate of the deceased is still an issue pending for determination before this court and at this stage the court has seen it fit to preserve the same to avoid a situation whereby the court is embarrassed later if the property is alienated only to find later that the subject land forms part of the estate of the deceased. Opining that the court is *functus officio* regarding the issues raised by the interested party in the application dated 25/10/2022 and the same ought to be struck out.
43. Regarding the issue of whether the orders issued by this court vide its ruling delivered on 26/9/2022 should be varied or set aside, it was submitted that the main ground on which the application by the interested party is hinged is that there is an error apparent on the face of the record because court failed to consider various issues.
44. Urging that what amounts to an error apparent on the face of the record should not be an issue which has to be established by long drawn process of reasoning or where there could conceivably be two opinions about the issue. Reliance was based on *Muyodi Industrial and Commercial Development Corporation & Anor (2006) 1 EA*, the court held as follows regarding what amounts to an error apparent on the face of the record as a ground for Review;

“In *Nyamogo and Nyamogo Advocates v Kogo [2001] 1 EA 173* this court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which as to be established by a long-drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the Court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal. This laid principle of law is indeed applicable in the matter before us”

45. Similarly, in the case of *Christopher Musyoka Musau v P.G Warren & 8 others (2017) eKrl*, the learned justices of appeal while citing with approval the case of *Muyodi Industrial and Commercial Development Corporation & Anor (supra)* held as follows;

“the learned judge allowed the issues he had already conclusively determined, whether wrongly or properly to be re-agitated and re-argued in the application as if for the first time. In doing so the learned Judge ignored the *dicta* in all the authorities he himself relied on, that an error apparent on the face of record must be such an error which must strike one on merely looking at the record and does not require any long-drawn process of reasoning on points where there may be two different opinions. Nothing demonstrates this departure



better than the length of the ruling. While the judgment where the main arguments were presented was only 28 pages the ruling on a simple question on review ran into 34 pages following protracted arguments. The reasoning in the ruling amounted to the learned Judge sitting in appeal on his own decision

“...As the issue in question had been strongly contested before the learned Judge, we think it was erroneous for him to resort to this unprecedented course. The effect of what happened in this case was explained by the Court in *Pancras T. Swai V Kenya Breweries Limited*, Civil Appeal No. 275 of 2010 as follows;

“If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are *functus officio* and have no appellate jurisdiction.”

“A power of review is not to be confused with appellate power which may enable an appellate court to correct all manner of errors committed by the courts below. The power of review cannot be stretched, as the learned Judge did to reverse and overturn his own judgment under the garb of review. Having misapprehended the evidence regarding the status of the roads and water works, by concluding that the question was not relevant in determining whether the respondents were in breach of their professional undertaking, the learned judge had no jurisdiction to reconsider the question.”

46. It was submitted by 1st Applicant that the Court herein rendered its decision on 26/9/2022 whereby it rightfully dismissed the 3rd IP’s application. Contending that the same 3rd IP has then file the current application seeking review of the ruling delivered on 26/9/2022 arguing that the court made an error apparent on the face of the record.
47. It was the contention of the 1st Applicant that the fact the court did not appreciate 3rd IP’S argument on the applicability of the doctrine of survivorship qualifies as an error apparent on the face of the record. Urging that this is not an error apparent and does not qualify as such hence, the 3rd IP’s claim is not straightforward issue, but an issue requiring the court sit and reason in order to come with the finding.
48. Contending that court needs to consider the effects of the law regarding the rights of co-wives in a polygamous marriage under Section 8 of the *Matrimonial Property Act* 2013. Opining that the 3rd IP misapprehended what amounts to an error apparent on the face of the record and has ended up falling into error.
49. With regard to the issue of who should bear the cost of the application, reliance was made on Rule 69 of the Probate & Administration Rules, 1980 which provides that costs of all proceedings shall be in the discretion of the court, urging the court to exercise this discretion in favor of the 1st Applicant/ Respondent herein.
50. Finally, it was contended that the court is *functus officio* on the issue of setting aside or varying the ruling and therefore the court cannot reopen the issue again at this juncture. Urging that the application dated 25/10/2022 is unmerited and be dismissed with costs.



Determination

51. The Court considered the pleadings and submissions by Counsel for the parties and the issue(s) that emerge for determination is/are;
- a. Whether the instant application is a review or the application discloses an appeal and/or this Court is functus officio.
 - b. Whether there is an error on the face of the record
 - c. What orders should the Court grant.
52. Order 45, Rule 1CPR 2010 provides;
Application for review of decree or order
- (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.
 - (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellants, or when, being respondent, he can present to the appellate court the case on which he applies for the review.
53. The Applicant's subject of review is that this Court's ruling of 26/9/2022, dismissing the application of 15/1/2021 and upholding the Ruling of Hon DK Kemei J of 4/6/2019, and that the interested party may lodge or enforce the interlocutory judgment against the Respondent Anne Itumbi Mulli and that the proposed interested party would be joined as party to the Succession Cause during confirmation of grant proceedings highlight an error apparent on the face of the record.
54. The error consists of a glaring omission by the court to note that the Respondent Annah Itumbi Mulli to date remains the sole registered proprietor of the suit property. That suit property devolved upon the said Anna Itumbi Mulli as the sole surviving joint Proprietor on the 6/7/2015 following the death of her husband Henry Nzioka Mulli with whom they owned the suit property as joint tenants and upon her notification to the registrar of lands of her deceased joint proprietor's death.
55. The Applicant deposed that on 24/5/2018 the deceased Henry Nzioka Mulli's Certificate Death No 0310075 was registered against the title for the suit property using Form LRA 38 as stipulated under Rule 54 (1) of the [Land Registration Act](#) (General) Regulations, 2017 where upon Annah Itumbi Mulli became the registered sole proprietor once the Land Registrar effected the transfer in her name



and relevant documents are attached for the Court's reference. The Applicant averred that the name of Henry Nzioka Mulli (deceased) was removed from the property register on the 24/5/2018 whereupon Annah Itumbi Mulli was left as the sole registered proprietor of the suit property with the particular registration remaining valid to date as it has not been challenged or cancelled in any court of law.

56. On the other hand, the Respondents collectively challenged the application on the following grounds; The 1st Applicant took the view that this Court already dealt with the issue of reviewing or setting aside in its Ruling delivered on 26/9/2022 as such the court cannot be called upon to reopen that issue as doing so will go against the *functus officio* doctrine. Secondly, that the instant application does not meet the requirements of review as the issue had already been determined neither does the application invoke the necessary legal provisions on which an application for review should be brought. It was submitted that the issue of whether or not L.R NO. 37/254/33 formed part of the estate of the deceased is still an issue pending for determination before this Court. It was urged that the fact the Court did not appreciate the Applicant's argument on the applicability of the doctrine of survivorship does not qualify as an error apparent on the face of the record. The 1st Applicant further submitted that the issue at hand has more than one possible outcome, as there are various issues to be considered among them the rights of cowives in a polygamous marriage and right to property as provided by Section 8 of *Matrimonial Property Act*.
57. The 3rd Administrator/2nd Applicant submitted that as at the date of death of the deceased the subject title was in the name of the deceased and 1st Respondent. The Court in the Ruling of 26/9/2022 is stated to have failed to note the facts deposed that the 1st Respondent was/is now proprietor of the subject property as evidence of joint tenancy was outlined after the deceased's death on 6/7/2015 and the 1st Respondent registered death certificate on 25/5/2018 against the Certificate of Title. The Court maintained the orders of 4/6/2019 and allowed the administrators to carry out their mandate of collecting and collating assets, a process that is ongoing. The Applicant objected to declaratory orders sought that it/they were not pleaded before. Secondly the Supporting Affidavit of the Applicant's instant application in the Affidavit sworn by Counsel was evidential in nature, particularly paragraphs 4,5,6,&7 contrary to Rule 9 of Advocates Practice Rules and the application ought to be dismissed.
58. To the 1st issue that this Court is *functus officio* at this stage is not true or borne out by evidence on record. Parties move the Court and in this instant Application the Applicant sought review of the Court Ruling of 26/9/2022. A review may be heard where a party is aggrieved by the Court order decree judgment or ruling, where an appeal has not been preferred, from the discovery of new and important matter or evidence, on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, an aggrieved party desires to obtain a review of the decree or order.
59. The Application is in Court on merit as the Applicant is aggrieved by Ruling of the Court of 26/9/2022 and is of the view that the Ruling had/has an error on the face on the record. The principle of *functus officio* is not applicable where the application for review is filed.
60. In *Mombasa Bricks & Tiles Ltd & 5 Others vs Arvind Shah & 7 Others* [2018] eKLR, the Court observed doctrine of *functus officio* and *res judicata* and stated as follows:-

“I understand the doctrine, like its sister, the *res judicata* rule to seek to achieve finality in litigation. It is a way of a court saying, ‘I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level’. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits. It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and every



other consequent, complementary, supplementary and necessary facilitative processes. As was held by the court of Appeal in *Telkom Kenya Ltd vs John Ochanda*, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file.”

61. In *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR

A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the Respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.

62. On the merits of the review application, the gist is that the Ruling of 26/9/2022 contains an error on the face of the record. The Ruling according to the applicant failed to address or confirm that one of the Respondents Annah Itumbi Mulli to date remains the sole registered proprietor of the property LR 37/254/33 Gandhi Road, Nairobi West. The glaring fact is self-evident and does not require elaborate argument to be established but this Court inadvertently omitted to note and address this in the Ruling.
63. The earlier Ruling by Hon D.K. Kemei J granted orders of temporary injunction and restrained intermeddling of the estate of the deceased as the estate was not administered as grant was not issued yet, and any contested occupation was preserved pending hearing and determination of the claim lodged in Environment & Land Court.
64. The subsequent impugned Ruling of 26/9/2022 where in the application filed on 15/01/2021 sought the Applicant to be joined as interested party in the proceedings and/or this Court expunges LR 37/254/33 from the Schedule of Assets Listed in the Succession cause of the estate of the deceased dismissed the Applicants application.
65. This Court’s mandate is the administration of estates of deceased persons intestate and testamentary succession and distribution of intestate estates of the deceased persons. To that end particularly in this case, after grant of letters of administration intestate was/were issued on 28/5/2021 to the Administrators Monica Gomes, Bernadetta Mutunge & Faith Mutheu Mulli as required by law, Section 82 & 83 of *Law of Succession Act* they were carrying out duties and exercise powers of personal representatives/Administrators, which include to gather and collect the assets that comprise of deceased’s estate pay out rates rents and other statutory payments, and thereafter between 6 months and 1 year file Summons for Confirmation of Grant. Therefore, this Court took the view it was premature to join the interested party to the proceedings as Administrators had not exhausted the statutory period for filing the Summons for Confirmation of grant.
66. The Summons for Confirmation of Grant entail ALL Beneficiaries written consents and/or Protests to the List of Beneficiaries of the deceased’s estate as outlined, the assets of the deceased that comprise



of the deceased's estate and whether the asset(s) are available for distribution and the proposed mode of distribution.

67. Section 71 of LSA mandates the;

1. After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

2. A,b,c,& d.....

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.

68. The process of confirmation of grant is where parties administrators, survivors, dependents, beneficiaries, nominees and interested parties may confirm the Summons in terms of beneficiaries, assets and distribution. Any contest is determined through filing of protests and they shall be heard first before the confirmation so that the Court satisfies itself of the identities of the beneficiaries and share of beneficiaries claims in the distribution of deceased's estate.

69. This Court could not therefore confirm/determine the issue/question of the interested party's claim before the Summons of Confirmation proceedings were/are underway, especially when the grant was issued in 2021. The Court also took the view that the Administrators ought to carry out their statutory mandate first then the interested party's claim maybe heard and determined inter partes.

70. It is at this stage that any claim is made to any property being part of the estate of the deceased or not or any party laying claim to it or legal interest that Rule 41(3)of Probate and Administration Rules may be applied where the Court grants partial confirmation of grant and the contested portion of the asset or the asset itself is hived off until declared available for distribution.

71. It is with this background in mind that this Court found the application of 15/01/2021 premature and dismissed it.

72. The issue of Annah Itumbi Mulli to date remains the sole registered proprietor of the property LR 37/254/33 Gandhi Road ,Nairobi West although confirmed from the attached documents to the application could not be determined by an application as it was/is hotly contested by the Administrators and beneficiaries of the deceased's estate. The claim that the property belongs solely to the Respondent was objected to by the Co wives/widows and family of the deceased as can be discerned from the record.

73. Therefore, in spite of the documents presented in the absence on evidence subjected to cross-examination to test its veracity and credibility, this Court could not at the preliminary stage declare that the subject property belongs to the said Respondent through joint tenancy and survivorship. In any case this is within the purview of the Environment & Land Court as provided by Article 162 (2) of *the Constitution* of Kenya 2010 & Section13 of Environment & *Land Act*. All matters relating to title, ownership, occupation, sale, transfer etc of land shall be heard and determined by the ELC Court.

74. The subject property as at the time of deceased's death was in the names of the deceased and respondent, the changeover was thereafter, there are competing legal interests by various parties in



the estate of the deceased; there is beneficial interest under *Law of Succession Act*, there is Proprietary interest claimed by the Applicant who purchased from the Respondent the suit property and there are claims of division of matrimonial property amongst the deceased's widows. All these matters cannot legally be resolved at the Preliminary stage and on the basis of Affidavits and Submissions but by filing the Summons for Confirmation of Grant and each party lays their claim in form of consent or a Protest to be heard first and determined before including the suit property as part of the estate of the deceased or expunging /hiving the property off from the rest of deceased's estate on the declared available for distribution.

75. The Applicant purchased the subject property LR 37/254/33 from 1st Respondent Annah Itumbi Mulli herein for Ksh 67,000,000/- and deposited Ksh 13,400,000/- 20% of the purchase price. The 1st Respondent was unable to complete the transaction and the Applicant sued the Respondent in Milimani High Court Suit E057 of 2019 Tamani Construction Ltd vs Annah Itumbi Mulli and obtained Interlocutory judgment. The decretal sum is Ksh 20,100,000/- as the decree was issued on 31/5/2019. From these facts, even if there is a claim over the asset contested as part or not part of the deceased's estate, the subject property then was worth Ksh 67,000,000/- cannot wholly be subjected to execution to settle the decretal amount yet it is 1/3 of the property's total value. This Court is not persuaded /convinced that the whole suit property should be expunged at this stage and for less its total value.
76. For these reasons the Court finds that it did not fail to recognize and declare ownership of LR 37/254/33 despite the facts/evidence presented but it is not for this Court to declare a proprietary interest but the ELC Court as had been advised in the earlier Ruling of 4/6/2019. Secondly, whether the property is part of or not part of the deceased's estate shall be canvassed during Summons for Confirmation of grant and if not part of deceased's estate shall be hived off as property not available for distribution.
77. This Court notes with concern that since 28th May 2021 when the grant was issued to date, the Administrators over 2 years now have not filed Summons for Confirmation Application. During the hearing and determination of the Application that culminated to the Ruling of 26/9/2022, it was slightly over 1year as prescribed by law hence the application of 15/1/2021 was found premature. Now it is long overdue and the interested party ought to pursue to its logical conclusion its rights. In light of these circumstances, the Court reviews its order of 26/9/2022 that the earliest the interested party's claim if any maybe considered in this Court is during confirmation of grant proceedings and now joins the interested party as a party to the deceased's estate proceedings to pursue its rights and pursue its claim.
78. Joinder of an interested party is governed by Order 1 Rule 10 (2) Of the Civil Procedure Rules which states that:
- “The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”
79. The guiding principles of enjoining an interested party were set out in the case of Joseph Njau Kingori v Robert Maina Chege & 3 Others [2002] eKLR as:
1. He must be a necessary party



2. He must be a proper party
3. In the case of a defendant there must be a relief flowing from that defendant to the plaintiff.
4. The ultimate order or decree cannot be enforced without his presence in the matter.
5. His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit.

Disposition

1. The Application for review filed on 27/10/2022 partly upheld and partly dismissed.
2. Each Party to bear own Costs.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 30TH JUNE 2023.
(VIRTUAL/PHYSICAL CONFERENCE)**

M.W. MUIGAI

JUDGE

In the presence of:

Ms Aliusola For 1st Adminsitrator

No Appearance – For The Respondents

No Appearance – For The Proposed I/party

Geoffrey/patrick - Court Assistant(s)

