



REPUBLIC OF KENYA



KENYA LAW

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Kinyua v Kariuki (Sued as the Personal Representative of Stanley Kariuki Wangombe (Deceased)) & another (Environment and Land Appeal E024 of 2021) [2025] KEELC 3492 (KLR) (30 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3492 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E024 OF 2021**

AA OMOLLO, J

APRIL 30, 2025

BETWEEN

CHARLES MUIGA KINYUA APPELLANT

AND

ALICE WAMBUI KARIUKI (SUED AS THE PERSONAL REPRESENTATIVE OF STANLEY KARIUKI WANGOMBE (DECEASED)) 1ST RESPONDENT

CITY COUNCIL OF NAIROBI 2ND RESPONDENT

(In the matter of an appeal against the whole of the judgement and decree delivered on 27th May 2020 by Hon. E.A. Nyaloti (CM) in Civil Suit No.3779 of 2008 at the Milimani Chief Magistrate's Court)

JUDGMENT

1. The subordinate court entered judgement against the Appellant who was the Plaintiff in the original suit by dismissing his suit with costs. Thereafter, the Appellant filed an application for review dated 8th July 2020 seeking inter alia that the Court be pleased to review, set aside and/or vary the judgement dated 27th May, 2020. The said application was also dismissed with costs vide a ruling dated 5th March 2021 hence the present appeal.

The Appellant's case:

2. Being aggrieved by the ruling dismissing the application for review, the Appellant filed memorandum of appeal dated 11th October 2023 raising the following grounds:
 - i. That the Learned Magistrate erred in law and in fact by misdirecting herself as to the issues before her and hence arriving at an erroneous ruling.



- ii. That the Learned Magistrate erred in law and in fact in finding that the appellant had not established that the first defendant is a legal representative of Stanley Kariuki Wang'ombe (Deceased), despite an express Court Order to that effect being on record.
 - iii. That the Learned Magistrate erred in law and in fact in failing to appreciate the very solid points of law and facts raised by the appellant in the trial and during his submissions both at the trial and in support of his application in issue.
 - iv. That the Learned Magistrate erred in law and in fact in arbitrarily dismissing the appellant's application in absolute conflict with the law and facts basis thereof.
 - v. That the Learned Magistrate erred in law and in fact in failing to find that the legal prerequisites of such an application had all been met by the appellant and that the application was for granting.
3. He also prays that the court grants the following reliefs;
- a. The appeal herein be allowed and the ruling of the Chief Magistrate herein issue and delivered on the 31st March 2021, be set aside and overturned with costs to the appellant.
 - b. Any other relief that this Honourable Court may deem just to grant.

Submissions

4. Direction was issued for the prosecution of the appeal by filing of written submissions. The Appellant filed submissions dated January 28 2025 in support of the appeal and stated that the issue for determination is whether the Magistrate erred in law and in fact in dismissing the application dated July 8th 2020.
5. He submitted that the learned Magistrate erred both in law and in fact by dismissing the application despite the existence of a clear and material error on the face of the record. That the impugned ruling failed to recognize that Hon. Nyaloti's judgment was premised on a mistaken belief that no substitution of the 1st Defendant had occurred, whereas Honourable L. Orange had issued a substitution order on 31st January 2017.
6. That this oversight directly impacted the finding that the Plaintiff had not established the 1st Defendant as a legal representative of the deceased. Further, that the court, by acknowledging the absence of this order in Hon. Nyaloti's consideration, should have found sufficient basis to entertain the review application under Order 45 Rule 1 of the Civil Procedure Rules, 2010, which permits review for an error apparent on the face of the record.
7. In support of his arguments, the Appellant relied on precedents such as Republic v Cabinet Secretary for Interior & Coordination of National Government ex parte Abulahi Said Salad [2019] eKLR and Muyodi v Industrial and Commercial Development Corporation [2006] 1 EA 243, which confirm that an error apparent must be clear, manifest, and not require detailed reasoning to detect.
8. Also, in Edison Kanyabwera v Pastori Tumwebaze (2005) UGSC 1, cited with authority in Josiah v Nyaga (Civil Appeal 34 of 2021) [2023] KEHC 2054 (KLR) (16 March 2023) (Ruling) it was held that even an error of law may justify review if it is evident from the record itself. He submitted that the Magistrate's insistence on speculative reasoning—whether the order would have changed Hon. Nyaloti's mind was misplaced.



9. That the test is not hypothetical reconsideration, but whether there was a glaring procedural or factual error, which in this case was shown. Thus, the dismissal of the review application was a misapplication of legal standards governing review and calls for Court's intervention in exercising its appellate jurisdiction.

Analysis and Determination:

10. This is the first appellate court and so I am guided in my role by the holdings of the Court of Appeal in *Selle & another v Associated Motor Boat Co. Ltd. & others* {1968} EA 123 and in *Peters v Sunday Post Limited* {1958} E.A. page 424 relied on in *Mursal & another v Manese* (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) thus;

“A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.” (underline mine for emphasis).

11. Through an amendment of the plaint dated , the name of the original defendant Stanley Kariuki Wangombe-deceased was substituted with ALICE WAMBUI KARIUKI now Sued as the personal representative of the deceased defendant. The honorable trial magistrate dismissed the suit on the ground that the Appellant had not satisfied her that Alice Wambui Kariuki was the legal representative of Stanley Kariuki Wangombe-deceased. The same position was taken by the honorable magistrate who determined the application for review saying she could not tell whether the error would have made hon Nyaloti change her mind and reach a different finding.
12. Consequently, this court will proceed to determine the question whether the honorable magistrate erred in holding that the Appellant had not established that Alice Wambui Kariuki was the legal representative of the deceased Defendant and the subsequent order dismissing the request to correct the error.
13. The Appellant relied on an order issued by hon. Ireri RM on 31st January 2017 to argue that the 1st Defendant was properly substituted by his legal representative. The Order was made pursuant to an application dated 20th January, 2017 made in this same file by the Plaintiff (found at pages 63-64 of the record). It is important that I reproduce the contents of that application.
14. The orders sought were framed is as follows:
- a. That there are subsisting injunctive orders against the 1st Defendant (now deceased)
 - b. That in the pendency of the 1st Defendant's substitution herein, Alice Wambui Kariuki (the 1st Defendant's widow) has gone on to interfere with the suit land without any colour of right.
 - c. That such aforesaid action is contrary to the overriding objective and only meant to defeat the outcome hereof vix-a-viz substitution.
 - d. That the applicant herein is the plaintiff and the 1st defendant Stanley Kariuki Wangombe has since passed on in the pendency hereof, and has not been substituted with a legal representative as required by Order 24 Rule 4 of the Civil Procedure Rules 2010.



- e. That the Applicant herein petitions for letter of administration to be issued to Alice Wambui Kariuki, the wife of the deceased. Under Rule 14 of the 5th Schedule and Section 54 of the *Law of Succession Act* Cap 160 Laws of Kenya.
 - f. That it is the interests of Justice and fair play that this Honourable Court proceeds to grant this application.
15. First, the prayer for substitution of the deceased 1st defendant was made in the body of the motion. Grounds (b) and (d) of the motion confirmed that the substitution was still pending. In ground (e) the Applicant was petitioning for grants of letters of administration to be issued to the wife of the deceased under Rule 14 of the 5th Schedule and section 54 of the *Law of Succession Act*.
16. Section 54 of Cap 160 provides thus;

Limited grants:

A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act.

While rule 14 of the Fifth Schedule states that:

Administration limited to suit When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution. (underline mine for emphasis)

17. It is not clear from the record if this application was opposed as no pleadings speak to that fact. Section 54 of cap 160 requires the application for limited grant be made in any of the forms provided for under the Fifth Schedule. While reading Cap 160, I noted that there are no specific forms that reference is made to under the Fifth Schedule. However, Rule 14 seems to say that an application for substitution can be made within the same case. Consequently, the Appellant having applied that the court nominate the widow of the 1st Defendant to take his place and no objection was raised, Hon IRERI RM proceeded to grant the order on 31st January, 2017. The order granted read thus:

“i ...

- ii. That the name of Alice Wambui Kariuki is hereby substituted and or nominated in place of 1st Defendant now deceased.”

18. It follows that the 1st Defendant was properly substituted and the order having been made in the same cause from which the impugned proceedings took place, the Appellant did not again have to prove what was already part of the court record before the trial magistrate. The trial Magistrate hon E. A Nyaloti failed to note the evidence on record as regards the order of substitution and so she arrived at the wrong conclusion that the Plaintiff did not establish that the 1st Defendant was the legal representative of Stanley Kariuki-deceased. She did not consider the suit on merit based on the evidence presented but on the technicality of want of capacity of the now existing 1st Defendant.



19. It is my considered view and I so hold that this was an error on the face of the record which did not require adduction of evidence to prove its existence. Hon Gicheha while dismissing the application for review asked this question;
- “That it is impossible to tell what Hon. Nyaloti would have decided had she seen the 31st January 2017 order substituting the defendant and if that would have been enough for her to make a finding that the Plaintiff has proven their case against the Defendant.”
20. While hearing the application for review, hon Gicheha had stepped into the shoes of Hon Nyaloti as her replacer. This is in line with the provisions of Order 45 rule 2(3) which states that;
- “if the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.”
21. It was thus not correct for her (hon Gicheha) to disallow the application based on the reasoning that she could not speculate what was in Hon Nyaloti’s mind. Having won the shoes as a trial court, she ought to have determined the question that the failure to note the order of substitution led to wrong conclusion in the judgement as it was the only reason for dismissing the suit. In the event she felt uncomfortable to deal with the said application, she should have forwarded the file to her colleague to deal. Since she did not do so, it was a misdirection for her not to allow the application despite having acknowledged there was an error on the face of the record.
22. In light of the foregoing analysis, I am satisfied that the appeal is merited as the Appellant’s suit was dismissed on a technicality which resulted from an error on the face of the record. So what orders ought to issue?
23. The Appellant had sought for orders that the appeal be allowed and the ruling of the Chief Magistrate issued and delivered on the 31st March 2021, be set aside and overturned with costs to the appellant. The effect of granting the said orders sought in the appeal would result in reviewing the judgement to allow the Plaintiff’s suit. Consequently, I set aside the order dismissing the application dated 8th July 2020 and consequently, set aside the order dated 21st May 2020 dismissing the Appellant’s suit.
24. Having reviewed the order of dismissal of suit, I will consider the merit of the claim as contained in the amended plaint dated 21st February, 2017 premised on the powers granted to re-evaluate the evidence as a first appellate court. The Appellant sought for the following orders:
- a. A declaration that the 1st Defendant’s Stanley Kariuki Wangombe’s (deceased) administrator and personal representative is not entitled to enter or use the said property namely Plot. No. 15 Komarock Bridge Jua Kali by constructing buildings thereon or at all and an order compelling the 1st Defendant’s Stanley Kariuki Wangombe’s (deceased) administrator and personal representative to hand over vacant possession of the said property.
 - b. An injunction to restrain the 1st defendant’s Stanley Kariuki Wangombe’s (deceased) administrator and personal representative whether by herself, her servants and/or agents or otherwise howsoever from remaining on or continuing construction and/or occupation of the said property to wit, Plot No.15 Komarock Bridge Jua Kali.
25. The Defendants/Respondents did not file any defence to challenge the Appellant/Plaintiff’s averments. Therefore, the evidence adduced in support of his ownership claim to the suit property was



unchallenged. Meanwhile, In re-evaluating the evidence presented to confirm the Plaintiff's ownership I take cognizance of the Court of Appeal's position in *Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another* [2014] eKLR espousing that:

“It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side.”

26. In the case of *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:

“As a general proposition under Section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

27. To prove his ownership, the Plaintiff produced documentary evidence inter alia; letter of allocation from Nairobi City Council dated 21st September 2001, receipts showing payments to the Council for the plot dues, beacon certificate dated 21st September 2001, Memo from the City Council of Nairobi Department of City Planning dated 15th October 2009, Memo from Nairobi City Council, Department of City Planning dated 2nd March 2011 to director housing department indicating complaint, letter from City Council treasurer's department dated 15th July 2008 confirming that the said plot has no arrears and the letter dated 3rd December 2009 from City Treasurer department confirming the Plaintiffs ownership of the subject property.

28. Thus, he has availed evidence which on the face of the documents show the suit land was allotted to him and he is therefore entitled to use and occupy it. These evidences not having been challenged, there is no basis why the 1st Defendant or their agents should be or remain on the suit property to the exclusion of the Appellant. Consequently, nothing stops me from entering a finding in favour of the Appellant which I hereby do in terms of the prayers sought in the amended plaint dated 21.02.2017.

29. In conclusion and In exercise of my discretion, I proceed to not only set aside the impugned ruling dated 5th March 2021 but also the decree judgement dated 27th May 2020. I make the following final order:

- a. A declaration is made that the Appellant is the lawful owner of Plot.No.15 Komarock bridge Jua Kali.
- b. The 1st Defendant ((as the legal representative of Stanley Kariuki Wangombe- deceased) and or their representatives and or persons claiming through her are given Ninety (90) days to hand over vacant possession of the suit premises. In default, eviction to issue using lawful means.
- c. Once vacant possession is surrendered and or the 1st Defendant (as the legal representative of Stanley Kariuki Wangombe- deceased) and her agents, representatives and or persons claiming through her are evicted, an order of permanent injunction is hereby issued restraining them



from further interfering with the Appellant's occupation of the suit plot No. 15 Komarock Bridge, Jua Kali.

d. Since the Appeal was not defended, I award no costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL, 2025.

A. OMOLLO

JUDGE

