



REPUBLIC OF KENYA



**In re Estate of Josphat Mburu Wanyoike (Deceased) (Succession Cause
64 of 2010) [2025] KEHC 1928 (KLR) (Family) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1928 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

SUCCESSION CAUSE 64 OF 2010

PM NYAUNDI, J

FEBRUARY 20, 2025

N THE MATTER OF THE ESTATE OF JOSPHAT MBURU WANYOIKE (DECEASED)

RULING

1. This ruling relates to 2 Applications, the first Notice of Motion dated September 16, 2024 and the 2nd Originating Summons dated 27th May 2024. The Notice of Motion dated 16th September 2024 is presented under Section 47 of the *Law of Succession Act* and seeks the following orders-
 1. Spent
 2. Spent
 3. That this Honourable Court be pleased to order the respondents to render an account on the funds received from the sale of property namely-
 - i. Nakuru Municipality Block 12/60/2
 - ii. Nakuru Municipality Block 12/60/3
 - iii. Nakuru Municipality Block 12/60/4
 - iv. Nakuru Municipality Block 12/60/5
 - v. Nakuru Municipality Block 12/60/6
 - vi. Nakuru Municipality Block 12/60/7
 - vii. Nakuru Municipality Block 12/60/8
 - viii. Nakuru Municipality Block 12/60/9
 - ix. Nakuru Municipality Block 12/60/10
 - x. LR Ngong/ Ngong / 55862



4. That this honourable Court be pleased to stay execution of the judgment delivered herein.
5. That this honourable court be pleased to lift the orders prohibiting the applicant from travelling out of this country made on 11th October 2019.
2. The Applicant is aggrieved that since obtaining a decree in their favour, the Respondents have gone on 'a selling spree' of his assets and they have failed to account for the proceeds from the previous auctions. That the respondents have also prevented him from disposing of the assets directly. It is his contention that if he disposes of the properties he will settle the decretal sum.
3. The Applicant therefore seeks that the Respondents be prevented from selling, alienating, interfering or in any manner possible dealing with the applicant's property namely
 1. Nyandarua/ Kirima/ 6679
 2. Nyandarua/ Kirima/ 66/80
 3. Nakuru Langa Langa Block 1/209
 4. Nakuru Municipality Block 17/23
 5. Kabatini/ Block 1/1140
 6. Ngong/ Ngong/ 55861
 7. Ngong/ Ngong/ 55863
 8. Lr. No. 15046/74 Maki Estate Thika
4. He also seeks that the orders prohibiting his travel made on 11th October 2019 be lifted. He contends that he is prepared to sell the assets and deposit the money directly into the account of the Respondent's Counsel.
5. He is prepared to make good the decree once the respondents give an account of the proceeds from the previous sales. It is his contention that the Respondents have recovered the decretal sum in full and therefore should not sale any of his properties.
6. The respondents oppose the Application and aver that the judgment is in respect of money that the Applicant fraudulently withdrew from the estate of their deceased father. They aver that they have recovered Kshs 54, 250, 000 from the sale of the following properties
 1. Ngong/ Ngong/ 55681 Kshs 16,200,000/-
 2. Ngong/ Ngong/ 55682 Kshs 12,500,000/-
 3. Ngong/ Ngong/55683 Kshs 7,550,000/-
 4. Nakuru Municipality Block 12/ 60 (sic) Kshs 6,000,000/-
 5. Nakuru Municipality Block 12/ 60 /3 Kshs 12,000,000/-
7. Further it is averred that the Applicant has frustrated the efforts of the Respondents to recover the decretal sum by obstructing the attempted disposal of LR 15046/74 (IR 61712) in Maki Estate in Thika and Nakuru/ Municipality/Block 17/23 and Kabatini/ Block 1/1140.
8. Finally, they contest the lifting of the travel restriction and reiterate that the Applicant is a flight risk.



9. The Application dated 27th May 2024 is presented under Order 45 Rules 1& 5 of the Civil Procedure Rules and Articles 48 and 159 (2)(d) of *the Constitution* of Kenya. The Applicants seek that the Court review order made on 7th December 2023, striking out the Notice of Motion dated 19th October 2023. It is averred that the Applicants have a judgment and decree in their favour for the sum of Kshs 276,392,703. That the respondent has obstructed the sale and transfer of assets, the respondents are therefore unable to realise the judgment. That the intervention of the Court is required to compel the Respondent to comply with the judgment.
10. The Applicant in application dated 16th September 2024 has filed submissions dated 19th December 2024. In the submissions he restates the averments in the supporting affidavit. No law or legal precedent has been cited.

Analysis And Determination

11. Having considered the pleadings and submissions and the relevant law, I discern the following as the issues for determination-
 1. Whether this Court should review orders made 7th December 2023 striking out the Application dated 19th October 2023 for want of jurisdiction
 2. Whether the Court should grant an injunction against the respondents in application dated 16th September 2024 as proposed
 3. Whether the respondents in application dated 16th September 2024 should render an account of the proceeds of the property sold.
 4. Whether the travel restrictions should be lifted?
 5. Who should pay costs of the Applications
12. I note that the issue herein relates to ruling of the Court delivered on 11th October 2019, in which judgment was entered in the sum of Kshs.113,275,698.00 against Dr. John Brown Ndungu Ikenye. The basis of the judgment was that he had intermeddled with the estate and was therefore required to refund the sum of Kshs.113,275,698 (together with interest) to the Estate as represented by the 2 Administrators; Peter Gitau Wanyoike and Anthony Wanyoike Mburu.
13. 5 years down the line, the Estate Administrators are still seeking to settle the amount. The judgment debtor has the temerity to submit that the Administrators are the authors of their own misfortune! He is coming at them from multiple fronts; they have failed to account for the proceeds; he has not been given an opportunity to sale the properties and the execution is tantamount to a violation of his property rights. This is why he has presented an application for stay of execution pending presentation of accounts.
14. He portrays himself as Antonio, the character in the Merchant of Venice, of whom Shylock demanded 'his pound of flesh' in accordance with the Venetian law, whose life was saved by the ingenious intervention of Portia who pronounces that Shylock shall have 'nothing but the penalty...just a pound of flesh...no more, no less. And if he takes even in the estimation of a hair, more than a pound of flesh, he will die and all his goods will be confiscated...'
15. Are the administrators 'a stony adversary.... incapable of pity...[and] void of mercy' as portrayed by the judgment debtor. Is the Judgment debtor deserving of the injunctive orders that he seeks?



16. The conditions required for the Court to grant an interlocutory injunction were settled and well-articulated in the landmark case of *Giella v Cassman Brown & Co. Ltd* (1973) EA 358. The three-part test is therefore that:
- a. An Applicant must show a prima facie case with a probability of success;
 - b. An interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages;
 - c. If the Court is in doubt of the two above principles, it will decide an application on the balance of convenience.
17. The Court of Appeal in the case of *Nguruman Limited –v- Jan Bonde Nielsen & 2 others* [2014] eKLR further stated that
- “...these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”
18. Applying this test to the facts as presented I am not persuaded that I should grant the orders as sought. There is a judgment on record. The Judgment debtor concedes the debt. His issue is the amount outstanding after the sale of the assets. The Administrators have responded and stated this information is within his knowledge on account of prior communication. He has not disputed that fact. Whereas he contends that no valuation has been done of the assets, there are valuation reports on the Court file.
19. In February 2021, Hon Muchelule J (as he then was) ruled that the assets owned by the judgment debtor should be utilised to offset the debt. Accordingly, the Court issued a prohibitory order against the following assets
1. LR No. Nakuru/ Municipality Block 12/ 60
 2. LR Ngong/ Ngong/ 55863
 3. LR Ngong/ Ngong/ 55862
 4. LR Ngong/ Ngong/ 55861 and
 5. LR No. 15064/ 74, Maki Estate- Thika
20. The issue therefore as to whether these properties may be disposed off to settle the debt cannot be reopened.
21. I have not seen the order restricting the travel of the judgment debtor, if it exists that is a matter that should be handled on appeal.



22. For the above stated reasons, the Application dated 16th September 2024 is dismissed with costs to the Respondents.
23. On the Application dated 27th May 2024, the Applicant seeks that the orders issued on 14th December 2023 be reviewed. The Application was struck out for want of jurisdiction. The Application as I understand it is presented on behalf of individuals who have purchased assets of the judgment debtor at an auction and who wish to have the assets transferred to them.
24. The power and principles to guide review are derived from Section 80 *Civil Procedure Act* and Order 45 Rule 1 the Civil Procedure Rules, 2010. Section 80 of the *Civil Procedure Act* provides as follows:
Any person who considers himself aggrieved—
- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
25. Order 45 Rule 1 of the Civil Procedure Rules, 2010 further provides for review in the following manner:
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.
26. There is a plethora of decisions by Courts on the issue of review. The Supreme Court in Application No 8 of 2017, Parliamentary Service Commission v Martin Nyaga Wambora & others [2018] eKLR, cited with approval the findings of the East Africa Court of Appeal in Mbogo and another v Shah [1968] EA and laid out the following guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:
1. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this Court.
 2. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
 3. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
 4. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.



5. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.
 6. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and as a result,
 - a. a wrong decision was arrived at; or
 - b. it is manifest from the decision as a whole that the judge has
 - c. been clearly wrong and as a result, there has been an apparent injustice.
27. The Court of Appeal in Civil Appeal No 2111 of 1996, *National Bank of Kenya v Ndungu Njau* observed as follows in respect of reviews applications:
- 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 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 proceeds on an incorrect expansion of the law.
28. Further in High Court in Miscellaneous Application 317 of 2018, *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR. the Court enumerated the principles for consideration in reviewing its own decisions as follows:
1. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
 2. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
 3. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
 4. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
 5. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
 6. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
 7. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
 8. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.



9. Section 80 of the *Civil Procedure Act* provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the *Civil Procedure Act* does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
10. The power of a civil court to review its judgment/decision is traceable in Section 80 of the *Civil Procedure Act*. The grounds on which review can be sought are enumerated in Order 45 Rule 1.
29. In the Application dated 19th October 2023, the Court is being invited to enforce a sale at the auction. This is beyond the mandate of this Court, which is a probate Court. Having determined that the Estate was owed by the judgment debtor and having validated the enforcement of the decree by sale of the assets of the judgment debtor, this Court would be colouring outside the margins if it proceeded to purport to supervise the transfers which are separate contracts.
30. The Administrators are aggrieved that they have been turned away by the Environment and Land Court. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR the Supreme Court succinctly stated:
- A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.
31. I would therefore add to that list that jurisdiction cannot be conferred by even an order of another court. I do not therefore consider that the Administrators have brought themselves within the purview of Order 45 of the Civil Procedure Rules. It has not been demonstrated that there is a mistake or an error on the face of the record. Nor is there a discovery of a new matter. The Administrators do not agree with the Court's finding on jurisdiction, that is a matter for appeal not review.
32. In Conclusion these are the orders of the Court
1. The Application dated September 16, 2024 is dismissed with Costs to the Respondent
 2. The Application dated May 27, 2024 is dismissed, each party will bear their own costs.

DATED, SIGNED AND DELIVERED ON THE VIRTUAL PLATFORM, AT NAIROBI THIS 20th DAY OF FEBRUARY, 2025.

PATRICIA NYAUNDI

JUDGE

In the presence of:

Fardosa Court Assistant

