



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Kiarii Kahinga (Deceased) (Succession Appeal E001 of 2023)
[2025] KEHC 2126 (KLR) (Family) (6 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2126 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
FAMILY
SUCCESSION APPEAL E001 OF 2023
CM KARIUKI, J
FEBRUARY 6, 2025
IN THE MATTER OF THE ESTATE OF KK (DECEASED)**

BETWEEN

**ABEL GUCHU KIARII 1ST APPLICANT
JOHN NGANGA 2ND APPLICANT
PETER KAGURU 3RD APPLICANT
SAMUEL MBURU 4TH APPLICANT
JACOB KINYANJUI 5TH APPLICANT
CATHERINE WANJIKU 6TH APPLICANT
MONICA WAIRIMU 7TH APPLICANT
MARY WAMBUI 8TH APPLICANT
PAUL MACHARIA KAMAU 9TH APPLICANT**

AND

BEATRICE WANJIKU MBURU RESPONDENT

RULING

1. By an application dated 20th May 2024, the applicants approached this court seeking the following orders: -
 - I. Spent.
 - II. Spent.



- III. That this Honourable Court be pleased to order a stay of execution of the Ruling and the consequential orders delivered on 24th April 2024.
 - IV. That the is Honourable Court be pleased to review and/or set aside its Ruling and the consequential orders delivered on 24th April 2024.
 - V. That costs of the is application be provided for.
2. The application is supported on the grounds on the face of the application and the supporting Affidavit sworn by Abel Guchu Kiarri on 20th April 2024. The Respondent, vide Replying Affidavit sworn on 5th June 2024, opposes the application. Parties were directed to canvass application via submissions which they filed and exchanged.

Applicants' Submissions:

3. The applicant submitted on the issues on whether this Court erred in adopting Section 75G of the Civil Procedure Act in contravention of Rule 63 of the Probate and Administration Rules and in adopting Order 9 of the Civil Procedure Code Rule 63 of the Probate and Administration Rules Order.
4. The appellant submitted that in determining the issue of whether the advocate for the appellant was adequately on record and whether the appeal was out of time, the Court ought to have found that Succession Act Cap 160 is an independent statute with its provisions on procedure and does not exclusively borrow from the Civil Procedure Code.
5. Rule 63 provides for the application of specific provisions of the Civil Procedure Code. Rule 63, by providing for the application of specific provisions of the Civil Procedure Code, clearly limits the application of the Civil Procedure Rules to proceedings commenced under the Law of Succession Act and that since the Preliminary Objection dated 10th January 2024 was brought under Order 9, it was incompetent and ought to have been dismissed with costs. Rule 63 does not include and, in fact, does not mention Section 75G or Order 9.
6. The Civil Procedure Act must be used to do what is lawful only and to apply order IX of the Civil Procedure Rules in Probate. Administration matters, when rule 63 of the Probate and Administration Rules has excluded order IX from the provisions of the Civil Procedure Act permitted to be applied in Probate and Administration matters, was doing what is not lawful in Probate and Administration matters. Law of Succession Act has its own Rules and regulations.
7. Reliance was made on In Re- Estate of Sarantino, M'chabari M'ukabi (Deceased) (2019) eKLR and Alice Wairimu Mwaniki v Mary Wairimu Mwaniki & Another (2019).
8. Also Applicants cited the provisions of Sec. 47 of the Act, which is on the Jurisdiction of the High Court and which provides: -

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this act and to pronounce such decrees and make such orders there in as may be expedient.”
9. Further reliance is placed on Rules 67 and 73 of the Probate and Administration Rules, which provide: -

“Where any period is fixed or granted by these Rules or by order of the court for the doing of any act or thing, the court upon request or of its motion may from time to time enlarge such period not with standing that the period originally fixed or granted may have expired.”



"Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the end of justice or to prevent abuse of the process of the court."

10. Thus summed up that discretion vested on this Court, though broad, ought to be exercised judiciously. The manner and extent to which discretionary powers should be exercised has been determined and reliance was made *in Re-Estate of Zakaria Mutiso Nzioka (Deceased)* (2021) eKLR.

Respondents Submissions:

11. The Respondent, vide Replying Affidavit sworn on 5th June 2024, vehemently opposed the application. In light of considering the foregoing, the Court is invited to determine the following issue: -whether there is an error apparent on the face of the record to warrant review and/or setting aside of the ruling delivered on 24th April 2024?:

In reliance of the case of *Nyamogo and Nyamogo Advocates v Kogo* (200171 EA 173. In *Nyamogo*, the Court of Appeal, the respondent submitted 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.

12. That an error that must be established by a long-drawn process of reasoning or no points where there may conceivably be two opinions can hardly be said to be an error 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. In the present case, following the Ruling delivered by this Honourable Court, the Court pronounced itself in the issues raised by the Applicants herein, and this Honourable Court took a view though what the Applicants have submitted could be another view.
13. To that extent, the application should fail in its entirety. It is submitted that the Applicants ought to have filed an appeal and not review the Ruling. The Applicants have gone an extra mile to demonstrate that Rule 63 of the *Probate of Administration Rules* does not mention Order 9, Rule 9 of the *Civil Procedure Rules*, and Section 79G of the *Civil Procedure Act*.
14. Succession appeals are considered to be civil appeals and, thus, section 79G of the *Civil Procedure Act*. The *Law of Succession Act* does not provide specific timelines for filing appeals from the lower Court to the Superior. It is submitted that, one should wait forever before filing an appeal and reliance is made on, thus the import of Rule 67 of the Probate and Administration Rules. To buttress the argument, the respondent relies on the case of *Nyindha-v-nyidha & Anoth Er* (succession Appeal E012 Of 2023) (2024) KEHC 2715 (KLR) (19 March 2024) Ruling, where the Court stated as follows: -

“ 10. The *Law of Succession Act* does not provide specific timelines for filing appeals from decisions of the Lower to the High Court. However, as Succession Appeals are considered to be Civil Appeals, the provisions of section 79G of the *Civil Procedure Act* are applicable.

11. Under Section 79G of the *Civil Procedure Act*, the time for filing an appeal from judgment or decree of the subordinate Court to the High Court is thirty days."



15. The only thing filed was a notice of change of advocates which was not shown to have been served upon the outgoing firm being Messrs. Gakuhi Chege & Associates Advocates which contravenes the provisions of Order 9 Rule 5 and 6 of the Civil Procedure Rules. Further reliance was placed on Orders 9 & 10, Order 9 rule 10ten of the Civil Procedure Act.
16. This was a case where judgment was on record and now been appealed against. In compliance with Order 9 Rule 10 of the Civil Procedure Code, there is no prayer seeking to address the issue of change of advocates for this court to address. The requirement is expressly provided for by the law and as such the defect is incurable and the same cannot even be salvaged by the provisions of Article 159 of the Constitution. The respondent stated that the pleadings filed by the firm of Messrs Ngotho Waweru & Company Advocates are improper as the said firm has no legal standing to move the court and as such the court has no powers to entertain or determine any issues as raised before it by the appellants. Reliance was placed on In re Estate of Rose Akuku Aoko (deceased) (Succession Cause 126 of 2014) [2022] KEHC 10082 KLR.

Issues Analysis And Determination:

17. After going through the pleadings, proceedings and submissions filed, I find the issues are; whether there is an error apparent on the face of the record to warrant review of the ruling delivered on 24th April 2024? And the order as to costs.
18. A review of order or judgment" under the Kenyan Civil Procedure Rules refers to a process where a party can ask the court to re-examine and potentially overturn a previous order or judgment based on grounds like discovering new evidence, a clear error on the face of the record, or other compelling reasons, as outlined in Order 45 Rule 1 of the Civil Procedure Rules; essentially allowing a second look at a decision where an appeal may not be possible or appropriate.
19. Key points about reviewing an order or judgment in Kenya: Grounds for review: Discovery of new evidence: When a party finds significant new evidence that was not available during the initial proceedings. Error on the face of the record: If the court made a clear and obvious mistake in its decision that can be seen from the court documents. Other sufficient reasons: In certain situations where the court deems it necessary to correct a significant injustice.
20. In the instant matter the complaint is that the Court erred in adopting Section 75G of the Civil Procedure Act in contravention of Rule 63 of the Probate and Administration Rules and also in adopting Order 9 of the Civil Procedure Code Rule 63 of the Probate and Administration Rules Order.
21. *Nyamogo and Nyamogo Advocates v Koqo* (200171 EA 173. In Nvamogo, case of the Court of Appeal, in determining an error apparent on the face of the record, observed thus:

“An error apparent on the face of the record cannot be defined precisely and 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 that has to be established by a long-drawn process of reasoning or no points where there may conceivably be two opinions can hardly be said to be an error 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... not a ground for a review, although it may be for an appeal."

22. In the present case, in the impugned Ruling, the Court pronounced itself in the issues raised by the Applicants herein, and this Honourable Court took a view though what the Applicants have submitted could be another view. That would dispose the matter as per the cited court of appeal case above as the Applicants ought to have filed an appeal and not review the Ruling.
23. The Applicants have gone the extra mile to demonstrate that Rule 63 of the Probate of Administration Rules does not mention Order 9, Rule 9 of the Civil Procedure Rules, and Section 79G of the Civil Procedure Act. However, he fails to appreciate that, the Succession appeals are considered to be civil appeals under, section 79G of the Civil Procedure Act. The Law of Succession Act does not provide specific timelines for filing appeals from the lower Court to the Superior court. Therefore, it cannot be that one should wait forever before filing an appeal. The answer lies, thus in the import of Rule 67 of the Probate and Administration Rules. In the case of Nyindha-v-nyidha & Anoth Er (succession Appeal E012 Of 2023) (2024) KEHC 2715 (KLR) (19 March 2024) Ruling, the Court stated as follows: -
 - “ 10 The Law of Succession Act does not provide specific timelines for filing appeals from decisions of the Lower to the High Court. However, as Succession Appeals are considered to be Civil Appeals, the provisions of section 79G of the Civil Procedure Act are applicable.
 11. Under Section 79G of the Civil Procedure Act, the time for filing an appeal from judgment or decree of the subordinate Court to the High Court is thirty days."
24. In the instant matter, the only thing filed was a notice of change of advocates which was not even established whether it was served though addressed to be served upon the outgoing firm being Messrs. Gakuhi Chege & Associates Advocates thus prove of the contravention of the provisions of Order 9 Rule 5 and 6 of the Civil Procedure Rules. Further reliance was placed on Orders 9 & 10, Order 9 rule 10ten of the Civil Procedure Act.
25. Moreover, the respondent argued that that is beside the point as in this case in point there is already a judgment on record that has now been appealed against. In compliance with Order 9 Rule 10 of the Civil Procedure Code, there is no prayer seeking to address the issue of change of advocates for this court to address. The requirement is expressly provided for by the law and as such the defect is incurable and the same cannot even be salvaged by the provisions of Article 159 of the Constitution.
26. The respondent stated that the pleadings filed by the firm of Messrs Ngotho Waweru & Company Advocates are improper as the said firm has no legal standing to move the court and as such the court had no powers to entertain or determine any issues as raised before it by the appellants. See the case of Re Estate of Rose Akuku Aoko (deceased) (Succession Cause 126 of 2014) [2022] KEHC 10082 KLR.
27. Thus, the court finds no merit in the instant application and thus make the orders;
28. The application is dismissed with costs to the respondents.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION THIS 6TH DAY OF FEBRUARY, 2025.

HON. CHARLES M. KARIUKI
JUDGE

