



REPUBLIC OF KENYA



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In re Estate of Mbuthi Mungushi Igiria (Deceased) (Succession Cause E875 of 2022) [2025] KEHC 3651 (KLR) (Family) (21 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3651 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE E875 OF 2022
PM NYAUNDI, J
MARCH 21, 2025
IN THE MATTER OF THE ESTATE OF MBUTHI MUNGUSHI IGIRIA (DECEASED)

BETWEEN

NYOKABI MBUTHI 1ST OBJECTOR
ROSE WAMBUI MBUTHI 2ND OBJECTOR
MARY NGINA MBUTHI 3RD OBJECTOR

AND

SUSAN WANJIKU 1ST PETITIONER
KARIUKI MUIRA 2ND PETITIONER

RULING

1. By Summons dated 6th May 2024, presented under Section 29, 70, 74, 76 of the [Law of Succession Act](#) Rules 44 and 49 of the Probate and Administration Rules, Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules, Section 3A of the [Civil Procedure Act](#), the Applicants seek the following orders-
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That Leave be and is hereby granted to the Defendant /applicant to adduce and file additional evidence annexed as Exhibit 3 in the accompanying Supporting affidavit sworn by Nyokabi Mbuthi.



- e. That the Annah Njoki, Petitioner's witness 2, be and is hereby summoned to appear in court for cross-examination on the Affidavit sworn on 5th July 2021 and commissioned before a commissioner of oath namely Ngunjiri Maina filed in Milimani CMCC no E930 of 2021 Annah Njoki vs Musa Githogo Mbuthi & another
 - f. That this Honourable Court be pleased to give redress in light of the impugned acts of perjury and subornation by Annah Njoki contrary to Section 108 of the Penal code and/or proceed to convict and sentence her to serve for prison sentence for a period of up to 7 years in consonance with section 110 of the penal code.
 - g. That in light of the new evidence herein, this Honourable Court be pleased to order to review its own orders/findings and allow the objectors cross-petition dated 13th June 2022 and appoint them as the joint administrators of the subject estate.
 - h. That costs of the application be borne by the said Annah Njoki.
2. The Application is supported by the 1st Applicant's Affidavit sworn on 6th May 2024. The Applicant avers that post judgment herein that was delivered on 26th April 2024, they have discovered new evidence that will impact the result of the case. The new evidence that the Applicants seek to admit is an affidavit sworn by Anna Njoki in Milimani CMCC No. E930 of 2021, Annah Njoki vs Musa Githogo Mbuthi & Another.
 3. It is the averment of the Applicants that in the aforestated affidavit she was unequivocal in her deposition that the Petitioners were the wives to the deceased. That however in her evidence in the Succession Cause she purported to deny that the Applicants were the wives of the deceased.
 4. The Applicants aver that they only became aware of this affidavit after the conclusion of the succession cause. They were not aware of it when the said Annah Njoki testified in Court and when the Applicant took the stand in the succession cause.
 5. It is stated that the affidavit was not served upon the Defendants in that matter or their counsel and they only accessed the same on the e-filing portal ahead of the mention of the matter in the Magistrate's Court on 16th May 2024.
 6. It is contended that the witness is guilty of perjury and that the Court should invoke the doctrine of judicial estoppel as provided for under Section 120 of the *Evidence Act*, to avoid making a travesty of the court proceedings herein.
 7. In addition to the death certificate of the deceased and judgment delivered on 26th April 2024, the Applicant has attached Notice of Motion dated 5th July 2021 in CMCC Case No. E930 of 2021. The Notice of Motion is supported by affidavit of Ann Njoki Nganga sworn on 5th July 2021.
 8. At paragraph 15 of that affidavit she avers -
That I ensured every month my brother Mbuthi Mungushi Igiria and three wives namely Nyokabi Mbuthi, Rose Wambui Mbuthi and Mary Ngina Mbuthi and my office attendants would account for the rent received, expenses Incurred and deduct the balance from the money owed.
 9. At Paragraph 16 of that affidavit she avers further-
That in March 2018 when one Mary Ngina Mbuthi came with a different man other than the husband demanding for Kshs 1, 500,000 to buy land. This was quite unusual since my brother Mbuthi Mungushi Igiria was ailing and she wasn't accompanied by the other two wives namely Nyokabi Mbuthi and Rose Wambui Mbuthi. I insisted presence of the other



two wives namely Nyokabi Mbuthi and Rose Wambui Mbuthi for me to give the amount. She was not happy about been accompanied by the other two co-wives namely Nyokabi Mbuthi and Rose Wambui Mbuthi. She became wild, made rude abusive comments and walked out on me very angry. She cut communication and never came back after that confrontation.

10. The Notice of Motion also accompanied by a plaint and witness statement signed by Ann Njoki Nganga dated 5th July 2021 in which she states-

The agreement was to build, operate and transfer the flat back to my brother Mbuthi Mungushi Igiria. We finished construction of the apartments in August 2014 and by then I had expended Kshs. 31, 980,690. I have over the years ensured every month my brother Mbuthi Mungushi Igiria and his three wives namely Nyokabi Mbuthi, Rose Wambui Mbuthi and Mary Ngina Mbuthi and my office attendants would account for the rent received, expenses incurred and deduct the balance from the money owed.

11. It is these unequivocal averments that are at the heart of the Application as it is contended that her evidence was pivotal in the Court's decision of 26th April 2024.
12. The Application is opposed and the 1st Respondent has sworn affidavit in opposition dated 7th June 2024. The Respondents contend that the evidence sought to be introduced is neither new nor important. It is further contended that the evidence was easily available to the Applicants and their advocate on record as it was served on them on 7th July 2021.
13. It is further submitted that the 1st Applicant herein and the 1st interested party filed a response to the affidavit in issue. The evidence has therefore been in possession of the respondents at all times.
14. For this reason, it is averred that no basis has been laid to interfere with the Court's judgment. It is stated that nothing in the new evidence suggests that the Applicants were married to the deceased under Kikuyu Customary law as alleged and further that the interested parties are dependants of the deceased. It is therefore submitted that the recourse of the Applicants lies in an appeal.
15. It is contended that doctrine of estoppel does not apply as the Respondents are not party to the matter in the magistrate's Court and that in any event the averments made by the witness elsewhere cannot be construed to replace the law and taken as proof of marriage.
16. The Respondents present an affidavit of service sworn on 7th July 2021, sworn by Court process server, Peter Mungai Matheri who states he served the 1st and 2nd Defendants in Milimani CMCC No. E930 of 2021 with plaint verifying affidavit, plaintiff witness list, certificate of urgency, notice of motion together with its supporting affidavit and annexures and order of the Court dated 7th July 2021 all dated 5th July 2021. The pleadings are prepared by Mwangi Wahome & Co. Advocates.
17. The Respondents have also attached Notice of Appointment of Advocates filed by TRIPLE NW & Co. Advocates on behalf of the 1st and 2nd Defendant's therein. The Respondents also attach affidavit sworn on 9th July 2021 jointly by Musa Githogo Mbuthi and Nyokabi Kiiru Maina. At paragraph 4 of that affidavit the deponents aver that they have sworn the affidavit in response to the Notice of Motion Application dated 5th July 2021.
18. The 2nd Defendant in the Milimani Commercial Courts Case No. E930 of 2021 is the 1st Applicant herein.



19. The Application was canvassed via written submissions. The Submissions of the Applicants are dated 8th November 2024 and frame the following as the issues for determination-
- a. Whether the Applicant should be allowed to adduce new and additional evidence?
 - b. Whether the Applicants are wives and the interested parties are the children of the deceased? (presumption of marriage from the new evidence of the applicant it shows the family knew she was a wife and had children)
 - c. Whether the Petitioner's witness, one Annah Njoki, should appear before Court for cross-examination? Upon the new evidence being allowed as evidence the Court should call Anna to testify and be cross-examined on the said affidavit.
20. On the 1st issue, it is submitted that the evidence of Annah Njoki was pivotal in the Judgment of the Court herein. That her evidence on 16th November 2023 contradicted her averments in affidavit sworn on 5th July 2021. The Applicants rely on the provisions of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules and urge that on the authority of *Republic v Public Procurement Administrative Review Board & 2 Others* [2018] eKLR and the decision of the Supreme Court in *Mohammed Abdi Mahamud vs Ahmed Abdullahi Mohammed & 3 Others* [2018] eKLR this Court should review its judgment.
21. On the 2nd Issue it is submitted that the Applicants are the wives of the deceased and their children are children of the deceased. Reference is made to the Supreme Court decision in *MNK v POM: Institute for Strategic Litigation in Africa* Petition No. 9 OF 2021 for the assertion that the Court should presume a marriage as the sister of the deceased recognised them as wives of the deceased.
22. On the 3rd issue, it is submitted that once the affidavit is admitted in evidence the deponent Ann Njoki Nganga should be summoned and cross examined. Reference is made to the decisions in *Pickard v Sears* 112 E.R. 179 and *Serah Njeri Mwobi v John Kimani Njoroge* [2013] eKLR on the application of the doctrine of estoppel.
23. The Submissions of the Respondent are dated 23rd September 2024. It is submitted that the Applicants have not brought themselves within the parameters of Order 45 rule 1 of the Civil procedure rules and reference made to the decision in *Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers* [2016] eKLR where the Court cited the Court of Appeal decision in *Tokesi Mambili and Others vs Simion Litsanga* [2004] eKLR on the test to be applied when considering an application for review. It is submitted that the evidence that the Applicants seek to rely on is not new and was within their knowledge at the time of trial.
24. On whether or not the Applicants can adduce additional evidence, reference is made to the reasoning of the Court in *Samwel Kiti Lewa v Housing Finance Co. Kenya Ltd & Anor* [2015] eKLR. It is submitted that the Applicants are seeking to fill the gaps in evidence and this will prejudice and embarrass the Petitioners.
25. It is submitted that this Court cannot revisit its decision on whether the Applicants are the wives of the deceased. In any event it is submitted that the impugned witness is not a party to this suit.

Analysis and Determination

26. Having reviewed the evidence in Court, the pleadings herein, submissions filed authorities cited and relevant law I discern the following as the issues for determination



- a. Whether the Applicant has met the legal threshold to warrant a review of the judgment of the Court delivered on 26th April 2024
 - b. Arising from the finding in (a) above what are the consequential orders the Court should make
 - c. Who should pay costs for the suit?
27. To determine this issue one needs to interrogate the provisions of Section 80 of the *Civil Procedure Act* and Order 45 (2) of the Civil Procedure Rules. Section 80 of the said 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.
28. Order 45 rule 1(b) of the said Rules, provides as follows:
- (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 appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.
29. The Application is premised on the applicant’s assertion that there is now evidence showing that a pivotal witness herein had in other judicial proceedings confirmed that the Applicants are the wives of the deceased. It is stated that she is therefore estopped from making contradictory statements as to the marriage of the applicants to the deceased.
30. The Applicant having relied on the ground of new and important matter or evidence as the basis of seeking a review of the judgment herein, I am guided by the reasoning of the Court of Appeal in the case of *Rose Kaiza -v- Angelo Mpanju Kaiza C.a. Civil Appeal No 225 of 2008 [2009] eKLR*, where while discussing the ground of new and important matter or evidence as a basis of review the Court cited with approval the following passage from Mulla’s *Civil Procedure Code 15th Edition* at page 2726:
- Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the discovery of new evidence, it must be established that the Applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the Petitioner had not acted with due diligence, it is not open to the Court to admit evidence on



the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of new and important matter which was not within the knowledge of the party when the decree was made. (Emphasis added).

31. Further, in the case of *D. J. Lowe & Company Ltd -v- Banque Indosuez, C.A.* Civil Application No 217 of 1988, the Court of Appeal sounded a caution in such applications based on that ground. It stated:

Where such a review application is based on fact of the discovery of fresh evidence, the Court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed that party must show that there was no remissness on his part in adducing all possible evidence at the hearing.

32. The Court in *Benjoh Amalgamated Ltd v. Kenya Commercial Bank Limited* [2014] eKLR, stated that the residual jurisdiction of the Court to review its own decisions “should be invoked with circumspection”.

33. In *Sanitam Services (E.A.) Limited v. Rentokil (K) Limited & Another* [2019] eKLR, observed that the Court of Appeal Rules, particularly Rule 35 thereof, allows for correction of errors in the same manner and in a similar situation as the provision of the *Supreme Court Act* discussed in *Fredrick Otieno Outa v. Jared Odoyo Okello & 3 Others* [2017] eKLR where it was held, inter alia, that the slip rule does not confer upon a court any jurisdiction to sit on appeal over its own judgment or to extensively review such judgment as to substantially alter it. It was further held that corrections made become part of the judgment or order as initially rendered and that the purpose of the said section was to steer a judgment, decision or order of the Supreme Court towards logical or clerical perfection.

34. By parity of reasoning the same interpretation must be made of Order 45 rule 1 of the Civil procedure Rules. Although the Applicants herein contend that the evidence they seek to introduce was not within their knowledge at the time of the trial, the Respondents have placed an affidavit of service and pleadings (replying affidavit sworn by the 1st Applicant) in the matter before the Magistrate’s Court that show that the Applicant’s and their Counsel were in possession of the affidavit in issue.

35. I find therefore that the evidence sought to be introduced albeit new cannot be said to be “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...”

36. The Application is further based on the assertion that the evidence of the impugned witness was pivotal in the Court arriving at its decision, I have considered paragraphs 37- 54 of the judgment which sets out the decision by the Court, this assertion by the Applicants is not borne out by the record. It is my view that the Applicants in presenting this application are seeking to fill the gaps in their evidence.

37. Courts have the onerous responsibility of resolving disputes and dispensing justice, we are guided in this task by a set of rules and procedure. As Kiage JA, observed in Court of Appeal decision in *Nicholas Kiptoo Arap Korir Salat vs. the Independent Electoral and Boundaries Commission and 6 Others* [2013] eKLR:

I am not in the least persuaded that Article 159 of the *Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in



the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.

38. This application is hinged on an untruth or false statement (that the Applicant's did not have the evidence they intend to introduce now at the time of trial) and for that reason it must be struck out. I borrow the words of Hon JJ Spigelman AC delivered on 26th May 2011 in his Sir Maurice Byers Address titled "Truth and the law", where he concluded thus,

Traditionally, justice has been represented by a blindfolded woman holding equally balanced set of scales. That is no longer an appropriate symbol. The appropriate symbol for justice today is that which Gulliver discovered in Lilliput. There, justice was represented by a statue which had no blindfold and which, significantly, had eyes in the back of her head.

Blind justice is not an appropriate symbol of impartiality in a justice system dedicated to truth in fact finding. The balanced set of scales is sufficient for that purpose. The pursuit of justice cannot allow itself to be deceived. It may be constrained by other public values or by natural human failings, but it cannot allow itself to be deceived.

39. Having concluded that the evidence of the impugned witness was not pivotal and further that the affidavit sought to be introduced was served on the 1st Applicant and Counsel for the Applicants between 7th and 9th July 2021, I find that the Application for review on the ground of new and important evidence does not meet the legal threshold and I dismiss the application accordingly.
40. Having dismissed the application the other prayers that were dependent on the admission of the affidavit by Anna Njoki Nganga must fail too.
41. On costs, I find that costs will follow the event and therefore the Applicants will pay costs.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF MARCH, 2025.

P M NYAUNDI

JUDGE

In the presence of:

Ms. Mwangi holding brief for Kiroko Ndegwa for Objector/Applicant

Wahome for Respondent

Kanja Court Assistant

