



**In re Estate of Wolfgang Walter Wirth (Deceased) (Succession Cause E034 of 2023) [2025] KEHC 5195 (KLR) (17 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5195 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
SUCCESSION CAUSE E034 OF 2023**

**G MUTAI, J**

**APRIL 17, 2025**

**IN THE MATTER OF THE ESTATE OF WOLFGANG WALTER WIRTH (DECEASED)**

**BETWEEN**

**TORSTEN LECHNER ..... APPLICANT**

**AND**

**EVERLINE TABU WANJALA ..... 1<sup>ST</sup> RESPONDENT**

**PURITY EUPHEMIA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Vide a Chamber Summons dated 23<sup>rd</sup> July 2024, the Applicant sought certain orders, among which was the revocation of a grant made on 2<sup>nd</sup> August 2023 and confirmed on 15<sup>th</sup> April 2024.
2. The said application was opposed by the two administrators/respondents. Upon hearing the parties, this Court delivered a ruling on 14<sup>th</sup> February 2025 vide which it found as follows:-

“32. My reading of the prayers sought is that no permanent orders are sought. Prayer No. 2 states “that pending the hearing of this application interpartes ...” No request is made for permanent orders nor indeed for revocation or annulment of the grant.”

3. Being dissatisfied with the said decision, the applicant filed an application for review dated 18<sup>th</sup> February 2025, vide which the applicant sought the following orders:-
  1. The ruling issued by Justice G Mutai on 14<sup>th</sup> February 2025 be reviewed and varied;
  2. The Court do proceed to determine the Summons dated 23<sup>rd</sup> July 2024 on merits; and
  3. The costs of this application be provided for.



4. The basis upon which the application was sought was that the Court made an error apparent on the face of the record when it found that the applicant had not applied for revocation of the grant, when the true fact was that he had. The applicant stated that there was therefore sufficient reason to review the orders that this Court made on 14<sup>th</sup> February 2025.
5. The application was opposed. The respondents' counsel, Mwaka Karisa & Co Advocates, filed Grounds of Opposition dated 12th March 2025, vide which the said counsels averred that the application was misconceived, and for being bad in law as there was no error requiring review. The respondents questioned the fact that the affidavit was sworn by counsel for the applicant, "yet a review application was on matters of facts." Further, it was urged that the applicant should have filed an appeal, rather than seeking to review the impugned decision. For the foregoing reasons, it was submitted that the application for review be dismissed.
6. The application was canvassed through both oral and written submissions. I have considered the said submissions as well as the previous application.
7. From my perusal of the previous application, it is clear that the application dated 13<sup>th</sup> July 2024 contains a prayer for revocation of the grant and that the summons accorded, in the main, with Form 107 of the Probate and Administration Rules, 1980. That being the case, there is in fact an error on the part of the court to the extent that it found that the applicant hadn't sought the revocation of the grant.
8. Is the error the court has identified and conceded that it made "an error apparent on the face of the record"? Can the Court rectify the said error by way of review? Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rule (which applies to Probate proceedings, pursuant to Rule 63 of the Probate & Administration Rules) provides for three grounds of review. Order 45 Rule 1 of the Civil Procedure Rules provides that:-

"1.

- (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.

9. From the foregoing provision of the Rules, it is clear that the grounds upon which review may be sought are:-



1. 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 the decree was passed or the order made;
2. Mistake or error apparent on the face of the record; and
3. For any sufficient reason.

The Rules are emphatic that the application for review must be made without unreasonable delay.

10. As already stated, the applicant seeks the review of the impugned decision of this court on the ground that there is an error apparent on the face of the record. What amounts to an error apparent on the face of the record has been settled. In *Republic v Medical Practitioners & Dentists Board & Another & another; MIO1 on behalf of MIO2 (a Minor) & another (Interested Party); Kingángá (Exparte)* [2021] KEHC 298 (KLR) Mativo J stated as follows:-

“ 39. The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1. To put it differently, an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision...”

11. In *Muyodi vs Industrial & Commercial Development Corporation & another* [2006] 1 EA 243, the Court of Appeal stated that:-

“...In *Nyamogo & Nyamogo vs Kogo* (2001) EA 174, 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 real distinction between a mere erroneous decision and an error apparent on the face of 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 has to be established by 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 or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”



12. in *Zablon Mokuva v Solomon M. Choti & 3 others* [2016] KEHC 683 (KLR), Lady Justice Wilfrida Okwany referred to the decision of the Court in *Chandrakant Joshibhai Patel -v- R* [2004] TLR, 218, where it was held that an error stated to be apparent on the face of the record:

“...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may conceivably be two opinions.”

13. Having read the application dated 23<sup>rd</sup> July 2024 afresh and perused my impugned decision, I find and hold that the ruling of this Court contained an error that is clear and requires no elucidation. The application sought expressly to revoke the grant contrary to what the Court found. The said error justifies the review of the decision that this honourable Court made on 14<sup>th</sup> February 2025.

14. I must state that I find nothing wrong with the fact that the affidavit in support of the application was sworn by counsel for the applicant. My perusal of the said affidavit shows that the advocate deposed to facts within his knowledge as counsel on record and was not in regard to facts in dispute. Secondly, on whether the applicant ought to have appealed rather than filed an application for review, it is my opinion that an application for review was the most appropriate remedy in the circumstances of this matter.

15. In the circumstances, I find and hold that the application dated 18<sup>th</sup> February 2025 has merit. I allow the same, review, and set aside the orders I issued on 14<sup>th</sup> February 2025. Having done so, I will consider the application dated 23<sup>rd</sup> July 2024 on its merits.

16. The factual position in this matter was set out in my impugned decision; I need not set it out here. I must, however, state that the 1<sup>st</sup> Administrator/Respondent filed a petition for letters of administration intestate on 23<sup>rd</sup> May 2023. She stated her capacity as the widow of the deceased. She averred that the deceased died intestate, domiciled in Kenya and that she and her children were beneficiaries. In my view these facts have to be interrogated for the Chamber Summons dated 23<sup>rd</sup> July 2024 is premised on the allegation that the grant was obtained fraudulently by the concealment from the court of material facts, to wit that the deceased had a valid will, was domiciled in Wollstein Germany, that the applicant was the duly appointed executor of the will, that a grant had been issued in Germany and finally that the administrators/respondents were not beneficiaries under the will of the deceased.

17. To determine this matter, this Court must interrogate the facts and consider the applicable law to see if a case has been made for the revocation of the grant.

18. The grounds upon which a grant may be revoked are set out in section 76 of the [Law of Succession Act](#). They are that:-

“ A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;



- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-
  - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
  - (ii) to proceed diligently with the administration of the estate; or
  - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances.”

19. The grounds upon which a grant may be revoked were discussed in the case of *re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR, where it was stated that:-

“Under section 76, a Court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.”

20. In *Albert Imbuga Kisigwa v Recho Kawai Kisigwa*, Succession Cause No.158 of 2000, Mwita J stated as follows:

“ [13] Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the Court to invoke section 76 and order to revoke or annul a grant. And when a Court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”



21. To determine this matter, I must consider whether the deceased died intestate regarding his Kenyan estate and if the 1<sup>st</sup> Administrator/Respondent was the deceased's spouse. I must also consider if, when the 1<sup>st</sup> administrator/respondent filed the Petition herein, she was aware of the existence of the will, and whether there was fraud or not in the manner in which these succession proceedings were commenced.
22. The Will left by the deceased is dated 4<sup>th</sup> August 1994. Since section 19 of the [Law of Succession Act](#) provides that a marriage of the testator revokes a Will, it is necessary to establish if the 1<sup>st</sup> administrator/respondent was married to the deceased.
23. I note that the administrator/respondent narrated the relationship that she had with the deceased. According to her, the deceased died in her arms in Dubai where they had gone on a holiday as husband and wife. Ms Wanjala averred that she lived with him in Kinondo in Kwale County. She produced photographs which appear to show that the deceased visited her home in Western Kenya. The applicant conceded that there was a relationship between the deceased and Ms Wanjala, but denied that the said relationship amounted to a marriage.
24. Since the case of the 1<sup>st</sup> administrator/respondent was premised on being a spouse, she had the burden of proof under section 107 of the [Evidence Act](#) to prove that very fact. In my view, no sufficient evidence was provided to show that a customary marriage was celebrated. Under the [Marriage Act](#), 2014, such marriages are registrable.
25. The lack of registration notwithstanding, I agree with the counsel for the applicant that the onus of proof lies with the 1<sup>st</sup> petitioner/respondent to show that a marriage was indeed celebrated under Luhya customary law. Under the said customary law, there can be no customary marriage unless dowry has been paid. In this case, no evidence was provided of the payment of dowry, and therefore, no proof of validity of the said marriage was given. I am guided by the decisions of the Court in the case of *Vincent Aliero Ayumba v Livingstone Eshikuri Liakayi & 2 others* [2017] KEHC 33 (KLR) where it was stated that:-
  - “19. In his book *Restatement of African Customary Law, The Law of marriage and Divorce Vol.1* Eugene Cotran at page 53 mentions the essentials of a valid Luhya marriage as:- Capacity to marry- Consent by parties to the marriage and their respective families- Payment of dowry- Cohabitation Mr Contran states that there can be no valid Luhya marriage unless bukhwi (dowry) has been paid. The dowry has to be negotiated between the families and can be paid by cattle or by money and can be paid by installments commencing before the marriage and continue afterwards. The witnesses who testified in this case propounded the ingredients of a Luhya marriage as set out in the above said book.
  20. Though the appellant contended that what he gave the parents on his introductory visit was dowry, this was disputed even by his own witnesses who said that that was a gift to the parents of the lady and does not amount to dowry. Besides there were no elders or other relatives when the appellant went for the visit. The trial court correctly found that the payment of Kshs.8,000/- was only a gift to the deceased's parents and did not amount to dowry as dowry negotiations had not taken place.
  21. From the evidence adduced before the court and upon consideration of the essentials of marriage as contained in *The Restatement of African Customary law*, I find that the learned trial magistrate was correct in holding that there was no dowry paid by the appellant to the family of the deceased. There was thereby no customary marriage between the parties...”



26. A similar holding was made in the case of re Estate of D M M (Deceased) [2018] KEHC 6321 (KLR) where the Court held as follows:-
- “67. From the foregoing, I am satisfied that the most important element of a Kamba customary marriage is the payment of 3 goats (mbui sya ntheo) by the groom. From the evidence on record, the above aspect aspects about the ceremony on alleged marriage of protester and deceased are lacking.
68. The protestor has not discharged the burden of proving the existence of a Kamba customary marriage between herself and the deceased bearing that in any customary law in relation to marriage, the families of both the husband and the wife comes together for mutual undertaking and agreement to the aspect of dowry price. Witnesses are engaged to witness. The protestor has failed to call any of her witnesses to confirm the matters of her dowry payment.”
27. With respect, I don't think that the mere fact that the deceased visited the home of the 1<sup>st</sup> administrator/respondent proves that a customary marriage was celebrated.
28. In the circumstances, find and hold that no proof of customary marriage between the deceased and the 1<sup>st</sup> petitioner/respondent was provided and consequently that she wasn't a spouse of the deceased. That being the case, the will remained valid.
29. Was the will applicable to the Kenyan estate of the deceased? My reading of the will is that it provided for what would happen to the deceased's residuary estate. I do not, therefore, agree that the deceased died intestate in respect of his Kenyan estate.
30. From the evidence on record, it is clear that the 1<sup>st</sup> administrator/respondent was aware of the will of the deceased, having been informed of it via a letter dated 24<sup>th</sup> January 2023 by the Municipal Council of Wollstein, Germany. While knowing about the said Will, she nevertheless filed a petition for Intestate succession rather than challenge its validity/applicability to the Kenyan estate or otherwise to disclose its existence.
31. I agree with the counsel for the applicant that filing an application for intestate succession while knowing that the deceased had left a will was a fraudulent act on the part of the 1<sup>st</sup> administrator/respondent.
32. Having engaged in fraudulent conduct, the 1<sup>st</sup> administrator/respondent can't be trusted to administer the estate, even if, which is not the case, she was the spouse of the deceased. I rely on In re Estate of Agwang Wasiro (Deceased) [2020] KEHC 8362 (KLR), where it was held as follows:-
- “The office of administrator is one of trust. A person who unlawfully deals with estate property prior to his appointment cannot possibly be trusted to faithfully administer such property in accordance with the law. His conduct does not inspire faith, trust and confidence. I do not think he is the proper person to be placed in charge of the estate, and I shall exercise the powers conferred upon me by section 76 of the Law of Succession Act, and the inherent powers saved in Rule 73 of the Probate and Administration Rules , to remove him from office.”
33. In re Estate of Ahmedali Abdulhussein Mamujee; Succession Cause No 234 of 2013, this court (per Mugure Thande, J) revoked a grant obtained on the false pretext that there was no further will.
34. In the circumstances, I find and hold that the grant issued on 2<sup>nd</sup> August 2023 and confirmed on 15<sup>th</sup> April 2024 was obtained fraudulently. I revoked the same. For avoidance of doubt, I find and hold that



the only valid grant in respect of the estate of the deceased person is that issued to the applicant herein in Mombasa High Court Succession Cause No E068 of 2023.

35. As this is a Succession matter, parties will bear their own costs.

36. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 17<sup>TH</sup> DAY OF APRIL 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

Mrs Chengo for the Administrators/Respondents;

Mr Andiwo for the Applicant

Arthur – Court Assistant.

