In re Estate of Ali Karisa Wanguma, aka Ali Mohamed (Deceased) (Succession Cause 424 of 2013) [2025] KEHC 5180 (KLR) (11 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5180 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

SUCCESSION CAUSE 424 OF 2013

G MUTAI, J

APRIL 11, 2025

IN THE MATTER OF THE ESTATE OF ALI KARISA WANGUMA, AKA ALI MOHAMED (DECEASED)

BETWEEN

KADZO KARISA CHENGO ..... APPLICANT

AND

KHALID HADI AHMED ..... 1ST RESPONDENT

DAMA KARISA CHENGO ..... 2ND RESPONDENT

KHAMIS KARISA CHENGO ..... 3RD RESPONDENT

ALI KARISA CHENGO ..... 4TH RESPONDENT

FATUMA KARISA CHENGO ..... 5TH RESPONDENT

SUING FOR AND ON BEHALF OF THE ESTATE OF KARISA CHENGO NGUMA - DECEASED

RULING

1. Before the Court is a Notice of Motion dated 31st October 2024 vide which the applicant seeks the following orders: -

    1. Spent;

    2. Spent;

    3. Spent;

4. This honourable Court be pleased to review and aside the order made on 27th May 2022 to revoke the registered ownership of Title No. Mombasa/Bububu "A" Settlement Scheme/27, including the resultant titles issued in favour of the Respondents to the effect that: -

    a. The acreage to be excised and or transferred is restricted to one quarter (1/4) of the suit property as per the grant of letters of administration interstate made on 8/4/2014, confirmed on 23/11/2015 and issued on 14/12/2015 over the estate of Ali Karisa Wanguma (deceased) as read together with the judgment entered on 15/2/2018 in ELC No. 203 of 2017; Karisa Chengo Nguma vs Kache Ruwa Kalama & Shida Ali Nguma;

    b. In addition, and or in the alternative, the order of 27/5/2022 is in any event subject to section 93 of the *Law of Succession Act*, which provides that revocation of a grant shall not affect the validity of a transfer effected by a person who held a grant; and

5. Costs of the application be provided.

2. The applicant filed the application as he was apprehensive that the matter was due for a notice to show cause on 7th November 2024 why the Land Registrar should not be punished for not complying with the orders of 27th May 2022, which directed him to revoke the resultant title for Title No. Mombasa/ Bububu "A" Settlement Scheme/27 issued to the Respondent on 21st September 2016. The applicant averred that he was the current registered owner of the resultant titles of the said property, which are registered as Title Nos Mombasa/Bububu "A" Settlement Scheme/1345 and 1346.

3. The applicant stated that 27th May 2022, when the impugned order was issued, he was the owner of the properties, having acquired the property by way of transfer on 21st May 2018 from the beneficiaries/ administrators of the estate of Ali Nguma (deceased) for a consideration of Kes.20,000,000.00. The administrators who transferred the property on 21st May 2018 held a grant of letters of administration issued by the Kadhi's Court on 22nd May 2012 in Mombasa Succession Cause No 214 of 2011 and a certificate of Confirmation of grant issued by the High Court on 18th September 2017 in HC Succession Cause No 196 of 2016 in respect of the estate and were for that reason qualified to do what they did.

4. It was urged that the applicant was occupying the suit property. Title No Mombasa/Bububu "A" Settlement Scheme/27 had ceased to exist. The Interested Party/Applicant contended that this Court would not have issued the impugned orders if it was aware that the suit premises were registered in his name, that he was not a party to the matter before the Court, and that he wasn't given an opportunity to be heard before orders adverse to him was issued which action was contrary to the binding authority of the Court of Appeal in Alton Homes Ltd & another vs Davis Nathan Chelogoi & 5 others [2020] eKLR.

5. It was stated that compelling the Land Registrar to cancel the title of the applicant and to register the title in the name of another person would be a manifest injustice and violate Article 50(1) and Article 40 of the *Constitution* and also be contrary to section 93 of the *Law of Succession Act*.

6. The applicant stated that the respondent's interest was only one-quarter of Title No. Mombasa/ Bububu "A' Settlement Scheme/27, as established by Mombasa ELC No 203/2017, which belonged to their father. The other three-quarters of the said parcel of land belonged to other beneficiaries who had acknowledged that they sold their entitlement and had no further claim. It was stated that unless there was a stay, the Land Register could be compelled by the court to act in a wrong way.

7. The applicant averred that it was necessary to review the orders of 27th May 2022 to clarify the acreage to be excised as being ¼ of the suit property and to prevent embarrassment to this honourable Court from being occasioned.

8. The applicant further stated that he was condemned without a hearing and that this Court had a duty under Order 1 Rule 10 of the Civil Procedure Rules to add any necessary party.

9. In response, the applicants/respondents' filed grounds of Opposition dated 6th November 2024 in which it was denied that the Interested Party/Applicant could file an application for review at the same as it was pursuing an appeal, that the applicant lacked locus stands to file the application as he wasn't a beneficiary of the estate, that what the applicant sought to do was to review a decision, that the review application was res judicata, as the previous application dated 23rd April 2024 was dismissed by the Court on 11th October 2024 and that the application was brought by a stranger, nor by the person whose attendance was required under the notice to show cause. It was also stated that the Court was functus officio.

10. The matter was canvased through both written and oral submissions. The Oral Submissions were made on 9th December 2024. I shall refer to the submissions of the parties below.

11. The applicant's submissions are dated 21st November 2024 and 6th December 2024.

12. In his submission, Mr Karina, learned counsel for the applicant, stated that it was necessary to review the decision made on 27th May 2022 as it deprived his client of a right to property without giving him an opportunity to be heard. The decision granted the applicants the entire suit property, whereas the Environment and Land Court found that they were only entitled to ¼ of it and that this Court had no jurisdiction to enforce the order of 27th May 2022 in a manner that violated section 93 of the *Law of Succession Act*.

13. The applicant identified issues coming up for determination as being: -

    1. Whether the lodging of the notice of appeal dated 14th October 2024 prevented the applicant from applying for review of the orders issued on 27th May 2022;

    2. Whether the applicant has the locus standi to apply for a review of the orders made on 27th May 2022;

    3. Whether the application dated 31st October 2024 is res judicata; and

    4. Whether there are sufficient reasons to review the orders of 27th May 2022.

14. On the first issue, it was submitted that the Notice of Appeal dated 14th October 2024 was in respect of the decision made by this Court on 11th October 2024 and not that of 27th May 2022. Secondly, it was urged, based on the decision of the Court of Appeal in Multichoice (K) Ltd vs Wananchi Group (Kenya) Ltd, Communication Commission of Kenya & Kenya Broadcasting Corporation [2020] eKLR that a party who had filed a Notice of Appeal, even if he had not withdrawn it has the right to apply for review.

15. Regarding the standing of the applicant, Mr Karina urged that under Order 45 Rule 1 of the Civil Procedure Rule, "any person considering himself aggrieved" could file an application for review. Counsel submitted that since his client was condemned unheard despite being the registered owner of the suit premises, he was an aggrieved party and thus, he had standing to file an application for

review. Counsel relied on the decision of the Court of Appeal in Daniel Gicheru Kingori & 2 others vs Wambugu [2022] KECA 1168 (KLR), where it was held that: -

> " ... the wording of the provisions of Order 45 Rule 1 are meant to take into account the fact that the said provisions are not restricted to parties to a suit since it takes of "any person considering himself aggrieved." An aggrieved party may not find the avenue of an appeal feasible and may apply for review..."

16. Mr Karina urged that the application dated 31st October 2024 was not res judicata that of 23rd October 2024 as the issues in the said application were not directly or substantially in issue in the application dated 23rd April 2024. He stated that the two applications sought to review different and distinct orders.

17. On the question as to whether there were sufficient reasons to review the orders made on 27th May 2022, Mr. Karina submitted that there were. He stated that it was necessary to review the said orders so that the interested party applicant could be heard before his title could be revoked. Secondly, so that the court could restrict the acreage to be excised, and thirdly, to place the ruling within the ambit of Section 93 of the *Law of Succession Act*.

18. On the first issue, it was urged that the right to fair hearing was a right which under Article 25(c) of the *Constitution* could not be derogated. Counsel stated, relying on the decision of the Court of Appeal in David Onyango Oloo vs Attorney General [1987]eKLR urged that a decision made without hearing a party was a nullity. Mr Karina urged that this Court administer justice without undue regard to procedural technicalities and instead administer substantive justice by revisiting the decision of 27th May 2022.

19. Regarding the restriction of the acreage, Mr Karina urged that "it would be manifestly unjust to register the applicants in the contempt application the proprietors of the entire suit properly because the said applicants are only entitled to one ¼ and not the entire suit property..."

20. The basis for the contention was that ELC in ELC No 203 of 2017 determined that Karisa ChengoNguma was only entitled to ¼ of the land. It was, therefore, necessary to review the orders made on 27th May 2022 to clarify the acreage and to avoid conflicting decisions between the Environment and Land Court and this Court.

21. Counsel urged that section 93 of the *Law of Succession Act* denied this Court a right to impeach a transfer made by administrators when they held the said position even if the grant was subsequently revoked.

22. On the basis of the foregoing, counsel urged this Court to review the order made on 27th May 2025 to accord the applicant a right to be heard, to restrict the acreage and to clarify the scope of section 93 of the *Law of Succession Act*.

23. The submissions of the respondents are dated 27th November 2024. Vide the said submissions, Mr Kenga, learned counsel for the respondents, urged that the application be denied.

24. Mr Kenga submitted that he would rely on his previous submissions on the grounds that the application dated 31st October 2024 was similar to those filed earlier but with "conning modification."

25. Counsel identified issues coming up for determination as being

    i. Whether this Court had jurisdiction to entertain a second review application dated 2024;

    ii. Whether a person who is not a beneficiary can apply for a review; and

iii. Whether the present application is res judicata.

26. On the first issue, it was urged that the law does not allow a review of orders made on review and, by extension, orders of contempt of Court.

27. On the second issue, it was urged that since the applicant was not a party to the succession proceedings, he could not apply for review.

28. On whether the present application was res judicata, Mr Kenga said it was. Counsel urged that this Court could not while hearing an application for review, undertake an appeal against its own decision. The court was referred to the decision of the Court of Appeal in Harrison Amolloh Okumu vs Perez Okumu & 3 others; CACA No 27 of 2019 (Mombasa) and *Mary Wambui Njuguna vs William Ole Nabala & 9 others CACA No 100 of 2016* (Malindi)

29. The Court was thus urged to dismiss the application.

30. The applicant filed supplementary submissions sworn on the 6th day of December 2025, in which it was urged that unless the orders of 27th May 2022 were reviewed, there would be "a grossly unfair outcome in judicial proceedings. The orders made therein were made without hearing the applicant, and the applicant would be affected by the contempt proceedings as his title would, as a result of the said proceedings, be cancelled.

31. Mr. Karina urged that the applicant pleaded facts which were not controverted, as no affidavit in response was filed challenging the pleaded facts, and thus, the said facts were unchallenged. Counsel relied on the decision of the Court of Appeal in Shunkur vs Rigogo Chonjo Company Ltd & others [2023]KECA 917 (KLR), where it was stated that

> " ... the Respondent didn't file any replying affidavit
>
> ...Failure to file a replying affidavit can only mean that those facts are admitted."

32. Counsel urged that the uncontroverted facts disclose a manifest injustice. He submitted, based on the holding in Githiga & 5 others v Kiru Tea Factory Company Ltd [2023] KESC 41 (KLR that this Court could not overlook a miscarriage of justice.

33. Counsel thus urged that I allow the application.

34. I have considered the application, the affidavits in support, and the grounds of opposition filed by the applicants/respondents. I have also taken note of the parties' written submissions.

35. This Court (per Onyiego, J) in paragraph 64 of the ruling delivered on 27th May 2022 ruled as follows: -

> "64. Having held the above, I do not find any evidence committed by the respondent nor concealment of material information, nor were the proceedings defective in substance. If anything, it is the applicants who, in my view, are abusing the Court process by being dishonest. For those reasons, the revocation application herein dated 15th August 2028 (sic!) is dismissed. This being a family issue, each party shall bear own costs. In conclusion, therefore, the following orders apply:-
>
> a. Revocation application dated 3rd July 2019 is allowed a prayed; and

b. The application for revocation dated 15th August 2018 is dismissed in its entirety; and

c. Each party to bear own costs."

36. To understand the effect of the above decision, one must look at what the application dated 3rd July 2019 sought. The said application had the following prayers: -

1. That this application be certified extremely urgent and be heard exparte in the first instance;

2. That an order of inhibition does issue restricting any dealings with Land parcel No Bububu "A" Settlement Scheme/27, also described as Plot No Mombasa/Bububu "A" Settlement Scheme/27 pending interpartes hearing and determination of this application;

3. That Mombasa Kadhi's Court Succession cause No 214 of 2011 be transferred from the Kadhi's Court (Mombasa) to this Honourable Court and be consolidated with this matter for further orders herein;

4. That the grant and or Succession Order issued in the Mombasa Kadhi's Court Succession Cause No 214 of 2011 on 22nd May 2012 pursuant to Article 170 (5) of the *Constitution* of Kenya, 2010, section 5 of the Kadhi's Court Act (cap 11) and section 48(2) of the *Law of Succession Act* (cap 160 Laws of Kenya) be revoked and all subsequent orders including the resultant Title No Mombasa/Bububu "A" Settlement Scheme/27 issued in favour of the Respondents on 27th September 2016 be revoked;

5. That the grant of letters of administration intestate made on 8th April 2014 and the subsequent confirmation of grant on 23rd November 2015 and issued on 14th December 2015 be considered as the only valid Succession orders of grant of this Court;

6. That the orders of this Court herein be served upon the Land Registrar, Mombasa, for compliance; and

7. That costs of this application be borne by the Respondents.

(emphasis added)

37. My understanding of the above decision is that it revoked the grant and the resultant title(s). That would be the basis upon which the resultant order would be served on the Land Registrar for compliance. That being the case, are there grounds warranting a review of this court's decision?

38. The review jurisdiction of the Court is stated in section 80 of the *Civil Procedure Act*. This section provides that: -

" 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."

39. The said provision is given effect by Order 45 Rule 1 of the *Civil Procedure Act*, which provides that: -

"(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."

40. Although Probate & Administration proceedings are sui generis, Rule 63 of the Probate & Administration Rules applies provisions of Order 45 of the Civil Procedure Rules to succession proceedings.

41. The grounds upon which review may be sought are therefore:-

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.

Order 45 Rule 1 is emphatic that the application for review must be made without unreasonable delay.

42. The applicant has not identified which of the three grounds he relies on. Given the nature of the matter, it seems that the basis is that there is an error apparent on the face of the record in so far as the applicant was condemned unheard and that the Court awarded the respondent land in excess of what they were justly entitled to. Are there sufficient grounds to review the decision of Onyiego J?

43. Before doing so, I must consider the contentions made by the respondent on the grounds of opposition.

44. On whether the judgment of Notice of Appeal bars the applicant from filing the application for review. I am in agreement with the counsel for the applicant that it does not. This is for two reasons. The Notice of Appeal is in respect of a different decision from the judgment of Onyiego J of 27th May 2025. Secondly, it is clear from the precedents that even if it was regarding the same matter, filing a Notice of Appeal alone does not bar a party from applying for review.

45. My understanding of Order 45 Rule 1 of the Civil Procedure Rules is that it allows any aggrieved party to file an application for review. The applicant is clearly aggrieved by the decision this court made on 27th May 2022 to revoke the title in his favour (as the holder of 2 resultants titles). He is clearly aggrieved by the said decision. In my view, he has the locus standi to file an application for review.

46. I do not think the application dated 31 October 2024 is res judicata.

47. Having determined the preliminary matters, I must now consider whether there is an error apparent on the face of the record. The applicant submits that the Court erred in revoking his title for giving

the applicant respondents the whole parcel of land and for not considering the provisions of section 93 of the *Law of Succession Act*.

48. The scope of what amounts to an error apparent on the face of the record has been discussed in many decisions of the Courts. 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..."

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

> " ...In Nyamogo & Nyamogo v 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."

50. The court of appeal in National Bank of Kenya Limited v Ndungu Njau (1997) eKLR stated as follows:-

> " 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."

51. Applying the above decisions of this matter, I note that this Court revoked a title which, at the time the decision was made, was in the name of the applicant. The applicant was not heard before the said decision was made. To that extent, he was condemned unheard.

52. The right to a fair trial is a non-derogable right under Article 25(c) of the *Constitution*. I agree with the counsel for the applicant that this Court can, when exercising its review jurisdiction, do so to correct a manifest injustice. Not allowing the application creates the risk of a serious miscarriage of justice.

53. I am therefore persuaded that the application has merit. The same is allowed.

54. I, therefore, review and vacate the orders issued on 27th May 2022, in respect of the application dated 3rd July 2019, strictly to the extent that the said orders revoke Title No Mombasa/Bububu "A" Settlement Scheme/27 and all the resultant titles, and also the requirement that the Land Registrar should be served for compliance.

55. Parties are at liberty to pursue remedies before the appropriate Courts.

56. As this is a succession matter, each party shall bear his or her own costs.

57. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 11TH DAY OF APRIL 2025. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of

Mr Karina, for the applicant;

Mrs Chengo, for the Applicants/Respondents; and

Arthur – Assistant Court.