



**In re Estate of Ongweny Wayungu (Deceased) (Succession Cause 807 of 2004) [2025] KEHC 4680 (KLR) (9 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4680 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
SUCCESSION CAUSE 807 OF 2004**

**MS SHARIFF, J**

**APRIL 9, 2025**

**IN THE MATTER OF THE ESTATE OF ONGWENY WAYUNGU (DECEASED)**

**BETWEEN**

**JACOB ODHIAMBO OTIENO ..... ADMINISTRATOR**

**AND**

**CHARLES ONDIEK AWUOR ..... RESPONDENT**

**RULING**

1. The applicant has moved this court vide a Notice of Motion dated 20<sup>th</sup> February 2024 for orders of review of the directions made herein on 19<sup>th</sup> February 2024, for the striking out of the respondent's preliminary objection dated 7<sup>th</sup> February 2024, and that this court do issue timelines for the compliance with the decree dated 27<sup>th</sup> June 2019. The applicant further seeks that the defaulting party be cited for contempt of court and be committed to civil jail for a term to be determined by this court. This court has also been moved to issue such directions as will ensure that this succession cause, which is 20 years old, is concluded and a provision be made for costs of this application.
2. This application is premised upon the grounds outlined in the face of it and is supported by an affidavit of Clifford Otieno Obiero sworn on 19<sup>th</sup> February 2024. The basis for this application is that the respondent is employing procrastination tactics while intermeddling with the estate of the deceased to the detriment of other beneficiaries of the estate. This cause is 20 years old. The applicant maintains that the preliminary objection dated 7<sup>th</sup> February 2024 is *pari materia*, the one dated 29.11 2022 which the respondent had withdrawn on grounds that it had been overtaken by events.
3. The respondent filed grounds of opposition dated 27<sup>th</sup> February, 2024 and he posits that the applicant has not met the threshold for review as envisaged under Order 45 rule 2. Further that the application lacks merit, is inept and is made in bad faith and that the issues raised in this application are *sub judice* a reference dated 1.4.2021 which is pending before the Court of Appeal.



4. Parties made oral submissions to the application. I have duly considered the application herein, the response thereto and the rival submissions of parties.

### **Analysis and Determination**

5. The applicant has moved this court under the provisions of articles 49, 50 and 159 of the [Constitution of Kenya](#) and orders 45 Rule (2) and (15) of the [Civil Procedure Rules](#) and Section 1 &3 of the [Civil Procedure Act](#).

Order 45 Rule 2 of the [CPA](#) provides as follows:

- (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.
  - (2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.
  - (3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.
6. On the other hand, articles 49, 50 and 159 call for fair hearing and the consideration of substantive Justice as opposed to dismissal of cases on procedural technicalities.
  7. The issues that emerge for determination are as follows:
    - a. Whether the applicant has made out a case for review of the directions made on 19.2.2024.
    - b. If the answer to (a) above is in the affirmative, whether the applicant's application dated 23.11.2023 ought to be allowed as unopposed.
    - c. Whether this court should issue timelines for compliance with the courts decree dated 27.6.2019
    - d. Whether there is need to cite any defaulting party for contempt of court.
    - e. Who should bear the costs of this application.
  8. On whether the respondent/applicant has made out a case for review I do note that it is the applicant's position that the petitioner/respondent had misled this court and caused it to give directions on his preliminary objection yet he had previously filed and withdrawn a similar preliminary objection dated 29.11.2022.
  9. I have perused the court record and I do note that indeed on 23.3.2023 the Petitioner had filed a notice of preliminary objection dated 29.11.2022 and had withdrawn the same on 24.7.2023 on grounds that it had been overtaken by events.
  10. It is instructive to note that the preliminary objection that the respondent Charles Ondiek Awuor had withdrawn was a response to the applicant's summons for confirmation of grant dated 23.8.2022 which was struck out on 29.5.2023 as the same had been filed by the applicant in person yet he was at



the material time being represented by the law firm of Otieno, Yogo, Ojuro & Company Advocates. Indeed, the Preliminary Objection had been overtaken by events upon the striking out of the summons for confirmation of grant dated 23.8.2022.

11. The question that now arises is whether the respondent is barred from filing preliminary objections in the future. The answer to this question is in the negative. Given that the applicant has filed summons for confirmation of grant dated 7.8.2023 and a chamber summons dated 23.10.2023, the respondent has every right to respond thereto in the matter that he deems appropriate. In this instance he filed preliminary objection dated 7.1.2024 and a replying affidavit sworn on 29.11.2023.
12. On 19.2.2024 I gave directions on the respondent's preliminary objection dated 7.1.2024. Subsequently the applicant filed the current application for review. As I have already stated herein above there is no legal basis for barring the respondent from prosecuting his preliminary objection more so given that it touches on the jurisdiction of this court. In any event the applicant has not demonstrated that there is error on the face of the record or that he has discovered new facts that were not within his knowledge as at the time that the directions were made on the respondent's preliminary objection dated 7.1.2024. Further no other sufficient reason as envisaged under Order 45 Rule (1) has been adduced by the applicant to merit a review of the directions made on 19<sup>th</sup> February 2024.
13. As pertains to the legal provisions that this application is premised on, I do note that Order 45(2) is merely procedural while Sections 1 and 3 of the Civil Procedure Act do not aid the applicant. Article 49 of the Constitution enshrines the rights of an arrested person. No one has arrested the applicant herein wherefore that provision is misplaced. Articles 50 and 159 (2) of the Constitution of Kenya 2010 are relevant as they underscore the right of a party to a fair hearing and the principles that bind a court when exercising judicial authority. In this instance the applicant is inviting this court to infringe upon the rights of the respondent to be accorded a fair hearing. That is an invitation that this court is obliged to decline.
14. On the balance I do find that this application is devoid of merit and I disallow it with costs to the respondent assessed at Kshs 15,000 payable within 45 days from the date hereof and in the event of default, execution to issue.

**DELIVERED, SIGNED, AND DATED AT KISUMU THIS 9<sup>TH</sup> DAY OF APRIL 2025.**

**MWANAISHA S. SHARIFF**

**JUDGE.**

