



**In re Estate of Njamwea Gitumio Kanyoni alias Njamwea Kanyoni (Deceased)
(Succession Cause 550 of 2008) [2025] KEHC 6380 (KLR) (13 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6380 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 550 OF 2008**

DKN MAGARE, J

MAY 13, 2025

**IN THE MATTER OF THE ESTATE OF NJAMWEA GITUMIO
KANYONI ALIAS NJAMWEA KANYONI (DECEASED)**

BETWEEN

SIMON MWAI NJAMWEA APPLICANT

AND

PETER KANYONI NJAMWEA RESPONDENT

RULING

1. Njamwea Gitumio Kanyoni (deceased) died at a ripe old age of 103 years in Maitharui on 18.6.2003. Peter Kanyoni Njamwea took out a citation on 14.10.2008. The citation was against Simon Mwai Njamwea. The deceased left one parcel of land measuring 0.539 hectares, that is, Land parcel number Mwerua/Kiandai/1119. Subsequently, the Petitioner/Respondent filed letters of administration on 14.11.2008. The court granted letters of administration on 30.03.2009. The letters of administration were confirmed on 29.1.2010, as follows:
 - a. Laban Kithome Wamugunda – 1 acre
 - b. Peter Kanyoni Njamwea – ½ acres
2. On 18.08.2022, the Objector/Applicant Simon Mwai Njamwea, filed an application dated 10.08.2022 for revocation of the grant conferred herein. He stated that the estate did not have a creditor. It was his case that the Petitioner/Respondent conspired with some of the beneficiaries to sell land to Laban Kithome Wamugunda. He stated that this was confirmed in Baricho ELC Case No 17 of 2022.
3. The Petitioner/Respondent, Peter Kanyoni Njamwea, replied that the application is based on false premises. The beneficiaries were all involved. The said parcel was a result of subdivision of Land parcel number Mwerua/Kiandai/330 as per the certified copy of the register. The said parcel was in the name



- of the deceased from 4.2.1961. The said parcel was subdivided into land parcels number Mwerua/Kiandai/1117-1122, five parcels measuring 0.539 hectares and one measuring 0.405 hectares.
4. It was indicated from the searches that the parcels were transferred to the deceased's children as follows;
 - a. The Objector/Applicant was given Land parcel number Mwerua/Kiandai/1118 measuring 0.539 hectares. It was transferred to his name by his late father on 25.09.1998.
 - b. Julius Kanja Njamwea was given Land parcel number Mwerua/Kiandai/1120 measuring 0.539 hectares. It was transferred to his name by his late father on 11.09.1998.
 - c. Maina Njamwea Kanyoni, Francis Wanjohi Maina, and Kanja Maina, children of Maina Njamwea, are registered owners of Land parcel number Mwerua/Kiandai/1121, measuring 0.539 hectares. It was transferred to them on 30.08.2022.
 - d. Julius Macharia Kahoru had Land parcel number Mwerua/Kiandai/1122 measuring 0.405 hectares transferred by the deceased on 11.09.1998.
 - e. The Petitioner/Respondent was given Mwerua/Kiandai/1119 measuring 0.539 hectares.
 5. He stated that his late father did not transfer it to his name by the time he died. It turned out that the other beneficiaries were given gifts inter vivos. The Petitioner/Respondent was the only child of one of the wives. The step brothers had been given their shares. The Petitioner/Respondent questioned why the application was made 13 years later. The Objector/Applicant could not explain why he did not respond to the citation. I directed the matter to be heard. The matter came for hearing on 14.10.2024. The Objector/Applicant was absent.
 6. The Objector/Applicant's advocate stated that the Objector/Applicant was sick and had just been discharged that morning. I did not believe the excuse. Consequently, I placed aside the file to enable the parties to file evidence of sickness. The Objector/Applicant filed the alleged evidence of sickness. The same was a forgery. It did not have the name of the treating Physician. Upon reading the discharge summary, I was not satisfied with the reason for the absence of the Objector/Applicant. I found that the discharge summary was bogus. I dismissed the application dated 10.08.2022 for want of prosecution, with costs of Kshs 15,000/=.
 7. This matter does not seem to be over. On 7/11/2024, the Objector/Applicant filed an application to review and set aside the orders I gave on 14.10.2024. He sought the following orders;
 - a. spent
 - b. spent
 - c. This Honourable court be pleased to rescind, alter, review and/or set aside orders of this court issued on 14.10.2024, dismissing the Objector/Applicant's application for lack of prosecution [sic].
 - d. This Honourable court be pleased to reinstate the application dated 10.08.2022.
 - e. N/A
 - f. Costs
 8. The application is based on the ground that the court failed to consider the Objector/Applicant's age, which is a material factor. Additionally, the court issued its order notwithstanding the medical documents provided by the hospital. Clearly, this constitutes an error apparent on the face of the



record. It was unforeseeable and unprecedented that the Objector/Applicant would fall ill before the hearing.

9. The Petitioner/Respondent responded through an affidavit dated 27.02.2025, stating that he had diligently attended court proceedings for the past two years. He contended that the Objector/Applicant had shown no willingness to prosecute the case. Furthermore, he asserted that by the time the matter was dismissed, the Objector/Applicant had already been discharged from the hospital.

10. It is noteworthy that Order 45 is applicable to succession by dint of rule 63 of the *Probate and Administration Rules*. Application of *Civil Procedure Rules* and *High Court (Practice and Procedure) Rules*, which provide as follows:

(1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the *Civil Procedure Rules*, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the *High Court (Practice and Procedure) Rules* (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.

11. Order 45 of the *Civil Procedure Rules* provides for review and it states 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 Objector/Applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

12. I associate myself with the reasoning of Kuloba J (as he then was) in *Lakesteel Supplies v Dr. Badia and another* Kisumu HCCC No 191 of 1994 where he opined that:

“The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the Civil Procedure Rules. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence



again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the Objector/Applicant's knowledge or could not be produced by him at the time when the ruling was made."

13. A review is not an opportunity to appeal and regurgitate the arguments made during the main trial or impugned proceedings. I dismissed reliance on the medical report to adjourn. The Objector/Applicant had a golden opportunity to be heard, but went into games. The Objector/Applicant was not intent on proceeding. This court can't revisit the same facts. This is not an appeal. There are no new facts except what I considered in declining an adjournment.
14. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. My brother, LN Mugambi, in *Josiah v Nyaga* (Civil Appeal 34 of 2021) [2023] KEHC 2054 (KLR) (16 March 2023) (Ruling) posited as doth regarding review:

Courts have the discretion to allow review on three grounds; where there is discovery of new and important matter of evidence, where there is an apparent error on the face of the record and where there is sufficient reason to do so. The application for review must be made without undue delay. The Objector/Applicant herein has pleaded that there was an error on the face of the record which warrants this court to exercise its discretion and review the orders issued on October 3, 2022.

19. Courts of similar and superior jurisdiction have discussed the several grounds for allowing review. In *Muyodi v Industrial and Commercial Development Corporation & another* [2006] 1 EA 243, the Court of Appeal described an error apparent on the face of the record as follows:

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 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 which has to be established by a long, drawn-out 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 a wrong view; certainly, there is 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.

15. What I understand the Objector/Applicant to be saying is that the court reached an erroneous decision, given the serious facts they had laid before it. However, this is not a ground for review, but rather a proper ground for appeal. The facts I considered then are the same herein. In the case of *Onyango &*



2 others v Awaab & 2 others (Civil Appeal E075 of 2022) [2023] KEHC 26344 (KLR) (4 December 2023) (Judgment), RE Aburili, J posited as doth:

As there any other sufficient cause which this court can leverage on to order for review of the impugned ruling? In *Republic v Cabinet Secretary for Interior and Co-Ordination of National Government Ex Parte Abullahi Said Sald* [2019] eKLR, the court observed, with respect to any other sufficient reason as follows: “A court can review a judgment for any other sufficient reason. In the case of *Sadar Mohamed vs Charan Singh and Another* [19] it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter. Mulla in the Code of Civil Procedure [20] (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that the expression ‘any other sufficient reason’...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out..., would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement. [21]

31. I also find useful guidance in *Tokesi Mambili and others v Simion Litsanga* [22] where they held as follows: -

- i. In order to obtain a review an Objector/Applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An Objector/Applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.
- ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.”

28. I have said enough to demonstrate the grounds under which an order of review may be granted.

16. There is no basis laid for setting aside the orders made on 14.10.2024. The application is dismissed.

17. The Court of Appeal in the case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 (KLR) had this to say:

“It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

18. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Petition No 4 of 2012; [2014] eKLR, as follows: -

- “(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant



or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

19. The application dated 7/11/2024 is thus dismissed with disbursements of Kshs 5,000/= to the Respondent.

Determination

20. In the circumstances, the court makes the following prayers:
- a. The application dated 7/11/2024 is thus dismissed with disbursements of Kshs 5,000/= to the Respondent.
 - b. The file is closed.

DATED, SIGNED AND DELIVERED AT NYERI ON THIS 13TH DAY OF MAY, 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Mokaya for the Applicant

Respondents in person

Simon Mwai present

Peter Kanyoni Njamwea present

Laban Githome Wamugunda

Court Assistant – Michael

