



REPUBLIC OF KENYA



**In re Estate of Joseph Runanu Wamaria (Deceased) (Succession Cause  
16 of 2017) [2025] KEHC 8701 (KLR) (18 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8701 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 16 OF 2017  
PN GICHOHI, J  
JUNE 18, 2025**

**IN THE MATTER OF ESTATE OF JOSEPH RUNANU WAMARIA (DECEASED)**

**BETWEEN**

**NOAH WAMARIA RUNANU ..... 1<sup>ST</sup> ADMINISTRATOR  
BEATRICE WANJIKU RUNANU ..... 2<sup>ND</sup> ADMINISTRATOR  
MONICA WANGUI RUNANU ..... 3<sup>RD</sup> ADMINISTRATOR**

**AND**

**NAFTALI KAMAU RUNANU ..... PROTESTOR**

**RULING**

1. By a Summons for Review dated 28<sup>th</sup> September, 2022, brought under Order 45 Rule 1 of the Civil Procedure Rules as read with Rule 49 and 63 of the Probate & Administration Rules and section 47 of the *Law of Succession Act*, the Administrators/ Applicants seek for the following Orders:-
  1. That the court orders issued in the Ruling delivered herein on 26<sup>th</sup> May 2022 by Hon. Rachel Ng'etich, J be reviewed on account of discovery of existence of an oral will as well as a new agreement reached by the family of the deceased.
  2. That the deceased's estate be distributed in terms of the new mode of distribution as listed in the annexed supporting affidavit of the Applicants herein.
  3. That costs of this application be provided for.
2. The application is supported by an affidavit sworn by Noah Wamaria Runanu, Beatrice Wanjiku Runanu, and Monica Wangui Runanu, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Administrators/Applicants, respectively, sworn on even date.



3. The Applicants stated that a Ruling delivered on 26<sup>th</sup> May, 2022, by Hon. Rachel Ng'etich, J, determined that the deceased's estate should be distributed in a ratio of 12:6:4, with 1½ acres allocated to the church.
4. They stated that subsequent to this ruling, the deceased's family held a clan meeting on 20<sup>th</sup> June, 2022 where witnesses revealed that the deceased had stated his wishes regarding the distribution of his estate approximately a month before his death, constituting an oral Will. They added that they were unaware of these wishes prior to this meeting.
5. They averred that at the clan meeting, the majority of beneficiaries acknowledged their awareness of the deceased's wishes and agreed to comply with them. The witnesses to this oral Will were listed to include; Ayub Maria, Isaac Gichomo Wamaria and Stephen Gatei Njoroge, whose affidavits are annexed as proof.
6. It is stated that according to the oral Will, Ann Wanjiru's house was to receive 20 acres, Thumbi Wamaria's children 10 acres, AIC Church 1½ acres, Wairimu Mukere 1 acre, and the balance of the land was to go to Charity Kabura's house.
7. The Applicants stated that except for Ann Wanjiru's house, the other beneficiaries are content with the portions willed to them and are willing to cede any extra portions awarded by the Court to the first house.
8. They stated that in line with the deceased's oral Will and in consultation with a surveyor, the family has agreed on a new distribution plan for L.R. NO. 6387/1 (IR. 30421). The proposed new distribution is detailed in a table showing specific acreage for various individuals and groups within the 1st House, 2nd House, and Thumbi Wamaria's House, as well as allocations for AIC Church and Wairimu Mukere.
9. Their position is that majority of beneficiaries have appended their signatures to consents annexed to the application, agreeing to this new mode of distribution. In addition, that the deceased had also made his wishes known to his children and beneficiaries prior to his death, including an oral recording captured by his daughter Mary Wairimu at a meeting with a surveyor.
10. The Applicants reiterated that the successors have agreed to this distribution plan to honour the deceased's wishes and to avoid unnecessary curses associated with going against the wishes of the deceased.
11. The Application is opposed by the Respondent/Protestor who filed a Replying Affidavit sworn on 31<sup>st</sup> March, 2023. He termed the application as bad in law, fatally defective, incompetent, and inept, devoid of merit and an abuse of the Court process. He further contended that the application has not met the established principles for granting the sought prayers. He therefore urged the Court to dismiss the application with costs.
12. While referring to the judgment delivered by the Court on 26<sup>th</sup> May, 2022 which ordered the deceased's estate to be distributed in a ratio of 12:6:4 for the first house, second house, and deceased brother's house, respectively, the Respondent stated that he was not informed of the alleged meeting held on 20<sup>th</sup> June, 2022. He stated that the alleged meeting occurred in his absence.
13. He claimed to be a stranger to the alleged wishes diverged by the deceased to the alleged independent witnesses which allegedly amounts to an oral Will. He finds it peculiar that if the majority of beneficiaries were aware of the alleged wishes, none informed the court of the alleged oral Will's existence during the five years the matter has been before the court.



14. He alleged that the purported witnesses to the oral Will are fabricated, and their affidavits contain misrepresentations, intended solely to mislead the court. He protests the proposed mode of distribution by the applicants in their affidavit and urged this Court to uphold the distribution as per the judgment delivered on 26<sup>th</sup> May, 2022.
15. He contended that all allegations in the applicants' affidavit are false and an afterthought aimed at enriching the applicants and disinheriting his house from its rightful share of the estate. He concludes by stating that the current application was brought with unclean hands, is bad in law and is an abuse of the courts process and the same should be dismissed with costs.
16. He believes no prejudice will be caused to the Applicants if the application is not allowed, as they have misrepresented facts and are misleading the court.
17. The matter proceeded also by way of viva voce evidence where the Applicants called three witnesses for their case while the Respondent was the only witness for his case.

### **Applicants' Submissions.**

18. The Applicants submitted that they are seeking review of the Judgement of the Court, asserting that the deceased's estate should be distributed according to a new scheme detailed in their supporting affidavit, based on the discovery of an oral Will and a new family agreement.
19. They explained that after the initial ruling, a clan meeting on 20<sup>th</sup> June, 2022, revealed the deceased's wishes, which they were previously unaware of. Further that witnesses to this oral Will; Ayub Maria, Isaac Gichomo Wamaria, and Stephen Njoroge Gatei, provided affidavits and testified, with Ayub Maria and Isaac Gichomo Wamaria, the deceased's younger brothers, remaining unshaken during cross-examination.
20. It was argued that as per the oral Will, Ann Wanjiru's house was to receive 20 acres, Thumbi Wamaria's children 10 acres, the AIC Church 1.5 acres, Wairimu Mukere 1 acre, and the balance to Charity Kabura's house.
21. The Applicants contended that all beneficiaries, except Ann Wanjiru's house, were contented with these land portions and willing to cede any extra allocations awarded by the Court. Consequently, a new distribution plan for L.R. NO. 6387/1 (IR. 30421) was agreed upon by the family, in consultation with a surveyor, to align as closely as possible with the oral Will. This proposed distribution specifically allocates acreage to members of the 1<sup>st</sup> House, 2<sup>nd</sup> House, Thumbi Wamaria's House, AIC Church, and Wairimu Mukere, with the majority of beneficiaries concurring. Further that both the deceased's widows confirmed his expressed wishes during the hearing.
22. Citing Section 9 of the *Law of Succession Act*, Cap 160, the Applicants argued that the oral Will was valid as it was made before two or more competent witnesses (Ayub Mukere Maria and Isaac Gichomo Wamaria, who testified) and the testator died within three months (on 23<sup>rd</sup> November, 2014, less than three months after the 11<sup>th</sup> October, 2014, making of the Will). They highlighted that the independent witnesses were not beneficiaries and thus had no motive to lie. Furthermore, the Respondent confirmed during cross-examination that a meeting discussing the oral will occurred on 20<sup>th</sup> June, 2022, and minutes were produced as an exhibit.
23. It was submitted that the Respondent's mother had been separated from the deceased for over 50 years, which might explain the 20-acre allocation to her family and further that the Respondent's mother and siblings have not challenged the oral Will.



24. The Applicants reiterated that the discovery of the oral Will at the 20<sup>th</sup> June, 2022, meeting, after the initial Succession proceedings concluded, is sufficient grounds for reviewing the Court's Judgement.
25. The Applicants relied on the Court of Appeal decision in *Shanzu Investments Ltd Vs Commissioner Of Lands* [1993] eKLR, which discussed the power of review under Section 80 of the [Civil Procedure Act](#) and Order 45 of the Civil Procedure Rules.
26. They referenced *Sadar Mohamed-vs- Charan Singh*, (1959) EA 1793, noting the unfettered discretion in review orders, but also *Yusuf -vs- Nokrach*, (1971) EA 104, which held any other sufficient reason to be analogous to other grounds.
27. They further cited *WANGECHI KIMITA & ANOTEHR Vs MUTAHI WAKABIRU* [CA No 80 of 1985](#) (unreported), which held that any other sufficient reason need not be analogous, asserting such a restriction would limit the unfettered right under Section 80.
28. The Applicants concluded that their application, based on the discovery of an oral Will unknown to them when the Succession Cause began as an intestate matter, fulfilled the principles for review and urged the court to allow it.

### **Respondent's Submissions**

29. The Respondent countered that the application is bad in law, fatally defective, incompetent, lacks merit, and failed to meet the criteria for granting the sought prayers, urging the court to uphold the 26<sup>th</sup> May, 2022, judgment.
30. While acknowledging that the deceased was survived by two houses and his brother's children, he questioned the Applicants' delay in disclosing the alleged oral Will until after the judgment, finding it very odd that no beneficiary, supposedly aware of these wishes, informed the court during the five years the matter was pending.
31. He highlighted that the 3<sup>rd</sup> Applicant had previously testified about the deceased distributing property and holding family meetings, suggesting that if an oral Will existed, it and its purported witnesses should have been presented then.
32. He asserted that these actions were not taken because there was no oral Will by the deceased, alleging that the supposed witnesses and their affidavits were fabricated and contained misrepresentations.
33. In support of his case, the Respondent relied on the case of *Re Estate Of Kevin John Ombajo (Deceased)* (Succession Cause 555 OF 2018) [2021] KEHC 459 (KLR), where it was held that Section 9 of the [Law of Succession Act](#) requires an oral Will to be made before two or more competent witnesses and the testator to die within three months.
34. Further reliance was placed in *Re Estate of Evanson Mbugua Thong'ote (Deceased)* [2016] eKLR, where the Court emphasised the necessity of an utterance of the Will in the presence of two or more persons. Accordingly, the Respondent contended that the deceased's meetings with beneficiaries did not constitute an oral Will, dismissing the claims of an oral Will as false and an afterthought designed to unjustly enrich the Applicants and disinherit the Respondent's house.
35. The Respondent further submitted that the Applicants failed to prove the principles required for a judgment review. Referencing *Re Estate Of Martim Tuwei Samitui (Deceased)* (Succession Cause 81 OF 1998) [2023] KEHC 23647 (KLR), he noted that review of probate court decisions is governed by Rule 63 of the Probate and Administration Rules and Order 45 of the Civil Procedure Rules.



36. He argued that Order 45 permits review upon 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 or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.
37. Further, he argued that without a valid oral Will, there was no mistake or error apparent on the record, nor any new evidence, thus warranting the dismissal of the review prayer.
38. Without prejudice, the Respondent maintained that for new evidence to be admitted, the Applicants must prove it could not have been obtained with reasonable diligence for use at trial, asserting that an oral Will, not being physical, would always be available if genuine.
39. He cited *Re Estate of Simoto Omwenje Isaka (Deceased)* [2020] eKLR, which referenced the Court of Appeal case in *Tokesi Mambili and others vs Simion Litsanga* [2004] EKLR, which Court stated that an applicant for review needs to show discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time or that there was a mistake or error apparent on the face of the record or for any other sufficient reason.
40. Further reliance was placed on *Re Estate of Penina Teriki Chepkurgat (Deceased)* [2020] eKLR, which, cited Lord Denning in *LADD V Marshall* [1954] 1 WLR 489, that outlined three conditions for admitting fresh evidence, that is; it could not have been obtained with reasonable diligence, it would likely have significantly influenced the case's result, and it must be presumably credible.
41. The Respondent concluded that the current application was an afterthought, brought with unclean hands, bad in law, and an abuse of the courts process aimed at unjustly benefiting the Applicants and disinheriting the Respondent's house.
42. He urged the Court to uphold the judgment dated 26<sup>th</sup> May, 2022, arguing that the Applicants have not demonstrated entitlement to a review and prayed for the Application to be struck out with costs.

### **Analysis and Determination**

43. Upon thorough perusal of the Application, the replying Affidavit and the rival submissions, the only issue for determination is whether the Applicants have met the requirements for a grant of a Review Order.
44. The law on Review is based on Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules. Section 80 of the *Civil Procedure 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 judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
45. Order 45 Rule 1 of the Civil Procedure Rules, 2010 on the other hand, 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.

(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.”

46. Accordingly, it is evident that, while section 80 of the *Civil Procedure Act* gives the Court power of Review, Order 45 of the Civil Procedure Rules 2010, sets out the rules, which limit the grounds applicable for Review to three conditions: -

- i. The discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the Decree was passed or the Order made.
- ii. On account of some mistake or error apparent on the face of the record.
- iii. Any other sufficient reason and that the Application has to be made without unreasonable delay.

47. The present application is hinged on alleged discovery of new and crucial information or evidence that, despite diligent effort, was unknown to the applicants or could not have been presented at the time the decree or order was issued.

48. In respect to the discovery of new and important matter or evidence, the Court of Appeal in *Rose Kaiza v Angelo Mpanju Kaiza* [2009] KECA 422 (KLR), quoted the commentary by Mulla on similar provisions of the Indian Civil Procedure Code, 15<sup>th</sup> Edition at page 2726, thus:

“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 ground of a 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 any new and important matter which was not within the knowledge of the party when the decree was made.”



49. The Applicants submitted that after judgement was delivered in this matter, they discovered existence of an Oral Will pronounced by the Deceased, which Will they were unable to obtain before Judgement was passed.
50. In support of this, the Applicant called three witnesses; Ayub Mukere Maria (Applicant's Witness No. 1) and Isaac Gichomo Wa Maria (Applicant's Witness No. 2), both younger brothers of the deceased, who consistently stated that the deceased made an oral Will concerning his property distribution shortly before his death. Stephen Gatei Njoroge (Applicant's Witness No. 3), a close friend, corroborated that the deceased expressed his wishes to share his land, both privately and in the presence of family members including Gichomo and Mukere, and confirmed the deceased was of sound mind at the time.
51. All three witnesses testified that Wanjiru, the second wife, received 20 acres, while 10 acres were allocated to the children of the deceased's late brother, Wamaria Thumbi, as the deceased had been supporting them prior to his death.
52. They also stated that the deceased bequeathed 1.5 acres to the AIC Church and 1 acre to Monicah Wairimu (Ayub Mukere's daughter) in recognition of her caregiving. The remaining land was designated for the first wife and her children.
53. Section 9 and 10 of the *Law of succession Act* provide as follows:-
- “9. Oral wills;
- (1) No oral will shall be valid unless-
- (a) it is made before two or more competent witnesses; and
- (b) the testator dies within a period of three months from the date of making the will: Provided that an oral will made by a member of the armed forces or merchant marine during a period of active service shall be valid if the testator dies during the same period of active service notwithstanding the fact that he died more than three months after the date of making the will.
- (2) No oral will shall be valid if, and so far as, it is contrary to any written will which the testator has made, whether before or after the date of the oral will, and which has not been revoked as provided by sections 18 and 19.
10. Proof of oral wills
- If there is any conflict in evidence of witnesses as to what was said by the deceased in making an oral will, the oral will shall not be valid except so far as its contents are proved by a competent independent witness.”
54. The Applicants attempted to justify the alleged oral Will, which was purportedly made on 11<sup>th</sup> October, 2014 stating that it was made in the presence of more than three witnesses and that the deceased died on 23<sup>rd</sup> November, 2014, that is within 3 months of the same.



55. However, there are conflicting accounts regarding the existence of the said oral Will and its form. Monica Wangui Runani, the 3<sup>rd</sup> Administrator/ Applicant had earlier testified that her father drafted a Will as a sketch map, while Beatrice Wanjiku Lunani claimed there was no valid written Will as it had expired, but confirmed that her father had expressed his wishes orally.
56. Conversely, Mary Wairimu Murimi asserted that a tape-recorded Will of 2010 exists, a claim directly contradicted by Naftali Kamau Runanu (the Protestor), who consistently maintained there was no Will at all.
57. Further, on 5<sup>th</sup> February, 2025, Mr. Gakuhi Chege Advocate for the Applicants abandoned the production of the alleged tape recording of the Will terming it as not material to the case and informed the Court that he listened to it and realised that it did not relate to the oral Will made.
58. This Court notes that the said electronic recording was one of the reasons the Applicants made this application for review as reflected at paragraph 12 of the supporting Affidavit sworn on 28<sup>th</sup> September, 2022.
59. Further contradictions emerged concerning the declaration of this oral will. Ayub Mukere Maria and Isaac Gichomo Wa Maria stated that both Naftali's mother (Hannah Wanjiru, the second wife) and Charity Kabura (the first wife) were present when the deceased discussed the distribution.
60. However, Hannah Wanjiru Gakungu (the deceased's second wife) countered this, testifying that only her son Duncan Gakungu was with her when the deceased informed her about a 20-acre allocation.
61. A further perusal of the record reveals that on 15<sup>th</sup> December, 2021, while Monica Wangui Runanu, the 3<sup>rd</sup> Administrator was testifying, she informed the Court that his father distributed his Estate in his life time by calling all his children and allocating them land. She stated that 120 acres were allocated to the 1<sup>st</sup> family, 20 acres to the 2<sup>nd</sup> Family, 10 acres, to Thumbi Wamaria, the deceased brother's children whom he was maintaining prior to his death and 1 ½ acres to AIC church. Anne Wanjiru Gakunyu, the second wife of the deceased, corroborated this fact and confirmed that the deceased gave her house 20 acres which they are satisfied with and have already shared it among his children.
62. In her Judgement, Rachel Ngetich, J stated at paragraph 35 thereof:-
- “ There is no consensus among the parties herein on how the estate of the deceased is to be distributed. It is not disputed that the second wife was divorced by the deceased. The second wife said she lived with the deceased for 20 years and she sired 5 children with him but got two more children after the divorce. This has not been disputed. It is not also disputed that the second wife was given 20 acres of land by the deceased before he died. The petitioner's argument and the second wife who is the objector's mother stated that it was the intention of the deceased to give the second house 20 acres which he gave before he died. No written will was availed, nor oral will to prove that.”
63. In essence, the Court noted the allegation of existence of an Oral and Written Will as seen from the evidence of of Monica Wangui Runanu but held that the parties failed to prove existence of the said Oral Will. It is therefore clear that the issue of existence of Oral Will was raised before this Court and before the Judgement was delivered. It is only that the issue was not properly addressed by the Applicants at that point. In the circumstances, it cannot be said to be discovery of a new issue, if the parties were aware of it before Judgement was delivered.



64. Faced with a such a scenario in Warui & 5548 others v Mbeere Elders Advisory Welfare Group (NGOME) & 14 others [2025] KECA 960 (KLR) , the Court of Appeal held:-

“As regards to whether the aggrieved party discovered a new and important matter or evidence which after the exercise of due diligence they were not within their knowledge or could not be produced by them, the learned Judge observed that the Gazette Notice No. 577 of 2004 was published by the Commissioner of Lands whose successor, the National Land Commission (the NLC), was represented in the petition at the time the partial consent was recorded as a major party in the petition. The gazette notice was therefore within its knowledge, was not unknown, and being a gazette notice, could be obtained in exercise of due diligence.”

65. In the circumstances herein, this Court finds that since the issue of existence of Oral Will was raised during hearing, the parties ought to have exercised due diligence at that time and prove it before the Court but failed to do so.

66. The said Court having pronounced itself on this matter and therefore, the issue of existence of Oral Will cannot be re-litigated under Review.

67. In conclusion, this Court finds the application without merit. It is therefore disallowed with no orders to costs.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 18<sup>TH</sup> DAY OF JUNE, 2025.**

**PATRICIA GICHOHI**

**JUDGE**

In the presence of:

Ms. Ndegwa h/b for Mr. Gakuhi Chege for Applicants

Naftali Kamau Runanu /Respondent in person

Ruto, Court Assistant

