



REPUBLIC OF KENYA



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**In re Estate of Ngari Wakanya (Deceased) (Succession Appeal
E031 of 2022) [2025] KEHC 7682 (KLR) (5 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 7682 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
SUCCESSION APPEAL E031 OF 2022**

JK NG'ARNG'AR, J

JUNE 5, 2025

IN THE MATTER OF THE ESTATE OF NGARI WAKANYA (DECEASED)

BETWEEN

BENSON GICHIRA NGARI 1ST APPELLANT

JAMES MURIITHI MWANGI 2ND APPELLANT

AND

MWANGI NGARI KABIRU RESPONDENT

*(Being an Appeal from the Ruling of the Chief Magistrate, Ithuku A.K at the
Chief Magistrate's court at Kerugoya, Succession Cause Number 398 of 2019)*

JUDGMENT

1. The Appellants filed Summons for Revocation of the Grant dated 23rd January 2019 in the trial court. The trial court directed that the Summons for Revocation shall be heard through viva-voce evidence. In its Ruling dated 22nd June 2021, the trial court (Chief Magistrate Ithuku A.K) dismissed the Summons for Revocation stating that the Appellants had failed to prove their claim within the provisions of section 76 of the *Law of Succession Act*.
2. The Appellants filed a Notice of Motion Application dated 20th August 2021 seeking a review of the Ruling dated 22nd June 2021. In its Ruling dated 14th April 2022, the trial court (Chief Magistrate Ithuku A.K) dismissed the Notice of Motion Application dated 20th June 2022. It is this Ruling that is the subject of the present Appeal.
3. Being aggrieved with the Ruling of 14th April 2022, the Appellants filed their Memorandum of Appeal dated 25th April 2022 and appealed against the whole Ruling and wanted this court to set it aside.



4. My work as the 1st appellate court is to re-evaluate and re-examine the evidence of the trial court and come to my own findings and conclusions.
5. This court directed that the Appeal be dispensed off by way of written submissions.

Appellants' submissions

6. Through their submissions dated 21st January 2025, the Appellants submitted that she had attached an Affidavit showing that Muringa Ngari and Mwangi Kabiru were the deceased's dependants and further attached the Chief's Letter but they were expunged from the record by the trial court. That had the trial court looked at the expunged documents, it would have come to a different conclusion. They further submitted that they were the deceased's dependants and lived on the suit property. That the Respondent did not live on the suit property.
7. It was the Appellants' submission that the court allows their Appeal to enable them adduce new evidence to prove that they were dependants of the deceased.

The Respondent's submissions.

8. Through his written submissions dated 21st January 2024, the Respondent submitted that the trial court did not err when it dismissed the Appellant's Application dated 20th August 2021. That the averments contained in the Appellant's Application dated 20th August 2021 could not be classified as new evidence as they only talked about their relationship with the deceased (Ngari Wakanya) and the Respondent leaving them out when he filed the succession suit. The Respondent further submitted that this was not new information as they had made similar averments in their Summons for Revocation dated 23rd January 2019. He relied on Order 45 Rule 1 of the Civil Procedure Rules, *Pancras T. Swai vs Kenya Breweries Limited (2014) eKLR et.al.*
9. It was the Respondent's submission that the Summons for Revocation was heard and determined on merit and no appeal had been lodged against the decision of the trial court.
10. I have gone through the trial court record, the Appellant's submissions dated 21st January 2025 and the Respondent's submissions dated 21st January 2024. The only issue for my determination was whether the trial court erred in dismissing the Appellants' Notice of Motion Application dated 20th August 2021.
11. As I have stated earlier in this Judgement, the trial court through its Ruling dated 22nd June 2021 had dismissed the Appellants' prayer to have the Grant revoked. Aggrieved by this Ruling, the Appellants filed a Notice of Motion Application dated 20th August 2021 where they sought the review of the Ruling rejecting their prayer for revocation.
12. The Appellants predicated their Application for review on discovery of new and important matters of evidence that was not within their knowledge at the time the Ruling was passed. In its impugned Ruling dated 14th April 2022, the trial court stated that there was no new and important matter as alleged by the Appellants and further held that the Appellants' recourse was through an Appeal.
13. It is trite law that the High Court has a power of Review. The law on Review is based on Section 80 of the *Civil procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules, 2010. It is salient to note that this court's power must be exercised within the framework of the aforementioned statutes.
14. 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.

15. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides 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 review of judgement to the court which passed the decree or made the order without unreasonable delay.

16. From the above provisions, it is clear that section 80 of the *Civil Procedure Act* gives the power of Review while Order 45 of the Civil Procedure Rules 2010, sets out the rules. The rules limit the grounds applicable for Review as follows: -

- a. 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.
- b. On account of some mistake or error apparent on the face of the record.
- c. Any other sufficient reason and that the Application has to be made without unreasonable delay.

17. The Supreme Court of India in the case of *Ajit Kumar Rath vs State of Orisa & Others*, 9 Supreme Court Cases 596 stated as follows: -

“.....the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule”.

18. The Court of Appeal in *Tokesi Mambili and others vs Simion Litsanga* (2004) eKLR held: -

- “i. In order to obtain a review an 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 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.”

19. Regarding the discovery of new and important matter or evidence, *Mativo J.’s (as he then was) in Nasibwa Wakenya Moses v University of Nairobi & another* [2019] KEHC 11472 (KLR), held: -

“To qualify to be new evidence so as to fall within the ambit of order 45 Rule 1 of the Civil Procedure Rules, the new evidence must be of such a nature that it could not have been within the knowledge of the applicant despite the exercise of due diligence.”

20. Further in *Rose Kaiza v Angelo Mpanju Kaiza* [2009] KECA 422 (KLR), the Court of Appeal held: -

“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.”

21. I have looked at the trial court proceedings and I agree with the trial court that there was no new evidence that was within the Appellants’ knowledge during the trial that would necessitate a review. The grounds that were contained in the Supporting Affidavit sworn by the 1st Appellant on 20th August 2021 were appellate in nature. The grounds for Review as demonstrated above are quite stringent and in the present case, the Appellants did not demonstrate discovery of new evidence as they alleged.

22. Interestingly, in their submissions, the Appellants acknowledged that the trial court expunged documents and it was these documents that they wanted to introduce in the event of this Appeal succeeding. According to the Appellants, these documents showed that they were dependants of the deceased. In the impugned Ruling, the trial court noted that the Affidavit dated 23rd February 2022 and a Preliminary Objection dated 27th January 2022 were illegally on record and expunged them. This in my view was prima facie evidence that the Appellants had no new evidence at the time the Ruling was being written and delivered.

23. In consonance with the trial court, I reiterate that the Appellants’ recourse in this matter would be through an Appeal. I have said enough.

24. In the end, the Appeal dated 25th April 2022 has no merit and is dismissed with costs to the Respondent.

JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 5TH DAY OF JUNE, 2025 IN THE PRESENCE OF:-



N/A for the Appellant

N/A for the Respondent

Siele/Mark (Court Assistants)

.....

J.K. NG'ARNG'AR

JUDGE

