



REPUBLIC OF KENYA



**Ngari v Kaguamba (Family Appeal E022 of 2024)  
[2025] KEHC 9508 (KLR) (3 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9508 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
FAMILY APPEAL E022 OF 2024  
FN MUCHEMI, J  
JULY 3, 2025**

**BETWEEN**

**TERESIA WANJIRU NGARI ..... APPELLANT**

**AND**

**HENRY KAMANDE KAGUAMBA ..... RESPONDENT**

*(Being an Appeal from the Ruling of Hon. O. Wanyaga (PM) delivered  
on 29th July 2024 in Thika CM Succession Cause No. 465 of 1998)*

**JUDGMENT**

**Brief facts**

1. This appeal arises from the ruling of Thika Principal Magistrate in CM Succession Cause No. 465 of 1998 where the court set aside the ruling dated 26<sup>th</sup> January 2022 whereby the lower court found that the appellant was a rightful beneficiary of LR. No. LOC.1/Mukarara.T.27.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 9 grounds of appeal summarized as follows:-
  - a. The learned trial magistrate erred in fact and law in failing to appreciate that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground of appeal.
  - b. The learned trial magistrate erred in law and in fact in applying the wrong principles of law in allowing a review, varying and setting aside of his own decision dated 26/1/2022.
  - c. The learned trial magistrate erred in law and in fact in failing to note that a probate court lacked jurisdiction to determine or even comment on issues of ownership of LR.LOC.1/Mukarara/T.27 which was before another court of concurrent jurisdiction in ELC No. 253 of 2018.



- d. The learned trial magistrate erred in law and in fact in failing to note that the application for review was brought after 2 years and 27 days in which no plausible explanation was adduced for the inordinate delay.
  - e. The learned trial magistrate erred in law and in fact in failing to note that the application dated 22/2/2024 had been overtaken by events as the appellant had been issued with a title to LR.LOC.1/MUKARARA/T.27.
3. Parties put in written submissions to dispose of the appeal.

### **Appellant's Submissions**

4. The appellant submits that the respondent filed this application on 22/2/2024 whereas she had filed her application for revocation on 27/10/2021, which was after a period of 2 years and 27 days. Thus, the appellant submits that the respondent did not give any evidence for the inordinate delay in filing his application. Further, the appellant argues that the respondent was served with the summons for revocation dated 27/10/2021. To support her arguments, the appellant relies on the case of Nzoia Sugar Company Limited vs West Kenya Sugar Limited [2020] eKLR and submits that the lower court delivered its ruling on 26/1/2022 and the respondent did not challenge the said ruling until February 2024.
5. The appellant relies on the cases of Wilson Thirimba Mwangi vs The Director of Public Prosecutions (no citation given) and Charles Kimaita Mwithimbu vs Edward Mutua M'Mwithiga Civil Suit No. 108 of 2010 eKLR and submits that the respondent did not pass the threshold to warrant a review before the lower court as the judgment in ELC Case No. 253 of 2018 was delivered on 29/10/2021 and thus the judgment was not new and compelling or was not within the respondent's knowledge or could not be produced at the time when the order to be reviewed was made. Further, the appellant argues that she served the respondent and therefore he did not explain why it took him two years to discover the said judgment.
6. Relying on the case of Succession Cause No. 588 of 1996 In the Matter of the Estate of Peninah Njeri Muthiora (Deceased), the appellant submits that the lower court had already delivered a ruling dated 26/1/2022 and a certificate of confirmation was issued in her favour. Thus LR No. LOC.1/MUKARARA/T.27 had been bequeathed to her and a title deed subsequently issued in her names. Therefore, the appellant argues that the said application was overtaken by events and the title issued could only be reversed by the ELC Court and not the probate court. Thus, the lower court was sitting on an appeal of its own ruling and the lower court ought to have stayed the ruling or referred the matter to the ELC Court

### **The Respondent's Submissions.**

7. The respondent relies on Section 80 of the *Civil Procedure Act* and the cases of Mwangi S. Kimenyi vs Attorney General & Another [2014] eKLR; Pithon Waweru Maina vs Thuka Mugira [1983] KECA 117 (KLR) and Benjoh Amalgamated Ltd & Another vs Kenya Commercial Bank Ltd [2014] KECA 872 (KLR) and submits that inordinate delay is not defined by a fixed measure of time but by the circumstances of each case.
8. The respondent submits that he was never served with the Summons for Revocation dated 27<sup>th</sup> October 2021 or the hearing notice and was therefore unaware of the revocation proceedings. The appellant chose to go through the backdoor to acquire ex parte orders in a bid to curtail his rights. The respondent relies on the cases of Onyango Oloo vs AG (1986-1989) EA 456 and Shadrack arap Baiywo



- vs Bodi Bach [1987] eKLR and submits that the right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.
9. The respondent further relies on the cases of Kanwal Sarjit Singh Dhiman vs Keshavji Jivraj Shah [2008] eKLR; Shadrack arap Baiywo vs Bodi Bach [1987] eKLR and Njuki vs Muthuru [1975] EA 258 and submits that service is not a technicality but a constitutional right tied to Article 50 and that the burden of proving service lies with the person who asserts it and if not proved, judgment is liable to be set aside.
  10. The respondent relies on the cases of Ivita vs Kyumbu [1984] KLR 441 and Richard Ncharpi Leiyagu vs IEBC & 2 others [2013] eKLR and submits that a case should not be dismissed if the delay is inordinate and inexcusable and causes substantial risk of unfair trial. The respondent argues that he was not aware of the application for revocation of grant dated 27/10/2021. He later received a letter of intention to purchase from the appellant through his advocates.
  11. The respondent refers to Section 80 of the *Civil Procedure Act*, Order 45 of the Civil Procedure Rules and the cases of Paul Mwaniki vs National Hospital Insurance Fund Board of Management [2020] eKLR; Muswii vs David & 6 Others (Environment & Land Case 76 of 2018) [2024] KEELC 5919 (KLR) (18 September 2024) (Ruling) and Republic vs Cabinet Secretary for Interior and Co-ordination of National Government ex parte Abullahi Said Sald [2019] eKLR and submits that the jurisdiction of a court to issue review orders is based on the court's power to exercise discretion. The respondent argues that by failing to serve him with the Summons for Revocation, the appellant denied him the right to be heard. The appellant sought revocation of the grant on the basis of ownership of the suit property LR No. LOC.1/Mukarara/T.27 without disclosing to the court that the issue had already been decided in MCLE 253 of 2018 which deprived the Succession court of a full and fair appreciation of the legal context leading it to issue a revocation order based on incomplete facts and on a matter that was res judicata. Further, allowing a grant to be revoked on the basis of a claim already settled in a land court would amount to parallel adjudication and duplication of legal processes which would cause grave injustice to him and confusion in the administration of justice. In any event, the respondent argues that the judgment issued on 29/6/2021 in MCLE 253 of 2018 would constitute new and important evidence as it was not within the court's knowledge at the time it was delivering its ruling and given that he had not been given a chance to be heard, the same could not have been raised before the court issued its ruling on the matter.
  12. Relying on the case of Omote & Another vs Ogutu [2022] KEHC 16441 (KLR), the respondent submits that in his application for review in the lower court there was no invitation to the court to revisit or re-evaluate the merits of the reasoning of the ruling delivered on 26/01/2022. The respondent argues that he did not allege that the court erred in law or fact nor did he dispute the legal conclusions reached in that ruling. The respondent further submits that the trial court's review decision was not a consideration of the merits but rather an exercise of its discretion to rectify procedural unfairness and a material non disclosure that affected the integrity of its earlier ruling.

### **Issue for determination**

13. The main issue for determination is whether the appeal has merit.



## The Law

14. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

15. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

16. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

- a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
- c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

### Whether the appeal has merit.

17. The deceased herein died on 24<sup>th</sup> March 1975 and the respondent was issued with letters of grant of administration intestate on 22<sup>nd</sup> March 2016 and confirmed on 10<sup>th</sup> May 2018. The appellant filed Summons for Revocation of Grant on 28<sup>th</sup> October 2021 seeking revocation of the said grant in respect of land parcel number LOC.1/ MUKARARA/T.27 which she claimed she had purchased from the deceased but he had not transferred the land to her. The respondent said she was not served with the Summons for Revocation. As such, she did not participate in the said proceedings whereas the court found that the appellant was the rightful beneficiary and directed that a confirmed grant to that effect to be issued in the appellant’s favour.

18. The respondent on learning of the new developments, filed an application for review and setting aside of the said ruling on grounds that he was not served with the Summons for Revocation of grant dated 27/10/2021 and with the hearing notice. The respondent informed the court that there existed a suit in the land and environment court being Thika MCL & E 253 of 2018 in which judgment was delivered on 29/6/2021 where the subject matter of the suit was LOC.1/MUKARARA/T.27 and also formed the subject matter in this succession cause. The parties in the land case were the same as the ones in the succession cause. The issues in both the land case and the succession case involved those already



decided in the land case. The court noted that the appellant was aware of the land case at the time she filed the application for Revocation of grant dated 27/10/2021 yet she did not disclose to the court the existence of the land case and outcome thereof. On that premise the lower court set aside its ruling that had ordered revocation of grant in favour of the appellant.

19. Order 45 of the Civil Procedure Code sets out the parameters for an application for review as follows:-

Rule 1

(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 order made 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 which he applies for the review.

20. It then follows that Order 45 provides for three circumstances under which an order for review can be made. The applicant must demonstrate to the court that there has been 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. Secondly, the applicant must demonstrate to the court that there has some mistake or error apparent on the face of the record. The third ground for review is worded broadly; an application for review can be made for any other sufficient reason.

21. The respondent grounded his application on the grounds that he was not served with the Summons for Revocation dated 27<sup>th</sup> October 2021 and hearing notice dated 29<sup>th</sup> November 2021. The respondent said that by that time, the land case had been determined in his favour in regard to the ownership of the suit property LOC.1/MUKARARA/T.27. I have perused the court record and noted that the respondent and one Mary Wairimu Njuguna instituted a suit in Thika MCL & E Case 253 of 2018 as against the appellant herein claiming the ownership of LOC.1/MUKARARA/T.27. The said court rendered its ruling on 29<sup>th</sup> June 2021 to the effect that the suit land was to be distributed to the respondent and beneficiaries of the estate of the deceased. The court further directed that the appellant herein stops intermeddling with the estate of the deceased and do voluntarily vacate the suit premises.

22. In the succession cause in the lower court, the appellant filed summons for revocation of grant on 28<sup>th</sup> October 2021 and gave evidence to the effect that she purchased the suit premises from the deceased but he died before transferring the same to her. The hearing of the Summons for Revocation of grant proceeded ex parte as the respondent states that he was neither served with the summons or with the hearing notice. It is evident from the record that the appellant filed the application for revocation of grant with full knowledge of the outcome of the land case. The applicant failed to disclose to the court that the respondent was successful in the land case and land in issue had been returned to him as a beneficiary of the deceased's estate. The trial court did not sit on its own appeal but was correcting an erroneous ruling which was based on non-disclosure by the appellant. The conduct of the appellant



shows that she had misled the magistrate during hearing of the Summons for Revocation by not disclosing material facts. The appellant deliberately failed to serve the respondent with the Summons for Revocation of the grant and the hearing notice for reasons that she was hell bent to conceal the correct facts in regard to the ownership of the land as related to the judgment of the court that had already been delivered before she filed the Summons for Revocation.

23. As such, the respondent had complied with the requirements of order 45 Rule 1 and deserved the orders of review in his application dated 27<sup>th</sup> October 2021. The appellant argues that an application for review ought to be made without undue delay yet the respondent filed his after two (2) years and twenty-seven (27) days. I have perused the record and noted that the ruling was delivered on 26<sup>th</sup> January 2022 and the application for review was filed on 22<sup>nd</sup> February 2024, which is a duration of over two years. The respondent explained that he did not come to know that an application to revoke the grant had been filed, heard and determined in the Succession court until much later. This explains the delay in filing this application which is acceptable in the circumstances.
24. Having found that the magistrate relied on new evidence presented by the respondent and which could not be presented during the hearing of the application since the respondent was not served, it is my considered view that the magistrate did not err in setting aside the court's orders issued on 22<sup>nd</sup> January 2022.
25. I therefore, find no merit in this appeal and I hereby dismiss it accordingly.
26. The appellant shall meet the costs of this appeal.
27. It is hereby so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 3<sup>RD</sup> DAY OF JULY 2025.**

**F. MUCHEMI  
JUDGE**

