



**Kyenze v Kithini & 3 others (Probate & Administration Appeal  
E001 of 2021) [2025] KEHC 12936 (KLR) (19 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12936 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
PROBATE & ADMINISTRATION APPEAL E001 OF 2021  
TM MATHEKA, J  
SEPTEMBER 19, 2025**

**BETWEEN**

**LOISE MUTIO KYENZE ..... APPLICANT**

**AND**

**DAVID NDOLO KITHINI ..... 1<sup>ST</sup> RESPONDENT**

**MUINDI NDOLO & 2 OTHERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. What is before me is the Notice of Motion dated 14<sup>th</sup> October 2024 brought under Rule 63 of the P and A rules Order 45 Rules 1,2 and 3, order 50 of the Civil Procedure Rules sections 80 and 3A of the Civic Procedure Act
2. The applicant seeks that this court does review, vary and or set aside the judgment delivered on the 28/08/2024 and proceed to make a finding that this appeal is merited and proceed to allow it.
3. The application is supported by the affidavit of LOISE Mutio Kyenze and the affidavit evidence of Peter Wambua Ngau and Gregory MulI Musyoki.
4. The background to the application is that the Applicant was dissatisfied with the ruling delivered on the 9<sup>th</sup> December 2020 in succession cause no 9 of 2019 in the lower court. The applicant filed this appeal challenging the said judgment on 21<sup>st</sup> January 2021 .The appeal was dismissed on 28<sup>th</sup> August 2024 through this court’s judgment and order issued that a fresh grant be issued in the names of the respondents and summons for confirmation of grant be filed within 14 days thereof. The applicant was dissatisfied with the decree and order of the court and filed this application for review and setting aside of the said orders on the ground that is court made a finding that the respondents are the children of the deceased Ivulu Kithini (Deceased) and that the applicant and her sisters are not beneficiaries of the estate of the deceased.



5. That following the said decision the applicant who says that she was married long ago and was not in contact with her father's relatives and in particular the respondents, was not aware of the identity of the respondents and to the best of her knowledge they were trespassers on the land which forms the estate of the deceased but it was only after the protracted succession proceedings that resulted in the revocation of the grant issued to her as a daughter of the deceased and this appeal that she conducted investigations to unravel the true identity of the respondents and their relationship with her father, if any, but out of that she has come upon new and important evidence that she did not have at the time of the hearing of the of the filing of the petition and of the hearing of the appeal that she has found that the respondents were not biological children of Ivulu Kithini
6. That the deceased Ivulu Kithini was the son of Kithini who had three wives. Wanza 1<sup>ST</sup> Wife and mother to deceased Ivulu Kithini Nzyulo 2<sup>Nd</sup> WIFE and mother to Ndolo, Muthike 3<sup>Rd</sup> Wife who did not have children and was returned to her home to her father's home in Kiteta. When there she entered into an Iweto Marriage with one Ngina. That she assigned Ngina to Ndolo her step son to bear children for her. That Ngina gave birth to the respondents, who according to Kamba customary law are children of Kithini and Muthike. It is the applicant's position that the court's lack of appreciation of the existence of Kamba customary law which had not been discovered as at the time of hearing both at the trial court and appellate court led the court to make an error in the judgment and final decree when the court found that Muthike and Ngina were the deceased's wives while in fact Muthike was his stepmother.
7. The Application is opposed through the replying affidavit of William Talava Ndolo alias Ivulu. He depones that he has the authority of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents to swear the affidavit.
8. And he depones that he is advised by his advocates that this court is functus officio. That no sufficient reason has been given to warrant a review, that the current application is premised on deceit and mendacious allegations with no iota of evidence in support of the same. He depones that there was no woman-to-woman marriage between his late mother by the name Ngina Ivulu and the late Muthike Ngau. That his mother was married to Ivulu Kithini Alias Ibulu Kithini
9. Parties filed written submissions and for the applicant it is submitted that the single issue for determination is whether the applicant has established sufficient reasons to warrant for review of the court's order issued on 28<sup>th</sup> August and to set aside the entire judgment and proceedings.
10. The applicant cites rule 63 of the Probate and Administration Rules Order 45 of the Civil Procedure Rules and section 80 of the *Civil Procedure Act*. The Applicant also relies on Francis Origo and Another vs Jacob Kumali Munjala [2005] eKLR where the court stated that an application for review on this all about: discovery of new and important evidence which was not available at the time of the hearing despite the exercise of due diligence. That such evidence must be credible and material to the case and not merely confirmatory of what was already presented.
11. It was further submitted that the evidence about the woman-to-woman marriage between the wife of the deceased and the mother of the respondents is very crucial in this matter as it determines the origin of the respondents and who are the actual beneficiaries of the estate to the deceased. It is also argued that there is now an expert of Kamba customary law who would be able to explain to the court what this means.
12. The applicant relies on in the matter of the estate of Monica Katei Kithinga (deceased) [2024] where the judge stated



...Kamba customary law comes into play if the deceased died intestate and the woman-to-woman marriage has been disputed or denied. Customary law would apply to prove the relationship of the appellants to the deceased and hence whether they are beneficiaries of the estate...’

13. The Applicant also relies on the estate of Anthony Mutolga Ndolo (deceased) [2019]eKLR where the protester sought reliance on Kamba customary law to establish the practice of woman-to-woman marriage among the Akamba. The court directed that Kamba customary law is one to be resorted to in order to resolve the dispute between the parties.
14. In their submissions, the respondents also gave a brief background and begun by stating that it “is gainsaid That whereas wedding is an event A marriage is a process and can only have one bite at the cherry”. The respondent submits that the import of this saying will be seen deep in the submissions. In summarizing the application, the respondent stated that the applicant had brought an application by way of Notice of Motion dated 14<sup>th</sup> October 2024 seeking among others the review or the setting aside of the judgment delivered on the 28<sup>th</sup> of August 2024 that the application is supported by three affidavits and the respondents vehemently oppose the application through their replying affidavit.
15. According to the respondents three legal issues arise  
Whether a woman-to-woman marriage existed thus warranting review,  
Whether stay of execution should issue,  
Whether the respondents are entitled to costs.
16. Citing the same legal provisions as the applicant the respondent argues that the respondents have unequivocally deponed that they are the biological children of the deceased and that their late mother Ngina and the late MUTHIKE Ngau never contracted women to woman Marriage otherwise known as iweto.
17. That the applicant despite citing that marriage does not answer the questions as to when, where and how the marriage took place, who was present, what happened. They also cite Cotran in Restatement of African Law Kenya Volume One on the law of marriage and divorce a woman-to-woman marriage in Kamba customary law.
18. It is submitted that the applicant has not provided any evidence to establish that there was indeed an iweto marriage to warrant a review. That the two affidavits that are presented as affidavit evidence do not pull up to the requirements of ss 107 to 109 of the Evidence Act.
19. The respondents rely on  
In real estate of Mbondo Kata Deceased [2018] Eklr  
Kimani Vs Gikanga (1965) Ea 735 At 739  
In Re estate of RicharD Kiplangat Tanui (deceased) [2020] Eklr  
Eliud Maina Mwangi vs Margaret Wanjiru Gachangi [2013] eKLR.
20. The import of these authorities is that the applicant had the duty to establish through evidence that indeed there was a Kamba customary woman to woman marriage; that she has not presented before court evidence of any person or clan member who witnessed the said marriage or who had any information that any of the rites that follow a woman-to-woman marriage had been conducted. In Particular they cite Cotran (above) where he states what encompasses a Kamba customary law woman to woman marriage that where a husband dies leaving a childless widow who is past childbearing the widow may marry a wife (iweto) by giving ngasya to her family in the usual way. the widow then selects



a man (Mutuany) from her late husband's relatives to have sexual intercourse with her wife and any children resulting from such cohabitation are regarded as the children of the widow and her deceased husband. This form of marriage can also take place during the lifetime of a husband where the wife is barren or has not produced male children.

21. It is submitted that the Ngasya is defined as the marriage consideration which is payment of cattle other livestock or property rendered by or on behalf of the bridegroom to the father or guardian of the bride and this is necessary for the validity of marriage and to establish the affiliation or legal control of the issue of the Union and which may be repayable in whole or in part on the dissolution of the marriage
22. It is submitted that the applicant has not settled in evidence any of the foregoing requirements. That having failed to do so the applicant cannot expect the court to exercise its discretion in her favour. That court's discretion is never designed to assist parties who approach courts with a view of obfuscating and obstructing justice hence the applicant should simply reconcile with the results of the litigation.
23. Having considered all the foregoing I find that the key issue for determination is whether there is ground for review. The other orders will arise from the finding hereof.
24. To determine the issue, I am guided by the requirement of s. 80 of the CPA and order 45 of the CPR. The question is: Is there new, important matter or evidence before me to warrant a review? Could the applicant have availed it if she had conducted due diligence?
  80. Review 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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
      1. Application for review of decree or order [Order 45, 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 made the order without unreasonable delay( emphasis mine)
25. Both parties are in agreement on the legal framework for review and the application of customary law in our justice system. I am alive to the Constitutional imperative, that each of us has the right to our culture. This is what Article 44 states ;inter alia
  44. Language and culture
    - (1) Every person has the right to use the language, and to participate in the cultural life, of the person's choice.



26. However, when one avers that a certain custom was practiced proof of that fact is upon that person.
27. While the respondent cites Cotran it is important to note that customary law is not static and what Cotran recorded as Essentials of a valid marriage under Kamba law have evolved with time with modifications brought about by the effluxion of time, effects of urbanization. However, the applicant ought at least to have availed evidence of when this marriage happened, were there any witnesses, was there compliance with the customs as they were then?
28. The applicant points out that there was an iweto marriage between one of the wives of the deceased and the mother of the respondents. Her evidence is contained in the affidavits of the retired Chief, who was a witness in this matter. Clearly any evidence he had he could have given it at that time and he did not have to wait until the court below and here had delivered its judgment to now bring the evidence. In any event it appears to me that had the applicant done due diligence she would have obtained this evidence.
29. I also find it unsettling that the applicant would want to provide evidence of iweto to the effect that the Muthike gave her iweto Ngina to her stepson Ndolo to produce children for her. The available knowledge on this customary practice is that the persons eligible to produce children for the childless wife would be the relatives of the husband or his age mates. A stepson could not bear children for his step mother as that would tantamount to bearing children for his father.
30. That upshot is that there is not sufficient evidence before me to support the so called new and important evidence to warrant a review.
31. It follows then that a stay of execution is not tenable.
32. In the circumstances I find that the application is not merited and is declined.

Each party will bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON 19<sup>TH</sup> SEPTEMBER 2025**

**MUMBUA T MATHEKA**

**JUDGE**

Ca Chrispol

Mukula For Respondents

N/a For Applicants/counsel

