



**Juma & another v Ochieng (Civil Appeal E025 of 2022)  
[2024] KEHC 2167 (KLR) (5 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2167 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CIVIL APPEAL E025 OF 2022**

**KW KIARIE, J**

**MARCH 5, 2024**

**BETWEEN**

**HELLEN ADHIAMBO JUMA ..... 1<sup>ST</sup> APPLICANT**

**CAREN AUMA ATUNDO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**ROSELINE ACHIENG OCHIENG ..... RESPONDENT**

**RULING**

1. Roseline Achieng Ochieng moved the court by way of Notice of Motion dated the 4<sup>th</sup> day of October 2023 under sections 1A, 1B, 2A, 3A and 80 of the *Civil Procedure Act*, Order 22, Order 42 Rule 6, Order 45 Rule 1 and Order 51 Rule 1 of the *Civil Procedure Rules*. She is seeking the following orders:
  - a. That this application be certified as urgent, service be dispensed with and heard ex-parte in the 1<sup>st</sup> instance.
  - b. That pending the hearing and determination of this application for review, a temporary order of stay of the proceedings in Succession Cause No.12 of 2019 be granted.
  - c. That the honourable court be pleased to review, vary and/or set aside the judgment delivered on the 28th March 2023 by the Hon. Judge Kiarie in Homa Bay High Court Civil Appeal No. E025 of 2022, which equally disinherited one of the beneficiaries from the estate of Samwel Onyuna Amollo and further vacated any orders pursuant thereto.
  - d. That the cost of this application be provided for.
2. The application was premised on the following grounds:
  - a. There is an error/mistake apparent on the face of the record in that the learned judge misdirected himself in paragraph 6 of the judgment in concluding that one of the beneficiaries,



Bernard Juma, is the son of the late Wilson Ogwang and a cousin of the deceased; therefore, he does not qualify as a beneficiary in the deceased's estate.

- b. The conclusion arrived at by the learned judge, as enshrined in the impugned judgment dated the 28th day of March, is contrary to the impugned ruling delivered on the 31<sup>st</sup> day of March 2022 by the Hon. Judge Nang'ea in Succession Cause No.12 of 2019.
  - c. That in the said ruling, the Hon. Judge correctly stated that one Bernard Juma is one of the children of the late Wilson Ogwang (who is the last-born brother of the deceased herein); consequently, his family is equally entitled to a portion of land parcel number No. Gem/Kowuor/Kotieno/51 as Wilson was allocated a portion of the suit parcel together with his brothers Martin Atudo and David Atudo by the deceased, who had taken him in his family as his son, their parents having died while he was still a minor.
  - d. The issue of whether the family members of the late Wilson Ogwang were entitled to the estate of the deceased herein was conclusively addressed by the impugned ruling dated 31st March 2022, where the court acknowledged that the deceased, Wilson Ogwang, was the brother of the deceased herein and not a cousin as contained in the judgment, hence the error in the judgment herein.
  - e. It is in the interest of justice and fairness that the judgment dated 28th day of March 2023 be reviewed, varied, and/or set aside as the impugned ruling dated 31st day of March 2022 already recognized the applicant as a beneficiary and the latter disinherited them based on being a cousin to the deceased.
  - f. The beneficiaries will, therefore, be greatly prejudiced if the court does not review the judgment dated the 28th day of March 2023, which disinherited them.
3. The respondent opposed the applications and stated:
- a. That the application did not meet the threshold for review of judgment.
  - b. That the application seeks to set aside the decision of this court.
4. Order 45 Rule 1 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 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.



5. There are two glaring errors in the application. The first is the one that refers to the judgment of the 31<sup>st</sup> day of March 2022 as having been delivered by Hon. Judge Nang'ea. The judgment that was delivered on the 31<sup>st</sup> day of March 2022 was by Hon. Nang'ea, the chief magistrate. The appeal gave rise to the judgment the applicant seeks to be reviewed.
6. The second obvious error is that what the applicant calls an error on the face of the record is the finding of this court. Even if my finding is erroneous, I cannot be asked to review that finding. This would be equivalent to sitting on appeal on my decision.
7. This being the only reason I am called upon to review the judgment dated the 28<sup>th</sup> day of March 2023, I find that the application lacks merit, which is dismissed with costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 5<sup>TH</sup> DAY OF MARCH 2024**

**KIARIE WAWERU KIARIE**

**JUDGE**

