



**In re Estate of Charles Muthike Gachoki (Deceased) (Succession Cause  
1291 of 2017) [2024] KEHC 12432 (KLR) (Family) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12432 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 1291 OF 2017  
HK CHEMITEI, J  
OCTOBER 16, 2024  
IN THE MATTER OF THE ESTATE OF CHARLES MUTHIKE GACHOKI (DECEASED)**

**BETWEEN**

**LYDIAH WANJIKU MUTHIKE ..... APPLICANT**

**AND**

**NELIUS WANGUI MUTHIKE ..... RESPONDENT**

**RULING**

1. This ruling relates to the application dated 28<sup>th</sup> July, 2022 filed by Lydiah Wanjiku Muthike, the Applicant, seeking for orders that:
  - (a) Spent.
  - (b) Pending the hearing and determination of this application inter partes or until such further orders, this honourable court be pleased to review, vary and/ or set aside in its entirety the ruling issued on 9<sup>th</sup> November, 2021 and any resultant orders.
  - (c) This honourable court be pleased to order the investigating officer attached to the Directorate of Criminal Investigations Unit, and in charge of the investigations to produce to this honourable court the findings of the investigations commenced on 23<sup>rd</sup> June, 2022 by the Applicant into the alleged forgery and falsification of documents by the Respondent herein.
  - (d) The ruling delivered by this honourable court on 9<sup>th</sup> November, 2021 be reviewed, varied and/ or set aside in its entirety.
  - (e) The costs of the application be provided for.



2. The application is supported by affidavit sworn by Lydiah Wanjiku Muthike on 28<sup>th</sup> July, 2022 stating inter alia that the Respondent was appointed co – administrator vide ruling delivered on 9<sup>th</sup> November, 2021.
3. The Applicant, thereafter, lodged a complaint with the DCI on possible forgery of documents produced in court by the Respondent. The Respondent, for example in applying for birth certificate through late registration together with her sister at Embu West and Kirinyaga, produced a fake ID Card that allegedly belonged to the deceased. The first application had a wrong ID number and the second application did not have the deceased’s ID Card copy attached.
4. This new evidence she deposed was in the custody of the investigating officer and it was not available at the time the ruling of 9<sup>th</sup> November, 2021 was being delivered. The investigating officer is willing to present it in court when called upon to do so. She prays therefore for the ruling aforementioned to be reviewed on the basis of the new and additional evidence.
5. The application is opposed vide replying affidavit sworn by Nelius Wangui Muthike on 27<sup>th</sup> January, 2023. She states, inter alia that this court is functus officio having delivered a ruling that she and her sister are the deceased’s beneficiaries. That the court deliberated upon the issues raised in the instant application before delivering the ruling.
6. The application was an appeal guised as a review and it is aimed at delaying confirmation of the amended grant, and the Applicant has also filed an appeal in the Court of Appeal.
7. She said that she has never been subjected to any criminal proceedings regarding any legal documents in her name and there is no evidence discrediting her birth certificate. The application has not met the threshold for review and ought to be dismissed.
8. The Applicant has filed submissions dated 16<sup>th</sup> October, 2023 placing reliance among others on the following:
  - a. Section 80 of the *Civil Procedure Act* which provides that 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.
  - b. Order 45 (1) of the *Civil Procedure Rules* which provides that 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 by a decree 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 judgment to the court which passed the decree or made the order without unreasonable delay.
  - c. Veronicah Njoki Wakagoto (Deceased) (2013) eKLR where the court stated, “...The effect of Section 45 is that property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised to do so by law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling.”



9. The Respondent has filed submissions dated 27<sup>th</sup> February, 2023 relying also among others on the following:
- a. Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*.
  - b. *Francis Njoroge v Stephen Maina Kamore* [2018] eKLR where the court stated, “Therefore, Order 45 of the *Civil Procedure Rules*, 2010 is very explicit that a court can only review its orders if the following grounds exist: )a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the Applicant at the time the decree was passed or the order was made; or (b) There was a mistake or error apparent on the face of the record; (c) There were other sufficient reasons; and (d) The application must have been made without undue delay. The pertinent issue for determination herein, therefore, is whether the appellant has established any of the above grounds to warrant an order for review.”
  - c. *Muyodi vs Industrial and Commercial Development Corporation & Another* [2006] 1 EA 243 where the court stated, “...In *Nyamogo & Nyamogo vs Kogo* (2001) EA 174 this court said that an error apparent of the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is areal distinction between a mere erroneous decision and an error apparent of the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by ling drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”

### **Analysis And Determination**

10. I have gone through the application before this court, the responses and submissions filed by the parties and address them as follows:
11. In *Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others* [2021] eKLR the court stated as follows:
- “ 18. The power of review can be exercised by the court in the event discovery of new and important matter or evidence which despite exercise of due diligence was not within the knowledge of the Applicant or could not be produced by him at the time when the order was made. As the Supreme Court of India<sup>[15]</sup> stated: -
- “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”

19. The reason for the above limitation is that it is an indulgence given to a party to get the previous decision altered on the basis of discovery of important evidence which was not within his knowledge at the time of original hearing. So, in the fitness of things, a person, who relies on such circumstances to obtain a review, should affirmatively establish them. The latitude shown to a party by a court is conditional upon strict compliance with that requirement.
20. Ordinarily, the expression 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 would refer only to a discovery made since the order sought to be reviewed was passed. An Applicant alleging discovery of new and important evidence must demonstrate that he has discovered it since the passing of the order sought to be reviewed...”
12. I have carefully read through the application and in particular the annexures thereto. Although it could be true that the documents relied on by the Respondent were fake it is only a criminal court which is able to carry out such verification. The fact that the directorate of criminal investigation is holding the documents does not prima facie indicate that they are fake.
13. I think this court would have considered the application if for instance there was a conclusive judicial decision that the documents were fake or illegal.  
  
For now, suffice to state that the application for review is not merited as there is nothing new to discuss. At any rate the Respondent has not been called upon by the DCI to record any statement or at least been charged for any known offence.
14. The application is otherwise dismissed with no order as to costs.

**DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 16<sup>TH</sup> DAY OF OCTOBER 2024.**

**H K CHEMITEI**  
**JUDGE**

