



**In re Estate of Francis Wekesa (Deceased) (Succession Cause  
3 of 2019) [2024] KEHC 11819 (KLR) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11819 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
SUCCESSION CAUSE 3 OF 2019**

**DK KEMEL, J**

**OCTOBER 4, 2024**

**IN THE MATTER OF THE ESTATE OF FRANCIS WEKESA (DECEASED)**

**IN THE MATTER OF**

**JOSEPH WAMALWA WEKESA ..... 1<sup>ST</sup> PETITIONER  
FLORENCE NAMAROME WEKESA ..... 2<sup>ND</sup> PETITIONER  
ANN KISAKA OTIENO ..... 3<sup>RD</sup> PETITIONER**

**RULING**

1. Vide Chamber Summons dated 16<sup>th</sup> July 2024, the 1<sup>st</sup> Petitioner/Applicant herein seeks to set aside the orders issued on 12<sup>th</sup> July 2024 wherein the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners' application dated 3<sup>rd</sup> June, 2024 was allowed as prayed as it was unopposed and that the costs be in the cause.
2. The application was premised on the grounds on the face of the summons and the supporting affidavit as sworn by the Applicant on 16<sup>th</sup> July 2024, wherein he averred inter alia; that there was improper service upon the Applicant; that his Counsel did not inform him of the matter and that it will be prudent if the said Orders as granted on 12<sup>th</sup> July 2024 be set aside and/or quashed.
3. The application was opposed. The 2<sup>nd</sup> Petitioner filed a replying affidavit sworn on 23<sup>rd</sup> July, 2024 wherein she averred inter alia; that the affidavit in support of the application is full of falsehoods; that the 1<sup>st</sup> Petitioner was duly served as per an annexed affidavit of service; that the 1<sup>st</sup> Petitioner is being misused by the members of the clan to frustrate her yet she is her biological mother; that the 1<sup>st</sup> Petitioner has severally refused to sign the transfer documents as ordered by the court so that the distribution is finalized; that the application is meant to delay and frustrate the final conclusion of the cause.
4. A brief background of this matter at hand is that the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners herein filed their application dated 3<sup>rd</sup> June 2024. On 8<sup>th</sup> July 2024, this Court issued directions that the said application be set down



for hearing on 12<sup>th</sup> July 2024 and that the hearing notice to be issued to the 1<sup>st</sup> Petitioner herein. It is imperative to note that Counsels for the 1<sup>st</sup> Petitioner and his Counsel Wasilwa was absent in Court.

5. On 12<sup>th</sup> July 2024, the 1<sup>st</sup> Petitioner and his Counsel, Wasilwa were yet again absent in Court. Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioner notified the Court that the application dated 3<sup>rd</sup> June 2024 was duly served upon Wasilwa and his client respectively as per the annexed affidavit of service sworn on 8<sup>th</sup> July 2024 showing that the 1<sup>st</sup> Petitioner and his Counsel Wasilwa were duly served with the application dated 3<sup>rd</sup> June 2024 and the hearing notice, but no response was filed. This Court proceeded to find the application dated 3<sup>rd</sup> June 2024 as unopposed and that the same was allowed in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners. The 1<sup>st</sup> Petitioner now alleges that there was improper service upon the Applicant as his Counsel did not inform him of the matter and that it will be prudent if the said Orders as granted on 12<sup>th</sup> July 2024 be set aside and/or quashed.
6. The right to be heard is one of the two cardinal rules established under the principle of natural justice and it is generally expressed as *audi alteram partem* (that a party should not be condemned unheard). However, this does not mean that a party must be heard in all circumstances or despite the circumstances. It only means that a party ought to be given the opportunity to present their case, and then it is up to that party to either utilize the opportunity or not. Most importantly, a Court cannot force a party to actually utilize the opportunity afforded to them to present their case since what is important is that it can be shown that the Party was availed the opportunity to be heard.
7. To set the record straight on the allegation that Counsel for the 1<sup>st</sup> Petitioner failed to inform him of the matter at hand and that there was improper service upon him, the Court record is clear that the date of 12<sup>th</sup> July 2024 was taken in Court and both the 1<sup>st</sup> Petitioner and his Counsel Wasilwa were duly served with the application dated 3<sup>rd</sup> June 2024 and the hearing notice for 12<sup>th</sup> July 2024 on 8<sup>th</sup> July 2024. On 12<sup>th</sup> July 2024, despite being aware of the hearing and the application, the Counsel for the Petitioner and the Petitioner himself were a no show in Court and that no response was filed regarding the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners' application dated 3<sup>rd</sup> June 2024. For this reason, the court proceeded to hear the application *ex parte* (Order 12 of the Civil Procedure Rules) and deemed the same unopposed thus allowing it.
8. The record therefore speaks for itself that the 1<sup>st</sup> Petitioner and his Counsel were well aware of the date given for the hearing of the application dated 3<sup>rd</sup> June 2024, however on that day, learned counsel and his client failed to attend Court. No sufficient reason or explanation has been given as to why they did not attend Court. The totality of the facts and circumstances is that this Court is of the view that the 1<sup>st</sup> Petitioner was accorded a chance to be heard but he chose not to utilize it.
9. In conclusion, on the 1<sup>st</sup> Petitioner was clearly granted a hearing before this Court made its determination on the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners' application, this Court finds that the 1<sup>st</sup> Petitioner was in fact given a chance to present his case and failed to utilize it. The claim as presented vide the present application is therefore without merit.
10. Section 80 of the [Civil Procedure Act](#) gives the Court unfettered discretion to review of its decision. Section 80 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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

11. Order 45 Rule 1(1) of the Civil Procedure Rules, 2010 sets out the grounds for review and provides as follows: -

“ 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.”

12. Section 80 of the Civil Procedure Act gives the power of review whereas Order 45 sets out the rules which restricts the grounds for review to the following grounds:

- a. 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 or;
- b. On account of some mistake or error apparent on the face of the record; or
- c. For any other sufficient reason

13. It becomes very clear then, that in the present case, the 1<sup>st</sup> Petitioner has not been able to point out any of the above grounds to warrant this Court to review/set aside its decision as issued on 12<sup>th</sup> July 2024. Suffice it to say that there is no. What the 1<sup>st</sup> Petitioner seeks is to have this Court re-open the application for a fresh deliberation which, as already pointed out, is akin to sitting on appeal on its own decision. In the case of *Evan Bwire vs Andrew Aginda* Civil Appeal No. 147 of 2006 cited in the case of *Stephen Githua Kimani vs Nancy Wanjira Waruingi T/A Providence Auctioneers* (2016) eKLR the Court of Appeal held as follows:

“ An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh...”

14. No such strong grounds have been exhibited to warrant a review and set aside the orders issued on the 12<sup>th</sup> July, 2024. The claim as presented vide the present application is an abuse of the court process



since the 1<sup>st</sup> Petitioner has not even challenged the service of the application dated 3<sup>rd</sup> June, 2024 such as seeking to have the process server called for purposes of cross-examination. At best, no good reasons have been advanced by the 1<sup>st</sup> Petitioner to warrant the setting aside of the orders dated 12<sup>th</sup> July, 2024.

15. In the result, it is my finding that the 1<sup>st</sup> Petitioner's application dated 16<sup>th</sup> July, 2024 lacks merit. The same is dismissed with no order as to costs.

Orders accordingly.

**DATED AND DELIVERED AT BUNGOMA THIS 4<sup>TH</sup> DAY OF OCTOBER 2024.**

**D. KEMEI**

**JUDGE**

In the presence of :

No appearance Muyala for 1<sup>ST</sup> Petitioner

Sabwami for Onyando for 2<sup>nd</sup> & 3<sup>rd</sup> Petitioners

Kizito Court Assistant

