



**In re Estate of Richard Olela Kinara (Deceased) (Civil Appeal
E049 of 2021) [2023] KEHC 998 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 998 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E049 OF 2021
KW KIARIE, J
FEBRUARY 16, 2023**

BETWEEN

JOSEPH OMONDI OLELA APPELLANT

AND

MOSES OMONDI ODHIAMBO RESPONDENT

RULING

1. The respondent/applicant moved the court by way of notice of motion dated November 10, 2022. It was brought under sections 1A, 1B & 80 of the Civil Procedure Act, & order 51 rule (1) as read with order 45 rule 1 (1) (a), 2 (1) & 3 (2) of the Civil Procedure Rules. The applicants are seeking the following orders:
 - a. That this application be certified as urgent, service be dispensed with and heard *ex parte* in the 1st instance.
 - b. That the honorable court be pleased to stay execution of the decree from the judgment of this court, delivered on the November 8, 2022 pending the inter partes hearing and determination of this application.
 - c. The honorable court be pleased to review the judgment and decree of this honorable court made on the November 8, 2022.
 - d. The costs of this application be in the cause.
2. The application was premised on the following grounds:
 - a. The applicant is aggrieved with the decree of this court from which appeal lies but no appeal has been filed.



- b. There is some mistake or error apparent on the face of the record and the judgment does not resolve the issues raised by the appeal.
 - c. That the court being the first appellate court with a duty to evaluate the entire evidence on record omitted some crucial evidence which were not on record and could have made the honorable court rule otherwise.
 - d. That the applicant has since discovered new and important evidence which, after the exercise of due diligence could not be produced by him at the time when the judgment was made.
 - e. That it has come to the attention of the applicant that deceased's estate had already been succeeded in Kisii High Court succession cause No 209 of 2005 and a certificate of confirmation of grant issued to that effect before the applicant purchased part of the estate.
 - f. That the subsequent succession being Oyugis Senior Principal Court succession cause No 209 of 2020 which this appeal lied was therefore void *ab initio* as a deceased estate cannot be succeeded twice.
 - g. The judgment did not make any reference to the Kisii High Court succession cause No 209 of 2005 nor did it render any direction on the same vis-à-vis the pending Oyugis Senior Principal Court succession cause No 202 of 2020.
 - h. That a serious miscarriage of justice has been occasioned by the failure of the court to give consideration to the Kisii High Court succession cause No 209 of 2005 which had already been concluded.
 - i. That since the administrator of the deceased estate had a confirmed grant which grant is still valid to date prior to the sale of land parcel number Kasipul/Kojwach Kamiro/1223 to the applicant herein then the transaction between the parties did not amount to intermeddling with the deceased estate and was in the line with section 82 (b) (ii) of the [law of Succession Act](#) as such the applicant ought not to be condemned to pay costs.
 - j. That the said orders are highly prejudice to the applicant.
 - k. That the application has been brought in good faith and without undue delay.
3. The respondent opposed the application on the following grounds:
- a. That the application lacks merit.
 - b. That he has no knowledge of the Kisii High Court Succession cause number 209 of 2005.
 - c. That the said succession cause refers to land parcel numbers East Kasipul/Kojwach Kamiooro/540 & 472.
 - d. That the introduction of the new evidence would be prejudicial.
4. Order 45 rule 1 of the [Civil Procedure Orders](#) provides for review in the following terms:
- (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.

5. It is incumbent upon the party who alleges an error on the face of the record to point out the error. The error or omission must be self-evident and should not require an elaborate argument to be established. In the case of *Nyamongo and Nyamongo v Kogo* [2001] EA 174, the Court of Appeal commented on what constitutes an error on the face of the record as follows:

An error on 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 a real distinction between a mere erroneous decision and an error apparent on 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 a long drawn out 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 a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.

Further, in the case of *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR, the Court of Appeal held that;

A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

6. In his paragraph 6 of the supporting affidavit, the applicant states:

"That I feel there is a mistake on the face of the record and the judgment of the honourable court does not resolve the issues raised by the case. A feeling is not pointing out an error or making it self-evident. There is no error that has been pointed out and the application cannot turn on the issue of error on the face of the record."

7. The land parcel number that featured in Oyugis Senior Principal Magistrate's succession cause number 202 of 2020 was Kasipul/Kojwach Kamioro/1223. At the time of the ruling by the trial court, land parcel numbers East Kasipul/Kojwach Kamiooro/540 & 472 did not feature anywhere. This is what the applicant says is a new discovery. He contended that a grant had been confirmed in Kisii High Court Succession cause number 209 of 2005. It was in this succession cause where land parcel numbers East Kasipul/Kojwach Kamiooro/540 & 472 featured.



8. In the case of *D. J. Lowe & Company Limited v Banque Indosuez* [1998] eKLR the Court of Appeal while remarking on discovery of new evidence said:

Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.

9. The applicant has not demonstrated how within two days of the judgment he seeks to be reviewed, he came to possess the new evidence and which he could not have discovered before, after the exercise of due diligence. I get an impression that what he calls new evidence was all along within his knowledge. He had a duty to place it before the trial court for consideration. In the case of *Rose Kaiza v Angelo Mpanju Kaiza* [2009] eKLR the Court of Appeal while commenting on the issue of discovery of new evidence, quoted Mulla with approval as follows:

"The construction and application of that provision has been discussed in many previous decisions but we shall take it from the commentary by Mulla on similar provisions of the *Indian Civil Procedure Code*, 15th Edition at page 2726, thus:

Applications on this ground must be treated with great caution and as required by r 4(2) (b) the court must be satisfied that the materials placed before it in alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.

10. From the foregoing analysis, I find that the applicant has not demonstrated that he has made a discovery of new facts within the meaning of order 45 rule 1 of the *Civil Procedure Rules* to warrant a review. The application is therefore dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 16TH DAY OF FEBRUARY, 2023

KIARIE WAWERU KIARIE

JUDGE

