



REPUBLIC OF KENYA



KENYA LAW
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**Migwambo v Ogenda (Civil Appeal E055 of 2021)
[2023] KEHC 1502 (KLR) (7 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1502 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E055 OF 2021**

KW KIARIE, J

MARCH 7, 2023

BETWEEN

MARTHA AKINYI MIGWAMBO APPELLANT

AND

SUSAN ONGORO OGENDA RESPONDENT

RULING

1. On July 15, 2022 the Susan Ongoro Ogenda, the applicant herein, moved the court by way of Notice of Motion under Rules 63 and 73 of the [Probate and Administration Rules](#), Order 45 [Civil Procedure Rule](#) and Article 159 of the [Constitution of Kenya](#). The respondent/applicant was represented by the firm of Mwirigi & Nzomo Company Advocates. She is seeking the following orders:
 - a. That this honorable court be pleased to offer clarification(s) on the contents of its judgment issued on the 22nd day of June 2022.
 - b. That this honorable court be pleased to review and/or vary its judgment issued on the 22nd day of June 2022.
 - c. That this being a family matter, there be no orders as to costs.
2. The application was premised on the following grounds
 - a. The appellant instituted the instant appeal vide a Memorandum of Appeal dated June 28, 2021 hinged on nine (9) grounds of appeal and which appeal was canvassed by way of written submissions.
 - b. On the 22nd day of June 2022, this honorable court rendered its judgment in the main appeal. In so doing, this honorable court partially allowed the appellant's appeal and made no order as to costs.



- c. In the said judgment at paragraph 12, this honorable court directed the administrator to file a fresh list of distribution within thirty (30) days of its judgment at the Oyugis court. Further, the said fresh list of distribution was to take into account land parcel number West/Konuonga/676 measuring 7.5 in respect of the appellant.
 - d. In the body of the said judgment, this honorable court made constant reference to land parcel number West Konuonga/676 and measuring 7.5 hectares in some instances and merely 7.5, without indication of measurement, in other instances.
 - e. This honorable court seems to have treated land parcel number West /Konuonga/676, measuring 7.5 as being different and/or separate from land parcel number West Kasipul/Konuonga/676, which was the subject matter of the objection proceedings before the trial learned magistrate at Oyugis and before this Honorable Appellate court.
 - f. Further, this honorable court was not very clear in its final determination as to whether the said land parcel number West/Konuonga/676 measuring 7.5 hectares or 5.5 acres.
 - g. The parcel of land being the subject matter of the instant Appeal is land parcel number West Kasipul/Konuonga/676 which measures 23.0 hectares.
 - h. The effect of this honourable court’s judgment (unless clarified, varied and/or reviewed is to allocate a whopping 7.5. hectares of the 23.0 hectares, contained land parcel number West Kasipul/Konuonga/676, to the appellant at the expense of the rest of the beneficiaries.
 - i. Unless this honourable court intervenes by clarifying, varying/or reviewing its judgment issued on June 22, 2022, the appellant will unduly benefit at the expense of the rest of the beneficiaries, whose only recourse will be to share the remaining 15.5 hectares of land parcel Number, West Kasipul/Konuonga/676 .
 - j. In the foregoing, it is in the best interest of justice and fairness that the orders sought in the instant application are granted.
3. The application was opposed by the appellant/respondent. She was represented by the firm of GS Okoth & Company Advocates. She raised the following grounds:
 - a. The estate of Japheth Ogenda Migwambo, deceased, the subject of Succession Cause No 286 of 2019 consisted only of Land parcel No West Kasipul/Konuonga/676 measuring 23.0 hectares (ie 56.81 acres). Although in paragraphs 8 and 9 of the judgment the word “a portion of” were omitted due to typographical error, the purport of the said judgment is very clear. In any event such clerical error and/or omission can be corrected by the court either on its own motion or on the application of any of the parties in accordance with Section 99 of the [Civil Procedure Rules](#).
 - b. Consequently, the prayers sought in the application dated July 15, 2022 are actually misdirected and are inapplicable. On thorough perusal of the supporting affidavit of Patrick Nzomo Wambua sworn on the 15th day of July one can only conclude that he intended to move the court under Section 99 of the [Civil Procedure Act](#) to clarify that the court was referring to a portion of land parcel No West Kasipul/Konuonga/676 and not the whole.
 - c. The provisions cited under which the application is advanced such as Article 159 of the [Constitution of Kenya](#), Rule 63 and 73 of the [Probate and Administration Rules, 1980](#) and order 45 of the [Civil Procedure Rules, 2010](#) are not applicable to the instant application and the application should be dismissed with costs. However considering that this is a family dispute as



rightly pointed out in the judgment dated June 22, 2022 such ill-advised applications should be avoided to save the parties the expenses.

4. Order 45 Rule 2 provides:

- "(1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.
- (2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.
- 3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate."

5. This Order has been a subject of interpretations which have been very narrow. The rationale is obvious; to avoid the court that made the disputed decision from sitting on own appeal. In the case of *Nyamongo and Nyamongo v Kogo* [2001] EA 174, the Court of Appeal dismissed an application on the ground that there were no errors apparent on the face of the record and stated;

"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."

6. And 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."



7. In order for an applicant to succeed, an error or omission on the face of the record must be pointed out. The same ought to be obvious without arguments. In the instant application the argument is that at paragraph 12 of the judgment I said:

"The administrator is therefore required to file a fresh list of distribution within 30 days of this judgment at Oyugis court and which will take into account Land parcel number West/Konuonga/676 measuring 7.5 in respect of the appellant."

The omission of the word hectares did not make the judgment in that respect vague. The paragraph read together with the entire judgment left no doubt as to what the court meant.

8. The application therefore lacks merit and the same is dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 7TH DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE

