



**Njambi & another v Wambui & 2 others (Civil Appeal  
203 of 2019) [2023] KEHC 19228 (KLR) (19 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19228 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL 203 OF 2019**

**A MSHILA, J  
JUNE 19, 2023**

**BETWEEN**

**WALFORD NGUGI NJAMBI ..... 1<sup>ST</sup> APPELLANT**

**EUNICE WAITHIRA NGUGI (DECEASED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**EUNICE WANJIRU WAMBUI ..... 1<sup>ST</sup> RESPONDENT**

**DANIEL KARUGA MACHARIA ..... 2<sup>ND</sup> RESPONDENT**

**JANE WANGUI WAHOME ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The notice of motion application dated April 22, 2022 and filed on April 15, 2022 seeks the court to review the judgment of February 17, 2022 on account of forgery and intentional misleading by Jane Wangui Wahome. The application is brought under order 45 rules 1(a) and 3(2), order 50 rule 6, order 51 rule 1 of the [Civil Procedure Rules](#), Section 80 and 3A of the [Civil Procedure Act](#).
2. The gist of the application is that Jane Wangui Wahome relied on some forged/non-authentic birth certificates that were believed to be authentic and disinherited the right beneficiaries of the estate of the deceased James Muigai Ngugi.
3. In the supporting affidavit sworn on April 22, 2022, by Eunice Wanjiru she deposes that her co-administrator produced forged birth certificates to hoodwink the court to find that her children belonged to the deceased. She acquired the information that the birth certificates were not authentic on April 6, 2022 vide a letter from the Registrar of civil registration services, after the delivery of the judgment.
4. In opposing the application, the 3<sup>rd</sup> respondent filed a replying affidavit sworn on September 23, 2022 in which she deposes that the application is incompetent and does not demonstrate the reasons for



granting review by the court. The issues raised by the Applicant ought to have been raised at the trial court to allow the exhibits availed be subjected to cross-examination. An appeal would be the appropriate forum to address the issues as opposed to a review. The authenticity of the annexures as provided can't be ascertained. The current application seeks to deny her and her children the fruits of the judgment, the same has been brought after the applicants were aggrieved by the outcome of the appeal.

5. The parties were directed to canvas the application by way of written submissions.

### **Applicant's Submissions**

6. The applicant filed submissions dated February 20, 2023 and submits the evidence adduced could not have been procured before the delivery of the judgment. The explanation given for the delay is the Covid -19 pandemic and the government office bureaucracy and red tape that slows down government officers' operations.
7. That if the court had the current information of the forged birth certificates its finding would be different. Cited was the Court of Appeal case sitting in Kisumu in Kisumu Civil Appeal No. 60 & 62 of 2017 *Otieno, Ragot & Co. Advocates Versus National Bank of Kenya*. Adopted its argument that they had made in *Kibos Sugar & Allied Industries Limited & Anor Versus Benson Ambuti Adega & 6 Others* (Civil Application No. 153 of 2019) where it stated:-

“In determining whether an appellate court can admit additional evidence, the court must seek to give effect to the overriding objective of doing justice and, in doing so, attempt to strike a fair balance between the need for concluded litigation to be determinative of disputes and the desirability that the judicial process should achieve the right result”

8. Counsel urges the court not to shut its eyes on the four forged birth certificates which would have had a whole different effect on the opinion of the court.
9. Counsel pleads with the court to exercise its discretion and to allow the application and review the judgment of February 17, 2022,

### **1<sup>st</sup> Appellant/respondent's Submissions**

10. The 1<sup>st</sup> appellant counsel filed written submissions dated 3<sup>rd</sup> March 2023 and filed on 14<sup>th</sup> March 2023 in which he submits the application fails to meet the threshold for a review under Order 45 Rule 1 of the Civil Procedure Rules. The casual explanation that the issue of the authenticity of the Birth Certificate would not have been procured before the determination of the suit fails to explain the indolence on the part of the Applicants. Reference was made to the case of *Alpha Fine Foods Limited vs Horeca Kenya Limited & 4 Others* (2021) eKLR where the court stated:-

“To pass the test, it must be demonstrated that the applicant was prevented by circumstances beyond his control from tendering the evidence to the court at the time when the judgment sought to be reviewed was delivered against him. ....to satisfy the test under the rule, an applicant must demonstrate discovery of new evidence which he could not procure at the time the application was heard despite the exercise of due care and diligence.”

11. The excuse by the Applicants of “government offices bureaucracy and red tape” is vague and fails to explain the indolence of the Applicants. The letters submitted to the Registrar of civil registration were done forty-five (45) days after the delivery of the judgment. Thus it is evident that the current application was an attempt by the Applicants to gather new evidence after the delivery of the judgment.



12. Further the production of the documents without their maker being cross-examined limits the instances when the same are admissible and/or permissible. The Applicants have not raised any issues which could not have been procured during the hearing, the issues have been raised upon receiving an unfavourable judgment and thus seeking the matter to be heard afresh.
13. The allegation that the 1<sup>st</sup> appellant was working in cahoots with the 3<sup>rd</sup> Respondent was denied. The reasons adduced for the delay in filing the current application two (2) months after the delivery of the judgment are insufficient and the Respondent urged this court to find the Applicant's application wanting in merit and to dismiss it with costs.

### **Issues for Determination**

14. Having considered the application, the affidavits on record, the written submissions by counsel for both parties and all the cited authorities. The issue framed for determination is;
  - i. Whether the application for review is competent and or meets the threshold prescribed by the law.
15. The High Court has the power of review, however, such power must be exercised within the framework of section 80 of the [Civil Procedure Act](#): Section 80 provides:-

“ 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 Judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
16. Also, order 45 rule I of the [Civil Procedure Rules](#) sets out the circumstances under which the High Court can review previous orders made by the same court as follows:-

“ Rule (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.”
17. From the above provisions it is clear that the three (3) main grounds for review are:-
  - i. Discovery of new and important matter or evidence;
  - ii. Mistake or error apparent on the face of the record; or,



- iii. For any other sufficient reason and most importantly, the application has to be made without unreasonable delay.
18. In the instant case, the Applicant relies on the discovery of new and important evidence to wit the none authenticity of the birth certificates adduced by the 3<sup>rd</sup> Respondent at the trial court. According to the Applicant the discovery was done after the court issued its judgment on February 17, 2022. The Applicant contends that due to the government officers' bureaucracy and red tape as well as the Covid-19 pandemic it was not possible to acquire the new information before judgment was delivered.
19. Counsel for the Applicant submits that the discovery of the new evidence will change the court's opinion and will find that the 3<sup>rd</sup> Respondent has deprived the rightful beneficiaries of the estate of the deceased. The Applicant submits that the impugned judgment of February 17, 2022 did not indicate her children as beneficiaries as some of her documents were expunged by the trial court whilst the appeal court included the children of the 3<sup>rd</sup> Respondent as beneficiaries which should not be the case.
20. This court has not been satisfactorily persuaded that the new evidence could not have been obtained before the court pronounced its judgment. If the Applicant had raised the issue challenging the birth certificates at the hearing of the appeal, then this court would have summoned the Registrar of civil registration to clarify the authenticity of the Birth Certificates. However, it is noted from the proceedings that this issue was never raised. It was only two (2) months after the court had pronounced its judgment that the Applicant wrote to the Registrar of civil registration to confirm the authenticity of the birth certificates. While it is not lost that the Country was hit by the COVID-19 pandemic in the year 2020, normal functions resumed in the year 2021, thus the reason for the COVID-19 pandemic is not reason enough for the delay.
21. What is clear is that the Applicant went on a fishing expedition for new evidence after finding the appeal was not in her favour. The court should therefore exercise caution in exercising its discretion to review a judgment or order on the ground of discovery of new evidence.
22. The Court of Appeal in *D. J. Lowe & Company Ltd -vs- Bonquo Indosuez*, Nairobi Civil Application No.217 of 1998, stated that:-
- “Where such a review application is based on the 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.”
23. In the circumstances, this court is satisfied that the introduction of the new evidence is tantamount to re-opening the case on the new evidence received which was not before the court would be prejudicial to the Respondents. In the case of *Wanga & Company Advocates v APA Insurance Company Limited* [2014] eKLR the court stated that:-
- “allowing a party to introduce new evidence at the appellate level was not only prejudicial to the opposing party but also against the law.”
24. This courts considered view is that the introduction of the letters would not have led the court to arrive at a different conclusion as alleged by the Applicant. The court in its finding observed that the 3<sup>rd</sup> Respondent had proven that she was married to the deceased. She also proved the deceased maintained and provided for her and her children even after the separation in 2012, she adduced copies of M-pesa statements that demonstrated the deceased sent her money. In the circumstances therefore, the new



evidence adduced will not change the conclusion that both Jane Wangui Wahome and Eunice Wanjiru Wambui are wives of James Muigai Ngugi (deceased) and thus were entitled to take out a grant of letters of administration of the deceased estate.

25. In the circumstances this court is not satisfied that the application meets the threshold for review.

### **Findings & Determination**

26. From the foregoing, this court finds that the application for review dated April 22, 2022 to be bereft of merit. The same is hereby dismissed.

27. This being a family matter each party to bear their own costs

Orders accordingly.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 19<sup>TH</sup> DAY OF MAY, 2023**

**HON. A. MSHILA**

**JUDGE**

### **In the presence of:**

Mourice court Assistant

Gachengu Gitau for the applicant (Eunice & Daniel)

Gichengo Kirika for the 1<sup>st</sup> appellant (Walford Ngugi Njambi)

**HON. A. MSHILA**

**JUDGE**

