



**In re Estate of John Kenya Njiru (Deceased) (Succession Cause 984 of 2007)  
[2024] KEHC 14107 (KLR) (Family) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14107 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 984 OF 2007  
HK CHEMITEI, J  
NOVEMBER 14, 2024  
IN THE MATTER OF THE ESTATE OF JOHN KENYA NJIRU (DECEASED)**

**BETWEEN**

**WILFRED MWENDA KENYA ..... 1<sup>ST</sup> APPLICANT  
NAMADA SIMONI ..... 2<sup>ND</sup> APPLICANT  
AMOSI JOHN OMERRI ..... 3<sup>RD</sup> APPLICANT**

**AND**

**NAOMI NJERI KIARIE ..... OBJECTOR**

**RULING**

1. This ruling relates to the application dated 26<sup>th</sup> October, 2023 filed by Wilfred Mwenda Kenya and Namada Simoni, Amosi John Omerri, seeking for orders that:
  - (a) Spent.
  - (b) This court be pleased to review its orders issued on 23<sup>rd</sup> October, 2023 and reopen the case to allow for:
    - i. Cross – examination of the Objector on her oral evidence before the court.
    - ii. The Petitioner and witnesses to give their oral evidence before the Court.
  - (c) Costs be in the cause.
2. The application is supported by the grounds thereof and the affidavits sworn by Wilfred Mwenda Kenya and Namada Simoni advocate on 26<sup>th</sup> October, 2023.



3. Winfred Mwendia Kenya avers that she was present in court that morning with her witnesses when the matter was called. His advocate was not around and the court was informed that he was at the parking lot.
4. That the court nevertheless proceeded to have the Respondent testify and had the case closed and thus there was no opportunity to have her cross examined.
5. Mr. Namada on the other hand deponed that he had other matters in two other courts which were to be handled by his colleague whose child had fallen sick that morning. He therefore scheduled the matters in the other courts which unfortunately his colleague did not arrive to deal with them hence his delay in arriving on time for this matter.
6. The said counsel apologized on behalf of his client stating that he was ready to pay thrown away costs for the period the parties were in court.
7. The application is opposed vide replying affidavit sworn by Naomi Njeri Kiarie on 22<sup>nd</sup> November, 2023. She avers, inter alia, that this matter is old and needs to be determined without delay. The matter's hearing was adjourned on 15<sup>th</sup> February, 2023 and 4<sup>th</sup> July, 2023 on account of the Petitioner's advocate, the latter being marked as a last adjournment. On 23<sup>rd</sup> October, 2023 the Petitioner's advocate indicated that he was ready to proceed with the hearing and time allocation of 12.00 pm was issued. He was not present at the said time and the reasons given for his absence are unacceptable and a delaying tactic in light of the previous adjournments.
8. The Applicant has filed written submissions dated 7<sup>th</sup> March, 2024 placing reliance on the following:-
  - i) Gideon Mose Onchwatti vs Kenya Oil Co. Ltd & Another (2017) eKLR and Ongom, Capt vs Catherine Nyero Owota Civil Appeal No. 14 of 2001 (2003) UGSC 16; where the courts referred to Order 12 Rule 7 and Order 51 Rule 15 of the Civil Procedure Rules, 2010 which provide the court with power to set aside an order or vary Ex parte judgments and orders upon such terms as may be just.
  - ii) Techbiz Limited vs. Royal Media Services Limited (2021) eKLR in which the court relied on Kenya Commercial Bank Limited vs Nicholas Ombija (2009) eKLR and Ugandan case of Simba Telkom where it was found that it is the philosophy of the court that before Judgement, Proceedings are live and a party can even apply to amend to bring all evidence before the court as closing him out would impact his Constitutional right to be heard. It was also held that the court retains the discretion to reopen the case though judiciously done not to allow filling of gaps.
9. The Objector/Co – Administrator has filed written submissions dated 8<sup>th</sup> March, 2024 placing reliance on Shanzu Investments Ltd v Commissioner of Lands [1993] as quoted in Langer Mutambu & Another (Civil Case 303 of 2011) [2023] KEHC 25372 (KLR) where the court stated, “The jurisdiction to vary judgment being a judicial discretion should be exercised judicially; and as is often said, whether judicial discretion should be exercised or withheld in a party's favour, depends, on a large measure, on the facts of each particular case. The tests for the exercise of this discretion are these: - First, was there a defense on the merits? Secondly, would there be any prejudice? Thirdly, what was the explanation for any delay?”

### **Analysis and Determination**

10. I have gone through the application, the response thereto and rival submissions and address it as follows:-



11. In Environment and Land Case 21 of 2021 {Formerly of Environment and Land Court at Kisii Case 254 of 2014) - Kenya Law the court quoted with authority, *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018* where John M. Mativo Judge culled out the following principles from a number of authorities: -
- i) A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
  - ii) The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
  - iii) An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
  - iv) An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
  - v) A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
  - vi) While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
  - vii) Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
  - viii) A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
  - ix) Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
  - x) The power of a Civil Court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.
12. Looking at the reasons given by the Applicant and the above extensive cited authority, it is apparent that this court has wide discretion to grant the orders of review but each case ought to be treated independently.
13. It is clear that the court proceeded on the premise that the Applicant had been granted a last chance since from the record it has been they who had caused the delay.
14. The reasons however advanced by the counsel appears plausible. The same is backed by the phone screen shot of her colleague whose child was unwell. At the same time the cause list attached shows



that the said firm had other two matters in two separate courts. With that in mind it appears that Mr. Namada expected his colleague advocate to take up the other matters once she was out of the hospital.

15. At the same time his clients were present in court together with the witnesses. It is therefore evident that they were ready to proceed.
16. The court will grant the Applicant another chance. Being a family matter, it is appropriate that a long-term solution and chance be granted to the parties to exhaust the matter to its logical conclusion.
17. In the premises, the application to reopen the matter to allow the applicant cross examine the Respondent is hereby allowed.
18. The Applicant shall pay to the Respondent thrown away costs of Kshs. 15,000 before the next hearing date and in default the Respondent can execute for the same.

**DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 14<sup>TH</sup> DAY OF NOVEMBER 2024.**

**H K CHEMITEI**

**JUDGE**

