



REPUBLIC OF KENYA



**In re Estate of David Mwangi Maina (Deceased) (Succession Cause  
239 of 2011) [2025] KEHC 13744 (KLR) (2 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 13744 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 239 OF 2011  
RN NYAKUNDI, J  
OCTOBER 2, 2025**

**IN THE MATTER OF ESTATE OF DAVID MWANGI MAINA .... DECEASED**

**IN THE MATTER OF**

**MARY NJOKI MWANGI MAINA ..... 1<sup>ST</sup> PETITIONER**

**AGNES WANJIRU MWANGI ..... 2<sup>ND</sup> PETITIONER**

**RULING**

1. The Applicant filed a Notice of Motion under Certificate of Urgency dated 19<sup>th</sup> day of August 2025 seeking the following orders:
  - a. That this matter be certified urgent and heard exparte in the first instance.
  - b. That the Honourable Court be pleased to review its orders issued on 16/02/2016 directing that the estate of David Mwangi Maina be distributed equally among all his beneficiaries, and instead substitute it with an order that the estate of the late David Mwangi Maina be distributed wholly to Stephen Kiptarus Kandie.
  - c. That costs be in the cause.
2. The application is anchored on the following grounds:
  - a. That the estate of David Mwangi Maina comprising of land parcel number Kahungura SFT Plot No. 322 measuring 6 acres had been sold to Stephen Kiptarus Kandie by consent of all the beneficiaries.
  - b. That the court made an order distributing the estate equally.
  - c. That it is impossible to implement the orders of the court as captured in the certificate of confirmation of grant in that the said Stephen Kiptarus Kandie has been in possession and use of the land from the year 2007 after he bought it to date.



- d. That there is no objection from the beneficiaries to the land being transferred to Stephen Kiptarus Kandie.
  - e. That there is need to review the orders to reflect the agreed mode of distribution and make it possible for the orders to be implemented.
  - f. That this application has been brought without undue delay and in the best interest of justice.
3. Which application is supported by the annexed affidavit of Agnes Wanjiru Mwangi which depones as follows:
- a. That the 1<sup>st</sup> Petitioner/Administrator passed on before we could distribute the estate – copy of death certificate annexed.
  - b. That prior to confirmation of the grant, we had sold the whole land comprised in the estate known as Kahungua Settlement Scheme Plot No. 322 to Stephen Kiptarus Kandie on behalf of the beneficiaries herein – copies of agreement annexed.
  - c. That court gave orders on 16/2/2015 distributing the estate equally to all the beneficiaries – copy of grant attached.
  - d. That it has come to our knowledge that we cannot transfer to Stephen Kiptarus Kandie land that is rightly his, unless the order distributing the estate is reviewed so as to distribute the estate to him solely.
  - e. That there is therefore need to review the orders of distribution and the whole parcel of land known Kahungura Settlement Scheme Plot 322 shared to Stephen Kiptarus Kandie to enable me finalize with the distribution.
  - f. That all the beneficiaries of the estate of David Mwangi Maina agreed with the mode of distribution in this application for review – copy of consent attached.
  - g. That there is need to review the orders to reflect the agreed mode of distribution so as to make it possible for the orders to be implemented.

## **Decision**

## **The Law**

4. The power of review anchored in the *Civil Procedure Act*, Cap 21 of the Laws of Kenya and Civil Procedure Rules, 2010. Section 80 of the *Civil Procedure Act* provides as follows:

Any person who considers himself aggrieved-

By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or By a decree or order from which no appeal is allowed by this Act, may apply for 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.

5. Order 45 Rule 1 of the Civil Procedure Rules, 2010 further provides for review in the following manner:

Any person considering himself aggrieved-

By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or 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 himself 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.

6. The Courts have interpreted and construed the provisions on the reviewed jurisdiction as supported by the case in *Tokesi Mambili and Others vs Simion Litsanga* [2004] eKLR which held as follows:

- i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An Applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.
- ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.”

7. Similarly, in the case of *Thungabhadra Industries Ltd v State of Andhra Pradesh* (1964) SC1372 at page 224 the Court held as follows:

“No judgment can attain perfection but the most that Courts aspire to is substantial justice. There will be errors of sorts here and there, inadequacies of this or that kind, and generally no judgment can be beyond criticism. Yet while an appeal may be attempted on the pretext of any error, not ever error will justify a review.”

8. The law is very clear that any error complained of must be obvious and patent mistake and not something which can be established in a long-drawn argument and counter arguments touching on the impugned Ruling or Judgment. It is not permissible for an erroneous decision to be “reheard and corrected.” There is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by the higher forum, the latter only can be corrected by exercise of the review jurisdiction. A review petition has a limited purpose and cannot be allowed to be “an appeal in disguise.”

9. As can be seen from the above exposition of law, it has been consistently held by this Court in several judicial pronouncements that Court’s jurisdiction of review, is not the same as that of an appeal. A judgment can be open to review if there is a mistake or an error apparent on the face of the record, but an error that has to be detected by the process of reasoning cannot be described as an error apparent on the face of the record for the Court to exercise its powers of review under Order 45 Rule 1 CPC.

10. Likewise, in the case of *Muhammad Botta and Others v Member (Revenue) BOR and Others* (PLD 2010 SC 1049) it was held:

“The principles upon which a review can be granted are well settled i.e., there must be some new point based upon discovery of new evidence which could not with diligence, have been found out on the previous occasion. A review petition is not competent where neither any new and important matter or evidence has been discovered nor is any mistake or error apparent on the face of the record. Such error may be an error of fact or of law but it must be self-evident and floating on surface and not requiring any elaborate discussion or process of ratiocination. Orders based on erroneous assumption of material facts, or without adverting to a provision of law, or a departure from undisputed construction of law and constitution,



may, amount to error apparent on face of the record. Error, on the other hand, must not only be apparent but must also have material bearing on fate of case and be not of inconsequential import. If judgment or finding, although suffering from an erroneous assumption of facts, is sustainable on other grounds available on record, review is not justifiable notwithstanding error being apparent on the face of the record. Where order under reviews did not appear to have been vitiated by any error on face of the record nor any other good and sufficient reason was given for review of order. Petition for review was dismissed.

11. It is trite law that parties must go to Court with all their causes of action and must sue all the persons they ought to sue. The doctrine of res judicata prohibits parties by suing in bits and pieces of giving a subsequent case a legal facelift by removing parties who are part of the earlier dispute and/or case filed and determined. The Plaintiff was aware that the earlier suit concerned the same subject matter as in the present suit. And if there was a defect in the earlier suit the opportunity of amendment was not exercised. Since the application for injunction was dismissed and the Plaintiff discontinued that suit and filed the present suit and obtained an order of injunction, the said action amounts not only to a res judicata but a flagrant abuse of court process. The present suit should not have been filed without sufficient reasons and before payment of the costs incurred in the earlier suit by the bank which has not been done by the Plaintiff. Since the issues and the parties are similar and/or the same, the Plaintiff by removing three defendants from this suit cannot purport to change the subject in this suit.
12. On the basis of these legal principles the application for review is dismissed and the only recourse is for the Administrator and the beneficiaries to sign the necessary instruments on advisory of the Land Registrar to transmit any shares to the purchaser. The Certificate of Grant of Confirmation as issued by the Court dated 16<sup>th</sup> February 2015 is not reviewable for there is no error of fact or law apparent on the face of the record. The application is lost.

**DATED, SIGNED AND DELIVERED VIA EMAIL AND CTS AT ELDORET THIS 2<sup>ND</sup> DAY OF OCTOBER 2025**

.....

**R. NYAKUNDI**  
**JUDGE**

