Mutinda (Suing as the Legal Representative of the Estate of Felicicia Wanjiru - Deceased) v Karani & 2 others (Civil Case 4 of 2017) [2025] KEMC 214 (KLR) (16 September 2025) (Ruling)

Neutral citation: [2025] KEMC 214 (KLR)

REPUBLIC OF KENYA

IN THE NAKURU LAW COURTS

CIVIL CASE 4 OF 2017

PA NDEGE, SPM

SEPTEMBER 16, 2025

BETWEEN

RACHAEL WANGARE MUTINDA ..... PLAINTIFF

SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF FELICICIA WANJIRU - DECEASED

AND

MARY WANJIRU KARANI ..... 1ST DEFENDANT

HASHI HAULIERS LTD ..... 2ND DEFENDANT

ATTORNEY GENERAL ..... 3RD DEFENDANT

RULING

1. On 11th March, 2025, this court dismissed and/or stuck out the applicant's application for leave to file the intended list of documents after close of leadings after finding that the application was incompetent for having been lodged by a deceased party and is therefore untenable. The court further opined and/ or directed that the issue raised in the said application as to the death of the 1st Defendant herein is a serious one that needed to be dealt with first before any application of whatever nature can be brought on her behalf or against her.

2. The Applicant has subsequently approached the court with the present application for orders that the Honorable Court be pleased to review and/ or vary the ruling of 11th March, 2025 by pronouncing itself with finality on the issue of granting leave to file the intended list of documents after close of pleadings. The Applicant further prays that the costs of the application be in the cause. The grounds upon which this application is premised may be summarized as follows:

    i. That this honorable court delivered its ruling on 11/03/2025 striking out the defendant's application.

ii. The said ruling had an error apparent on the face of the record for inadvertently failing to pronounce itself with finality on the issue of leave to file the judgment after close of pleadings (sic).

iii. The application has ben brought without undue delay and ought to be heard on merit to prevent the defence from being denied a right to a fair trial, and the court from making different judgments in matters from the same cause of action.

iv. It is in the interest of justice that the ruling be reviewed and/or varied.

3. The Learned Counsel for the Plaintiff/ Respondent herein, Gladwell Kamau, has sworn an affidavit in opposition stating that the application is without merit, frivolous and a blatant abuse of the court process meant only to further delay the hearing and determination of this matter, and should therefore be dismissed with costs. That the Honorable Court did, in its ruling delivered on 11th March 2025, pronounce itself with finality on all the issues raised in the application then before it, including the issue of whether leave should be granted to the Defendant to file a list of documents after the close of pleadings, when it declared the entire application a nullity on the basis that it had been made on behalf of a deceased person, who could not legally participate in legal proceedings, thereby rendering the entire application incompetent and void ab initio. That by striking out the said application in its entirety, the Court effectively determined all prayers contained therein, and there is no ambiguity or error apparent on the face of the record as alleged by the Defendant/ Applicant. That the present application is therefore a disguised attempt at appealing or re-litigating matters already determined, and is yet another delaying tactic by the Defendant intended to frustrate the fair and expeditious conclusion of this matter and waste this Honorable Court's time. That this suit was filed in 2013, and over a decade, the Defendant has employed various strategies to delay conclusion of the matter, thus occasioning great prejudice and injustice to the Plaintiff/ applicant.

4. She further averred that the document the Defendant now seeks to introduce out of time is a judgment in Nakuru Civil Suit No. 1286 of 2018: Erick Charkes Mutero & Patricis Mutero Vrs Mary Wanjiku Karani, Hashi Hauliers Limited & Attorney General, a matter that was never consolidated with the present suit. That the said Nakuru Civil Suit was entirely separate and was heard and determined by the Magistrate's Court, which is a court of similar jurisdiction to this Honorable Court, and thus the said judgment cannot be binding on this Honorable Court. That it would be irregular, improper, and prejudicial to allow the Defendant to rely on a judgment from a different suit, involving different witnesses, and different factual and legal issues to influence the outcome of this current suit. That further, the witnesses in the Nakuru matter are not the same as those in the current suit, and asking this Court to rely on a judgment from a different matter would amount to importing extraneous and untested evidence, contrary to the rules of procedure and fair hearing, and would ultimately result in a miscarriage of justice.

5. I have considered these averments. The remedy of review is prescribed under Section 80 of the *Civil Procedure Act* as read together with Order 45 Rule (1) of the Civil Procedure Rules. Section 80 of the *Civil Procedure Act* provides that:

> 80. Any person who considers himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed by this *Act*, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is allowed by this *Act*, may apply for a 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.

6. Order 45 Rule 1 of the *Civil Procedure Rules, 2010* provides that:

> 1. (1) Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (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.

7. Based on the foregoing, there are three grounds which a party may prove to be granted orders of review:

(a) discovery of new and important evidence which was not within the knowledge of the applicant or could not be produced at the time the orders were passed;

(b) on account of a mistake or error apparent on the face of the record or

(c) for any other sufficient reason.

8. The rationale for the remedy of review was set out by the Court of Appeal in the case of *Benjoh Amalgamated Limited & Another vrs Kenya Comercial Bank Limited* [2014] KECA 872 (KLR) as follows:

> The basic philosophy inherent in the concept of review is acceptance of human fallibility and acknowledgement of frailties of human nature and sometimes possibility of perversion that may lead to miscarriage of justice. In some jurisdictions, courts have felt the need to cull out such power in order to overcome abuse of process of court or miscarriage of justice. In the High Court, both the *Civil Procedure Act* in section 80 and the *Civil Procedure Rules* in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered range from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review.

9. The Defendant/Applicant has through this application sought to review the ruling of this court delivered on 11th March, 2025, on the sole ground of a mistake or error on the face of record. A mistake or error on the face of the record must be one that stares one in the face, as it were, and on which there cannot be two opinions. In *Nyamogo and Nyamogo Advocates vrs Kago* (2001) 1 EA 173, the Court of Appeal reiterated that:

> An error apparent 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 merely erroneous decision and an error apparent on 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 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 review although it may be for an appeal.

10. In *National Bank of Kenya vrs Ndungu Njau*, Civil Appeal No. 211 of 1996, it was emphasized that the error or mistake must be self-evident and should not require an elaborated argument to be established; that 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.

11. The position taken by the learned counsel for the plaintiff/ respondent, that in striking out the application in its entirety, the court struck out and/or dismissed all the prayers or orders sought for therein and thus it cannot be a ground for review on account of an error apparent on the face of record that any order or prayer sought for in the impugned application has been inadvertently left out as argued by the applicant herein. It is trite that the primary effect of an application being 'struck out' is that all the relief, or the specific prayers and orders sought, are dismissed by the court. This action effectively ends that part of the proceedings or the entire case, meaning the application fails to proceed further. In my considered view therefore there is no error or mistake on the face of the record as the ruling sought to be reviewed dismissed all the prayers or orders sought for therein. For the reasons stated, the prayers sought cannot be granted. The application is dismissed with costs.

DATED, DELIVERED AND SIGNED AT NAKURU THIS 16TH DAY OF SEPTEMBER, 2025

ALOYCE PETER NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Plaintiff's Counsel: N/A

Defendants' Counsel: N/A

Hon Attorney-General: N/A

Plaintiff/ Respondent: N/A

2nd Defendant/ Applicant: N/A