Hindia v Maganda; Safaricom Plc (Garnishee) (Civil Appeal 145 of 2006) [2025] KEHC 14992 (KLR) (23 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14992 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL 145 OF 2006

JM OMIDO, J

OCTOBER 23, 2025

BETWEEN

ELISHA ADUL HINDIA .... APPELLANT

AND

LUCAS NGODE MAGANDA .... RESPONDENT

AND

SAFARICOM PLC .... GARNISHEE

RULING

1. There are two applications before me that ought to be the subject of this ruling:

   a. The Garnishee's notice of motion dated 11th December, 2024 expressed to be brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 10 Rule 11, Order 22 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other provisions of the law, which seeks the following orders:

   a. Spent.

   b. There be a stay of execution of the Garnishee Order Absolute dated 14th November, 2024 pending the hearing and determination of this application.

   c. The Garnishee Order Absolute be set aside.

   d. The costs of this application be provided for.

   b. The Respondent's notice of motion dated 31st January, 2025 presented under Articles 10, 25, 27, 28, 29, 48, 50 and 159 of *the Constitution* of Kenya, 2010, Sections 1A, 1B, 3 and 80 of the *Civil Procedure Act* and Order 45, Order 9 and Order 9 Rule 9 of the Civil Procedure Rules, which seeks orders:

a. Spent.

b. That in view of the purported decree given herein on 9th April, 2015, the Honourable Court be pleased to grant leave to the law firm of O.P. Ngoge & Associates Advocates to act for the Applicant/Judgement Debtor herein.

c. That the Honourable Court be pleased to review and set aside the judgement and decree given by this Honourable Court on 9th April, 2015 plus all consequential orders thereupon including the execution proceedings herein.

d. That the said Kisumu High Court Civil Appeal No. 145 of 2006 be dismissed with costs.

e. That the costs of this application be provided for.

2. For reasons that I will later on state in this ruling, I will only address the Respondent's application in its merits as the determination thereof shall give direction to the Garnishee's notice of motion.

3. The grounds upon which the Respondent's application is premised are set out on its face and are as follows:

i. That since the decree which was rendered against the Applicant by the Senior Resident Magistrate's Court at Bondo in Civil Case No. 31 of 2005 was fully settled by Invesco Assurance Co. Limited on behalf of the Applicant herein, the Applicant contends that the Respondent/Decree Holder herein contravened Articles 10 and 159 of *the Constitution* of Kenya by lodging an appeal.

ii. That the Applicant further contends that since the Appellant herein died on 31st July, 2009, this Honourable Court lacked jurisdiction to hear and determine this appeal and to enter judgement against the Applicant since nobody has petitioned the High Court to be issued with letters of administration ad litem to the estate of the Decree Holder herein and to be enjoined as the Appellant in this matter in place of the Deceased person.

iii. That additionally, the Applicant contends that the decree herein as drawn is defective since it does not indicate the learned Judge who heard this appeal and allowed it on the 9th April, 2015.

4. The application is supported by the affidavit of Lucas Ngode Maganda, the Respondent in the present appeal, sworn on 31st January, 2025 and the further affidavit that the Respondent swore on 25th March, 2025. The Respondent expounds on the above grounds and offers the following reasons to support his application:There being a judgement in the present appeal, it is necessary for the court to grant leave to the Respondent in the appeal to change Advocates.The decree against him issued in the primary suit, Bondo SRMCC No. 31 of 2005 was fully settled by his insurer Invesco Assurance Company Limited.The Appellant died on 31st July, 2009. (The Respondent has annexed to his affidavit as "LNM2" a copy of the Appellant's certificate of death.That no grant of letters of administration ad litem has been taken out or obtained in respect of the Appellant's estate.The judgement and decree obtained in the present appeal is irregular as it offends Section 45 of the *Law of Succession Act*.The should this court be minded to set aside the judgement entered in this appeal together with all consequential orders, the appeal should subsequently be dismissed as it has abated.

5. It is instructive from the record that the law firm of S.O. Madialo & Co. Advocates was served with the application but did not file a response to the same. Consequently, the prayer by the firm of O.P. Ngoge & Associates Advocates to come on record for the Respondent after judgement in the place of the firm of S.O. Madialo & Co. Advocates is not resisted.

6. The Garnishee did not participate in the Respondent's application.

7. Jude Ragot, an Advocate and a partner in the law firm of Owiti, Otieno & Ragot Advocates responded to the Respondent's application by filing a replying affidavit that he swore on 19th March, 2025. The replying affidavit raises the following grounds against the Respondent's application:That the law firm of Otieno, Ragot & Co. Advocates was instructed by the Appellant to file the matter before the lower court and judgement was ultimately delivered on 13th November, 2006.That being aggrieved by the judgement of the lower court, the Appellant instructed the said law firm to prefer an appeal and the same was filed on 13th December, 2006, prosecuted and judgement entered on 9th April, 2015.That the Respondent fully participated in both the suit in the lower court and this appeal without raising any allegation of the Appellant's demise and the judgement entered in this appeal was therefore regular.That pursuant to the allegations that the Appellant is deceased, the said law firm has made attempts to trace or reach him through a provided contact phone number but the same have not been successful.That the application is misconceived and an abuse of the court process, aimed at averting execution proceedings.

8. This court directed that the application proceeds by way of written submissions and the Respondent and the Appellant file their respective submissions, which I have had occasion of going through.

9. The application before me seeks an order that I review and set aside the judgement and decree that was entered/issued in this appeal. Having considered the application and the two affidavits sworn by the Respondent in support thereof, the replying affidavit and the submissions by the parties, I discern the issues for determination to be the following:

    a. What is the position in law regarding the validity of appellate proceedings where a party meets his demise before judgement is rendered and remains unsubstituted?

    b. Whether the judgement and decree entered/issued on 9th April, 2015 was a regular judgement?

    c. Whether the Respondent has demonstrated that there exist sufficient grounds to warrant the judgement and decree entered/issued herein on 9th April, 2015 to be reviewed and set aside?

    d. What orders commend the Respondent's application?

    e. A determination as to costs.

10. I will proceed to address and determine the issues seriatim.

11. I will address issues (a) and (b) together. The same relate to the validity of appellate proceedings where a party who meets his demise remains unsubstituted and the regularity of any judgement that may result, after such demise.

12. In respect of the instant proceedings, the Respondent stated on oath that the Appellant herein died on 31st July, 2009. He annexed to his affidavit in support of his application the certificate of death that was issued pursuant to the demise of the Appellant.

13. The Appellant's Counsel did not challenge the fact of the demise of the Appellant as he did not address the court on the certificate of death that was relied upon by the Respondent. That being the case, this court finds that the Respondent has indeed proved that the Appellant died on 31st July, 2009.

14. The question that then abounds is, what happens to the appeal when an Appellant dies before its conclusion?

15. The position in law is that if an Appellant dies before the judgment in the appeal is rendered and no substitution is made, then the proceedings after the Appellant's death are technically a nullity because there is no proper Appellant before the court to prosecute the appeal.

16. A deceased person has no legal capacity to maintain or prosecute proceedings. The Advocate's instructions lapse upon death of the client, where there is legal representation by Counsel, unless ratified by substitution by a legal representative, subject to legal timelines under Order 24 Rule 23 of the Civil Procedure Rules.

17. This position has been affirmed by our court. In the case of Said Sweilem Gheithan Saanum v Commissioner of Lands & 5 others [2015] eKLR, the Court of Appeal held that:

> " An advocate cannot act for a dead person. Any proceedings undertaken on behalf of a dead person are a nullity."

18. In the case of Lalji Bhimji Sanghani Builders & Contractors v City Council of Nairobi [2012] eKLR the court emphasized that proceedings conducted without substitution after death are invalid.

19. In Florence Hare Mkaha v Pwani Tawakal Mini Coach & another [2024] eKLR, the Court stated that:

> " Once a party dies, the proceedings can only continue after substitution; any steps taken without substitution are a nullity."

20. As I have stated above, the Appellant's Counsel does not dispute that the Appellant died on 31st July, 2009 which was long before the judgment and decree of this Court that were delivered/issued i.e. on 9th April, 2015. No application for substitution of the Appellant with his legal representative was ever made under Order 24 Rule 3 of the Civil Procedure Rules.

21. Order 24 Rule 23 of the Civil Procedure Rules provides as follows:

> " 24(3). Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned."

22. The above, self-explanatory provision, applies to appeals, as dictated under Order 24 Rule (8), which expressly states as follows:

> " 24(8).The provisions of this Order shall apply to appeals as they apply to suits."

23. The judgment delivered in favour of the Appellant after his demise was therefore rendered in favour of a non-existent party. The court lacked jurisdiction to proceed in the absence of a proper party before it. The proceedings that were taken after the demise of the Appellant and the resulting judgement were therefore irregular and a nullity.

24. The third issue for me to determine is whether the Respondent has demonstrated that there exist sufficient grounds to warrant the judgement and decree entered/issued herein on 9th April, 2015 to be reviewed and set aside?

25. We have seen above that the judgement and decree that was entered and/or issued in this appeal was irregular.

26. Review is provided for under Section 80 of the *Civil Procedure Act* and Order 45(2) of the Civil Procedure Rules. Let us read the two provisions.

> " Section 80. Review 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."
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> "Order 45. Application for review of decree or order
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> (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
> >
> > (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.
>
> (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

27. The issue that presents itself is, whether the Appellant, vide the Application before this court, has demonstrated 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; and/or whether there is an error apparent on the face of the record; and/or whether there is any other sufficient reason for the court to review its judgement.

28. As to whether the Appellant has demonstrated 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, the Respondent stated in his affidavit that he received information from the Insurance Regulatory Authority that the Appellant died on 21st July, 2009. That, without a doubt amounts to new and important matter of evidence that was not within the knowledge of the Respondent at the time the judgement and decree were issued and that could be produced upon the exercise of due diligence.

29. With regard to what would amount to an error on the face of the record, the Court of Appeal in the case of Muyodi v Industrial and Commercial Development Corporation & Anor [2006] 1 EA 243 observed as follows:

> "In Nyamogo & Nyamogo v Kogo [2001] EA 174 this court said 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 real distinction between a mere erroneous decision and an error apparent on the face of 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 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 or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."

30. In the case of National Bank of Kenya Limited v Ndungu Njau [1997] eKLR, the Court of Appeal distinguished between an error apparent on the face of the record that can be subject of review and errors of law which can only be corrected on appeal. The court stated as follows:

> "A review may be granted wherever 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."

31. Taking guidance from the above authorities, my definite determination, having found that the Appellant was deceased at the time the judgement herein and decree were entered/issued and that this court had no jurisdiction to take further proceedings and further that the proceedings subsequent to the Appellant's demise were a nullity, entry of the judgement and issuance of the decree, in my view, amounted to an error apparent on the face of the record. I say so because I am certain that had the court been notified or informed of the demise of the Appellant, judgement would not have been entered.

32. But then, Order 45 Rule 1(b) requires that the application for review be made without unreasonable delay. As the Respondent has not disclosed when he received the information on the demise of the Appellant, I am unable to tell if the application for review was made timeously.

33. Be that as it may, it will be recalled that the order of review is sought in the Respondent's application in order that the judgement and decree, which I have already found to be irregular, are set aside.

34. The authorities of Jane Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR; Bouchard International (Services) Limited v M'Mwereia [1987] KLR 193; Remco Limited v Mistry Jadva Parbat & Company Limited & 2 others [2002] 1 EA 233; Gulf Fabricators v County Government of Siaya [2020] eKLR; and Baiywo v Bach [1987] KLR 890, all provide the jurisprudence that an irregular judgement is set aside, upon application by a party as a matter of right, or ex debito justitiae and unconditionally while a regular judgement may on application by a party be set aside by

the court in exercise of its discretion, whereby the court may attach terms and/or conditions to the order setting it aside.

35. The instant judgement and decree, being irregular, are for setting aside ex debito justitiae. Thus then, notwithstanding that the Respondent has not demonstrated that he filed his application without unreasonable delay, he is entitled to the order sought as a matter of right.

36. With regard to the prayer by the Respondent that I proceed to dismiss the appeal after reviewing and setting aside judgement as having abated, my view is that the Respondent should make a different, substantive application, seeking that order.

37. Being of the foregoing findings, I find that the Respondent's notice of motion dated 31st January, 2025 has merit. I proceed to allow it in the following terms:

    a. That the firm of O.P. Ngoge & Co. Advocates is hereby granted leave to come on record for the Respondent in the place of the firm of S.O. Madialo & Co. Advocates.

    b. That judgement and decree issued on 9th April, 2015 is hereby reviewed and set aside together with all consequential orders.

    c. That as the Appellant is deceased, I make no order as to costs.

38. Having determined the Respondent's application dated 31st January, 2025 in the above terms, it would be preposterous to address the Garnishee's notice of motion dated 11th December, 2024 as the same is now rendered mute.

39. This file is hereby closed.

40. Parties shall be at liberty to apply if it is deemed necessary.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 23RD DAY OF OCTOBER, 2025.

JOE M. OMIDO

JUDGE.

For Appellant: Ms. Anuro for Mr. Ragot.

For Respondent: No appearance.

For Garnishee: No appearance.

Court Assistants: Mr. Juma & Mr. Ngoge.

Ms. Anuro: I seek leave to appeal.

Court: A formal application to be filed.

JOE M. OMIDO

JUDGE.