



REPUBLIC OF KENYA



In re Estate of Reuben Denga Otende (Deceased) (Succession Cause 110 of 1998) [2025] KEHC 15434 (KLR) (30 October 2025) (Ruling)

Neutral citation: [2025] KEHC 15434 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 110 OF 1998**

E OMINDE, J

OCTOBER 30, 2025

IN THE MATTER OF THE ESTATE OF THE LATE REUBEN DENGA OTENDE (DECEASED)

BETWEEN

AMOS ODHIAMBO BHARAK OBJECTOR

AND

MARGARET AORO DENGA PETITIONER

RULING

1. By way of Summons dated 13th December 2024, the Applicant seeks the following orders;
 - a. Spent
 - b. Spent
 - c. That this honourable court be pleased to review and/or vary its judgement delivered on 27th November 2024 by considering the family tree and the objector's supplementary list of documents dated 28th January 2024 which are properly on record.
 - d. Costs be provided for.
2. The Application is expressed to be brought under Order 45 of the Civil Procedure Rules and Section 73 of the *Law of Succession Act* and all enabling provisions of the law. The Application is premised on the grounds on the face of it and the averments of Amos Odhiambo in the supporting affidavit to the application.
3. In his affidavit, he deponed that this court delivered judgement in this case on 27th November 2024 which judgement has been pronounced without consideration of children of 3 deceased beneficiaries annexing a copy of the Judgement as AB-1.



4. That further, that the parties entered a consent which compromised the objection by recognizing the beneficiaries of the 1st and 2nd houses as listed in the objection documents subject to the objector furnishing the court with identification documents of the children of the dependants of the house of Peninah Denga and Judith Denga.
5. That the objector was also directed by the court to file a family tree to assist the court in identification of all dependants of the deceased estate. Subsequent to the said consent and directions of court, the objector filed a family tree and a supplementary list of documents dated 28th January 2024 which included identification documents of beneficiaries who are alive, death certificates of those who are dead and identification documents of the children of the deceased beneficiaries of the 1st and 2nd house. He annexed copy of the family tree and supplementary list of documents marked as AB2a) and b) respectively.
6. The deponent averred that the court, in delivering judgement, failed to consider the fact that one Benson Caleb Ochieng, a beneficiary from the 2nd house left behind a child, namely Edwin Otieno Ochieng of I.D NO.XXXXXXX. Further, that the 2 deceased beneficiaries in the 1st house being one Anna Ondече Alias Anna Akongo and Rose Anyango Sande Alias Margaret Hamisi left behind 4 children and 6 children respectively.
7. That the court also did not give guidance on how land parcel Eldoret/Municipality Block 12/365 should be apportioned in terms of value as part of the land is developed with rental premises.
8. The deponent averred that the said oversight has swayed the decision of the court owing to the reasons that the court might not have seen the supplementary list of documents and the family tree which are properly on record. He urged that unless the orders sought are granted, the children of the deceased beneficiaries of the 1st and 2nd house stand to suffer irreparably.

Respondent's Replying Affidavit

9. The Petitioner filed a replying affidavit dated 7th February 2025 in response to the application. She deponed that the proceedings relate to her late husband Reuben Denga Otende, who died on 20/10/1996. That she commenced these proceedings in 1998 and the Grant was subsequently made on 26/09/2002 and confirmed on 21st July 2014.
10. That subsequently, it was rectified and eventually revoked after the Objector applied stating that he and members of his household were excluded. The court directed that parties do written submissions on the mode of distribution of the estate, which the parties did and the court retired to write the impugned judgment which was delivered on 27/11/2024.
11. She urged that when the court issued directions on filing of submissions, it gave parties timelines and the applicant/objector filed their submissions together with the additional affidavit on 06/02/2024. It is at this point that the objector came up with the alleged 1st wife Peninah, her children and grandchildren who he sought to represent and obtain a share of the deceased estate on their behalf. She stated that no direct evidence to indicate that the grandchildren were dependants of the deceased was produced and therefore the claim made on that behalf is remote and unsustainable.
12. She deponed that with regard to the 2nd house, the court took into consideration that Benson Caleb Ochieng predeceased his father and the only identifiable survivors were the objector and his sister Pamela Auma Karia. She urged that at the time she took out the petition for grant of probate, she didn't include Mary Achieng Denga who was married and was not a dependant of the estate. She further



- stated that she came back and now lives with her, annexing a copy of her national ID as MAD1 (a) and (b).
13. The deponent averred that the 3rd generation heirs sought to be introduced to court to claim a share of the estate have never stepped forward to make the claim and cannot do so post judgement. Urging that they have never been dependants of the estate, he prayed the court dismiss the application with costs.

Objector's Submissions

14. On whether the objector has met the threshold for review, counsel cited Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 (1) of the Civil Procedure Rules on the same, urging that this court is vested with the power and discretion to issue review the judgement delivered on 27th November, 2024. He urged that the conditions to be satisfied which are derived from the said Order 45 Rule 1 (1) of the Civil Procedure Rules are basically three each of which must be looked at jointly with the fourth one to wit;
- a. There must be discovery of a new and important matter or evidence which the applicant would not know of despite exercising due diligence and therefore not produced at the time of passing the decree or
 - b. There was a mistake or error apparent on the face of it.
 - c. There is other sufficient reason to warrant that and
 - d. The application must be made without unreasonable delay.
15. Counsel urged that the objector's reasons for seeking review in the instant case is that there is a mistake apparent on the face of the record. He submitted that the court delivered judgment without consideration of the 3 deceased beneficiaries. That the parties entered a consent which compromised the objection by recognizing the beneficiaries of the 1st and 2nd houses as listed in the objection documents subject to the objector furnishing the court with identification documents of the children of the deceased dependants of the house of Peninah Denga and Judith Denga.
16. That subsequently, the objector filed a family tree and supplementary list of documents dated 28th January, 2024 which included identification documents of beneficiaries who are alive, death certificates of those who are dead, identification documents of the children of deceased beneficiaries of the 1st and 2nd house. As stated in the supporting affidavit, counsel reiterated that the Court failed to consider the fact that Benson Caleb Ochieng a beneficiary from the 2nd house left behind a child, Edwin Otieno Ochieng of ID. NO.XXXXXXXX. Similarly, the 2 deceased beneficiaries in the 1st house being one Anna Ondече alias Anna Akongo and Anyango Sande alias Margaret Hamisi left behind 4 children and 6 children respectively.
17. He reproduced the contents of the affidavit with regards to guidance on how land parcel Eldoret/ Municipality Bloc 12/365 should be apportioned. He stated that the application was filed without unreasonable delay as the judgement was delivered on 27th November 2024 and the application filed on 13th December 2024. He prayed the court allow the application with costs.

Respondents' Submissions

18. Learned counsel for the respondent laid down the sequence of events leading up to the filing of the application, pointing out that although the consent compromising the objection was recorded on 25th July 2022 before Hon. Justice Erick Ogola, it only recognized the objector. The directions by Wananda



J were made on 5th June 2023 whereas the objector was ordered to furnish particulars of the 1st house within 30 days and in the very latest by 7th July 2023,

19. Thereafter parties were required to file written submissions. That the Objector did not comply until 6th February, 2024 when he filed the objector’s supplementary list of documents which were filed late and without leave. They were served with the objector’s submissions on 6th February 2024 and the petitioner had no chance to test their veracity.
20. Counsel submitted that the Review jurisdiction is donated by Order 45 of the Civil Procedure Rules. Further, that the *Civil Procedure Act* and Rules are excluded from succession matters unless through Rule 63(1) of the Probate and Administration Rules, which provisions he reproduced. He urged that an applicant seeking review from a judgment can only do so on discovery of new and important matter or evidence which after the exercise or diligence, was not within his knowledge or could not be produced at the time when the decree was passed or the order made.
21. Counsel urged that the application is an appeal disguised as a review. The orders sought are so far-fetched that they are intended to reward parties who never appeared before court nor proved. Dependency to the estate as spelt out by Section 29 of the *Law of Succession Act*. He stated that the introduction of the parties sought to be included in the list of heirs of the deceased is being done too late in the day and improperly so. That recognition of such persons would have to abide the provisions of Section 46(2) of the *Law of Succession Act* and additionally, that by introducing them without vetting, the applicant is attempting to steal a match.
22. He urged that the heirs have also never stepped out in their personal capacity to claim to the estate. The court is being asked to act in a vacuum and gift faceless persons. He maintained that the application is without merit and ought to be dismissed with costs. Further, that if the applicant is unhappy with the judgement, he should consider an appeal.

Analysis & Determinatio

23. The issue for determination is whether the Court should review its judgement

Section 80 of the *Civil Procedure Act* provides as follows:

“ 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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

24. Rule 63 of the Probate and Administration Rules lists the provisions of the Civil Procedure Rules that apply to Probate and Administration proceedings. It states;
 1. Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.



25. Order 45 of the Civil Procedure Rules is therefore applicable. The said order reiterates the power of the court to review its own judgments or orders and proceeds to specify the circumstances under which the court may exercise its power of review. Order 45 Rule 1 (b) expressly provides that a court can review its judgment or order if an applicant satisfies any of the following conditions:
- (i) That he has discovered new evidence which after the exercise of due diligence was not within his knowledge or was not available at the time the order was made;
 - (ii) That there was a mistake or error apparent on the face of the record; and
 - (iii) That there is sufficient reason to warrant the review sought and that the application had been made timeously.
26. In the case of *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR, the Court of Appeal stated: -
- “A review may be granted whenever 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 require no 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.”
27. In considering the issues herein raised, as I have already pointed out, under the provisions of Rule 63 of the Probate and Administration Rules, the court has the power to review its judgement in Probate and Administration cases as provided under Order 45 of the Civil Procedure Rules. I have gone back to the pleadings and I note that it is indeed correct that the documents that the Applicant seeking for review is relying on in stating that the act of the court not taking them into account in distributing the estate of the deceased amounts to an error on the face of the record for the simple reason that they were on file at the time the court was writing the judgement but it did not consider them. This indeed is correct.
28. The reason why the court did not consider the documents comprised of what has been referred to as the “Family Tree of the Deceased” is explained at paragraphs 56-58 of the judgement sought to be reviewed. In summary, it was the court’s finding that the status of the children of the 1st and 2nd wives, the objector being one such, was not stated in that Affidavit in support of the Objection. All that was stated is that the 1st wife and the children of the said 1st wife had all died and there was no deposition made in the said Affidavit that they had left behind any children and/or whether those children were alive or dead.
29. As regards the 2nd wife, the deposition made in the Affidavit is that in the Objector’s house out of three children, he was the only one surviving with his sister. He did not state whether their mother was alive or dead and/or whether his late brother left behind any children. He also did not indicate whether between him and his sister they had any children. The court also noted that the fact of his mother as a dependant was not brought out in the pleadings, but was brought out at the stage of submissions.
30. The court further notes that Hon Justice Wananda in the proceedings of 30th October 2024 adopted a consent entered into by the parties on this issue of who the dependants of the deceased in the 1st and 2nd house were among other issues. By virtue of that consent, the court directed the objector to furnish the court with the particulars of the dependants of the houses of Peninah Denga and Judith Denga. The court further stated in adopting the consent that subject to compliance by the Objector in availing



the particulars of the dependants, the distribution of the estate of the deceased would then proceed by way of written submissions to be file as therein directed.

31. With these directions given, it was the court's expectation that subsequent thereto, the Objector would file a Supplementary Affidavit availing the said particulars of dependants. That the same would then be served upon the Petitioner for their perusal and/or input if any also by way of affidavit evidence. However, from my perusal of the pleadings filed, no such particulars were availed under any known procedure in law.
32. Instead, the court noted that attached to the Objector's submissions filed on 6th February 2024 is a document titled "Objector's Supplementary List of Documents" which contains the document comprising the Family Tree for the estate of the deceased referred to, among other documents. It is the contents of this Supplementary List and more particularly the document that relates to the Family Tree of the Estate of the deceased that the court is said to have overlooked hence the review sought.
33. It is to be noted that in its judgement delivered on 27th November 2024, the court observed particularly that the objector through the submissions by Counsel had now introduced the issue of his mother being a dependant of the deceased estate yet throughout his pleadings, his claim in the Objection was on his own behalf and on behalf of his surviving sister stating that his other brother had since died.
34. For this reason, the court pointed out in the said judgement at paragraph 58 that because it is trite law that matters of evidence belong to the purview of pleadings and cannot be adduced by way of submissions, the court shall disregard the objector's submission on the issue of whether or not his mother is still living for reasons that the same was not pleaded.
35. It is this very same reasoning that is also applicable to the Objector's Supplementary List of Documents that was attached to the pleadings which is the subject of this review. It should be noted that everything that is contained in the supplementary list are matters of fact that belong to the purview of pleadings and not submissions. As such, the opposite party should have been served with the same and accorded the opportunity to consider, interrogate and respond to the same in whatever manner they deemed to be appropriate by way affidavit evidence.
36. However, in the instant case, this list was simply attached to and forwarded to court with the submissions. This having been the case, it is important to state here that submissions do not comprise evidence; submissions comprise of the law that a party deems to be relevant to their case in any matter that is in contention before a court as applied to the evidence adduced in support of the facts of the case by a party seeking to persuade the court to make a finding in their favour.
37. Submissions therefore are not and cannot be an avenue for the introductions of evidence, documentary or otherwise because such comprise of the facts of the case and belong to the purview of pleadings. With this said, for whatever it is worth, even assuming that the court was to consider the contents of list of supplementary documents, the court also notes that nowhere in the objector's submissions to which this list was attached, has an explanation been given introducing the said list, its contents, their relevance, and why they had been filed with the submissions at least in an attempt to introduce them to the cause. The court was therefore left to make its own assumptions.
38. It is for the above reasons that the court finds that the document the court said to have overlooked is what I will call "a stranger to the proceedings" for the reasons I have herein given. I am therefore well satisfied that the court did not overlook the said documents at all, but did not find it necessary to apply its mind energy and effort blindly to the same in preparing its judgement for reasons that in my very well-considered opinion, their place in the submissions was unknown to the court.



39. It follows therefore in light of my findings above, that there is no error apparent on the face of the record as has been pleaded in seeking the review of the court's judgement to warrant the order sought. The court did proceed well within its purview and considered all the relevant and applicable evidence on record in reaching its determination. In this regard, I find no merit in the objector's application for review and the same is accordingly dismissed in its entirety. The costs shall be in the cause.

READ DATED AND SIGNED AT ELDORET ON 30TH OCTOBER 2025

E. OMINDE

JUDGE

