

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**SUCCESSION CAUSE NO. 59 OF 2004**

**IN THE MATTER OF THE ESTATE OF ALPHONCE MASINDE**

**MUKISU**

**(DECEASED)**

**AND**

**RICHARD W. MASINDE ..... 1<sup>ST</sup> PETITIONER  
/APPLICANT**

**CHRIS MAKHANU MASINDE ..... 2<sup>ND</sup>  
PETITIONER/APPLICANT**

**CAPTAIN (RTD)**

**CHARLES MASINDE ..... 3<sup>RD</sup>  
PETITIONER/APPLICANT**

**VERSUS**

**GLADYS NANYAMA MASINDE ..... 1<sup>ST</sup>  
RESPONDENT**

**GLADYS NASIMIYU NYONGESA ..... 2<sup>ND</sup>  
RESPONDENT**

**RULING**

1. The Petitioner/applicant in this matter seeks to have all the pleadings filed by and made by Arnold Otundo & Associates,

the court proceedings therein, and the Ruling dated 1/8/24 set aside, along with all consequential orders. He also seeks to be granted leave to file a fresh summons for confirmation of the grant and distribution scheduled for the estate of the late Alphonse Masinde Mukisu for hearing and determination. The third prayer is that the court recalls Gladys Nanyama Masinde, the first Respondent, and Wycliffe Khisa for rehearing and cross-examination. Lastly, he requests the court to order a DNA test on Christine Nafula, daughter of the first Respondent.

2. The application is supported by the affidavit of Captain (Rtd) Charles Masinde, the 3rd Petitioner. He states that they instructed Caleb Amudavi, who informed them that he was an advocate of the High Court of Kenya operating a law firm called Arnold Otundo & Associates. They instructed him to act on their behalf. He prepared pleadings and filed submissions in the firm's name. He represented them at the hearing of the summons for confirmation, and the court issued the Ruling dated 1.8.2024. Later, he discovered that Caleb Amudavi was not a lawyer, and he also confirmed that no law firm by the name Arnold Otundo & Associates exists at St. George's House. The Petitioner deposed that documents prepared by an unqualified person are legally void, the court proceedings are also null, and consequently, any decisions based on such invalid documents and proceedings are not valid. The petitioners further deposed

that they wish for Christine Nafula to undergo a DNA test to determine whether she is the daughter of the deceased.

3. The application was opposed. Gladys Nanyama Masinde, the 1st Respondent, in her replying affidavit dated 20.3.2025, deposes that the applicant should have exercised due diligence before appointing an unqualified person to represent them. She argues that the proceedings conducted by the unqualified individual ought to be struck out from the court records, specifically those from 3.5.2023 to 1.8.24, during which the unqualified person participated. She states that prior to the unqualified person's involvement, the firm of M/S Were Advocates was on record, and she participated as an objector, being cross-examined by Mr. Were along with her witness. The applicant's request to recall her for further cross-examination appears to be an attempt to delay the matter, which has been pending in court for the last 21 years. The 'Lufu' minutes, which the applicant references, were never part of the documents filed in court. Allowing the applicant's prayers 3 and 4 would be prejudicial to her, and she contends that these prayers are made in bad faith and constitute an afterthought.

4. Gladys Nasimiyu Nyongesa, the 2nd Respondent, also opposed the application through the replying affidavit dated 24.3.2025. She states that pleadings filed by unqualified persons should be struck out from the court records and set aside, as sought by the petitioners/applicants. The

petitioners' request to include Elizabeth Naswa is an afterthought made in bad faith and is intended to benefit them, as they proposed the mode of distribution. The petitioners lodged an appeal in the Court of Appeal against the ruling delivered on 1.8.2024, and the matter remains pending. The petitioners should clarify their intentions, as they cannot simultaneously appeal against the court's ruling and seek to set aside the court's order. The petitioners are enjoying rights over the deceased's property and are attempting to prevent the other beneficiaries from receiving their rightful shares of the estate.

5. Parties submitted written submissions. I have carefully read and considered the submissions. The applicant submits that the issues for determination are whether the petitioner or the applicants are entitled to the relief sought and who should bear the costs of the application. Regarding the first issue, the applicant contends that they discovered they were represented by an unqualified person named Caleb Amudavi, and therefore, the pleadings and court proceedings conducted by him are null and void in law (see holding by the Supreme Court of Kenya in *National Bank of Kenya Ltd v Anaj Warehousing Ltd* [2015] eKLR). It is further argued that the Ruling based on proceedings undertaken by the unqualified person should also be set aside. Concerning the inclusion of Elizabeth Naswa (Elizabeth), it is submitted that she is a beneficiary of the deceased's estate; she is the

daughter of the late Dr. Fredrick Sikuku Masinde, the son of the deceased. They assert that they did not become aware of her existence until after the Court Ruling of 1st August 2024. Therefore, her inclusion was not an afterthought. None of the respondents has demonstrated that Elizabeth is not a legitimate heir or beneficiary of the deceased's estate. The court has yet to confirm the distribution of the estate, as the Ruling of 1st August 2024 only confirmed the estate's beneficiaries. Regarding the recall of the 1st Respondent and Wickliff Khisa (Wickliff) for cross-examination and DNA testing on Christine Nafula (Christine), it is submitted that Order 45 of the Civil Procedure Rules allows for a review of a court order on grounds of discovery of new and important evidence or for any other sufficient reason. As per the applicant's supplementary affidavit paragraph 3, the minutes of Lufu held on 3rd September 1986 were not available for consideration by the court and were not considered in the ruling dated 1st August 2024. These minutes are to be used in cross-examining the 1st Respondent and Wickliff regarding the distribution of the deceased's estate. The DNA test on Christine will assist in determining whether she is a beneficiary of the deceased's estate. No appeal has been lodged against the Ruling dated 1st August 2024; what is on record is an invalid notice of appeal. Their application is not barred by the provisions of Order 45 Rule 1 (a). It was further submitted that each party should bear their own costs.

6. The 1st Respondent submits the following: there are four main issues for determination — whether the summons for confirmation and all related documents, drawn by an unqualified person claiming to be an advocate, should be expunged from the records; whether the applicants have satisfied the criteria for recalling a witness; whether the requirements for reviewing a ruling have been met; and whether a DNA test should be conducted on Christine Nafula to establish paternity. Concerning the first issue, it was submitted that they agree with the applicants' arguments and that the law clearly states any document prepared by a person lacking the necessary qualifications of an advocate is void. However, they seek costs for preparing responses to the defective applications. Regarding the recall of witnesses, it was submitted that the two witnesses need not be recalled as they have already testified, and the applicants have not established grounds for recalling witnesses. The minutes of the alleged lufu ceremony have not been served on the respondents to verify their authenticity and relevance to the matter. The case has been in court since 2004, and the applicant has never produced the minutes at any stage. The applicant has not shown that they were unable to obtain the minutes despite exercising due diligence. If the minutes are discovered after the ruling, the applicant should have applied to the court under section 80 and Order 45 of the Civil Procedure Rules. The said evidence sought to be

introduced is not relevant as the deceased died intestate. The court rightly decided that the 1st respondent was the deceased's widow. The 1st respondent relied on Section 126 (4) of the Evidence Act and Order 18 Rule (10) of the Civil Procedure Rules. Reliance was also made in the case of *Raindrops Limited vs County Government of Kilifi* [2020] eKLR where the court stated the principles that govern the reopening of cases;

*“This high threshold found its way to our jurisprudential principles considerations that respects an appropriate balance to effect the scheme in general of exercising discretion that lie at the core of re-opening a case to admit further evidence. The answers to this question have broad implications on the rights of the parties to a litigation. Together with the above outlined tests, more to the point in the present case is clearly postulated in the following local cases. (See the case of *Andrew Mugandi Nuri & 2 others v China Dalian International Group* {2020} eKLR). First, the jurisdiction is a discretionary one and is to be exercised judiciously as seen in the case of *Samuel Kiti Lewa v Housing Finance Company Limited & another* {2015} eKLR. In exercising that discretion, the Court is duty-bound to ensure that the proposed re-opening of a party’s case does not embarrass or prejudice the opposite party. In the case of *Samuel Kiti Lewa (supra)*, Lady Justice Mary*

*Kasango while considering a somewhat similar application where the plaintiff sought to have his case re-opened so that he could recant the evidence adduced by one of the defence witnesses, stated as follows:*

*“the Court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the Court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence.”*

*Secondly, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the Court will not grant the plea, (See Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd (supra) where the Judge went on to observe thus:*

*“..... in my view if the plaintiff was allowed to re-open his case to so prove it that a document produced by the defendant was different to the one he had would amount to allowing the plaintiff to fill the gaps in his evidence. That would be prejudicial to the defendants.”*

*Thirdly, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on part of the applicant (See the cases of Victoria Naitano Kiminta v Gladys Kiminta Prinsloo (supra), Mohamed Abdi Mohamed v Ahmed Abdullahi Mohamed & others {2018} eKLR; Samuel Kiti Lewa v Housing Finance Company Limited & Another (supra); and Ladd v Marshall {1954} 3 ALL ER 745. In the case of Hannah Wairimu Ngethe v Francis Ng'ang'a & Another {2016} eklr, Lady Justice Achode declined to allow a petitioner in a Succession Cause to reopen the case to adduce further evidence. The Judge in the case interalia stated:*

*“This Court has not been told that the petitioner has come upon or discovered some new and important evidence which after exercise of due diligence was not within his knowledge. It is noted that the petitioner has always had the advantage of counsel from the inception of this case.”*

*Fourth, the applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case and lastly the evidence must be such that, if admitted, it would probably have an important influence on the result of the case, though it*

*need not be decisive. Lastly, the evidence must be apparently credible, though it need not be incontrovertible'.*

7. Further reliance was placed in the case of *In the Matter of the Estate of Gikundu M' Rinkanya (Deceased)* [2016] eKLR, where the court held that the applicant must establish the necessity for recalling a witness.
8. On review of the ruling, it was submitted that although the applicants invoked section 80 of the CPA and Order 45 in their submissions, they did not do so in the main application. The applicants have not satisfied the threshold for review as outlined in the Rules. Furthermore, they have not specified the particular ground on which they rely, although it appears they are relying on the ground of discovery of new evidence. It was further submitted that the objects and purpose of review proceedings presuppose the existence of a Ruling or Judgment to be reviewed. The 1st respondent wondered if the ruling is set aside, then what will the court be reviewing. Regarding the appeal, it was submitted that the applicants have failed to demonstrate that the appeal is withdrawn and therefore the application should be dismissed. On the DNA testing, it was submitted that the subject of the DNA is an adult who has been part of the family of the deceased and that the test can only be done if the applicants demonstrate that exceptional circumstances exist to warrant DNA testing, which they have failed to do. The order for DNA testing is

drastic in the circumstances, as it will probably involve exhumation of the deceased for sampling. It was further argued that the option is to presume that the deceased was the father of Christine Nafula, and that the Evidence Act provides that a child born during the subsistence of a marriage is presumed to be the biological offspring of the spouses. Reliance was placed on section 118 of the Evidence Act Cap. 80. It was further argued that subjecting Christine to DNA testing would be an invasion of her privacy, contrary to Article 31 of the Constitution of Kenya 2010, which states that every person has a right to privacy, including the right not to have their person, home, or property, their possession seized, or information relating to their family or private affairs unnecessarily required or revealed, or the privacy of their communication infringed.

9. The 2<sup>nd</sup> respondent did not file any submissions.

### **ANALYSIS AND DETERMINATION**

10. I have considered the affidavits filed with the parties' application, the written submissions, and the law. The issues that arise are; *whether the court can review its order or set aside the proceedings and ruling dated 1.8.2024. Have the applicants made out a case to file a fresh application on the confirmation of the grant? Should Gladys Nanyama and Wycliffee Khisa be recalled? Can the court order a DNA test on Christine Nafula?*

11. The applicant moved this court under Rule 45 of the Civil Procedure Rules, 2010, which governs the review of judgments and court orders (see Order 45 Rule 1 and Section 80 of the Civil Procedure Act). It is apparent from the face of the application that the applicants do not seek a review of the orders made, but rather an order to set aside the ruling on an application filed by an individual who was not a qualified lawyer. Article 159(2)(d) of the Constitution states that, in exercising judicial authority, justice shall be administered without undue regard to procedural technicalities. The orders sought are not orders of review. All parties agree that the person who appeared before this court as *Arnold Otundo* was not a lawyer but a quack. I will not penalize the applicant for citing the incorrect provision of law. The proceedings conducted by the person known as *Arnold Otundo* were and remain null and void, and I therefore set aside the proceedings conducted between 3rd May 2023 and 1st August 2024. The ruling delivered on 1st August 2024 is also set aside.

12. The application for confirmation, dated 17 July 2023, was filed by Arnold Otundo. This was after the court issued letters of administration in the names of Chriss Makhanu, Richard Wafula Masinde, and Charles Masinde. In my view, it is only fair to allow the applicants to submit a further application for confirmation of the grant regarding the distribution of the deceased's estate. I recognise that the

parties have been in court since 2004. Nonetheless, to ensure a fair and just resolution of this matter, I will permit the applicants to file a new summons for confirmation of the grant and the estate's distribution of the late Alphonse Masinde Mukisu. The application should be filed within 30 days of this ruling. Additionally, I note that some of the parties have testified before Justice Riechi; to facilitate a clear resolution, all witnesses will be recalled to testify again. The Court, in the case of Raindrops Limited vs County Government of Kilifi (supra), held that the court is obliged to ensure that the proposed reopening of a party's case does not cause embarrassment or prejudice to the opposing party, and that the court retains discretion to permit such reopening. This discretion must be exercised carefully. Recalling Gladys Nanyama Masinde and Wicliffe Khisa constitutes reopening the case. Recall of the two witnesses will not prejudice any party. Succession cases are highly emotional; recalling these witnesses will also assist the court in observing their demeanour in reaching a fair decision based on their evidence. This resolves the second and third issues.

13. Regarding the issue of an order for a DNA test on Christine Nafula, the daughter of the 1st Respondent, I agree with the 1st Respondent's submission that the applicant has not established a case for such testing. Christine is now an adult and has not been served with the application to

respond accordingly. The provisions of Article 31 of the Constitution must be considered when making such an order, recognising that granting a DNA order could infringe upon an individual's constitutional right to privacy. Costs shall be in the cause.

**Dated, signed and delivered at Bungoma this 29<sup>th</sup> day of October 2025.**

**R.E.OUGO**

**JUDGE**

**In the presence of:**

**Mr Malonza -For the Applicants**

**Richard W. Masinde -1<sup>st</sup> Petitioner/ Applicant**

**Chris Makhanu Masinde - 2<sup>nd</sup> Petitioner/  
Applicant**

**Gladys Nanyama Masinde - 1<sup>st</sup> Respondent**

**2<sup>nd</sup> Respondent - Absent**

**Miss Natwati - For 2<sup>nd</sup> Respondent Absent**

**Wilkister - C/A**