

REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE NO 252 OF 2003

IN THE MATTER OF THE ESTATE OF ELIAKIM EGADIZE LWANGU
(DECEASED)
THROUGH

ISAIAH

LWANGU.....APPLICANT

Coram: Justice R. Nyakundi
M/s OG Law LLP
M/s Orlando & Co Advocates

RULING

1. What is pending before this Honourable Court for determination is an application dated 4th March 2025 brought pursuant to section 48 of the Law of Succession Act, Rule 63 of the Probate and Administration Rules and Order 45 rule 1 of the Civil Procedure Rules in which the Applicant is seeking the following orders: -
 - a. That schedule of distribution in paragraph 18 of the judgement dated 11/10/2024 be reviewed as per the schedule of distribution in the affidavit.
 - b. That costs of this application be in the cause.
2. The Application is made on the following grounds on the face of it as follows;
 - a. That there is an error apparent on the face or the record since the distribution schedule omits the dependents of the deceased daughter by the name Joyce Atonya Lwangu.
 - b. That there is an error apparent on the face of the record since the 2nd Administrator passed on while the matter was pending judgement

hence her children Ruby Andisi Okee and Sharlene Musimbi Siundu should have taken her place as beneficiaries.

- c. That Kennedy Kibisu Lwangu & Fiona Kakadinya Lwangu be excluded amongst the names of the beneficiaries in the schedule of distribution of the deceased property being that they are deceased and have dependants surviving him.
3. The application is grounded on the supporting affidavit dated 4th March 2025 sworn by ISAIAH LWANGU who deponed as follows: -
- a. *That on the 11/10/2024, a judgment was passed distributing the estate of the deceased equally among the deceased beneficiaries.*
 - b. *That I am advised by my advocates on record which advise I believe to be sound that there is an error apparent on the face of the record in terms of identifying the surviving beneficiaries of the deceased justifying an order for review of the judgment by the Honourable Court.*
 - c. *That I am advised by my advocates on record which advise I believe to be sound, that the Honourable Court missed the affidavit in support of Confirmation of Grant sworn on the 09/08/2023 which revised list of beneficiaries of the deceased.*
 - d. *That the initial petition and the affidavit in support for Confirmation of Grant sworn on 03/03/2022 erroneously omitted the names of the deceased's eldest, Joyce Atonya Lwangu who was at the time survived by three children namely Isaiah Lwangu, Wilson Selebwa and Zephania Kufwafwa.*
 - e. *That the facts were later corrected by a subsequent affidavit in support of confirmation of grant sworn by one of the administrators John Lwangu who deponed that my mother's name had been omitted from the list of the beneficiaries.*

- f. That Mary Jahenda Lwangu, a co-administrator in the estate also passed on before the judgment was delivered leaving behind two dependants namely Ruby Andisi Okee and Sharlene Musimbi Siundu.*
- g. That I am advised by my Advocates on record the shares of the deceased beneficiaries who left behind dependents should be distributed to the dependents equally.*
- h. That I am informed by my advocate on record that the share granted to the deceased beneficiaries with no dependants should revert back to the deceased estate for distribution to the remaining beneficiaries of the deceased.*
- i. That the court therefore ought to rectify the Certificate of Confirmation of Grant to include the dependents of Joyce Atonya Lwangu in the schedule of distribution.*
- j. That upon adding the dependents of Joyce Atonya Lwangu in the schedule of distribution, the Court ought to further order that her share be equally distributed among her 3 children per stripes.*
- k. That further, I am advised by my advocates on record which advise I believe to be sound that being that Mary Lwangu's should equally devolve to her two-daughters per stripes.*
- l. That further, I am advised by my advocates on record which advise I believe to be sound that being that Mary Lwangu's should equally devolve to her two daughters per stripes.*
- m. That I am advised by my advocates on record which advise I believe to be sound, that the names of Kennedy Kibisu Lwangu and Fiona Kakadinya Lwangu ought to be excluded from the schedule of the distribution of the deceased estate for reasons that they are deceased and have no beneficiaries surviving them.*
- n. That from the foregoing, it is evident that the Honourable Court made an error apparent on the face of the record warranting the*

rectification of the said order for distribution for distribution of the deceased estate.

4. By the time of writing this ruling, nothing has been filed in record and in the Case Tracking System (CTS) in response to the said application hence the application is unopposed.

Analysis and Determination

5. I have read and considered the application, the grounds and the affidavit in support of the same. There is one sole issue for determination by this Honourable Court: -

Whether the application for review of the judgement dated 11/10/2024 is merited?

6. Review of decisions of a probate court is governed by Rule 63 of the Probate and Administration Rules, which provides as follows: -

“63. Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules

(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 Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (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.

(2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.”

7. In **John Mundia Njoroge & 9 Others Vs Cecilia Muthoni Njoroge & Another [2016] eKLR**, the court cited Rule 63 of the Probate and Administration Rules, and then stated as follows: -

“As stated above, the only provisions of the Civil Procedure Rules imported to the Law of Succession Act are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time. Clearly, Order 45 relating to review is one of the Civil Procedure Rules imported into succession practice by rule 63 of the Probate and Administration Rules. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in Order 45 of the Civil Procedure Rules.”

8. Order 45 of the Civil Procedure Rules and section 80 of the Civil Procedure Act deals with reviews and a party seeking a review of an order must meet the substantive requirements of an application brought for review as set out in order 45 of the Civil Procedure Rules in succession matters. Specifically Order 45 of the Civil Procedure Rules provides as follows: -

(1) “Any person considering himself aggrieved—

(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”

9. An error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter or the court proceeded on an incorrect exposition of the law or misconstrued a statute or other provision of law. In other words, if a court reached a different conclusion based on the same facts, it cannot be a ground for review because this court believes that the court of coordinate jurisdiction was plainly wrong or it reached an erroneous conclusion of law. It could even be true that the court was wrong; but there is no room for correcting another high court judge. In the case of **National Bank of Kenya Vs Ndungu Njau (1997) eKLR** the court stated as follows: -

“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 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.”

10. I have perused the affidavit evidence in support of the summons which is unopposed and the following facts are salient;

- a. The judgment dated 11/10/2024 distributed the estate among identified beneficiaries but omitted to include and/recognize one of the deceased daughter Joyce Atonya Lwangu who it is averred, was mistakenly omitted from the initial petition but later recognised in an affidavit sworn on 09/08/2023 being a revised list of beneficiaries which the deponents averred that it was not considered during the time of the distribution of the intestate estate of the deceased. Joyce was survived by three children: Isaiah Lwangu, Wilson Selebwa and Zephania Kufwafwa.
 - b. That Mary Jahenda Lwangu, a co-administrator and listed beneficiary died before the judgment was delivered. She left two dependants: Ruby Andisi Okee and Sharlene Musimbi Siundu. I take note that a burial permit dated 19th March 2024 has been attached in the affidavit.
 - c. Kennedy Kibisu Lwangu and Fiona Kakadinya Lwangu are deceased and have no surviving dependants and therefore by the Applicant's argument and on the material before the Court, their shares ought not to remain as distributed to named persons who are dead with no successors.
11. I take note that the Court must be cautious in permitting review; review is not an appeal in disguise. However, where an error is apparent on the face of the record or where relevant material facts existed and were not considered, the Court should correct the record to prevent manifest injustice in distribution. The circumstances before me disclose an omission and changed circumstances that materially affect who the true beneficiaries are and how shares should be allocated. The omission of Joyce Atonya Lwangu's dependants who, on the Applicant's unopposed evidence, were subsequently identified in a supporting affidavit and the death of a listed co-administrator/beneficiary Mary Jahenda while proceedings were pending are not mere points of arguable fact rather

they go to the identity of beneficiaries entitled to inherit. These are classic examples where the review is appropriate: they are either errors apparent on the face of the record that warrant review as per the provisions of Order 45 of the Civil Procedure Rules. From the above facts, I am guided by the dictum in the case of **Dock Workers Union & 2 others Vs Attorney General & another Kenya Ports Authority & 4 others (Interested Party) [2019] eKLR** where it was held that: -

“...A Court will also review its orders if it is demonstrated that there is some mistake or error apparent on the face of the record, or for any other sufficient reason. The error must be evident on the face of the record and should not require much labour in explanation. An application for review must also be made without unreasonable delay.”

12. In my considered view, as to Kennedy Kibisu Lwanga and Fiona Kakadinya Lwangu, the undisputed assertion that they are deceased and have no surviving dependants means their shares cannot sensibly vest in them and should be reallocated in accordance with the law of intestate succession. In absence of contrary evidence, it is appropriate to exclude them from the schedule and to re-distribute their shares as the law provides.
13. Notwithstanding that position taken by this court, some of this applications on rectification and amendment do threaten or infringe the provisions of Section 7 of the Civil Procedure Act on the doctrine of res judicata. They demonstrate the following element in which the doctrine applies:
 - a) **Final judgement:** There must be a prior, final judgment or order
 - b) **Competent court:** The judgement must have been delivered by a court with jurisdiction over the subject matter and parties
 - c) **Merits-based decision:** The judgment must have been a decision on the merits of the case

- d) **Principle** : This doctrine confirms that re-judicata is founded on public policy to bring finality to litigation and prevent the harassment of parties with repeated legal proceedings.
- e) **Same parties and issues:** The parties and the issues in the subsequent suit must be the same as or substantially similar to those in the former suit. (See *Dina Management Limited v County Government of Mombasa & 2 Others* (SC Petition No 8 (E010) of 2021

14. In view of the above, the summons for review herein are merited and the following orders shall abide: -

- a) *That the schedule of distribution contained in paragraph 18 of the Judgment dated 11th October 2024 be and is hereby reviewed pursuant to the provisions of Order 45 Rule 1(b) of the Civil Procedure Rules.*
- b) *That the administrators of the intestate estate of the late Eliakim Egadize Lwangu shall, within ninety (90) days from the date hereof complete the process of transmission of all the assets of the estate to the respective lawful beneficiaries in accordance with the reviewed distribution matrix and the Law of Succession Act.*
- c) *That the matter shall be mentioned for a Status Conference on 30th January 2026 to confirm compliance with the orders above.*
- d) *That a Rectified Certificate of Confirmation of Grant shall be generated by the Deputy Registrar of the High Court with the following schedule of the distribution matrix;*

Schedule

NO	PROPERTY	SHARE	BENEFICIARY
1.	LAND PARCEL NO. NANDI/KOIBARAK	EQUALLY	Estate of Joyce Atonya Lwangu Sophie Feis Lwangu

	"B"/P/NO. 496		Peter Ijaika Lwangu John Lwangu Misoga Pamela Lwangu Estate of Mary Jahenda Lwangu Amy Mideva Lwangu Oscar Kegode Lwangu Allan Egadize Lwangu
2.	NANDI TEA GROWERS SACCO- ON 0570037	EQUALLY	Estate of Joyce Atonya Lwangu Sophie Feis Lwangu Peter Ijaika Lwangu John Lwangu Misoga Pamela Lwangu Estate of Mary Jahenda Lwangu Amy Mideva Lwangu Oscar Kegode Lwangu Allan Egadize Lwangu

e) There shall be no orders as to the costs of this application

f) Orders accordingly

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 3RD DAY OF
NOVEMBER 2025**

.....
R. NYAKUNDI
JUDGE