

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**SUCCESSION CAUSE NO. 533 OF 2003**

**IN THE MATTER OF THE ESTATE ALFAYO AKHOYA(DECEASED)**

FITA ALFAYO AKHONYA-----PETITIONER/  
RESPONDENT

VERSUS

DAUGLAS MAINA  
TITIYA-----OBJECTOR/APPLICANT

AND

SAMUEL OTURI OKONGO-----1<sup>ST</sup> INTERESTED  
PARTY/APPLICANT

CLEOPHAS OGONJI ODILA-----1<sup>ST</sup> INTERESTED  
PARTY/APPLICANT

**RULING**

1. Vide a notice of motion application dated 7<sup>th</sup> May, 2025, the applicant filed the application seeking the following orders;
  - 1) Spent.
  - 2) Spent.
  - 3) Spent.
  - 4) The honourable court be pleased to review vary and/or set aside its Judgement delivered on 19th February 2025.
  - 5) The grant of letters of administration issued to the petitioner/respondent and subsequently confirmed be revoked and/or annulled.
2. The application is supported by the affidavit of DAUGLAS MAINA TITIYA, applicant and the following grounds:
  - i. There is an error apparent on the face of the record.

- ii. Two strangers were awarded shares in the estate.
  - iii. Some beneficiaries in the certificate of confirmation of grant were not included in the petition as beneficiaries.
  - iv. The applicant has been sidelined in the subsequent dealings with the estate.
  - v. The objectors did not consent to the petitioner's proposed mode of distribution of the estate as was erroneously discerned by the court.
3. The respondent opposed the Application via a replying affidavit sworn on 25<sup>th</sup> June, 2025 .
  4. The Court directed that the parties file submissions to dispose off the Application but at the time of writing the ruling no party had filed submissions; therefore I take that they choose to rely on their pleadings. So I proceeded on the basis of the pleadings in writing the ruling.
  5. The Applicant's case is premised on the grounds in support of the Application as enumerated in paragraph 2 of this ruling.
  6. The Respondents' case is that there is no error apparent on the face of the record for Cleophas Ogonji and Samuel Oturi Okongo are just true liabilities to the estate of the deceased but not strangers nor intermeddlers as insinuated by the applicant.
  7. A consent on the mode of distribution was recorded and the Objector then was represented by the Applicant herein, Douglas Maina Titiya thus the Applicants Application for revocation of Grant is an afterthought.

8. The Applicant has not satisfied the conditions for review as provided for under order 45 of the Civil Procedure Rules.
9. I have looked at the rivaling positions of the parties, to me the issues for determination are:-
  - i. Whether the Applicant has met the threshold for review as a set out under rule 45 of the Civil Procedure Rules.
  - ii. Whether the Applicant has met the threshold requisite for revocation of a grant as envisaged under Section 76 of the Succession Act.
  - iii. Who is to bear the costs of this Application.

#### DETERMINATION

10. Order 45 of the Civil Procedure Rules provides:-

**1. Application for review of decree or order [Order 45, rule 1]**

***(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.**

**2. To whom applications for review may be made [Order 45, rule 2]**

**(1)An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.**

**(2)If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.**

**(3)If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.**

**3. When court may grant or reject application [Order 45, rule 3]**

**(1)Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.**

**(2)Where the court is of opinion that the application for review should be granted, it shall grant the same: Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.**

11. There is significant jurisprudence from the Kenya Superior courts on the key principles governing Applications for review under order 45 of the Civil procedure Rules. Some of the principles include, that a Review is an alternative to appeal and is primarily for correcting self evident errors but not for re-litigating a case, an "error apparent on the face of the record" must be self-evident. "New and important matter or evidence" must have been

undiscoverable with due diligence. Applications must be prompt. There is no second review of an order on a prior review. A review court corrects clear errors but does not act as an appellate court.

12. See the cases of **National Bank of Kenya Ltd. v Ndungu Njau, Sanitam Services (E.A.) Limited v Rentokil (K) Limited & Another, and Nyamogo & Nyamogo v Kogo and Kamau Vs National Housing Cooperation and 2 others.**

13. The judgments sought to be reviewed is rendered by my brother Justice P. J Otieno who does not sit in this court having been transferred to another station. Therefore I preside over the Application as per Order 45 Rule 2.

14. The Applicant says that there is an error apparent on the face of the record for two strangers were awarded shares in the Estate and some beneficiaries were left out in the sharing, he is being sidelined in dealings with the estate and lastly that the objectors did not consent for the Petitioners proposed mode of distribution of the estate.

15. So the question to be answered here what is an error apparent on the face of the record in order to assess whether the grounds advanced by the Applicant amounts to such.

16. To me an **error apparent on the face of the record** refers to a glaring, obvious mistake in a court's judgment or order that requires no extensive reasoning to identify, like misapplying a clear legal principle or a factual misstatement that's self-evident **Obvious**

**and Patent:** The error "stares one in the face" and is clear without needing complex deductions.

17. The error should be so obvious and clear such that no one of the same mind can have a different opinion on it.

18. Here, the Applicant says that two strangers were awarded a share in the estate and that the objector did not consent to the petitioners' proposed mode of distribution, the Respondent has a different opinion. He says the two strangers are liabilities, both the Administrators and the other beneficiaries including the Applicant, acknowledged and accepted them as such.

19. I have looked at the judgment, Paragraph 18, 20,21and 22 of the Judgment. The judge has extensively alluded to the said consent. Therefore, the inclusion of SAMUEL OTORI OKONGO and CLEOPHAS OGONJI ODILA were not erroneously included as beneficiaries.

20. Given the definition of what is an error on the face of the record, I find there is no error to be corrected for judgment is very clear and straight.

21. On the issue of revocation of the Grant , section 76 of the Succession Act provides :-

***A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—  
(a)that the proceedings to obtain the grant were defective in substance;(b)that the grant was obtained fraudulently by***

***the making of a false statement or by the concealment from the court of something material to the case;(c)that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently; (d)that the person to whom the grant was made has failed, after due notice and without reasonable cause either-(i)to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or(ii)to proceed diligently with the administration of the estate; or(iii)to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or(e)that the grant has become useless and inoperative through subsequent circumstances.***

22. The Applicant wants the Grant to be revoked because SAMUEL OTORI OKONGO and CLEOPHAS OGONJI ODILA were not included as beneficiaries in the Petition thus they are strangers.

23. I have looked at the Petition, it is true that they were not included.

24. To me it is not fatal for the Administrator explained how they got into the list of the beneficiaries at the confirmation stage. The Administrator and other beneficiaries acknowledged them and

accepted them as Liabilities of the estate therefore it cant be said that there was concealment of any material fact. In these matters, courts are reluctant to interfere where the family members are in agreement on how to share an estate unless it's clearly visible that the sharing is outrightly unjust.

25. As per the court record and the Judgment the Applicant herein Douglas Maina was present when the consent was recorded and it is minuted that he was present and also represented the objector See Paragraph 18 of the Judgment therefore he cannot come around and say that he did not consent to the mode of distribution of the estate. He is estopped. The doctrine of estoppel comes to play.

26. It's a trite law that for a consent order to be set aside the parties have to consent to set such a consent order aside or the party seeking such an order to be set aside should prove that the consent was entered fraudulently, through misrepresentation of facts, through undue influence/coercion, or by mistake. The Applicant has not proved this neither has he alluded/insinuated that the said consent was a fraud.

27. The issue of demarcation of the land on the ground, where allegedly there is no provision of access roads this is beyond this court, it is the work of the Land registrars and Surveyors to fix boundaries.

28. From the above analysis, I find that the Application has no merit on the both fronts, thus I find there is no reason to review the

Judgment and revoke the grant as requested by the Applicant. I dismiss the Application. Since this is a family matter I order that each party to bear its own costs.

29. Right of Appeal 30 days.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA  
16<sup>TH</sup> DAY OF JANUARY, 2026.**

**S.MBUNGI**

**JUDGE**

**In the presence of:-**

**CA: Angong'a**