

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MURANG'A**  
**SUCCESSION CAUSE E035 OF 2021**

**RAPHAEL MURIITHI NGUGI..... APPLICANT**

**VERSUS**

**NAFTALI MUTEGI KIMANI.....1<sup>ST</sup>**  
**DEFENDANT**

**MARY WANJIRU KIMANI.....2<sup>ND</sup>**  
**DEFENDANT**

**RULING**

**1.** This ruling is in respect of the applicant's Chamber Summons dated 5<sup>th</sup> September 2024. Prayer 1 and 2 of the summons are already spent. What is pending this court's determination is prayer 3 and 4 in which the applicant sought the following orders which are reproduced verbatim.

***(3) That this court's honourable Judge be pleased to review and or set aside or vary***

***its order dated 11<sup>th</sup> July 2023 and order that each party to bear its own costs.***

***(4) That Costs of the Application be provided for.”***

2. In the grounds anchoring the summons and in his supporting affidavit, the applicant averred that the deceased was his uncle while the respondents were his cousins; that prior to his death, the deceased wrongly had himself registered as owner of parcel of land known as No. Loc.9/Kiruri/3 which was part of ancestral land which ought to have been registered in his late father’s name.
  
3. In paragraph 5 of the supporting affidavit, the applicant deposed that immediately after discovering that land meant for his late father had been registered in the deceased’s name, he instructed the firm of *Khaminwa & Khaminwa* advocates who filed a citation with the aim of compelling the respondents to take out letters of administration in respect of their father’s Estate to enable him claim his father’s entitlement; that when in discussion with his advocates, it emerged that there was a pending succession cause

involving the deceased being Nairobi HC SUCC No.523 of 1985 and his advocates advised that he withdraws the citation which he did on 9<sup>th</sup> March 2023.

4. Further, the applicant claimed that the respondents filed and caused taxation of the bill of costs without his knowledge as he was not served with the bill of costs as well as the ruling on taxation dated 30<sup>th</sup> November 2023; that the bill of costs was taxed at Kshs.64,150 and the respondents have irregularly and prematurely commenced its execution.
5. The applicant urged this court to allow the application mainly on grounds that it was a common practice and tradition in our courts that in family matters, each party is ordered to pay its own costs.
6. In response, the respondents filed a replying affidavit sworn by their counsel on record *Mr. Jeremiah Mbutia*. Counsel deposed that on 11<sup>th</sup> July 2023, this court awarded costs to the respondents then the citees against the applicant who was the citor; that the application is misconceived as an award of costs is discretionary and there was no law

shielding family members from an award of costs; that the applicant was guilty of excessive delay and was not deserving of the orders sought. The respondents prayed that the application be dismissed for want of merit.

- 7.** The application was prosecuted by way of written submissions which both parties duly filed and which I have carefully considered. After considering the affidavits on record sworn in support and in opposition to the application alongside the submissions filed by the parties and upon reading the court record, I find that the only issue for my determination is whether the applicant has demonstrated that he was deserving of grant of the orders of review as sought.
- 8.** In his submissions, the applicant submitted at length on the law applicable to applications for setting aside *ex parte* judgements which submissions are, with respect, irrelevant to the prayers sought in the instant application. Whereas applications for review and for setting aside *ex parte* judgements invoke the court's discretion, different principles

and considerations apply to determination of the two applications. The law applicable to the two applications is also different. Applications for setting aside *ex parte* judgements are governed by *Order 10 Rule 11* of the *Civil Procedure Rules* (hereinafter the Rules) while the law applicable to applications for review is set out in *Order 45 Rule (1)* of the Rules which is anchored on *Section 80* of the *Civil Procedure Act*.

9. *Order 45 Rule 1* of the Rules reads as follows;

***“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.”***

- 10.** Order 45 of the Rules has been made applicable to succession proceedings by Rule 63 (1) of the *Probate and Administration Rules* which provides as follows;

***“ (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.”***

- 11.** A careful reading of the above provision reveals that to succeed in an application for review, an applicant must demonstrate that either of the following circumstances existed in his or her case.

- i. That the party has not filed an appeal or has no right of appeal.
- ii. That there was discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced at the time the decree or order was made; or
- iii. That there was a mistake or error apparent on the face of the record; or
- iv. That there was other sufficient cause to warrant review of the orders in question.

**12.** In this case, the applicant has not indicated whether or not he has a right of appeal and if he has, whether he had exercised that right by filing an appeal against the orders sought to be reviewed. A reading of the application also reveals that the applicant did not specifically state which of the three grounds in *Order 45 Rule 1* he was relying on in support of his application.

- 13.** From the grounds premising the application and in his submissions, it is apparent that the applicant was advancing the view that the court erred when it awarded costs of the citation to the respondents because the court went against the practice and tradition of courts which require that in family disputes, each party should bear its own costs.
- 14.** The applicant also submitted that the respondents should not be allowed to benefit from their indolence or mistake of failing to take out letters of administration of their fathers Estate with the aim of frustrating his efforts of lawfully inheriting his late father's land.
- 15.** From the foregoing, it is clear that the applicant was faulting the exercise of the court's discretion in awarding the respondents costs of the citation. He was in short saying that the court was wrong in its decision as it ought to have ordered each party to bear its own costs. This is not the same thing as claiming that there was an error apparent on the face of the record.

16. An error apparent on the face of the record is supposed to be an obvious or a patent mistake which can be detected on a casual perusal of the record. It is not an error that can only be established by a process of reasoning or a mistake that constitutes an error of law.
17. The Court of Appeal in **National Bank of Kenya Limited V Ndungu Njau [1997] eKLR** discussed what constituted an error on the face of the record and expressed itself 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....”***

- 18.** In this case, it is evident from the record that the applicant dragged the respondents to court by filing and serving them with a citation seeking to compel them to take out letters of administration in respect of their father's estate at a time when there were succession proceedings already pending in respect of their father's estate in HC. SUCC No.523 of 1985. When he realized he had made a mistake, he filed a notice of withdrawal of the citation but this was done after the respondents had already filed responses to the citation. In the exercise of its discretion, the court awarded costs of the citation to the respondents.
- 19.** If according to the applicant the court wrongly exercised its discretion or reached a wrong conclusion of law, his only option was to appeal against the court's decision but not to seek a review. In my view, seeking a review of such a decision was akin to asking the court to sit on appeal over its own decision which was not permissible in law.

**20.** Lastly, the applicant in his submissions invited this court to review the taxation ruling delivered by the taxing master. I find this invitation misconceived as this being an application for review of the court orders issued on 11<sup>th</sup> July 2023, it cannot be converted into a reference under *Rule 11* of the *Advocates Renumeration Order*.

**21.** For all the above reasons, I find that the instant application lacks merit and it is hereby dismissed with no orders as to costs.

It is so ordered.

**DATED, SIGNED** and **DELIVERED** at **MURANGA** this 12<sup>th</sup> day of February 2026.

**HON. C.W. GITHUA**

**JUDGE**

**In the Presence of :**

*Mr. Mbutia* for the Respondents

No appearance for the Applicant

*Ms Susan Waiganjo, Court Assistant*