

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

SUCCESSION CAUSE NO. E001 OF 2021

IN THE MATTER OF THE ESTATE OF KIPTOGOM ARAP BOR

ALIAS KIPTOGOM BOR ALIAS KIPTOGOM KORGOREN BOR

(DECEASED)

BETWEEN

WILLIAM KIPKEMOI TOGOM APPLICANT

VERSUS

EVALINE CHEMUTAI BOR

RESPONDENT

R U L I N G

1. Through a Ruling delivered by this court on 12th May 2025, this court found that the deceased's estate comprised of KERICHO/CHESOEN/106 and KERICHO/CHESOEN/106 and the

estate was to be shared equally between the Applicant, the Respondent and Esther Chepngetich Cheriro.

2. Through a Notice of Motion Application dated 27th May 2025, the Applicant sought to this court review its Ruling dated 12th May 2025. Through its Ruling dated 28th January 2025, this court declined to review its Ruling and dismissed the Application.

3. The Applicant stated that the impugned Ruling was based on a Mediation Agreement born of a meeting which was not attended by all the beneficiaries and the said Mediation Agreement was not executed by all the beneficiaries. That some of the excluded beneficiaries are children of the deceased's siblings and were entitled to a share of the deceased's estate.

4. It was the Applicant's case that nowhere in the Mediation Agreement did it state that the deceased had allocated the

Respondent the parcel known as KERICHO/CHESOEN/24 and its Title cancelled through a Consent dated 22nd October 2024. That the Title reverted to the deceased and the parcel should have been available for distribution. That the said Consent had not been appealed.

5. The Applicant stated that the rest of the deceased's estate stood to suffer irreparable loss and damage if the orders he sought are not granted.
6. Through his written submissions dated 29th July 2025, the Applicant submitted that the impugned Ruling was anchored entirely on the Mediation Agreement dated 4th October 2022 which was invalid because it did not contain the signatures of all the beneficiaries of the deceased's estate. That the Mediation Agreement did not specifically state that the Respondent had been allocated KERICHO/CHESOEN/24 by the deceased in his lifetime. The Applicant further submitted that these two scenarios constituted ban error apparent on the face of the record. He relied on **re Estate of Daudi**

Cheptum Sawe (Deceased) [2021] KEHC 4692 (KLR)
and **Gakara vs Chepchieng & another [2023] KEHC**
22961 (KLR).

7. It was the Applicant's submission that KERICH0/CHESOEN/24 should be available for distribution as the Respondent's title had been cancelled by a Consent by this court dated 22nd October 2024. That this court went against its earlier order.

Response

8. Through her Replying Affidavit dated 21st July 2025, the Respondent stated that the Application had no merit as it had violated **Rule 39 of the Civil Procedure (Court Annexed Mediation) Rules** as the Applicant failed to seek leave before filing the Application.

9. It was the Respondent's case that she had been allocated KERICH0/CHE00EN/24 (9 acres) by the deceased in his lifetime and had resided on the parcel since, a fact that was within the Applicant's knowledge. That this was supported by the fact that the Applicant thumb printed the Mediation Agreement. It was the Respondent's further case that her two sisters, Esther Chepngetich and Grace Towett confirmed in their Affidavits of Protest that she had been allocated the said parcel by their father.
10. The Respondent stated that her other sisters, Leah Tuiya, Elizabeth Siele, Emily Chemutai Chepkosiom (deceased), Elizabeth Chepngeno Lewnei (deceased) and Christina Barchok (deceased) had renounced their right to inherit. That this court correctly pronounced itself on this issue and it was not solely based on the Mediation Agreement.
11. It was the Respondent's case that there was no error on the face of the record and that the Applicant simply faulted the court's reasoning. That there was no fraud or

misrepresentation on the part of Mediation. It was the Respondent's further case that parties should not be allowed to approbate and reprobate at the same time.

12. Through her written submissions dated 13th October 2025, the Respondent submitted that the present Application had been filed without the court's leave and was defective. She relied on **re Estate of Joseph Njeri Ndungu alias Josephine Njeri (deceased) and Rule 39 of the Civil Procedure (Court Annexed Mediation) Rules.**

13. It was the Respondent's submission that in terms of the review or setting aside order, there was no error apparent on the face of the record and no new material had been evidenced by the Applicant. She relied on **re Estate of Kipsoget arap Chesoen (Deceased) [2022] KEHC 1448 (KLR).** It was the Respondent's further submission that the issues raised by the Applicant in his Application had been dealt with by this court. That the

prayer for review was akin to asking the court to sit on Appeal on its own Ruling.

14. The Respondent submitted that the issues raised by the Applicant were not self-elaborate and would involve a long process of reasoning, examination and analysis of the issues. That the present Application had to fail.

15. I have gone through the entire record, the Notice of Motion Application dated 27th May 2025, the Replying Affidavit dated 21st July 2025, the Applicant's written submissions dated 29th July 2025 and the Respondent's written submissions dated 13th October 2025. The only issue I have sieved for my determination was whether this court should review the impugned Ruling dated 12th May 2025.

16. The law on Review is based on **section 80 of the Civil procedure Act** and **Order 45 Rule 1 of the Civil Procedure Rules, 2010**. It is salient to note that this

court's power must be exercised within this circumscribed legal framework.

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

18. Order 45 Rule 1 of the Civil Procedure Rules, 2010
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 review of judgement to the court which passed the decree or made the order without unreasonable delay.

19. From the above provisions, it is clear that **section 80 of the Civil Procedure Act** gives the power of Review while **Order 45 of the Civil Procedure Rules 2010**, sets out the rules. The rules limit the grounds applicable for Review as follows: -

- (i) The discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the Decree was passed or the Order made.
- (ii) On account of some mistake or error apparent on the face of the record.

- (iii) Any other sufficient reason and that the Application has to be made without unreasonable delay.

20. In this matter, the Applicant stated that this court went against its own orders when it found that KERICHO/CHESOEN/24 did not form part of the deceased's estate and was not available for distribution. He further stated that this amounted to an error apparent on the face of the record. On the ground of an error apparent on the face of the record, the court in **Zablon Mokuva v Solomon M. Choti & 3 others** [2016] KEHC 683 (KLR) held: -

“In Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243, the Court of Appeal described an error apparent on the face of the record as follows:

“ In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined

precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down

principle of law is indeed applicable in the matter before us.”

21. Similarly, the Court of Appeal in **National Bank of Kenya Limited Vs Ndungu Njau [1997] KECA 389 (KLR)** held: -

“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.” (Emphasis mine)

22. In the impugned Ruling dated 12th May 2025, this court dealt with the issue of the consent dated 22nd October 2024 and its consequences in relation to the parcel known as KERICHO/CHEOEN/24. In my view, this was not an error apparent on the face of the record but a divergent view on this court's interpretation of the consent and its consequences on KERICHO/CHEOEN/24. This was a ground for an appeal.
23. On the issue of the Mediation Agreement dated 4th October 2022, this court found that it was a valid court order which was enforceable and the same had neither been appealed nor reviewed. This court further found that the Applicant attended the Mediation session and thumb printed the Mediation Agreement. On the issue of the deceased's beneficiaries being left out, this court noted that Leah C. Tuiya, Elizabeth C. Lewenei, Grace Towett and Elizabeth Siele had renounced their claims to the deceased's estate. That the only beneficiaries left to the deceased's estate were the Applicant, the Respondent and Esther Chepngetich Cheriro.

Similarly, this was not an error apparent on the face of the record but the Applicant's a divergent view. This was a ground for an appeal.

24. Flowing from the above, it is clear that this court addressed itself sufficiently on the matters raised by the Applicant as above. Asking for a review on the grounds cited by the Applicant would be akin to be asking this court to sit on appeal on its own decision. It is my finding that the grounds raised by the Applicant are appellate in nature and the same are not allowed in a Review Application. In the case of **Nasibwa Wakenya Moses v University of Nairobi & another [2019] KEHC 11472 (KLR)** it was held that: -

“.....The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to

exercise of Appellate Jurisdiction, which is not permissible.”

25. Further, the Court of Appeal in **National Bank of Kenya Limited vs Ndungu Njau (*supra*)** held that: -

“In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law.....”

26. In the final analysis, having considered the Application in its entirety, I find that the grounds cited by the Applicant did

not qualify to be grounds for review to bring the Application within the ambit of the grounds specified in **Order 45 Rule 1 of the Civil Procedure Rules**. It is my finding that this was not a proper case for the court to grant the review sought. Accordingly, the invitation to review the Ruling dated 12th May 2025 is declined.

27. In the end, the Notice of Motion Application dated 27th May 2025 has no merit and is dismissed with costs to the Respondent.

Ruling delivered, dated and signed at Bomet this 3rd Day of March, 2026.

.....
HON. JULIUS K. NG'ARNG'AR
JUDGE

Ruling Delivered in the presence of;

Susan/Siele Court Assistant

Nandi for the Applicant

Kipngetich for the Respondent

ORIGINAL