In re Estate of Kiambati (Deceased) (Probate & Administration 19 of 2003) [2026] KEHC 2447 (KLR) (27 February 2026) (Ruling)

Neutral citation: [2026] KEHC 2447 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

PROBATE & ADMINISTRATION 19 OF 2003

MA ODERO, J

FEBRUARY 27, 2026

IN THE MATTER OF THE ESTATE OF SIMON KIAMBATI (DECEASED)

BETWEEN

JANE GATHONI WAITITU ..... APPLICANT

AND

EZEKIEL KARIUKI MWANGI ..... RESPONDENT

RULING

1. Before this Court for determination is the Summons dated 19th May 2025 by which the Applicant Jane Gathoni Waititu seeks the following orders;-

> " 1. That the Honourable Court be pleased to review its judgment delivered on 15th November 2007 in particular be pleased to vary the mode of distribution of LR no. Chinga Gikigie/257 to read as follows;-
>
> > "1. That parcel no. Chinga/Gikigie 257 be shared equally and equitably amongst the following; Ezekiel Kariuki Mwangi, Nicasio Gathii Mwangi, Magdaline Kamuyu Kiambati and Jane Gathoni Waititu."
>
> 2. That the honorable court be pleased to make a finding that the subdivision of LR no. Chinga/Gikigie/257 into LR no. Chinga/Gikigie/ 1703, LR no Chinga/Gikigie/1704, LR no. Chinga/Gikigie/1705, and LR no. Chinga/ Gikigie/ 1706 was not equitable and be pleased to cancel the same and direct the Administrator to repartition the same in an equal and equitable manner.
>
> 3. That the cost of this summons be in cause."

2. The summons was premised upon Section 74 of the *Law of Succession Act*, Rule 63 of the Probate and Administration Rules and all enabling provisions of the law and was supported by the affidavit of even date sworn by the Applicant.

3. The Respondent Ezekiel Kariuki Mwangi opposed the application through his replying affidavit dated 21st July 2025. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated 10th November 2025 whilst the Respondent relied upon his written submissions dated 19th November 2025.

Background

4. This succession cause relates to the estate of the late Simon Mwangi Kiambati who died intestate on 11th August 1997. A copy of the Death Certificate Serial number 719321 is annexed to the Petition for letters of Administration Intestate dated 17th July 2003.

5. This is an old matter in which there has been much litigation. The applicant filed a Protest challenging the proposed mode of distribution of the estate of the Deceased. Vide a judgment delivered on 15th November 2007 Hon. lady Justice Kasango (Retired) directed that the estate and particularly the parcel of land known as Gichinga/Gikigie/257 be shared/divided equally amongst the four (4) beneficiaries to the estate. A copy of the said judgment appears as annexture 'JGW1' to the supporting affidavit dated 19th May 2025.

6. The applicant avers that the portion which was allocated to her being Chinga/Gikigie/1703 (hereinafter 'the suit land') comprising of five (5) acres has turned out to be inhospitable for settlement due to its inaccessibility extreme gradient, drainage, and soil stability. That it is impossible to carry out any developments on the suit land.

7. The applicant by this application now seeks a review of the judgment delivered on 15th November 2007 on grounds that the distribution of the land was not equitable.

8. The Respondent confirms that the High Court directed that the land in question be divided equally amongst the four (4) beneficiaries to the estate. He states that following that judgment steps were taken to actualize the same but that the applicant refused to co-operate in the exercise and refused to attend on the day of survey despite having been summoned by the chief.

9. The Respondent avers that the applicant has made several previous attempts to have the judgment reviewed all of which have been unsuccessful. He asserts that the subdivision of LR. No. Chinga/Gikigie/257 was done with full consideration to the developments already carried out on the land by the other beneficiaries.

10. The Respondent states that the applicant does not reside on the land and to review and re-survey the land will interfere with existing developments including burial sites. Finally the Respondent submits that this application for review coming over sixteen (16) years after delivery of the judgment is inordinately delayed and ought to be dismissed.

Analysis And Determination

11. I have considered the application before this court, the reply filed thereto as well as the written submissions filed by both parties.

12. Section 80 of the *Civil Procedure Act*, Cap 21 Laws of Kenya allows any party who considers themselves aggrieved by a ruling or judgment to file an application for review of the same.

13. Order 45(1) of the Civil Procedure Rules 2010 provides that:-

(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.

14. From the above provisions, it is clear that section 80 of the *Civil Procedure Act* grants to courts the power of Review while Order 45 of the Civil Procedure Rules 2010, sets out the principles which govern applications for review as follows;-

(a) The discovery of new and important matter or evidence which after the exercise of 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.

(b) Evidence of some mistake or error apparent on the face of the record.

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

15. Order 45 of the Civil Procedure Rules is imported into the *Law of Succession Act* by virtue of Rule 63(1) of the Probate and Administration Rules which provide as follows:-

> " Save as is in the Act or in these Rules otherwise provided, and subject to any order of the Court or a Registration in any particular case for reasons to be recorded, the following provision of the Civil Procedure Rules, namely Order 5 Rule 2 to 34, 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 proceedings under these Rules."

16. In John Mundia Njoroge & 9 others v Cecilia Muthoni Njoroge & another [2016] eKLR the court held;

> " .....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." [Own emphasis]

17. Section 47 of the *Law of Succession Act* empowers the High Court to entertain any application and to determine any dispute under the Act and pronounce such decrees and make such orders as may expedient.

18. Coming back to the application at hand the first issue that stands out is the fact that the judgment in question was delivered in November 2007. The application for review was filed in May 2025 a full seventeen (17) years AFTER delivery of the ruling. This delay cannot be described in any way other than inordinate. Why has the Applicant taken so long to act?

19. The Applicant has attempted to explain this delay by stating that she has been suffering poor health which kept her from acting sooner. The applicant has not adduced any evidence e.g. medical reports to prove this poor health.

20. In the case of Kioko Peter -vs- Kisakwa Ndolo Kingoku [2019] eKLR Hon. Justice Odunga (as he then was) stated as follows:-

> " Parties and Counsel ought to give the court's some credit that the courts are not manned by morons who can be easily duped into believing all manner of incredible stories with little or no iota of truth. It is these kinds of allegations that Madan, J (as he then was) had in mind when in N v N [1991] KLR 685 he expressed himself in the following terms: " I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order....."

21. No believable and/or reasonable explanation has been advanced to justify this delay of seventeen (17) years. From the record this is not the first attempt the applicant has made to oust the judgment of 15th November 2007. In his replying affidavit the Respondent has cited various previous similar applications made by the applicant. These attempts have not been denied. The same were either dismissed or withdrawn. Clearly the current application is part of the applicants continuing rodeo ride in bombarding the court with applications hoping for a different outcome.

22. In the case of Ivita -vs- Kyumbu [1984] KLR, the court held that

> " The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay....."

23. All in all I find that this application was filed after inordinate and unexplained delay. That delay was both prolonged and inexcusable and the application ought to be dismissed on that ground alone. However in the interests of justice and completeness I will consider the other ground raised by the applicant.

24. Under Order 45 one of the grounds upon which a review may be granted is the discovery of new and important evidence. However this must be material evidence which after exercise of due diligence was not within the knowledge of the Applicant and therefore could not have been presented to the court during the trial of the matter.

25. The applicant sought to rely on the discovery of new and important evidence as a basis for her request for a review. The applicant stated that she has all along been residing in Ngong Town in Kajiado County and as such did not make any visit to the site. That it was only upon her retirement in late 2024 that she sought to move to the suit land and settle there.

26. Upon visiting the location in Nyeri County and noted the disadvantages of the portion of land which had been allocated to her. The applicant then engaged the services of Geo-Spatial Artificial Intelligence (hereinafter referred to as 'Geo-Spatial') to conduct a survey on the suit land. The applicant annexed to her supporting affidavit a copy of a report dated 14th January 2025 prepared by Geo-Spatial which report she asserts concur with what she observed on the ground. (Annextue 'JGW2').

27. As a general rule new evidence can only be admitted firstly if it was not within the applicant's knowledge during the trial. Secondly where said evidence could not have been discovered even with due diligence.

28. In Tokesi Mambili and others v Simion Listanga (2004) eKLR the Court of Appeal held that:-

    (i) In order to obtain a review an application has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.

    (ii) Where the application is based on sufficient reason it is for the Court to exercise its discretion."

29. Was the evidence contained in the Geo-Spatial report available at the time of the trial. Certainly it was if the applicant had bothered to look for it. The applicant stated that she did not visit the suit land until the year 2024 when she had retired.

30. Firstly I do not believe that all throughout the trial and sixteen (16) years after the judgment the applicant took no steps to visit the land which she herself had fought so hard to be given a share of.

31. Secondly nothing and nobody had prevented the applicant from going to the suit land. The decision not to go there and view the area was her own choice/decision.

32. The Respondent stated that the applicant refused to participate in the survey process. Again this was by choice. Nobody had prevented the applicant from so participating.

33. The information contained in the Geo-Spatial report was not new. The location and site remained the same. If the applicant had applied due diligence she could have commissioned a similar report even at the time of the trial. Her own indolence prevented the applicant from presenting such a report during the trial.

34. In the case of Mohamed Abdi Mahmamud -vs- Ahmed Abdullahi Mohamed & 3 Others [2018] eKLR, the Supreme Court of Kenya set out the principles which govern the admission of new and additional evidence as follows:-

> " We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:-
>
> a. The additional evidence must be directly relevant to the matter before the court and be in the interest of justice;-
>
> b. It must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
>
> c. It is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been

produced at the time of the suit or petition by the party seeking to adduce the additional evidence;

d. Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;(

e. The evidence must be credible in the sense that it is capable of belief;

f. .....;

g. Whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;

h. .....

i. .....

j. .....

k. The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on others" [Own emphasis]

35. I find that with exercise of due diligence the report which the applicant commissioned some seventeen (17) years after the judgment had been delivered could have been made available during the trial. Further I find that there has been no change to the topography of the suit land. It remains just as it was during the period of the trial. If the Applicant had bothered to visit the suit land then she would have noted the issues which she is now complaining about seventeen (17) years after the fact.

36. The applicant for no discernible reason decided not to visit the suit land. Her claim to have discovered its unsuitability seventeen (17) years after the judgment is neither credible nor believable. The Respondent has averred that the other beneficiaries have developed the portions allocated to them. To sanction a review so late in the day would certainly prejudice the other beneficiaries and the work they may have done on the sub-divisions which were allocated to them. I find there exists no new evidence to warrant a review of the judgment.

37. The Applicant has not made any claim of an error apparent on the face Of the record.

38. Finally I find no merit in this application for review. The same is dismissed in its entirety. Costs will be met by the Applicant.

DATED IN NYERI THIS 27TH DAY OF FEBRUARY 2026.

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MAUREEN A. ODERO

JUDGE