

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VIHIGA

ELC APPEAL NO E008 OF 2022

WYCLIFFE MUHUNYI AWINJA.....1ST APPELLANT
WILBERFORCE MULAMBA AWINJA.....2ND APPELLANT
JASS NYAMWANDA.....3RD APPELLANT

VERSUS

KENNEDY NEHEMIAH AWINJA.....1ST RESPONDENT
VIHIGA COUNTY LAND REGISTRY.....2ND RESPONDENT
THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

(Being an appeal from the Judgement of the Senior Resident Magistrate’s court at Vihiga and delivered on the 21st day of July 2022 by Honourable R. M. Ndombi, SRM in Vihiga Senior Principal Magistrate’s Court ELC Case No. 50 of 2020.)

KENNEDY NEHEMIAH AWINJA.....PLAINTIFF

VERSUS

WYCLIFFE MUHUNYI AWINJA.....1ST DEFENDANT
WILBERFORCE MULAMBA AWINJA.....2ND DEFENDANT
JASS NYAMWANDA.....3RD DEFENDANT
VIHIGA COUNTY LAND REGISTRY.....4TH DEFENDANT
THE HON. ATTORNEY GENERAL.....5TH DEFENDANT

RULING

The application before the court for determination is the Notice of Motion dated 20th November 2025 brought by the appellants under the provisions of Article 40 of

the Constitution of Kenya 2010, sections 1A, 1B, 3A, and 79G of the Civil Procedure Act, Order 42 Rule 6, and Order 50 Rules 1 and 4 of the Civil Procedure Rules.

The application seeks orders that;

- a) This Honorable court be pleased to stay execution and subsequent warrant of arrest of the 1st, 3rd appellants/applicants pending the hearing of this application inter partes and further execution.
- b) This Honorable court be pleased to vary/review and set aside the judgment entered on 18th January 2024 and resultant decree in this case, as the same was procured through fraud.
- c) That the costs of the application be in the cause.

The grounds upon which the application was brought are that the court delivered judgment on 18th January 2024, dismissing the appellant/applicant's appeal.

That the 1st respondent misled the lower court into believing that his late father bequeathed him the suit property through a Will that was valid. Yet, the lower court inadvertently made a decision that the root of the title in the names of Kennedy Awinja Nehemiah was valid when the authenticity of the Will had not been determined. That the High Court in Vihiga Succession Cause No. E004 of 2023 made a declaration that the Will was procured fraudulently and was not the document of the deceased, and that this renders the judgment of the court incorrect.

That there is need for the court to suspend the execution of the warrants as the root of the title in possession of the respondent was acquired through fraud, which the court cannot uphold its judgment. That the exceptional circumstances make it

pertinent for the court to review and set aside its judgment, which was procured on misappropriation of the Will as a valid.

That the 1st Respondent has proceeded to execute the judgment when he is duly aware that he has an unclean title to WEST BUNYORE/EBUTANYI/31. That the 1st Respondent should not be allowed to proceed in executing the decree, the genesis for the court in entering the judgment was fraud.

That based on the decision of the High Court in Succession Cause No. E004 of 2023, which declared the Will to be invalid, makes the execution of the decree unenforceable and a grave miscarriage of justice, and hence the need for the court to entertain the application.

That the doctrine of *functus officio* is not applicable in this case for the court to meet the ends of justice occasioned in the case. That the 1st respondent had a judgment entered in his favour in the lower court due to the fraudulently acquired Will, it will be oppressive to the judicial conscience to allow him to proceed with any execution. That to prevent the perpetual irredeemable injustice, it would be just if the orders sought are granted.

The application was supported by the contents of the Supporting Affidavit sworn by the 1st appellant on 30th November 2025 and the annexures thereto.

In response to the application, the 1st respondent relied on his Replying Affidavit, sworn on 5th December 2025, together with the annexures thereto. The case of the 1st respondent is that the application was misconceived, *mala fides*, and totally in bad faith, and only calculated to delay the 1st respondent from enjoying the fruits of the judgment.

That the applicants filed a succession Cause Bo, E004 of 2023, which they are now seeking to rely on to delay the execution herein. That the instant appeal has no relation to the Succession cause as the suit land is registered in his name, hence not a subject of Succession.

That the applicants have not appealed against the judgment of the court. That the particulars of fraud as alleged by the appellants have not been proved specifically as required by law. That the applicants have not shown any justification to warrant the grant of the order sought. That the applicants filed a similar application dated 16/4/2025 seeking similar orders, which application was dismissed on 14th May 2023 by the court. Another similar application was dismissed on 19th September 2024.

That similar orders were sought and declined in Vihiga MCELS No. 50 of 2020 vide application dated 3rd October 2025.

That the applicants tend to wrongly believe that the subject matter herein being Land parcel No. WEST BUNYORE/EBUTANYI/31 forms part of the estate of one Wilfred Awinja Nyawanda, hence the same ought to be included in the ongoing Succession vide VIHIGA H.C Succ Cause No. E004 of 2023. That the applicants have not demonstrated any willingness to deposit security pending the determination of the application. That the application is baseless and unwarranted and *res judicata*, sub judice, and lacks merit, hence the same ought to be dismissed with costs.

The 2nd and 3rd respondents field no response.

Submissions

Vide directions given on 8/12/2025, the application was heard by way of written submissions. No written submissions were filed on behalf of the applicant within the timelines set by the court.

The 1st respondent filed written submissions dated 16th December 2025. He submitted that the current application was res judicata, that this being a matter that proceeded to appeal and the appeal determined, this court is functus officio, and that the only avenue available to the applicants is to proceed on appeal. That the applicant is not seeking to review or re-open their case through the instant application. The 1st respondent relied on the case of Kabansora Nyangera (Civil Appeal No. E665 of 2022).

The 1st Respondent also submitted that the application is an abuse of the court process. That the 1st respondent was registered as the owner of the land, not through transmission by gift, and hence the issue of the nullification will not arise.

The 1st respondent urged the court to dismiss the application with costs.

Determination

The substantive relief sought in the application is that the honourable court varies or reviews its judgment delivered herein on 18th January 2024 in the appeal herein.

The genesis of the appeal was that the 1st respondent herein had sued the appellants and the 2nd and 3rd respondents herein in Vihiga MCELC No. 50 of 2020, seeking orders that the appellants be restrained from interfering with land parcel No. WEST BUNYORE/EBUYANYI/31, and for an order that the 2nd and 3rd respondents be restrained from canceling, rectifying, or in any way interfering with the title in respect of the suit land.

In the suit, the 1st respondent herein claimed that he was the registered owner of the suit land, having been gifted the same by the late Wilfred Awinja Nyamwada-deceased (his father)

The appellants denied these claims and, vide their defence and counterclaim, sought a declaration that registration of the suit land in the name of the 1st respondent was unlawfully acquired and an order of rectification of the register by cancelling the registration of the land in favour of the 1st respondent.

One of the documents presented to the trial court by the 1st respondent under a Supplementary list of documents was a document dated 25/11/2016 and titled “Will” which, according to the 1st respondent, was executed by the deceased on how he intended his property to be distributed upon his death. It was produced as Exhibit P.5 for the 1st respondent.

The appellants challenged the Will. The 1st appellant, in his testimony before the trial court, stated that the 1st respondent had presented a fake Will. The trial court ultimately decided in favour of the 1st respondent and awarded the relief sought in the plaint. The appellant filed the appeal herein, which appeal has since been determined in favour of the 1st respondent vide the judgement dated 18th January 2024, which is the judgement sought to be reviewed and/or varied.

Are the applicants entitled to an order of review of the judgment?

Section 80 CPA provides for the power of a Court to review its decisions 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 review of the judgment to the court which passed the decree or made the order, and the court may make such orders thereon as it thinks fit.”

Order 45 provides the grounds for an application for review. These are;

- (i) discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant’s knowledge or could not be produced by him/her at the time when the decree was passed or the order made.
- (ii) or on account of some mistake or error apparent on the face of the record or
- (iii) for any other sufficient reason
- (iv) the application must be brought without unreasonable delay.

The ground advanced herein for seeking review is that the Will relied on by the 1st respondent as the basis of the gift of the suit land from his father to him has since been annulled by the Probate and Administration Court in the ruling in Vihiga HC Succession cause No E004 of 2023 dated 16th September 2025.

The trial court, in reaching its judgment, relied on the documents and evidence before it, including the Will.

Similarly, in arriving at the judgment of this court on appeal, the court considered the evidence placed before the trial court. One of the aspects of such evidence was the claim by the 1st respondent that the suit land had been gifted to him by the deceased *inter vivos*. The Probate and Administration Court, which has jurisdiction to test the validity of Wills of deceased persons, has since tested the Will, found it invalid, and annulled it. This decision no doubt affects the 1st respondent's evidence placed before the trial court. The ruling of the Probate and Administration court was not within the reach of the parties at the time of the judgments of both the trial and the appellate court. No amount of diligence by the appellants could have made them access the ruling as the same had not been rendered at the time the judgment sought to be reviewed was made. I find that the appellants have demonstrated sufficient ground to review the judgment.

The estate of the deceased, the alleged maker of the impugned Will, is the subject of the succession cause in which the Will was revoked. All matters regarding the beneficiaries, the assets, liabilities, and distribution of the estate of the deceased shall be canvassed and determined. It is proper that the suit land, which was listed in the said Will as one of the properties of the deceased, be administered through the Succession Cause.

For the foregoing reasons, I find that the application herein has merit and hereby allow it as follows:

- a. The judgment of this court dated 18th January 2024 is therefore hereby set aside and substituted with a judgment allowing the appeal on the following terms**

- i. The judgment of the trial court is set aside and substituted with a judgment dismissing the suit.**
 - ii. As the contest is between siblings, each party shall bear its own costs of the appeal and of the court below.**
- b. Each party to bear its own costs of the application.**

Orders accordingly.

Judgment dated and signed at Vihiga and delivered virtually this 19th day of March 2026.

**E. ASATI,
JUDGE.**

In the presence of:

Ajevi- Court Assistant.

The 1st Applicant/Appellant in person.

The 1st Respondent in person.