

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**  
**CIVIL APPEAL NO. E013 OF 2023**

**BALUGHO ADEN MOHAMED (Suing as administrator  
of the Estate of Bare Aden Mohamed).....**  
**APPELLANT/RESPONDENT**

**VS**

**ABDI ABDULLAHI ADEN..... 1<sup>ST</sup>**  
**RESPONDENT/APPLICANT**

**AFDAN MUHAMMED.....2<sup>ND</sup>**  
**RESPONDENT**

**MADOW DAKAT TAKOY.....3<sup>RD</sup>**  
**RESPONDENT**

**RULING**

1. The matter for determination before the court is an application dated 09.12.2025 in which the applicant seeks for orders that:
  - i. Spent.
  - ii. **The applicant herein be considered for review of the judgment that declared him as having no *locus standi* and be found to be an interested party.**
  - iii. **The finding by the Kadhi's court sitting at Bute apportioning 75% stake of the disputed plot be adopted.**
  - iv. **Any further orders this Honourable Court may deem fit.**
  
2. The application is premised on the grounds on its face and further supported by the affidavit of the applicant deponed on the 9-12-2025.

3. The crux of the application is that, based on the applicant's previous lawyer's misadvice, he approached the Kadhi's Court in KCSSUC No. E001 of 2023 as a petitioner rather than as an interested party. He averred that it was the said advice that resulted in this court holding that he ought to have come before it as an interested party, not as a petitioner. He lamented that the consequence of this finding was that the court ruled he had no *locus standi*. He further asserted that the decision has gravely prejudiced him hence denied him the opportunity to have his matter heard on its merits.
4. He deposed that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had relinquished their respective stakes of 50% and 25% in the suit property in his favour. He further stated that this surrender was formally adopted and recorded as an order of the court by the Kadhi's Court sitting at Bute.
5. He stated that he had resided on the property continuously from 2016 to date with the full knowledge and blessings of the late Mr. Bare Adan Mohamed (deceased) during his lifetime. He deposed that the deceased had adopted him, provided for his education, and even given him a wife, thereby treating him as an adopted son in every respect. He urged this court to adopt the finding of the Kadhi's Court as an order of this court, emphasizing that he will suffer irreparable harm if deprived of his stake in the disputed plot, since it remained the only home for himself and his children.
6. In reply, Abdirahman Adan Mohamed the second respondent, filed a replying affidavit sworn on 15.12.2025 in which he stated

that he was a brother to the deceased and that the applicant was his son. He averred that the deceased had adopted the applicant, paid his school fees, given him a wife to marry, and even constructed a three-roomed permanent house for him on the disputed land in Bute.

7. He went further to state that although the adoption was not formalized, it was a matter of public knowledge. He added that the express will and knowledge of his late brother during his lifetime had persuaded him to surrender the 50% stake due to him in the disputed plot, being a direct beneficiary of the deceased's estate. He further asserted that, through a letter dated 17th October 2023, he informed the Kadhi that he had gifted his 50% stake to the applicant.
8. That the Kadhi did not object to the same and therefore, this court also should consider the same.
9. The 3<sup>rd</sup> respondent, Madow Dakat Takoy, filed an undated replying affidavit in which he stated that the deceased, the 2nd respondent, and himself were siblings, and that he is a beneficiary of the deceased's estate. He averred that it was within his knowledge that the deceased paid the applicant's school fees and further adopted him. He further stated that the deceased had built for the applicant a three-roomed permanent house, and surrendered his 25% share to the applicant. He added that since the Kadhi at Bute had already adopted the surrender, this court ought to be persuaded to adopt the same finding. He accused the respondent, Balugo Adan Muhumed, of constantly

threatening him should he surrender his share. He concluded by urging that, in the interest of justice, the application be allowed as prayed.

10. On the other hand, Balugo Adan Muhumed the respondent in this application, filed a replying affidavit sworn on 22.12.2025 in which she stated that she instituted the present appeal being dissatisfied with the finding of the trial Kadhi. She asserted that the applicant was duly represented by an advocate during the proceedings and therefore could not now claim that his counsel had failed to represent him properly. She further contended that the applicant has not presented any new facts or evidence that had not been adjudicated upon during the hearing of the main appeal, hence there is no basis for this court to allow the suit.
11. It was deposed that the application amounted to nothing more than an afterthought, driven by ill motives and intended solely to frustrate the fair distribution of the suit property forming part of the deceased's estate. It was urged that, since no fresh evidence had been placed before this court to justify granting the prayers sought, the application ought to be dismissed as frivolous and vexatious.
12. The court gave directions that the application be canvassed by way of written submissions.
13. The applicant filed undated submissions through the firm of Wachira and company advocates basically reiterating the content contained in the affidavit in support of the application. He submitted that he had not been properly represented by his

advocate on record, as counsel failed to clearly demonstrate that the deceased had adopted him, albeit informally, by paying his school fees and generally providing for him. He stated that his previous counsel had misguided him by advising him to move the court as a petitioner, whereas he was merely an interested party. He emphasized that the actions of the deceased were not acts of charity but carried significant weight, since the deceased's other children were alive, capable, and willing to provide for him, yet the deceased had deliberately chosen him.

14. It was argued that no prejudice would be occasioned if the 1<sup>st</sup> and 2<sup>nd</sup> respondents surrendered their respective stakes in the estate to the applicant. It was emphasized that this position was reinforced by the respondent's own earlier submissions, wherein they had expressed their willingness to relinquish their shares in favor of the applicant. To that end, reliance was placed on the case of **In the matter of the estate of Elizabeth Wanjiku Munge(deceased) [2015] eKLR** where it was held that:

**“That any of the heirs or survivors who does not wish to take up their entitlements in the estate or who wish to accept a share lesser than what they are entitled to shall file a deed of renunciation once the fresh application for confirmation of grant is filed”.**

15. In the end, this court was urged to allow the application as prayed noting that even if this matter were to start de novo, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are still willing to surrender their shares to the applicants.

16. The respondent submitted in regards to the following issues:
  - i. Whether the application has raised distinctive grounds warranting the review orders being sought.
  - ii. Who bears the costs.
17. Counsel submitted on the first issue that the court, in its judgment and specifically at paragraphs 46, 47 and 48, had exhaustively addressed the question of whether the applicant possessed the requisite capacity to institute Succession Cause No. E001 of 2023 at Bute. It was argued that the court had rightly held that the applicant lacked legal capacity both under Islamic law and section 29 of the Law of Succession Act, as he was not a direct heir.
18. Counsel further opined that the court had observed that the applicant failed to prove that the deceased had left a will bequeathing him any property. Additionally, it was emphasized that the alleged adoption of the applicant by the deceased was never formalized, and therefore the applicant had no legal capacity to institute the suit before the Kadhi or to be joined as a party, as he was simply a stranger to the proceedings.
19. That the current application seeks to invite the court to again deliberate on the issues it has decisively and conclusively deliberated upon and pronounced itself. To buttress that position, counsel relied on the case of **Republic vs Public Procurement Administrative Board & 2 Others [2018] eKLR** where the court held:

**Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds:**

- a. 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 or;**
- b. On account of some mistakes or error apparent on the face of the record, or**
- c. For any other sufficient reason and whatever the ground there is a requirement that this application has to be made without unreasonable delay.**

20. It was further submitted that any beneficiary who wished to transfer his or her interest to another beneficiary, next of kin, assignee, or representative could do so, provided that such transfer was effected with the consent of the other beneficiaries.

21. It was contended that it remained an undisputed fact that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had not been barred from transferring all or any portion of their entitled shares in the deceased's estate to the applicant or to any other person of their choice at the time of distribution before the Honourable Kadhi at Bute, as directed by this court. It was further emphasized that the 1st and 2nd

respondents' rights to dispose of their respective shares in the estate had not been constrained by the Honourable Court, and consequently, this did not constitute a substantive ground warranting review of the court's orders.

22. It was further urged that the review application had been filed approximately nine months after the delivery of this court's judgment, and that the delay had neither been explained nor justified. On that basis, it was contended that the application was merely an afterthought and therefore ripe for dismissal.
23. On the issue of costs, it was urged that the respondent had taken all necessary steps to resolve the matter with the applicant through family and local leaders, but those efforts had been in vain as the applicant continued to hold onto the property in a bid to frustrate her. It was further contended that the present application was intended solely to frustrate her, and therefore she was deserving of the costs of this suit.
24. I have considered and analyzed the pleadings and the submissions by the parties herein. The main issue for determination is whether this court can review its judgment delivered on 12.03.2025 on such terms as it may deem fit and proper. As already enumerated above, the question that I therefore ask is whether the orders sought herein can issue.
25. The remedy for review is provided for under order 45 (1) of the Civil Procedure Rules and Section 80 of the Civil Procedure Act.

**Order 45 (1)** provides;

**“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 sufficient reason desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay.**

26. An error within the meaning of Section 80 and Order 45 of the Civil Procedure law was defined in the case of **National Bank of Kenya Ltd vs Ndungu Njau [1997] eKLR**, by the Court of Appeal which stated thus: -

**“A review may be granted wherever 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.”**

27. As indicated above, a review is permissible on the grounds of discovery by the applicant of some new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order was passed; the underlying object of this provision is neither to enable the court to write a second judgment nor to give a second innings to the party who has lost the case because of his negligence or indifference. Therefore, a party seeking a review must show that there was no remiss on his part in adducing all possible evidence at the trial.
28. Where an applicant in an application for review seeks to rely on the ground that there is discovery of new and important evidence, one has to strictly prove the same.
29. In the case of **Stephen Wanyoike Kinuthia (suing on behalf of John Kinuthia Marega (deceased) vs Kariuki Marega & Another (2018) eKLR** the Court of Appeal stated as follows:

**“We emphasize that an application based on the ground of discovery of new and important matter or evidence will not be granted without strict proof of such allegation.”**

30. In the same breadth, the Court of Appeal in the case of **Rose Kaiza vs Angelo Mpanju Kaiza (2009) eKLR** held that not every new fact will qualify for interference of the judgment.
31. It is trite that statutory grounds for review may extend to situations where an applicant has been wrongly deprived of the opportunity to be heard, or where the impugned decision or order was procured through illegality, fraud, or perjury: [ See **Serengeti Road Services v CRBD Bank Limited [2011] 2 EA 395**].
32. Also to be included as part of sufficient reason is where the impugned order if reviewed, would lead the court in promoting public interest and enhancing public confidence in the rule of law and the system of justice: [See **Benjoh Amalgamated Limited & Another vs Kenya Commercial Bank Limited [2014] KECA 872 (KLR)**]. In light of the foregoing, it is trite that a review application must not be permitted to morph into an appeal in disguise, where the merits of the case are revisited. The concept of “sufficient reason” must therefore be understood within the framework of the statutory grounds for review as set out under the Civil Procedure Rules. Those statutory grounds form the starting point and serve as a guiding principle in determining whether a review is justified.
33. In this case, the applicant stated that he was not properly advised by his previous advocate on record as he did not clearly bring out the fact that the deceased had adopted him albeit not formally. That he paid his fees and generally provided for him.

Further, that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents surrendered their stake in the estate to the applicant. That the same was fortified by the fact that the duo had previously submitted that they are willing to surrender their shares to the applicant.

34. Having the above in mind and in contrast to the judgment delivered by this court which the applicant is seeking to review, I am convinced that this is not an issue worth considering by this court. I say so for the reason that this court stated clearly that the court found that the estate of the deceased shall be distributed in accordance with the Islamic law amongst the beneficiaries namely: Balugho Adan, Abdirahman Afdan Mohamed and Madow Dakat Takoy. Additionally, that any beneficiary who wishes to transfer his or her interest to any of the beneficiaries or next of kin or assignee or representative can do so with the consent of the other beneficiaries.
35. In as much as the previous advocate for the applicant was blamed for allegedly advising the applicant otherwise, I also find that the current counsel has almost fallen into a similar trap. I say so for the reason that the court's judgment delivered on 12.03.2025 was so plain and direct hence this application was not necessary as none of the elements constituting grounds for review of applications contained in order 45 (1) and (2) of the civil procedure rules has been established. The best the applicant would have done was to appeal and not to invite the court to sit on appeal on its own judgement or simply follow the advice given in the impugned judgment.

36. As a consequence of the above holding, I humbly find that the application before the court is bereft of merit and is hereby dismissed with costs awarded to the 3<sup>rd</sup> respondent.

Dated, signed and delivered virtually this 18<sup>th</sup> day of March, 2026

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**J.N.ONYIEGO**  
**JUDGE**