REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. E3450 OF 2022

IN THE MATTER THE ESTATE OF ZACHARY MUMBO MOSOTI (DECEASED)

GLADYS KERUBO MOSOTI .....

APPLICANT/PETITIONER

VERSUS

PERIS ONDARA .....

RESPONDENT/OBJECTOR

RULING

1. This ruling relates to the application dated **6th March, 2025** filed by the Applicant, Gladys Kerubo Mosoti seeking for **ORDERS THAT**:
    1. **That this honorable court be and is hereby pleased to set aside, vacate and or review the orders issued on 8th July, 2024.**
    2. **That this honorable court be and is hereby pleased to admit the replying affidavit dated 30th**

March, 2023 as part of the pleadings for the record along with the factors and evidence therein.

3. **That costs of this application be provided for.**

2. The application is based on the grounds thereof and supported by affidavit and supplementary affidavit sworn by Gladys Kerubo Mosoti on **18th December, 2024** and **19th June, 2025**.

3. She avers *inter alia* that she is the registered absolute proprietor of **NAIROBI/BLOCK 83/14/135** and that the said property does not form part of the deceased's estate and is therefore not available for distribution in the succession proceedings. She contends that despite this, the court, by its orders of **8th July, 2024** permitted the Objector to continue occupying and utilizing the property as a matrimonial home. She attributes this outcome to the Court's failure to consider her replying affidavit dated **30th March, 2023** which, although served, was not filed due to inadvertent error of counsel.

4. She maintains that the omission was neither deliberate nor intended to prejudice the proceedings and that the affidavit contains material evidence demonstrating her sole ownership of the property.

5. The deponent further asserts that enforcement of the impugned order has occasioned grave prejudice by depriving her of her constitutional and proprietary rights and that the continued occupation of the property by the Objector

amounts to unlawful infringement and abuse of the court process.

6. She urges that in the interests of justice and fairness, the court should set aside Order No. **2** of **8th July, 2024** and admit the replying affidavit dated **30th March, 2023** for consideration, emphasizing that failure to do so would occasion irreparable harm and undermine the sanctity of her registered title. The application dated **6th March, 2025** is meritorious and raises substantive issues warranting determination.

7. She contends that the Respondent has not demonstrated any prejudice that would arise if the application is allowed and denies that the application constitutes a re-litigation of previously determined matters. Instead, she asserts that the replying affidavit dated **30th March, 2023** was inadvertently served but not filed and was therefore not part of the court record at the time of the ruling delivered on **27th June, 2024.**

8. She attributes the omission to an excusable error by counsel, emphasizing that the mistake was discovered upon review of the file and promptly brought to the court's attention. She maintains that the omitted affidavit contains material evidence capable of influencing the court's determination and that its consideration is necessary to meet the ends of justice.

9. She disputes the Respondent's assertions that the supplementary affidavit was irregularly filed or required

leave and urges the court to verify from the record that the earlier replying affidavit was not considered.

10. Further, she asserts that the issues raised are substantial and ought to be determined at the interlocutory stage, as they bear directly on the Respondent's claims to the estate. She reiterates that the admission of the omitted affidavit will not occasion prejudice but will instead facilitate a fair and just determination.
11. Additionally, she introduces a new allegation regarding the Respondent's conduct, stating that the Objector is facing criminal charges, which she argues is indicative of improper motive. On this basis, she urges the court to review its earlier orders and allow the application in the interests of justice.
12. The application is opposed vide replying affidavit sworn by Peris Ondara on **8th April, 2025**. She avers *inter alia* that it is an attempt to re-litigate issues already conclusively determined by the court in its ruling of **27th June, 2024** and thus amounts to an abuse of the court process. The court had duly considered the relevant affidavits, including the replying affidavit dated **30th March, 2023** and that the present application fails to meet the threshold for review under **Order 45 Rule 1** of the Civil Procedure Rules, instead constituting a disguised appeal.
13. It is further deponed that the issues raised can properly be addressed at the substantive hearing and do not warrant reopening interlocutory orders.

14. The deponent further asserts that the Applicant's claim over **NAIROBI/BLOCK 83/14/136** amounts to unlawful intermeddling with the estate contrary to **Section 45** of the Law of Succession Act, particularly as the alleged change of title is said to have occurred posthumously. She argues that the Applicant's own reliance on title documents, including Gazette Notice evidence, reinforces rather than negates the allegation of intermeddling and raises concerns regarding her suitability as a co-administrator.
15. She maintains that the orders of **27th June, 2024** were properly issued, remain justified and do not determine the substantive dispute, which is still pending.
16. Additionally, the Respondent highlights the inordinate delay of approximately **9** months in bringing the present application, contending that such delay undermines any claim of prejudice and demonstrates lack of merit.
17. She further avers that the continued filing of applications is vexatious and prejudicial and urges the court to uphold the principle of finality in litigation by dismissing the application with costs.
18. In support of the application, the Applicant has filed written submissions dated **19th June, 2025**.
19. In opposition to the application, the Respondent has filed written submissions dated **8th August, 2025**.

ANALYSIS AND DETERMINATION

20. I have read the application before this court, the responses thereto and the rival submissions.
21. The application before the court seeks review and setting aside of Order No. **2** arising from the ruling delivered on **27th June, 2024**, primarily on the ground of discovery of new and important evidence, namely the replying affidavit dated **30th March, 2023** which the Applicant alleges was not considered.
22. The guiding principles on whether to set aside, vary and/or review orders, have been established as follows:
23. In **Anwar Ali & another v Monica Muthoni & another [2021] eKLR** the court stated as follows:

> "***8. Further, Order 45(1) of the Civil Procedure Rules, 2010 provide the conditions under which a court can allow an application for review. The Court of Appeal in the case of Pancras T. Swai –vs- Kenya***
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> ***Breweries Limited (2014) eKLR reiterated the conditions set by Order 45 and held that for an Applicant to succeed in an application for review, he must establish to the satisfaction of the court any one of the following three main grounds: -***
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> ***i. That there is discovery of new and important evidence which was not available to the Applicant when the Judgment or order was passed despite having exercised due diligence; or***

ii. That there was a mistake or error apparent on the face of the record; or

iii. That sufficient reasons exist to warrant the review sought.

iv. In addition to proving the existence of the above grounds, the Applicant must also demonstrate that the application was filed without unreasonable delay.

9. From the above conditions, it is clear that the prayer for review in the instant application is premised on the first condition.

In the case of Turbo Highway Eldoret Limited –vs- Synergy Industrial Credit Limited [2016]eKLR Sewe J. cited the case of Rose Kaiza – vs- Angelo Mpanjuiza [2009]eKLR, where the Court of Appeal considered an application for review on the ground of new evidence and held that:-

"Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the Applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought

for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."

10. It is therefore clear that the discovery ought to be of new and important evidence which after due diligence was not within the knowledge of the party or could not have been produced when the decree was being made.

In the case of D. J. Lowe & Company Ltd –vs- Bonquo Indosuez, Nairobi Civil Application No.217 of 1998, the Court of Appeal sounded a caution in such applications and stated that:-

"Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his

part in adducing all possible evidence at the hearing."

24. In **Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others [2021] eKLR** the court stated as follows:

"***18. The power of review can be exercised by the court in the event discovery of new and important matter or evidence which despite exercise of due diligence was not within the knowledge of the Applicant or could not be produced by him at the time when the order was made. As the Supreme Court of India[15] stated: -***

"the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any

other sufficient reason" ..... means a reason sufficiently analogous to those specified in the rule"

19. The reason for the above limitation is that it is an indulgence given to a party to get the previous decision altered on the basis of discovery of important evidence which was not within his knowledge at the time of original hearing. So, in the fitness of things, a person, who relies on such circumstances to obtain a review, should affirmatively establish them. The latitude shown to a party by a court is conditional upon strict compliance with that requirement.

20. Ordinarily, the expression 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 order was made would refer only to a discovery made since the order sought to be reviewed was passed. An Applicant alleging discovery of new and important evidence must demonstrate that he has discovered it since the passing of the order sought to be reviewed…"

25. The applicable threshold under **Order 45 Rule 1** of the Civil Procedure Rules, 2010 requires the Applicant to demonstrate, *inter alia*, that the evidence was not within her

knowledge despite due diligence or that there exists an error apparent on the face of the record.

26. However, the material placed before this court, particularly the record confirming that the said replying affidavit dated **30th March, 2023** was indeed filed and considered at paragraph **8** of the impugned ruling, undermines the central premise of the application. Consequently, the alleged new evidence does not meet the legal threshold, as it neither constitutes newly discovered material nor evidence that was unavailable at the time of the decision.

27. Further, the explanation advanced by the Applicant attributing the omission to inadvertence of counsel does not satisfy the requirement of due diligence. The jurisprudence in the authorities above underscores that a party must demonstrate absence of remissness in presenting evidence.

28. In the present case, the Applicant had the opportunity to place all material before the court and, in any event, the record contradicts her assertion. This indicates that the application is not grounded on discovery of new evidence but is instead an attempt to revisit the merits of the earlier determination, which falls outside the scope of review jurisdiction and veers into the realm of an appeal.

29. On the competing proprietary claims, while the Applicant relies on annexures evidencing registered ownership i.e., certificate of lease and gazette notice, such documentation, though *prima facie* proof of title, does not conclusively

determine beneficial or matrimonial interests within succession proceedings.

30. Conversely, the Respondent's assertion of intermeddling under **Section 45** of the Law of Succession Act raises substantive issues regarding the legality and timing of title changes.
31. These contested factual and legal questions are not amenable to determination at the interlocutory stage of a review application and are more appropriately reserved for full hearing, where evidence can be tested. The annexures, therefore, while relevant, do not decisively tilt the balance in favour of granting review.
32. Additionally, the delay of approximately **9** months in bringing the present application is inordinate and remains insufficiently explained. The requirement that an application for review be made without unreasonable delay is a mandatory condition. The delay, coupled with the absence of a qualifying ground for review, prejudices the principle of finality in litigation and supports the Respondent's contention that the application is vexatious and an abuse of the court process.
33. In the circumstances, I fine that the Applicant has failed to satisfy the statutory threshold for review under **Order 45 Rule 1** of the Civil Procedure Rules, 2010.
34. **The application dated 6th March, 2025 is otherwise dismissed for lack of merit.**
35. **Each party to bear its own costs.**

Dated signed and delivered at Nairobi via video link this

23rd day of April 2026.

H K CHEMITEI
JUDGE