

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**HIGH COURT SUCCESSION APPEAL CASE NO. E013 OF 2022**

**IN THE MATTER OF THE ESTATE OF SAMUEL GITHINJI**

**GITHITU (DECEASED)**

**ESTHER NJOKI GITHINJI.....APPLICANT**

**-VERSUS-**

**LUCY WAMBUI GITHINJI.....RESPONDENT**

**RULING**

1. Before this Court for determination is the Notice of Motion application dated **1<sup>st</sup> August 2025**, by which the Applicant **ESTHER NJOKI GITHINJI** seeks the following orders:-

**“1. THAT the Honourable Court be pleased to review, vary and/or set aside the orders made on 18/07/2025 and order that LR Othaya/Kiahugu/2518 be shared equally between the appellant and the respondent herein and the grant dated 30<sup>th</sup> September 2022 be amended accordingly.**

**2. THAT costs of this application be provided for.”**

2. The application was premised upon **Section 80 and 3A of the Civil Procedure Act, Cap 21, Order 45 Rules 1, 2 and 3 and Order 51 Rules 1 of the Civil Procedure Rules** and all other enabling provisions of the law and was supported by the affidavit of even date sworn by the Applicant.
3. The Respondent **LUCY WAMBUI GITHINJI** opposed the application through her Replying Affidavit dated **25<sup>th</sup> September 2025**. The matter was canvassed by way of written submissions. The applicant filed the written submissions dated **21<sup>st</sup> November 2025** whilst the Respondent relied upon her written submissions dated **9<sup>th</sup> December 2025**.

**BACKGROUND**

4. The Applicant herein had filed in the High Court an appeal being **Succession Appeal No. E013 of 2022** challenging the judgement delivered in the Lower Court in **Othaya SRM Succession Cause No. 30 of 2021**. The Appeal was duly heard and vide a judgment delivered on **18<sup>th</sup> July 2025**, this Court dismissed the appeal.

5. In the judgment of **18<sup>th</sup> July 2025** the court found as follows in relation to the property known as **LR Othaya/Kiahugu/2518** (hereinafter the Suit Property)

**“There is no evidence that this particular property was gifted by the deceased during his lifetime to Esther Nyambura or for that matter to any other person. Accordingly, I find and hold that LR Othaya/Kiahugu/2518 forms part of the estate of the deceased and as such is available for distribution.”**

6. The applicant states that despite the above finding the court did not give directions on the mode of distribution of the suit property. The Applicant pleads that there therefore exists an error on the face of the record and seeks a review by the court of its judgment to indicate how the suit property should be distributed.

7. On her part the Respondent retorts that the learned trial magistrate did in its judgment did take into account the suit land and stated as follows:-

**“Therefore since LR Othaya/Kiahugu/2518 approximately one acre is already registered in the name of one of the beneficiaries from the 1<sup>st</sup> house namely Esther Nyambura Githinji, I find that that it is fair that and reasonable that LR Othaya/Kiahugu/2516 be awarded to the beneficiaries of the 2<sup>nd</sup> house to be shared in accordance to provisions of sub-sections 35(1) of the Law of Succession Act Cap 160 Laws of Kenya.”**

8. The Respondent urges this court to adopt the mode of distribution as set out by the trial court.

### **ANALYSIS AND DETERMINATION**

9. I have carefully considered the application before me, the reply filed thereto as well as the written submissions filed by both parties.
10. **Rule 63 (1)** of the **Probate and Administration Rules** imports several Orders of the Civil Procedure Rules into Succession Law. The Rule states that:

**“Save as is in the Act or in these Rules otherwise provided, and subject to any order of the Court or a Registrar 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. Legislation) together with the High Court (Practice and Procedure) Rules (Cap 8 Sub. Legislation) shall apply so far as relevant proceedings under these Rules.”**

**11. 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.

**12. 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 judgment to the court which passed the decree or made the order without unreasonable delay.**

13. 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 rules 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.**

14. The first issue for consideration is whether the application has been brought without unreasonable delay. In this case the judgment was delivered on **18<sup>th</sup> July 2025** and the application for review was filed on **1<sup>st</sup> August 2025** - a period of approximately **two (2) weeks** after delivery of the judgment. I find that the application was filed in a timely manner.

15. In this case the Applicant has not alleged the discovery of new and important evidence. Rather the Applicant claims that there exists an error on the face of the record. That despite finding that the suit land formed part of the estate of the deceased the court failed to indicate how the said property ought to be distributed.
16. The definition of what constitutes an error on the face of record was set out in the case of **NYAMOGO & NYAMOGO ADVOCATES -VS- [2001] 1 E.A 173** where the Court of Appeal held as follows:-

**“.....There is a real distinction between a mere erroneous decision and an error apparent on the face of the 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 a 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 apparent on the face of the record, though another view was also possible. Mere error or worn view is certainly no ground for review although it may be for an appeal.....”**

17. The Lower Court in its judgment awarded the Suit Property to **Esther Nyambura Githinji** a beneficiary from the first house. However the High Court found and held that the Suit property **had not** been gifted to **Esther Nyambura Githinji**. Instead the High Court found that this property belonged to the Deceased, formed part of the estate and was therefore available for distribution to the beneficiaries.
18. Given the above finding by upholding the mode of distribution of the Suit Property as set out by the trial court clearly constitutes an error on the face of the record. As such I find merit in this application for review.
19. Finally the application dated **1<sup>st</sup> August 2025** is allowed and the court makes the following orders:-

- (a) The property known as LR Othaya/Kiahugu/2518 is to be divided between the two Houses left behind by the deceased in equal shares, and the Grant dated 30<sup>th</sup> September 2022 to be amended accordingly.**
- (b) This being a family matter I make no orders on costs.**

**Dated in Nyeri this 24<sup>th</sup> day of April 2026.**

.....  
**MAUREEN A. ODERO**  
**JUDGE**