

REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION APPEAL NO. 1 OF 2019

IN THE MATTER OF THE ESTATE OF GITARI GICHOHI
(DECEASED)

GICHOHI NJIMO GITARI..... 1ST
APPELLANT
SAMUEL MWAI GITARI 2ND
APPELLANT

VERSUS

ISAAC GICHOHI GITARI..... 1ST
RESPONDENT
SAMUEL MBUTHIA GITARI..... 2ND
RESPONDENT
EDITH WAMUYU GICHOHI 3RD
RESPONDENT

RULING

1. The application dated 26.1.2026 and 11.02.2026 was slated to be heard before the court. Parties have spent acres of paper in terms of submissions. The court upon hearing the parties

directed that the ruling shall be given ex tempore, since I noted the ages of the parties before me.

2. The applicants have filed two applications. The court had already dispensed with other applications. The first one seeks for extension of time to appeal to the court for appeal and the second one seeks review of the order 3.02.2026.
3. The ruling they seek to review gave the following orders:
 - a. The notice of motion dated 14.10.2025 lacks merit and is accordingly dismissed.
 - b. Each party to bear its own costs.
 - c. The matter shall be heard before Court 2 on the prefixed application on 26th February, 2026.
4. The court found that there was no appeal before the court. Even in the application filed for extension of time there is an admission that there is not valid appeal.

Submissions

5. The 1st Respondent filed submissions dated 11.3.2026. It was submitted that the Application did not meet the threshold for review and the order sought to be stayed was negative. Therefore, the Application was not merited. Reliance was placed inter alia on National Bank of Kenya Ltd v Njau (1997) KECA 71.
6. It was also submitted that litigation must come to an end and the application should be dismissed.

7. The 2nd Respondent filed submissions dated 6.5.2026. It was submitted that the Application does not meet the conditions for review under Order 45 of the civil procedure rules.
8. It was submitted that this was a disguised appeal as a review and the appeal could lie to the court of appeal.
9. It was submitted that a negative order cannot be stayed and reliance was placed on the case of **Western College of Arts and Applied Sciences v EP Oranga & 3 others.**

Analysis

10. Review had its base in Section 80 of the Civil Procedure Act states that:

“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 a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit”.

Section 63 (e) of the Civil Procedure Act states that:

“In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other

interlocutory orders as may appear to the court to be just and convenient

11. Further this is buttressed by Order 45 of the Civil Procedure Rules provides for Review and it states as follows:

“(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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent,

he can present to the appellate court the case on which he applies for the review”

12. Review was addressed on the case of **Lakesteel Supplies vs. Dr. Badia and Anor Kisumu HCCC No. 191 of 1994**, Kuloba J (as he then was), stated as follows regarding review:

The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the Civil Procedure Rules. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first

one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a 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 at the time when the ruling was made.

13. In addressing the question of review in the case of **Songole & Another v Kwenya & Another [2025] KECA 1778 (KLR)**, The Court of appeal [MSA Makhandia, Po Kiage & Ha Omondi, JJA] stated as follows:

17. ... At our instigation, however, counsel for the appellants agreed that the said error was not manifest on the face of the record. In Paul Mwaniki Vs. National Hospital Insurance Fund Board Of Management (supra), a decision that was cited by the appellants' counsel, the court was categorical that the power of review, based on

the ground that there is an apparent error on face of the record, can only be available where the said error is conspicuous upon a cursory look at the record. The court rendered itself as follows;

39. Review is impermissible without a glaring omission, evident mistake or similar obvious error. An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review.”

18. This Court was of a similar view in National Bank Of Kenya Limited Vs. Ndungu Njau [1997] KECA 71 (KLR) where it stated; “A review may be granted whenever 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.”

14. Further, in the case of **Kitts Mbatu Mukonyole v Levi Ndombi Mukonyole [2015] KECA 210 (KLR)**, the court of appeal [Musinga, Gatembu, Murgor JJ, A] was of the considered view that:

Order 45 of the Civil Procedure Rules clearly sets out the basis upon which a court can review its orders. The conditions are: (a) there must be a discovery of a new and important matter which after the exercise of due diligence was not within the knowledge of the applicant at the time the decree was passed, or the order was made; or (b) there was a mistake or error apparent on the face of the record; or there were other sufficient reasons; and (c) the application must have been made without delay.

The appellant’s case is that there was an error of law apparent on the face of the record, in that the High Court should have taken into account that the Tribunal did not have jurisdiction to make an order of subdivision of the disputed property, but instead, when the appellant sought a review of the High Court’s decision to reinstate the Land Tribunal’s decision, the High Court had dismissed the application.

The question as we see it is whether in determining the review application, the court below rightly found that there was no error apparent on the face of the record, or that no new information had been placed before the court.

15. However, an error apparent must be clear and not searched for. An error of law is not an error apparent. The making of a wrong decision is not an error apparent. this was succinctly addressed in the case of **James Kiiru Mwangi v Gibson Kimani Mwangi & another [2021] eKLR**, where J. K. Serгон J, held as follows:

29. The Court of Appeal in the case of *Muyodi v Industrial and Commercial Development Corporation & Anor* [2006] 1 EA 243 cited by the parties herein, rendered itself thus: “In *Nyamogo and Nyamogo v Kogo* [2001] EA 174 this court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is 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 even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”

16. In the circumstances, there is not error apparent on the face of the record.

17. The next issue is extension of time. In this case the applicant indicates that he had financial troubles to file the record of appeal. However, the notice of appeal was filed and served on 13.08.2024. There has been a myriad of applications filed by the same party instead of appealing. It is doubtful that the court has jurisdiction to extend time to file the record of appeal. This is the province of the court appeal under rule 4 of the Court of Appeal Rules, 2022. rule 4 provides as follows:

The Court may, on such terms as may be just, by order, extend the time limited by these Rules, or by any decision of the Court or of a superior court, for

the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended

18. The propriety of any appeal in the Court of Appeal will be dealt with by that court. This court. The court cannot, by craft or innovation, assume jurisdiction. In the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**, the supreme court stated as doth: -

“This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

19. The court will therefore assume jurisdiction where it has and eschews jurisdiction where none exists. Where no right of appeal lies, the court has no power to deal with an application for stay. In the case of **Akinyi v Ogwari & another** (Petition (Application) E025 of 2025) [2026] KESC 9 (KLR) (23 January 2026) (Ruling), the supreme court [MK Koome, CJ & P, PM Mwilu, DCJ & VP, SC Wanjala, N Ndungu & I Lenaola, SCJJ] held as follows:

We Now Opine and Determine as follows:

- i. It is trite law that a court's jurisdiction flows from either the Constitution or legislation or both. In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011, this Court dealt with the question of jurisdiction extensively. The Court observed that where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.

Determination

20. In the circumstances, I make the following orders: -
 - a. The notices of motion dated 11.02.2026 and 26.1.2026 lacks merit and are accordingly dismissed.
 - b. Costs of Ksh 7,500/= to the 1st and 3rd Respondents and disbursements of Ksh.3,000/= to the 2nd Respondent.

c. The file is closed.

DELIVERED, DATED and SIGNED at **NYERI**, virtually on this **11th** day of **May, 2026**. Ex Tempore Ruling Delivered through Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the presence of: -

Samuel Mbuthia Gitahi present

Ms. Macharia for the 1st Respondent

Mr. Sirma for the Applicants

Court Assistant - Michael / Martin