Gatobu & 2 others v Kiara & another (Civil Appeal (Application) E006 of 2022) [2025] KECA 575 (KLR) (28 March 2025) (Ruling)

Neutral citation: [2025] KECA 575 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL (APPLICATION) E006 OF 2022

JW LESSIT, A ALI-ARONI & GV ODUNGA, JJA

MARCH 28, 2025

BETWEEN

PATRICK MUTHOMI GATOBU ..... 1ST APPLICANT

FRANCIS KARIMI KIARA ..... 2ND APPLICANT

NICHOLAS MURIUNGI KIARA ..... 3RD APPLICANT

AND

GEOFFREY MUGAMBI KIARA ..... 1ST RESPONDENT

PAUL GITONGA MUGO ..... 2ND RESPONDENT

(Being an application for review and Stay of execution of the Judgment and consequential Decree of the Court of Appeal (J. Mohammed, Kimaru and Muchelule JJ.A) delivered on 17th May 2024. in Nairobi Civil Appeal No. E006 of 2022)

RULING

1. On 17th May 2024, this Court (J. Mohammed, L. Kimaru and O. Muchelule JJ.A) delivered a judgement in this appeal in which they found no merit in this appeal and dismissed it with costs. The appeal arose from the ruling of the High Court of Kenya at Meru (A.A Ong'injo, J.) dated 15th October, 2020 in Succession Cause No. 677 of 2014. In its decision this Court, in identifying the issues before it stated that:

> "The two questions that formed the basis of the complaint by Patrick Gatobu (the 1st appellant), Francis Karimi Kiara (2nd appellant) and Nicholas Muriungu Kiara (the 3rd appellant) contained in the Memorandum of Appeal dated 13th January 2021 that was filed to challenge the ruling of the learned A. A. Ong'injo, J. of the High Court at Meru were, whether the court had erred in finding that Geoffrey Mugambi Kiara (the 1st respondent)

and Jane Gacheri Kiara were children of the Deceased M'Ikiara M 'Ngutari and therefore his beneficiaries; and whether the court erred in distributing the estate of the deceased equally to the beneficiaries, instead of finding that the deceased had during his lifetime distributed his property to his children (beneficiaries)."

2. In their Judgment, the Learned Judges found that the deceased died intestate; that since the deceased considered the 1st respondent to be his step-son and treated him and Jane Gacheri Kiara as his dependants and beneficiaries of his estate, the appellants had no business saying otherwise; that the trial court correctly appreciated that, though the deceased had allocated each child where to build and cultivate, he had not distributed the land to them by the time of his death; that the portions the deceased gave to each of his children were only a temporary measure; that based on section 38 of the *Law of Succession Act* as expounded in the case of *Stephen Gitonga M'Murithi vs Faith Ngira Muriithi* [2015] eKLR, the children were each entitled to an equal share of the estate.

3. The applicants are, once again, before this Court by a Notice of Motion dated 7th June 2024 in which they seek:

    1. Certification of the application as urgent and for hearing ex parte in the first instance;

    2. Stay of execution of the ruling delivered and dated 15th October, 2020 by Hon. Lady Justice A.A Onginjo in Meru Succession Cause No. 677 of 2014 and the instant judgment delivered on 17th May, 2024 by this Court and all consequential order pending hearing and determination of this application;

    3. Inhibition, inhibiting all dealings on LR No. Nkuene/Uruku/52 pending hearing and determination of this application;

    4. An order barring any further subdivision of LR No. Nkuene/Uruku/52 pending the hearing and determination of this application inter partes;

    5. A reaffirmation of the distribution done by the deceased during his life time as carried out by his surveyor;

    6. An order for valuation of developments undertaken by the Applicants on the locus in quo under the authority and direction of the then registered owner M 'Ikiara M 'Ngutari (Deceased) to enable them to be compensated by the Respondents;

    7. Any order or better relief as shall meet the ends of justice.

    8. Provision for the costs of the application.

4. It is clear, from the way the orders sought are crafted, that the only substantive prayers are (5) and (6).

5. The application was premised on the grounds that the appeal shall be rendered nugatory if stay is not granted and it has high chances of success. In support of the application, the 3rd applicant swore an affidavit on 7th June 2024 in which he deposed: that following the dismissal of the appeal, the respondents embarked on subdividing the suit property where permanent dwelling residences belonging to them were being targeted for demolition under the guise of execution of the orders of the court; that material evidence which was presented before the Court was not factored in and which, had it been factored in, would have tilted the decision in their favour; that the surveyor pinpointed the exact portions to be occupied by the children listed in paragraph 7 of the affidavit in support and

sworn by Joyce Muthoni Kiara; the deceased himself M'Ikiara M Ngutari vide the replying affidavit dated 4th July, 2008 in Meru High Court Civil Suit No. 127 of 20907 - *Geoffrey Musembi Kiara & 2 Others vs M'Ikiara M Ngutari* - averred that he had shown his sons where to develop and cultivate and went ahead to aver how the land was subdivided but that the respondents were coercing him on how to divide his land; that in the said suit, the deceased averred that he had shown the respondents the portions they were to occupy and utilize; that the surveyor testified in court how he adhered to the deceased wishes and each of the children occupied the place pinpointed by the deceased; and that if stay is not granted, the application would be rendered nugatory and the interest of the applicants and those of their children would be defeated.

6. In opposing the application, the 1st respondent has sworn a replying affidavit dated 15th July, 2024 wherein he averred: that the applicants had not shown any new ground to review the judgment since the issues raised were canvassed before the trial court and determination made thereon; that the applicants occupied more land than they are entitled to and were attempting to re-open the already concluded matter; and that unless the application is dismissed, the distribution of the of the deceased's estate will stall to the detriment of other beneficiaries.

7. We heard this application on the Court's virtual platform on 26th November 2024 when learned counsel, Mr Mark Muriithi, held brief for Mr Munene Kirimi for the applicants while learned counsel, Miss Mugo held brief for Mr Gichunge Muthuri for the respondents. While Mr Muriithi relied on his written submissions, Miss Mugo relied on the replying affidavit.

8. We have considered the application, the supporting as well as the replying affidavit and the submissions on the record.

9. Although the body of the application does not expressly seek a review of the judgement, the title of the application indicates that the applicants seek to have the judgement of this Court reviewed. While it is appreciated that this Court has jurisdiction to review its decisions, the principles upon which this Court does so are now well settled as clarified by this Court in the case of *Ndeti & another vs. Matei Julius Mulili Ndeti & Nzioki Mulili Ndeti (Administrators of the Estate of Harrison Mulili Ndeti - Deceased) & 4 others* Civil Application E064 of 2019) [2023] KECA 60 (KLR) that:

> " The law as we understand it is that the general rule is that a Court of Appeal will not ordinarily re- open its decisions. But there are exceptions to the general rule, which as authorities suggest are reserved for rare and limited cases, where the facts justifying them can be strictly proved. A party is not entitled to seek a review of a judgment delivered by a Court of Appeal merely for the purpose of a rehearing and obtaining a fresh decision in the case. Ordinarily, the norm is that a judgment pronounced by the Court of Appeal is final and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so. The Court may also re-open its judgment if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice...Whenever the residual jurisdiction is sought to be invoked, the court must be satisfied that the case falls within the exceptional categories before it can accede to the application and reopen the case. One may without levity ask the question, how exceptional is exceptional? The language used in decided cases is necessarily general: apart from the descriptive phrase "exceptional circumstances", the requirements are that the probability of a significant ("real") injustice must be clearly established, and that there be no effective alternative remedy".

10. However, as was held in *Benjoh Amalgamated Ltd v Kenya Commercial Bank Limited* [2014] eKLR, the residual jurisdiction of the Court to review its own decisions "should be invoked with

circumspection". In that case, the Court, after reviewing decisions from different jurisdictions, expressed itself as follows:

> " The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court)...It is our finding that this Court not being the final court has residual jurisdiction to review its decisions to which there is no appeal to correct errors of law that have occasioned real injustice or failure or miscarriage of justice thus eroding public confidence in the administration of justice. This is jurisdiction that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice...This Court will be reluctant to invoke its residual jurisdiction of review where, as here, there is laches or where legal rights of innocent third parties have vested during the intervening period which cannot be interfered with without causing further injustice".

11. In *Ndubi v Standard Limited (Civil Application No. 74 of 2019) [2021] KECA 364 (KLR)* Kiage, JA expressed himself as hereunder:

> "I reiterate the constant refrain of this court that reviews are not provided for in our rules. They must never be thought of as common place exercises to be sought as knee-jerk response to decisions of the court that do not flatter a party's fancy. We entertain applications for review only in exceptional circumstances where it is apparent that the usual principle of finality might work injustice...See also Benjoh Amalgamated Ltd & another vs Kenya Commercial Bank Ltd [2014] eKLR. I think that the court ought to be even less inclined to revisit and review rulings made at interlocutory stages such as the one sought to be reviewed herein. The court exists to determine appeals and does not have the luxury of engaging in such applications, and twice over at that. On point of principle therefore, I stand disinclined to the grant of this kind of application."

12. In reaching its decision, the Court relied on Mohammed Jawayd Iqbal (personal Representative of The Estate of The Late Ghulam Rasool Jammohamed) v George Boniface Mbogua [2020] eKLR in which this Court held that:

> " ...the power to review, re-open and/or set aside judgments in concluded appeals is one that is exercisable only in exceptional circumstances. The court embarks on it cautiously, with circumspection and, we dare add, in the most compelling cases where the justice of the case patently demands that the court turn back and re- examine what is declared with finality. The burden to convince the court to do must lie with the applicant...."

13. In the case of Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR, this Court stated that:

> " In the interest of safeguarding the integrity of the administration of justice and particularly in the absence of an express bar we, like the House of Lords in Inco Europe Ltd & others (supra) hold that the Court of Appeal should have residual jurisdiction but only in exceptional and limited circumstances. Such a finding is in consonance with practises from other jurisdictions and maintains fidelity to the law."

14. In the case of Patrick Kitamonge Leparleen v Maralal Town Council [2020] eKLR, this Court observed that:

> " The above makes it clear that this Court does have a limited residual jurisdiction to review its decisions. The residual jurisdiction is to be exercised in very exceptional circumstances where the application has been brought without undue delay and only for the purpose of correcting errors of law that have occasioned substantial injustice or miscarriage of justice, and in regard to which errors there is no other alternative remedy. In addition, the Court will not invoke the residual jurisdiction to review its decision where to do so would interfere with rights of innocent third parties."

15. Chief Justice, Lord Wolf, in his lead judgement in the case of *Taylor & another v Lawrence & Anothe*r [2002] 2 All ER 353, dealt with both the justice principle and finality principle and held that the Court of Appeal:

> "Had a residual jurisdiction to reopen an appeal which it had already determined in order to avoid real injustice in exceptional circumstances.
>
> 'The Court had implicit powers to do that which was necessary to achieve the due objectives of an appellate Court, namely to correct wrong decisions so as to ensure justice between the litigants involved, and to ensure public confidence in the administration of justice, not only by remedying wrong decisions, but also by clarifying and developing the law and setting precedents. A Court had to have such powers in order to enforce its rules of practice, suppress any abuses of its process and defeat any attempted thwarting of its processes. The jurisdiction to reopen appeals was linked to a discretion which enabled the Court of Appeal to confine its use to the cases in which it was appropriate for the jurisdiction to be exercised. There was tension between a court having such residual jurisdiction and the need to have finality in litigation, so that it was necessary to have a procedure which would ensure that proceedings would only be reopened when there was a real requirement for that to happen. The need to maintain confidence in the administration of justice made it imperative that there should be a remedy in a case where bias had been established and that might justify the Court of Appeal in taking the exceptional cause of reopening proceedings which it had already heard and determined. It should however, be clearly established that a significant injustice had probably occurred and that there was no alternative effective remedy
>
> ...."

16. From the above decisions we gather that:

    1. The power of reviews before this Court is not provided for in our Rules hence this Court has not been statutorily conferred with the jurisdiction to reopen a decided matter.

2. That notwithstanding, this Court has residual jurisdiction to reopen a decided matter.

3. The jurisdiction to do so is only available in exceptional and limited circumstances where it is apparent that the usual principle of finality might work injustice and when circumstances of a substantial and compelling character make it necessary to do so.

4. That the jurisdiction is exercisable in cases of fraud, bias, or other injustice in cases where a manifest wrong has been done and it is necessary to pass an order to do full and effective justice with a view to correct the same and to boost the confidence of the public in the system of justice.

5. That the jurisdiction is available at a stage in which the court is normally deemed to have lost jurisdiction over the case or the subject matter involved in the appeal.

6. That to justify reopening of the matter, there must be a probability of a significant, real or substantial injustice or miscarriage of justice without an effective alternative remedy.

17. The basis upon which this application is brought is that the Court, in reaching its decision, did not factor in some material evidence presented before it which, had it been factored in, would have tilted the decision in the applicant's favour. For the applicants to succeed in this type of application, they must go further and show that as a result of the omission to consider the alleged material, there was "a probability of a significant, real or substantial injustice or miscarriage of justice without an effective alternative remedy". In other words, the applicant ought to show that had the Court considered the said documents it would have probably arrived at a different determination. Apart from bare averment, no effort was made by the applicant to show how this Court, upon consideration of the alleged material, would have reached a different determination. In our view, the issues of valuation and what portions to be given to which beneficiary are issues which can be dealt with during distribution of the estate hence there is an alternative remedy to the applicants' grievances.

18. We agree with the respondents that what the applicants seek, in this application is a re-consideration of the material placed before the Court in order to arrive at a different finding. By doing so, this Court would, in effect be sitting on an appeal against the said judgement, and that is not the purpose for which the very limited jurisdiction of review is exercised.

19. We find no merit in the Notice of Motion dated 7th June 2024 which we hereby dismiss with costs.

20. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 28TH DAY OF MARCH, 2025.

J. LESIIT

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JUDGE OF APPEAL ALI-ARONI

.....**.....**

JUDGE OF APPEAL

G. V. ODUNGA

.....**.....**

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR