Khauka (Administrator of the Estate of Luka Masakha) v Wepukhulu (Civil Appeal 134 of 2019) [2025] KECA 707 (KLR) (25 April 2025) (Judgment)

Neutral citation: [2025] KECA 707 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 134 OF 2019

HM OKWENGU, JM MATIVO & JM NGUGI, JJA

APRIL 25, 2025

BETWEEN

ALFRED WAFULA KHAUKA .... APPELLANT

ADMINISTRATOR OF THE ESTATE OF LUKA MASAKHA

AND

GEORGE WEPUKHULU .... RESPONDENT

(Being an appeal from the ruling and order of the Environment and Land Court at Bungoma (Olao, J.) dated 9{{^th}} May, 2019 in ELC Case No. 11 of 2019)

JUDGMENT

1. The genesis of the present appeal is in Bungoma High Court Succession Cause No. 15 of 1999. In that cause, the appellant filed for letters of administration in respect of the Estate of his father, Luka Masakha (deceased).

2. Prior to the deceased's death, one Cosmas Austin Wepukhulu (Cosmas), the father to the respondent herein, had laid claim to a parcel of land measuring 3.5 acres, which was part of Land Parcel No. East Bukusu/South Kanduyi/121 (suit land) registered in the name of the deceased. Cosmas claimed that he had purchased the 3.5 acres from the deceased on 29th September, 1968, and that the purchase price included cash payment and payment of the appellant's school fees totaling to Kshs. 1,200./=.

3. When the deceased died before the issue was resolved, and pursuant to Rule 17 of the Probate Administration Rules, Cosmas lodged an objection in the succession cause stating that his interest was not catered for by the appellant because he was not included as a purchaser and beneficiary of the 3.5 acres to be excised from the suit land yet he has always been in possession of it. He feared that the appellant would distribute the suit land without recognizing his interest.

4. During trial in the succession cause, the appellant admitted that the deceased had entered into a land purchase agreement for the said 3.5 acres and the consideration was payment of his school fees at the National Youth Service (NYS). However, he claimed that Cosmas only paid Kshs. 600./=, hence he did not complete school. His position, therefore, was that the respondent was not entitled to the 3.5 acres.

5. In his ruling dated 1st February, 2006, J.K. Sergon, J. held thus:

> "I have considered the objection and I am not convinced that it can oust the rights of the petitioner to seek for the administration of his father's estate. In my view, the objector's rights will not be affected in any way even if the grant of representation is given to the petitioner.
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> In fact, it will be of great help to the objector if the grant is given to the petitioner because at the end of the day the objector will have a legal representative of the Estate of Luka Masaka, deceased whom he can sue.
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> In the end, I see no merit in this objection. The objector's claim may be dealt before the grant is confirmed. It is incumbent upon the objector to be vigilant. In the end I see no merit in the objection. It is dismissed with no order as to costs. I direct that the grant be issued to the petitioner forthwith to forestall any further delay in the matter."

6. The record shows that, thereafter, Cosmas filed a protest against the confirmation of grant through his advocate, Mr. Situma, but later withdrew it and, instead, gave instructions for an Originating Summons claiming adverse possession to be filed.

7. Thereafter, an originating summons dated 9th January, 2014, was filed in Bungoma Environment and Land Court Case No. 11 of 2014 between the respondent and appellant herein. In it, the respondent prayed for the determination of the following questions:

    1. Whether the said Alfred Wafula Khauka is the administrator of the estate of Luka Masakha.

    2. That George Wepukhulu be declared the owner through adverse possession of land measuring 3.5 acres from land parcel no. East Bukusu/South Kanduyi/121 which he has occupied uninterrupted from 1988 to date.

    3. That the court do order that the applicant be registered as the owner and proprietor of the portion of the said parcel of land East Bukusu/South Kanduyi/121 and the respondent to facilitate the transfer.

    4. That the court do order subdivision of land parcel no. East Bukusu/South Kanduyi/121 into two portions with 3.5 acres to be transferred to the applicant.

    5. That such further relief this court deems fit to grant be also granted.

    6. That the costs of this summons be paid and borne by the respondent.

8. The originating summons was accompanied by a verifying affidavit and supporting affidavit of George Wepukhulu of even date wherein he averred that: on 29th September, 1968, his father bought 3.5 acres from the deceased to be hived from the suit land; upon purchase of the said land parcel, the purchase price was duly paid which included paying school fees and cash; that his father later took possession of the said land parcel with very clear demarcations and later in 1988, he (respondent) took possession of it; upon taking occupation, his father gifted him the said parcel and he has been in peaceful occupation till the vendor (deceased) died and the appellant was sued as the administrator of his estate; upon the death of the deceased, he had peacefully resided on the said land parcel till 2001 when he learnt

that the appellant had filed a succession cause and had deliberately omitted his name in the list of beneficiaries; the suit land is currently registered under the name of the deceased and the appellant is the administrator of his estate; he has now acquired title of the said land parcel by adverse possession; and the court should order the sub division of the suit land to enable him get his title.

9. It is not clear from the record why the originating summons was taken out by the respondent and not his father; and, if the father was dead, whether the respondent sued as a personal representative to his estate. In any event, the suit was not defended. The appellant did not enter appearance and it proceeded ex parte. In his judgment dated 30th July, 2015, S. Mukunya, J., , held thus:

> "The plaintiff avers that since 1988 to date, he has been in a continuous and peaceful occupation of the same. That the registered owner Luka Masakha died leaving the plaintiff/ applicant in the suit land.
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> That thereafter the son of Luka Masakha, one Alfred Wafula Khauka filed a Succession Cause in the High Court at Bungoma Succession Cause No. 15 of 1999 and a certificate of confirmation of grant was issued to the said Alfred Kkauka on 30/1/2013 and the land was distributed to the deceased beneficiaries:
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> Alfred Wafula Khauka – 6.4 acres Gabriel Bernard Masakha – 4.7 acres Stephen Wafula Masakha – 4.7 acres Felistas Namalwa Masakha – 4.7 acres Hesbon Wafula Masakha – 5.5 acres Redempter Nanyama Masakha – 5.5 acres
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> The applicant avers that the beneficiaries deliberately left out the applicant in the Succession Cause though they knew he was on the land.
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> The applicant states that the respondent is the administrator of the estate of Luka Masakha aforesaid.
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> The applicant avers that by the time this grant was confirmed in 2014, he had already acquired 3. 5 acres of the same, the area he occupies by adverse possession for being on the land for a period in excess of 12 years.
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> The applicant says that the area he occupies has no dispute with the heirs. He says he is still on the ground and fully in occupation of the 3.5 acres that are well demarcated. The hearing notice for this case for 08/06/2015 was served on the respondent by Mr. Peter Masika on 13/4/2015. Despite that, the respondent never attended the hearing. There is no doubt that the applicant has been in peaceful continuous and uninterrupted occupation of 3.5 acres of the suit land since 1968. He put up his house in 1996. The area he has occupied is distinctively marked. It is known to the respondent.
>
> No one has challenged this originating summons. By the time the respondent was granted the letters of administration of the estate of the late Luka Masakha, the applicant had acquired the title by adverse possession of 3.5 acres. This fact which was known by the beneficiaries should have been disclosed to the Succession Court. The 3. 5 acres were therefore not available for distribution as part of the estate of Luka Masakha. The heirs knew this since the applicant herein has lived there all along. Indeed, he is still there now.
>
> I do order that the 3.5 acres in which the applicant occupies shall be surveyed and a separate title shall issue. The same shall be hived from the suit land. The said 3.5 acres shall be registered in the name of the applicant absolutely.
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> The Land Registrar Bungoma shall ensure no further transaction shall be registered on the suit land until the 3.5 acres are registered in the name of the applicant.

These are the orders of the Court."

10. There was no appeal against the above judgment. Instead, the appellant herein filed a notice of motion application dated 4th April, 2017, for the following orders:

    1. That service of this application be and is hereby dispensed with at the 1st instance due to urgency.

    2. That there be a stay of execution of the ex-parte judgment herein and all consequential orders pending the hearing and determination of this application inter-parte.

    3. That the respondent/applicant be and is hereby granted leave to cross examine Peter Masika on the contents of his affidavits of service dated 7th March, 2015 and 28th May, 2015.

    4. That the ex-parte proceedings herein dated 8th day of June, 2015, the ex-parte judgment dated 30th July, 2015, and all the consequential orders be set aside, the respondent/applicant be granted leave to file a replying affidavit out of time to the originating summons herein and the draft replying affidavit hereto annexed be deemed to be duly filed subject to payment of the requisite court fees.

    5. That costs of this application be provided for and be borne by the applicant/respondent.

11. The grounds listed on the face of the notice of motion were that:

    1. Ex-parte judgment was delivered against the defendant/applicant herein on the 30th July, 2015, after the suit was heard ex-parte on the 8th day of June, 2015.

    2. The defendant/applicant was not served with either the summons to enter appearance, the originating summons, the hearing notice dated 29th January, 2015, or any other document prior to the hearing of this suit.

    3. The defendant/applicant has a good defense to the suit that raises triable issues and has overwhelming chances of success but has been totally locked out of this suit and therefore condemned unheard.

    4. The plaintiff/respondent is in the process of executing the judgment and has filed the application dated 27th day of January, 2017, for the purposes of implementing the ex-parte judgment.

    5. This application has been brought without inordinate delay.

12. The notice of motion application was accompanied by the appellant's supporting affidavit of even date. The appellant also filed submissions in support of his application.

13. The notice of motion application was opposed by the respondent on the following grounds among others, that: he had already commenced the execution process of getting the title deed for his portion of the suit land as per the court order; the defendant/applicant was served with all the pleadings by the process server and the defendant/applicant did not annex a defense. Additionally, he denied the appellant's allegation of mistaken identity and that the proceedings of the Succession Cause ran parallel with his suit/claim for adverse possession.

14. This application to set aside the ex parte judgment came up before S. Mukunya, J. In dismissing it, the learned Judge stated that:

"4. Having perused the entire Succession case, the application herein and all annextures, I note that the respondent herein was an objector in the Succession Cause. The Court dismissed that objection and advised him to wait for the administrators of the estate of the deceased to be appointed. He did so. He filed this suit thereafter. There were no parallel suits as alleged by the applicant. I am convinced that the parties herein live on the same land and know each other. There could not have been a case of mistaken identity in serving the applicant.

I am inclined to believe that once he got the letter of administration of the estate of the deceased and land parcel East Bukusu/South Kanduyi/121 was distributed to the heirs by the Succession Cause, he was complacent and that is why he told the process server to serve the summons and pleadings on M/s J.O. Makali & Co. his lawyers in the Succession Cause.

I am persuaded on balance of probabilities that the applicant was duly served with summons to enter appearance and other pleadings. He was also served with the hearing notice for the 8/6/2015 and failed without any good reason to attend the court. He was therefore aware of the case.

The orders:

5. This application is not merited. It is dismissed with costs to the respondent."

15. Again, the appellant did not appeal against this decision by Mukunya J. which was dated 4th October, 2017. Instead, he took out a notice of motion dated 25th September, 2018, for the following orders:

a. That service of this application be dispensed with in the first instance.

b. That there be a temporary stay of execution, action or any process pursuant to the decree herein pending inter-parte hearing of this application.

c. That it pleases the Honourable Court to review, vary and/or set aside the ex-parte decree herein on such terms it deems fit.

d. The suit herein be set down for hearing inter- parte and be struck out for want of jurisdiction.

e. Costs be provided for.

16. The grounds appearing on the face of that application were as follows:

1. There is an error apparent on face of the record.

2. There are factors sufficient to warrant revision of the court orders as the estate has not been fully administered and the suit parcel is still in the deceased names.

3. The plaintiff/respondent claims if any ought to have been filed and canvassed in the succession cause as the law does not confer any jurisdiction to this subdivision and transfer part of an estate as it occurred.

4. The plaintiff's objection was dismissed because he is not a beneficiary but he could lodge a claim during confirmation which window is still open.

5. The orders and/or judgment of the Honourable Court has paralyzed or literally occasioned difficulties to conclude the succession process.

6. That interests of justice demand that the Honourable Court revises or reviews its decree to enable the estate be fully administered.

17. The application was accompanied by the appellant's supporting affidavit dated 26th September, 2018.

18. The respondent opposed the application vide his replying affidavit dated 19th November, 2018, wherein he averred that: the applicant did not participate in the suit proceedings that led to the judgment dated 30th July, 2015, therefore he could not seek review thereof under the invoked provisions of the law; there was no error apparent on the face of the record; the mode of distribution as granted in the confirmation of grant was subject to the judgment dated 30th July, 2015; he chose to file a separate cause against the applicant which was granted by the land court; his father filed an objection against the applicant whilst he filed a suit for adverse possession against the applicant; the judgment dated 30th July, 2015 has not paralyzed land occupation of any party to the suit as they are all in separate parcels of land that have been demarcated by rural access road; he chose a clear way to claim the share of land parcel he had occupied for over twenty (20) years hence the wishes of the applicant were not made in good faith; his claim was valid as he was able to establish that he had been in occupation of the said land parcel for over twenty (20) years; and there had been an inordinate delay since the applicant filed appearance on 21st March, 2017.

19. In a ruling dated 9th May, 2019, which is the subject of this appeal, Boaz N. Olao, J. dismissed the application with costs. In doing so, the learned Judge made the following determination:

> " I have considered the application, the rival affidavits and submissions by counsel.
>
> What is clear from the record herein is that by an Originating Summons dated 9th January 2014 and filed herein on 17th January 2014, the Plaintiff/Respondent sought the main order that he be registered as the proprietor of a portion measuring 3½ acres from land parcel NO East Bukusu/South Kanduyi/121 (the suit land) then registered in the names of Luka Masakha (deceased) but whose Estate was being administered by the Defendant/Applicant herein. The plaintiff/Respondent's claim to the suit land was hinged on adverse possession having been in occupation thereof since 1968 when his father had purchased it from the deceased. It would appear from the record that the Defendant/Applicant did not file any response to the Originating Summons and on 8th June 2015, the hearing proceeded ex–parte before Mukunya J who delivered a Judgment on 30th July 2015 directing that 3½ acres out of the suit land be registered in the names of the plaintiff/Respondent.
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> An application by the defendant/Applicant dated 4th April 2017 seeking to set aside the said Judgment and also to cross – examine the Process Server and allow the filing of a Replying Affidavit out of time was dismissed by Mukunya J by his ruling dated 4th October 2017. No appeal appears to have been filed against the ruling. I cannot therefore re-visit the issue of setting aside the ex- parte Judgment because that was dealt with by Mukunya J and dismissed in his ruling dated 4th October 2017 and is therefore res – judicata.
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> The defendant/Applicant has also asked that the suit be struck out for want of jurisdiction. The suit has already been heard, determined and a decree drawn. No appeal was filed against the Judgment delivered on 30th July 2015 by Mukunya J. There is really no suit capable of being struck out for want of jurisdiction. That is water under the bridge. Even assuming that the issue of jurisdiction was properly raised, there is nothing to show that Mukunya J had no jurisdiction to determine the dispute before him which was based on a claim of adverse possession.
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> What I gather from the submissions by Mr Sichangi Advocate is that since the suit land was registered in the names of the deceased and was part of the subject in Bungoma Succession Cause – No 15 OF 1999, then Mukunya J should not have determined this case. This is what Mr Sichangi has submitted:-

"Your Lordship our big argument is that the land Court is essentially the Court that deals with those parcels of land that are registered in the names of living persons. When this Honourable Court heard and determined a suit in respect of land registered in the names of a deceased person even if succession was pending, it was an error."

The answer to that submission is that a claim for adverse possession can be instituted against the Estate of a deceased person. This was confirmed in Karuntimi Raiji .v. M'makinya M'itunga C.a Civil Appeal No 325 Of 2009 (2013 eKLR). See also Section 2(1) of the *Law Reform Act* which provides that:-

"Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or as the case may be, for the benefit of his estate:

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery."

....

Having elected not to appeal the Judgment of Mukunya J delivered on 30th July 2015, the Defendant/Applicant, as the Administrator of the Estate of the deceased, has no option but to abide by the decree that followed."

20. We must also add that the record also shows the existence of an order issued on 25th August, 2016, by Aroni, J. as she then was. This order was mentioned by the appellant in his pleadings with regard to the application for review above and it read as follows:

    1. That the caution placed by Cosmas Wepukhulu on land parcel E. Bukusu/S. Kanduyi/121 on the 9th day of 2009 be and is hereby lifted.

    2. That the restriction placed by the Lands Registrar, Bungoma on land parcel LR. NO. E. Bukusu/S. Kanduyi/121 on the 15th day of July, 2009 be and is hereby lifted.

    3. That costs of this application be provided for.

21. Aggrieved by the decision of the Environment and Land Court, the appellant filed a Notice of Appeal dated 13th May, 2019, and a Memorandum of Appeal dated 12th July, 2019, in which he raised five (5) grounds of appeal. These are that:

    1. The learned trial judge erred in law and fact when he scantily, narrowly and hesitantly analyzed or avoided concrete and fundamental issues that were raised in the review application thereby arrived at a wrong conclusion of the matter.

    2. The learned trial judge erred in law and fact when he held that there was inordinate delay when infact evidence on record pointed to the contrary and the fact that two courts were dealing with the same matter. The authority that the Court of Appeal upheld review after four years was at hand.

    3. The learned trial judge erred in law and fact when he held that reviewing a ruling or a judgment is subject to the doctrine of res-judicata.

    4. The findings on simultaneous proceedings for adverse possession and succession in respect of the same estate were not supportable as held by the Honourable trial judge.

5. The entire ruling is contrary to the weight and veracity of the evidence adduced in favour of the appellant.

1. Consequently, the appellant prayed that the appeal be allowed with costs to be borne by the respondent, and the entire ruling of the Environment and Land Court be set aside and the ex-parte judgment on record be vacated.

23. During the virtual hearing of the appeal, learned counsel Mr. Sichangi appeared for the appellant, whereas there was no appearance for the respondent even though he was served with the hearing notice as attested by the hearing notice on record which was sent via email on 5th May, 2024, to both advocates on record. The appellant had filed written submissions which he relied on entirely. The respondent did not file any written submissions.

24. The appellant contended that the ex-parte judgment dated 30th July, 2015, has never been effected as the suit land referred to was non-existent and titles have been issued to the beneficiaries. For this reason, there is need to review the previous orders to ensure justice is done. He further contended that during the hearing of the objection filed by Cosmas evidence led by Cosmas himself showed that he had never completed paying the consideration for the purchase of the land. It was, therefore, he argued, improper for the time for adverse possession to start running when Cosmas was yet to complete paying the purchase price.

25. The appellant also submitted that the learned judge failed to tackle "the serious omissions and disparities on whether the Environment and Land Court had jurisdiction to hear a dispute over land in the name of a deceased person." He argued that since the suit land was subject to succession, the respondent ought to have done a search to verify its registration before lodging his claim. Further, that the jurisdiction of the Succession Court and Environment and Land Court are separate and, therefore, the order issued by the Environment and Land Court created a situation that "cannot be resolved."

26. For his third point, the appellant submitted that the discretion of the Environment and Land Court to revise its own order is not fettered as it should always look at the guiding principles such as an error apparent on the face of the record, delay and prejudice. And in this particular case, the suit land had been transmitted under the Succession Court to the beneficiaries.

Thus, the order issued by the Environment and Land Court ought to be reviewed and/or vacated.

27. Turning to the regularity of the ex parte judgment, the appellant contended that even though the learned judge held that he was served with pleadings and originating summons, the process server was never cross-examined and being a layman, he did not understand if the service was for a fresh case or the succession proceedings that were on going at the time. According to him, the process server ought to have served the firm of J.O. Makali & Co. Advocates hence the conclusion by the learned judge that he was properly served was erroneous. Similarly, he contended that the learned judge erred when he held that the respondent/applicant in the originating summons was the objector in the Succession Cause. He submitted that the objector in the Succession Cause was Cosmas Austin Wepukhulu, whereas the applicant in the originating summons was George Wepukhulu (the respondent herein); and he never stated in his pleadings whether he was a legal administrator of the objector or an appointee or an attorney. Thus, the Environment and Land Court conducted proceedings without confirming the respondent's legal capacity to bring the suit.

28. Further, the appellant contended that once it was disclosed that the suit land was in the name of the deceased, the matter ought to have been struck out and referred to the Succession Court.

29. Finally, the appellant submitted that whereas the court in Bungoma ELC No. 11 of 2014 held that 3.5 acres be excised from the suit land before anything is done, the court in Bungoma Succession Cause No. 15 of 1999 ordered the cancellation of all restrictions placed by the Land Registrar following the decree in the Environment and Land Court. Therefore, the Land Registrar proceeded to register the confirmed grant and issued titles to the beneficiaries as ordered. For this reason, he submitted that this has created conflict and confusion which required the ELC to review its orders and allow the parties to ventilate their issues in a fresh hearing.

30. We have considered the pleadings in the record of appeal, the rulings and judgments of the Probate Court and Environmental Court, the appellant's grounds of appeal and submissions and the oral submissions of the appellant bearing in mind our obligation to re-consider and re-evaluate the evidence and come up with independent conclusions. See Selle vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123 and Abok James Odera T/A A. J. Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR. In our view, the singular issue for determination is whether the learned Judge was correct in declining to review the ruling of 4th October, 2017 on the grounds presented by the appellant to the court.

31. It is important to recall that in his application dated 25th September, 2018 which was the subject of the impugned ruling,the appellant requested the court to review its ex parte judgment dated 30th July, 2015. Before filing the application dated 25th September, 2018, the appellant had approached the trial court with an application to set aside the ex parte judgment. As rehashed above, in a ruling dated 4th October, 2017, the court declined the appellant's invitation to set aside the ex parte judgment entered in the suit. The application dated 25th September, 2018 was, therefore, not an appeal against the ruling dated 4th October, 2017. The appellant elected not to appeal against that application. Instead, he elected to pursue a review against the ex parte judgment dated 30th July, 2015. This strategic choice is important because it limits the types of arguments the appellant could present before the court to urge the review.

32. Before this Court, almost all the points taken up by the appellant are, in fact, not points attacking the learned Judge's ruling dated 19th May, 2019 which is the subject of this appeal. Instead, the points taken up are grounds attacking either the ex parte judgment dated 30th July, 2015 or the ruling dated 4th October, 2017 declining to set aside the ex parte judgment. Unfortunately for the appellant, neither of those decisions are on appeal before us. What is on appeal before us is the ruling by Olao J. dated 19th May, 2019 declining to review the ex parte judgment dated 30th July, 2015. As such, it was incumbent upon the appellant to demonstrate to us how the trial court erred in declining to review the ex parte judgment of 30th July, 2015.

33. The learned Judge was correct that the application that was before him is governed by Order 45 Rule 1 of the Civil Procedure Rules. That Rule reads as follows:

1(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." Emphasis added.

34. Under this governing regulation, there are three circumstances under which an order for review can be made. The applicant can demonstrate to the court that there has been 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. Secondly, the applicant can demonstrate to the court that there is some mistake or error apparent on the face of the record. Thirdly, an application for review can be made for any other sufficient reason.

35. Our case law has defined the outer limits of each of these grounds. Respecting the ground of discovery of new and important matter or evidence, this Court held in Francis Origo & Another v Jacob Kumali Mungala [2005] KECA 356 (KLR) that for a review based on discovery of new evidence, the applicant must demonstrate that the evidence could not have been obtained with reasonable diligence during the original proceedings. The Court stated:

> " [I]t is clear that an applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason."

36. And, also, that:

> " Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end."

37. On when a court can review its decision on the ground of an error on the face of the record, the leading decision is National Bank

> of Kenya Ltd vs Ndungu Njau (Civil Appeal No. 211 of 1996) [1997] eKLR where the Court held:-
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> "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."

38. Similarly, in Paul Mwaniki vs National Hospital Insurance Fund Board of Management [2020] eKLR the Court 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 provisions of law cannot be a ground for review."

39. The Court added:

> "The term 'mistake or error apparent' by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for purposes of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. Put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/ decision. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it."

40. On the other hand, the phrase "any other sufficient reason" has been subject to judicial interpretation to determine its scope and application. The key case is Wangechi Kimita & Another v. Mutahi Wakabiru [1980-88] 1 KAR 977 where this Court held that the phrase should be interpreted broadly and is not confined to grounds analogous to discovery of new evidence or error apparent on the record. This means that courts have the discretion to grant a review for reasons other than those explicitly listed, provided they are sufficient to warrant such a review. As per Nyarangi, JA:

> " I see no reason why any other sufficient reason need be analogous with the other grounds in the order because clearly section 80 of the *Civil Procedure Act* confers an unfettered right to apply for a review and so the words "for any other sufficient reason" need not be analogous with the other grounds specified in the order: see Sadar Mohamed v Charan Singh (1959) EA 793 ."

41. Even while our jurisprudence is that the phrase "any other sufficient reason" is given a flexible interpretation, the review jurisdiction of the court cannot be used to reverse a reasoned decision of the court or to re-appraise evidence or to attack the process of reasoning by a court. These types of grievances must be processed through an appeal. A decision that a party feels is erroneous cannot be corrected in the guise of the power of review.

42. In the case that was before Olao, J., the appellant was obligated to bring his case within one of these defined grounds under Order 45 Rule 1 in order to succeed. He chose to shoehorn himself under the ground "error on the face of the record." According to the appellant, the error on the face of the record was that the ELC did not have jurisdiction to determine the questions that it did in the originating summons because the suit land was in the name of a deceased person and, furthermore, the suit land was the subject of a succession cause. The learned Judge considered this argument and rendered himself as follows:

> " My understanding of the Defendant/applicant's Notice of Motion dated 26th September 2018 is that it seeks a review of the Judgment dated 30th July 2015 and the decree that followed since there is an error on the face of the record because the plaintiff/Respondent's claim ought to have been made in Bungoma Succession Cause No 15 of 1999. The answer to that plea is that a succession Court cannot determine a claim in adverse possession – Stephen

Munene Gachuiri & Another .v. Wanoi Karani C.a Civil Appeal No 273 OF 2007 (as consolidated with NO 274 OF 2007). See also Vincent Gatimu Gitaku .v. Charity Wangechi Ngari Kerugoya Elc Case No 353 OF 2013 (2017 eKLR). Therefore, the fact that Mukunya J delivered a Judgment concerning property that had been the subject of a succession cause is not in my view, an error apparent on the face of the record to warrant a review of that Judgment. If anything, that can only be an error of law which is not a ground for review – NAtional Bank Of Kenya .v. Ndungu Njau C.a Civil Appeal No 211 OF 1996."

43. We are in complete agreement with the reasoning and analysis of the learned Judge. A question of jurisdiction is not one that can be contested in a review application. It is a substantive question of law which can only be determined in an appeal. What the appellant was urging before Olao, J. was, in essence, that his colleague at the ELC, Mukunya, J., had committed an error in entertaining a suit over which he had no jurisdiction; that jurisdiction belonged to the probate court. With respect, the learned Judge was correct in declining the invitation to sit in a disguised appeal against a decision of another ELC Judge.

44. The analysis is exactly the same for the argument that the respondent did not have capacity to file his suit in the Environment and Land Court as he had no letters of administration for the estate of his father, Cosmas, and that it was not clear in what capacity the respondent filed the suit on behalf of his father. This may, indeed, have been a good ground for appeal against the ex parte judgment of 30th July, 2015 – but it could not be a viable ground for review of the ex parte judgment before the same court.

45. Similarly, the appellant could not attack the regularity of the ex parte judgment in the application for review; and neither can he do so in this appeal. If the appellant was aggrieved by the trial court's conclusion that the ex parte judgment was, in fact, regular, he ought to have taken out an appeal against the trial court's ruling dated 4th October, 2017 to contest the trial court's finding that the ex parte judgment was regular. It is in an appeal against that ruling that he would have been able to urge his claim that he was not served with the originating summons and that Mukunya, J. was wrong to so find. He lost that opportunity when he elected to forgo an appeal against that decision and, instead, file an application for review.

46. The appellant's claim that the evidence before the probate court had shown that the respondent's father never completed paying the consideration for the land he had allegedly bought from the deceased fares no better. The train for that factual contestation left the station when he elected not to pursue an appeal against the ruling dated 4th October, 2019. Only that application or an appeal reversing the learned Judge's ruling would have permitted the appellant an opportunity to reopen the adverse possession suit and give him an opportunity to present evidence contesting the respondent's possession that he had established all the ingredients for a favourable finding of adverse possession.

47. Finally, the appellant's argument that there now exists two conflicting court orders – one from the probate court; and the other from the ELC – respecting the distribution of the deceased's estate, is not a sufficient reason to warrant a review and reopening of the ELC case. As the learned Judge intimated, the import of the ELC judgment is that the 3.5 acres occupied by the respondent is no longer part of the estate of the deceased it having been acquired by adverse possession by the respondent. This means that the estate of the deceased is less 3.5 acres of what the probate court distributed through the Certificate of Confirmation of Grant. It is up to the appellant, as the administrator, to know what to do to regularize matters to take into account this loss of 3.5 acres.

48. We have said enough to demonstrate that the appeal herein is without merit and must fail. We hereby dismiss it. We note that the respondent did not participate in the appeal at all. We, therefore, order that there will be no order as to costs.

49. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF APRIL, 2025.

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR