



REPUBLIC OF KENYA



**Mwiandi (Suing as the Legal Representative of the Estate of Mwiandi
Kaibiru) v Mukungi; Mwiandi (Applicant) (Civil Appeal (Application)
79 of 2019) [2025] KECA 1219 (KLR) (4 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1219 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL (APPLICATION) 79 OF 2019
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA
JULY 4, 2025**

BETWEEN

**EVANGELINE KANYUA MWIANDI APPELLANT
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MWIANDI
KAIBIRU**

AND

GILBERT KATHENYA MUKUNGI RESPONDENT

AND

KINYUA GIDEON MWIANDI APPLICANT

*(An application for review and setting aside of the Ruling and Order
of the Court of Appeal (Karanja, JA.) in Civil Appeal No. 79 of 2019)*

RULING

1. The applicant in the appeal was Evangeline Kanyua Mwiandi (as the legal representative of the Estate of Mwiandi Kaibiru). The applicant has approached us by notice of motion said to be anchored on various provisions of law - Article 50(1) of the Constitution, section 80 and section 1A and 1B of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules (the Civil Procedure Act and rules made thereunder have no application to the procedures of this Court); rules 102 (1) and (3) of the Court of Appeal Rules and the inherent jurisdiction of the court. The applicant prays in the main that a firm of lawyers be granted leave to come on record for the applicant post judgment;

“That this Honourable Court be pleased to vary, set aside and/review its orders/ruling issued on 7/6/2024.”;



that we be pleased to allow the application for substitution of the appellant and revival of the appeal in Civil Appeal No. 79 of 2019.

2. In the grounds in support of the application and in a supporting affidavit of Kinyua Gideon Mwiandi who says that he is the applicant and he is competent to make the affidavit he says amongst other things that this Court in a ruling delivered on 7th June, 2024 dismissed his application dated 19th April, 2024 after finding that the annexed grant was not helpful as the grant should have been in respect of the applicant's late mother, not his late father; that there was delay in filing the application and the same was compounded by the applicant filing the wrong document in support of the application. The applicant claims that the finding of the Judge was a mistake or error on the face of the record.
3. Perhaps a brief visit to the history of the matter will bring the Motion to proper perspective.
4. The respondent, Gilbert Kathenya Mukungi filed Meru Environment and Land Court (ELC) case No. 410 of 1991 against Gideon Mwiandi Itangi alias Mwiandi Kaimbiru. That suit was transferred and became Chuka ELC Case No. 410 of 1991. Gideon Mwiandi Itangi died on 8th October, 1997 during the pendency of the suit. His widow, Evangeline Kanyua Mwiandi was enjoined to the suit on 5th September, 2016 as the legal representative of his estate. She died on 13th April, 2021 during the pendency of the appeal after Chuka ELC Case No. 410 of 1991 had been determined in favour of the respondent.
5. The applicant filed an application for substitution which was considered by W. Karanja, JA. who in the ruling the subject of the current Motion found it without merit after finding that the grant annexed to the application was the grant in respect of Gideon Mwiandi Itangi instead of that of his widow Evangeline Kanyua Mwiandi who had been enjoined to the suit. The single Judge also found that there had been inordinate delay in bringing the application. The applicant now tells us in this application for review or setting aside that the grant annexed to the application was the rightful grant:

“ ... as the same was in regard to the estate of Gideon Mwiandi Itangi alias Mwiandi Kaimbiru, the original defendant and sole proprietor ...”
6. Further, that the grant was obtained from the High Court at Meru on 15th February, 2024 and thus there was no delay; that the applicant wishes to be substituted as the legal representative of the estate of his late father (Gideon), the original defendant in place of the appellant and that the applicant will suffer great prejudice if the application is not granted.
7. In a replying affidavit by the respondent Gilbert Kathenya Mukungi who says amongst other things that the application has no merit and should be dismissed; that judgment in the original suit was delivered on 23rd October, 2018 in favour of the respondent; Evangeline appealed the said judgment but died when the appeal was pending; since there had been no substitution the appeal was marked as abated on 6th November, 2023; that the applicant sought to be substituted in place of his late father (Gideon); that the decree has been executed; that there is no error on the face of the record.
8. It seems to us that what the applicant is attempting to do is what is contemplated by rule 57 of the *Court of Appeal Rules*, 2022 which provides that:

“ 57. Reference from decision of a single judge

1. Where under the proviso to section 5 of the Act, any person, being dissatisfied with the decision of a single judge-

a.



- b. in a civil matter, wishes to have any order, direction or decision of a single judge varied, discharged or reversed by the Court, that person may apply therefor informally to the judge at the time when the decision is given or by writing to the Registrar within seven days thereafter.
2. At the hearing by the court of an application previously decided by a single judge, no additional evidence shall be adduced.”
9. That rule gives an applicant a right to approach the court after the decision of a single Judge by applying informally to the single Judge or by writing to the Registrar within 7 days of that decision. No additional evidence is allowed to be given at the hearing before the Court.
10. What the applicant has done here is to file an application, different from the one before the single Judge asking the court to stay, set aside and/or review the ruling of the single Judge.
11. We are unable to grant the application as the rules are clear on the steps to be taken where one is aggrieved by the decision of a single Judge.
12. W. Karanja, JA. sitting as a single Judge considered the application where the applicant was asking to be substituted to take over the case of his late father. The Judge found that the applicant should have obtained a grant in respect of his late mother, who had been substituted and became a party in the suit before ELC.
13. This Court, as the apex court pre-the *Constitution* of Kenya, 2010 did not entertain applications for review or setting aside of judgment or ruling. That position was altered slightly with the onset of the new constitutional dispensation where the *Constitution* created a Supreme Court. But even in this new dispensation applications for review or setting aside of judgment or rulings of this Court are rare and not common-place. We still do not have provision in our rules for review or setting aside of our judgments or rulings. As was held in a ruling of this Court in *Ndubi v Standard Limited* (Civil Application 74 of 2019) [2021] KECA 364 (KLR) (19 March 2021):
- Reviews were not provided for in the Court of Appeal Rules. They were not to be thought of as commonplace exercises to be sought as a knee-jerk response to decisions of the court that did not flatter a party’s fancy. The Court of Appeal entertained applications for review only in exceptional circumstances where it was apparent that the usual principle of finality could work injustice...”
14. In the event that the applicant intended that the application be a reference to the full Court under rule 57 of the rules, having looked at the ruling of the single Judge, we cannot see any error on the face of the record it has no merit and we dismiss it with costs to the respondent.

DATED AND DELIVERED AT NYERI THIS 4TH DAY OF JULY, 2025.

S. OLE KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

ALI – ARONI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

