



**Mbuthu & another v Wanja & another (Civil Application
E061 of 2023) [2024] KECA 1387 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1387 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E061 OF 2023
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
OCTOBER 11, 2024**

BETWEEN

JULIA MBUTHU 1ST APPLICANT

CHARITY MUTHONI 2ND APPLICANT

AND

EVERLYN WANJA 1ST RESPONDENT

NAOMI MWENDWA MAJAU 2ND RESPONDENT

*(Being an application for re-opening, reviewing and/or set setting aside the judgment
and the consequential orders of the Court of Appeal at Nyeri (Okwengu, Sichale
& Mbogholi, JJ.A.) delivered on 29th July 2022 In Civil Appeal No. 100 of 2019)*

RULING

Background

1. Before us is a notice of motion dated 13th July, 2023 filed by Julia Mbuthu and Charity Muthoni (the 1st and 2nd applicants) expressed to be brought under Article 159 (2) (d) of the [Constitution](#) of Kenya, Sections 3, 3A & 3B of the [Appellate Jurisdiction Act](#), Section 3A of the [Judicature Act](#) and Rule 1(2) of the [Court of Appeal Rules](#), (this Court's Rules) against Everlyn Wanja and Naomi Mwendwa Majau (the 1st and 2nd respondents). The applicants herein are the daughters of M'Itunga M'Imbutu (the deceased) while the respondents are the widow and daughter respectively of Julius Majau M'Itunga (deceased) who was the only son of M'Itunga M'Imbutu (the deceased).
2. The application seeks orders in the main:
 - i. Spent



- ii. That pending hearing and determination of this application inter partes, the Court be pleased to issue an order of stay of execution of the judgment of this Court and its consequential orders in Nyeri Court of Appeal Civil Appeal No 100 of 2019
 - iii. That pending hearing and determination of this application inter partes, the Court do issue an order of inhibition stopping further dealings, registration and transactions over parcels of land known as Abogeta/U- Kithangari/3358, 3359, 3360, 3361, 3362, 3363 & Abogeta/U- Kithangari/3364, 3365, 3366 and 3367.
 - iv. That pending hearing and determination of this application inter partes, the Court do issue an order of maintenance of the pre-existing status quo of the estate of M'Itunga M'Ibutu.
 - v. The Court be pleased to re-open the appeal, review and/or set aside the judgment and its consequential orders in Nyeri Court of Appeal in Civil Appeal No I00 of 2019 delivered by the Court (Okwengu, Sichale & Mbogholi, JJA) on 29th July 2022.
 - vi. That upon granting prayer v above, the Court be pleased to issue an order of cancellation of all the resultant subdivisions of Abogeta/U-Kithangari/486 & Abogeta/U-Kithangari/732 and the same do revert to the name of M'Itunga M'Ibutu (the deceased).
 - vii. That the costs of this application be provided for.
3. The application is based on the grounds, inter alia:
- i. That in its judgment this Court overturned the High Court's judgment that found that the deceased's estate should be governed by the law of intestacy.
 - ii. That in its judgment this Court determined that the deceased had a valid will and upheld the distribution therein.
 - iii. That the applicants are the daughters of the deceased and bona fide beneficiaries of his estate.
 - iv. That there is discovery of new and important evidence that this Court did not have when making the decision regarding the authenticity of the deceased's will.
 - v. That there are exceptional circumstances where the need to obviate injustice outweighs the principle of finality in litigation.
 - vi. That this Court has residual jurisdiction and inherent powers to re-open the appeal, review and/or set aside its judgment and consequential orders, and further grant the prayers sought in the interest of justice.
 - vii. That there is need to preserve the suit property as it is in danger of being alienated by the respondents.
 - viii. There has been no inordinate delay in bringing this application.
4. The application is supported by a joint affidavit of the two applicants dated 13th July, 2023 and a supplementary affidavit of the 2nd applicant dated 22nd September, 2023 deponing that they discovered that there was a variance between the deceased's Identity card number indicated in the Will and that on the deceased's Identity card . That they reported the matter to the police for investigation and the outcome was that the deceased's Will had been forged as per the report of the Directorate of Criminal Investigations (DCI) hence their request that the judgment of this Court be reviewed and/or set aside.



5. A brief background will help place the application in context. Gladys Nkirote M’Itunga (the Petitioner) petitioned for Grant of letters of administration intestate in respect of the estate of her late husband, M’Itunga M’Imbutu (the deceased) in the High Court through Succession Cause No 46 of 2013. The Petitioner stated in the Petition that the deceased was survived by:
- a. Gladys Nkirote Itunga – Widow
 - b. Julia Mbuthu Itunga – Daughter
 - c. Charity Muthoni Itunga – Daughter
 - d. Lydia Maiti Francis – Daughter
 - e. Julius Majau M’Itunga – Son.

6. In the Petition, the assets of the deceased were listed as Abogeta/U.Kithangari/486, Abogeta/U. Kithangari/732 (the suit properties) and an account at Kenya Commercial Bank, Nkubu Branch.

On 8th January, 2015 letters of administration were issued to the Petitioner who proceeded to file an application seeking to have the letters confirmed. Subsequently, through an affidavit of protest, Julius Majau M’Itunga (the Objector) raised an objection deponing that the deceased left a Will outlining how his estate should be distributed which was read to the beneficiaries by Mr. Moses Kirima, advocate. The Objector formally filed and introduced the deceased’s Will before the court and called witnesses including Moses Kirima Dulu (OBW1) who told the court that on the instructions of the deceased on 22nd February 2012, he prepared a Will which was attested by two witnesses, one of whom was known to him, one Bernard Mwenda.

7. The Petitioner on the other hand stated that the deceased died intestate.

That in 2009, the deceased developed bad health and subsequently developed diminished mental capabilities and he was totally dependent on others for all his functions. The Petitioner further stated that in February 2012 when it is alleged that the deceased prepared a Will he was in very poor health and was incapable of writing a will.

8. After hearing the Succession Cause, the High Court (Gikonyo, J.) found in part as follows:

“...I am perturbed by one important thing: discrimination of daughters on the basis of gender and status...Hon. Kirima also stated that the deceased told him that he had given the bulk of his land to son(sic) because the daughters were married...He was so preoccupied with daughters taking more land yet they were married. Clearly, the deceased made the will to disinherit his own daughters. Accordingly, a will that offends the law and the *Constitution* is invalid. I find this will offends the law and the *Constitution*. Therefore on the basis of this finding, I declare the will herein invalid...In light thereof, the estate will be governed by law on intestacy. The deceased did(sic) intestate. He left a widow and the following children: Julia Mbutu, Charity Muthoni, Lydia Maiti and Julius Majau (deceased)...I now appoint Everlyn Wanja and Charity Muthoni Ikiugu as joint administrators of the estate. I make a grant to them. The grant is also confirmed in the above terms.”

9. The respondents herein were aggrieved by that decision and filed an appeal to this Court against the Petitioner being Civil Appeal No 100 of 2019. After re-evaluation of the evidence, this Court (Okwengu, Sichale & Mbogholi, JJA) found merit in the appeal and set aside the judgment of the High Court dated 13th December, 2018 holding that the law recognizes a testator’s power to distribute



his/her property as he/she deems fit as long as he/she has made reasonable provision for his/her dependants. This Court further found that:

“...the issue of unfair (or unequal) distribution was not raised by the parties. This was picked up by the trial judge who was “perturbed” by what he considered discrimination. In our view, he had no reason to do so as this was not an issue raised in the pleadings.”

10. Consequently, this Court directed that the estate of the deceased be distributed in accordance with the deceased’s Will dated 22nd February, 2012.
11. Aggrieved by that decision, the applicants have now filed the instant application seeking, inter alia, orders of review of the said decision of this Court. The applicants’ submissions are that the gist of their application is that the deceased’s alleged Will dated 22nd February, 2012 was forged as revealed by the DCI report dated 17th July, 2023. That there is need to cure a fraudulent act of a forgery of a Will, an exceptional circumstance which justifies this Court to exercise its residual jurisdiction under Section 3A of the *Judicature Act* coupled with Rule 1(2) of this Court’s Rules and obviate injustice to the applicants occasioned by the forged Will. The applicants relied on this Court’s decisions in *Benjob Amalgamated Limited & another v Kenya Commercial Bank Limited* [2014] eKLR and *Standard Chartered Financial Services Limited & 2 others v Manchester Outfitters (Suiting Division) Limited (Now known as King Woollen Mills Limited & 2 others* [2016] eKLR where this Court held that it has residual jurisdiction to review and/or set aside its judgment consequent to the 2010 *Constitution*.
12. There is on record no replying affidavit or written submissions filed by the respondent.

Determination

13. We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. The applicants seek a review of this Court’s judgment dated 29th July, 2022 on the ground, inter alia, that there is discovery of new and important evidence that was not available to this Court when it heard and determined the appeal on 29th July 2022.
14. In *Benjob Amalgamated Ltd v Kenya Commercial Bank Limited* (*supra*) this Court stated as follows;

“...As long ago as 1966, the predecessor of this Court, (The East Africa Court of Appeal) sitting in Nairobi in Civil Appeal No 6 of 1966 involving *Lakhamshi Brothers Ltd v R. Raja & Sons* (1966) E.A. 313 dealt with the issue of review... The Court held that it had inherent jurisdiction to recall its judgment in order to give effect to its manifest intention or to what clearly would have been the intention of the Court had some matter not been inadvertently omitted, but would not sit on appeal against its own judgment in the proceedings.”
15. The review jurisdiction of this Court is exercised in exceptional circumstances to correct errors of law thereby preventing an injustice and promoting public confidence in the justice system. It is not to be exercised as an avenue for an appeal against its own decision. This Court in *Mohammed Jawayd Iqbal (Personal representative of the Estate of the late Ghulam Rasool Janmohamed) v George Boniface Mbogua* [2020] eKLR stated as follows:

“Equally, without doubt is the fact 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 it has declared with finality. The burden to convince the Court to do must lie with the applicant...”

16. Further, in *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* [2017] eKLR the Supreme Court narrowed the scope of the circumstances when a court can exercise its residual jurisdiction to review, vary or rescind its decisions and pronounced itself as follows:

“However, in exercise of its inherent powers, this Court may, upon application by a party, or on its own motion, review, any of its Judgments, Rulings or Orders, in exceptional circumstances, so as to meet the ends of justice. Such circumstances shall be limited to situations where:

- i. the Judgment, Ruling, or Order, is obtained, by fraud or deceit;
- ii. the Judgment, Ruling, or Order, is a nullity, such as, when the Court itself was not competent;
- iii. the Court was misled into giving Judgment, Ruling, or Order, under a mistaken belief that the parties had consented thereto;
- iv. the Judgment or Ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision.”

17. Applying the above parameters and having carefully considered the application before us, we find no exceptional circumstances advanced by the applicants to warrant the exercise of the review jurisdiction of this Court. The upshot is that the notice of motion dated 13th July, 2023 lacks merit and is dismissed.

18. This being a family matter, the order that commends itself to us is that each party will be bear their own costs.

DATED AND DELIVERED AT NYERI THIS 11TH DAY OF OCTOBER, 2024

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

