



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: GITHINJI, OKWENGU & J.MOHAMMED, J.J.A)**  
**CIVIL APPEAL NO 89 OF 2015**

**BETWEEN**

**MARY WAMBAYA.....APPELLANT**

**AND**

**JACOB JOSEPH WAMBAYA (Personal representative of**

**ESPERANCE PERSIDE WAMBAYA).....RESPONDENT**

*(An appeal from the order of the High Court of Kenya at Kitale (J.R. Karanja, J)*

*dated 22<sup>nd</sup> July 2015 in P&A Cause No 6 of 1997)*

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**JUDGMENT OF THE COURT**

**Background**

1. This is a first appeal from the Ruling and order of the High Court (J. R. Karanja J) delivered on 22<sup>nd</sup> July, 2015. **Mary Wambaya** (the appellant) seeks to set aside the decision of the High Court disallowing her application for review of the judgment delivered on 21<sup>st</sup> February 2003 by Nambuye, J. (as she then was) and a redistribution of the estate.

2. The brief facts of the case are that the appellant and **Esperance Perside Wambaya (Esperance)** were both widows of **Geoffrey Erastus Wambaya** (the deceased) who died intestate on 3<sup>rd</sup> December 1992. Subsequently, a grant of letters of administration intestate was issued to his two widows, but they failed to agree on the mode of distribution leading to protracted proceedings for the distribution of the estate resulting in the judgment rendered by the court on 21<sup>st</sup> February 2003. By an application dated 25<sup>th</sup> February 2004 that was supported by an affidavit and a further affidavit, the appellant moved the High Court for a review of the said judgment and redistribution of the estate, on the grounds that there were errors on the face of the record, that there were mistakes in the judgment and discovery of new evidence. In the affidavit sworn on 25<sup>th</sup> February 2004, the appellant made various allegations faulting the manner in which the trial court distributed the estate of the deceased. This included: that the trial court ought to have valued the entire estate before embarking on distribution; that the distribution included shares in Nyawita Maternity & Nursing Home Ltd which was a limited liability company and any claims in respect thereto should have been made under the Companies Act; that the trial court failed to conclusively deal with the issue of inheritance of the shares held by the deceased in Nyawita Maternity & Nursing Home Ltd which shares formed part of the estate of the deceased; that the trial court failed to consider the present and future needs of the beneficiaries before the distribution; that the distribution included a property (Kitale Municipality Block 15 (Koitogos) 746) which belonged to the appellant personally and should not therefore have been considered as part of the estate of the deceased; that the trial judge awarded the appellant a property in Olunguruone which could not be traced; and that the trial judge awarded the appellant money in two bank accounts at Kenya Commercial Bank and National Bank of Kenya without ascertaining whether there were monies in the respective accounts.

3. In addition, the appellant further faulted the learned trial judge for including **Esperance** in the distribution of properties acquired by the deceased before **Esperance** was married to the deceased. In the supplementary affidavit sworn on 16<sup>th</sup> June, 2004 the appellant averred that **Esperance** ought not to have benefitted from any share of the estate because she was not a wife to the deceased and further because the deceased was not the father of **Esperance's** children.

4. In a further affidavit sworn on 2<sup>nd</sup> October 2014, the appellant further contended that the property known as **Kitale Municipality Block 15 (Koitogos) 746** was a property in her name that ought not to have been considered as part of the deceased's estate. Based on these documents and averments, the appellant urged the court to redistribute the estate.

5. In the Further affidavit sworn on 13<sup>th</sup> October, 2004, the appellant claimed that a parcel of land in **Olenguruone** that formed part of the assets of the deceased, and which was awarded to her, did not exist. The appellant annexed a letter from the Provincial Commissioner, Rift Valley Province, confirming that from the records in the Provincial Land Adjudication and Settlement Office, the parcel of land was no longer available for allocation to the deceased and had since been allocated to another party.

6. **Esperance** died during the pendency of the motion and was replaced by her son and legal representative, **Jacob Joseph Wambaya** (the respondent). In a replying affidavit sworn on 15<sup>th</sup> July 2014 the respondent accused the appellant of laches and of being indolent in the prosecution of her motion. The respondent maintained that the shares in Nyawita Maternity & Nursing Home Ltd were properly dealt with by the trial court. He urged that the motion was an abuse of the court process and asked the court to dismiss it.

7. In a ruling dated 22<sup>nd</sup> July 2015, the learned Judge (J. R. Karanja, J.) dismissed the applicant's motion holding that the motion was prosecuted after a 10 year delay, and that it was also filed one year after the date of the judgment sought to be reviewed, and the inordinate delay had not been sufficiently explained; that the appellant had made out a case for review, as the review was challenging the manner in which the estate was distributed, and this could have been more appropriately dealt with in an appeal; that there was no error apparent on the face of the record, nor was there new evidence that would justify the grant of orders of review.

8. Aggrieved by this decision the appellant filed this appeal on the grounds that the trial court erred in: failing to consider the principles governing the review of judgments; failing to find that there were errors apparent on the face of the record which necessitated an order of review; and in failing to appreciate that there was new and important evidence that had not been previously available to the appellant. The appellant sought the orders that this Court makes findings on the issues raised before the trial court; that the appeal be allowed; that the impugned ruling of J.R. Karanja, J. delivered on 22<sup>nd</sup> July, 2015 be set aside and the judgment of Nambuye, J. (as she then was) read by Etyang, J. on 21<sup>st</sup> February, 2003 be accordingly reviewed and the estate redistributed; and costs of this appeal and the suit below be borne by the respondent.

#### **Submissions by Counsel**

9. When the appeal came up for hearing, both parties were represented by counsel. Learned counsel, **Mr Katama Ngeywa** and **Mr Mike Wafula** appeared for the appellant and submitted that there was an error in distribution of the estate since the parcel of land known as **Kitale Municipality Block 15 (Koitogos) 746** that was taken as forming a part of the deceased's estate was the appellant's personal property and that the court erred in including it as part of the estate; that there was discovery of new evidence that the parcel of land in **Olenguruone** was no longer a part of the deceased's estate, and the appellant's averments in her affidavits on these points were not controverted. Learned counsel also submitted that the period of one year that was taken before filing the application for review was not unreasonable as the appellant had been engaged in trying to trace the property. For these reasons, counsel urged us to set aside the ruling of the High Court and allow the appeal as prayed.

10. **Mr Koros**, for the respondent submitted that the appellant was indolent in going to court after one year and argued that she ought not to be allowed to argue the appeal; and that since there was no stay of execution of the trial court's order for distribution, some of the properties had been sold to third parties. Counsel faulted the appellant's submissions on the availability of the **Olenguruone** property as well as **Kitale Municipality Block 15 (Koitogos) 746** since the appellant included these properties as part of the assets of the deceased. On this basis, **Mr. Koros** argued that the appellant had not set out a case that would warrant a review of the trial court's judgment. **Mr Koros** also raised various issues on the form of the appeal, arguing that it offended rule 85 of the Court of Appeal Rules, 2010 since the notice of appeal lodged and filed by the appellant was in the name of a deceased person; that the record of appeal itself is incomplete contrary to rule 87 of the Court of Appeal Rules, 2010 as it does not include an application, dated 27<sup>th</sup> February 2014 which was filed by the respondent seeking a dismissal of the application for review.

#### **Determination:**

11. This being a first appeal our duty as an appellate court is to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned Judge are to stand or not and give reasons either way. See the case of **Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**. In **Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2 EA 212**, this Court stated as follows on the duty of the court sitting on a first appeal:

*“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”*

12. As submitted by **Mr Koros**, the Notice of Appeal filed in this Court named the deceased **Esperance Preside Wambaya** as the respondent. We agree that this was irregular but find that this irregularity was curable under rule 85(2) of the Court of Appeal Rules which provides that:

*“An appeal shall not be incompetent by reason only that the respondent was dead at the time when it was instituted but the Court shall, on the application of any interested person, cause the legal representative of the deceased to be made a party in place of the deceased.”*

13. Turning to the main issue in this appeal, which is whether or not the appellant made out a case for the grant of orders of review of the judgment of the High Court, Order 45 of the Civil Procedure Rules, 2010 provides for orders of review in the following terms:

*“(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).

14. There is a plethora of case law interpreting the grounds for review set out in Order 45 of the Civil Procedure Rules 2010. In **National Bank of Kenya Limited v. Ndungu Njau** (Civil Appeal No. 211 of 1996 (unreported)), this Court held as follows:

***“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 ground for review.”***

15. In **Francis Origo & another v. Jacob Kumali Mungala** (C.A. Civil Appeal No.149 of 2001 (unreported)), which was cited with approval by this Court in **Pancras T. Swai v Kenya Breweries Limited** [2014] eKLR, the High Court dismissed an application for review because the applicants did not demonstrate that they had made discovery of new and important matter or evidence. In the court's words:

***“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. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant's application for review. We have therefore no option but to dismiss this appeal with costs to the respondent.”***

16. The appellant submitted that there was an error apparent on the face of the record in that the parcel of land in Kitale was not registered in the name of the deceased but in the name of the appellant. When giving evidence as to how distribution ought to be done, the appellant had stated that **Kitale Municipality Bock 15 (Koitogos) 746** measuring 0.3983 hectares was purchased by the deceased, jointly with the appellant, but was registered in the appellant's name. The appellant did not annex the certificate of title to show that the property was indeed registered in her name. In the case of **Nyamogo & Nyamogo v Kogo** [2001] EA 173 (LLR No. 75 (CAK)), this Court described what would comprise an error apparent on the face of the record in the following terms;

***“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 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 or wrong view is certainly no ground for a review although it may be for an appeal.”*** (Emphasis added).

17. If it is true that the property in question was registered in the name of the appellant, then it would not have been free property that would have been available for distribution as part of the deceased's estate as provided for by the Law of Succession Act. However, without the certificate of title to prove that the property belonged to the appellant, alongside with the evidence that it was the appellant herself who listed this property for distribution, we are unable to determine if there was indeed an error on the face of the record with respect to this property. As it is, to determine the ownership of this property would require inquiry beyond what is before us now, and for that reason, we are unable to definitely determine whether there was an error on the face of the record.

18. The appellant urged that there was a further error with respect to the property in **Olenguruone**, and what in her view was new evidence in the form of a letter from the Provincial administration stating that the property was no longer being allocated to the deceased due to the fact that he had not taken steps to secure it earlier. We are not satisfied that this letter could not have been secured earlier. As stated in **Muyodi v Industrial & Commercial Development Corporation & Another** [2006] EA 243, this Court held that to succeed on an application for review on this ground:

***“ the applicant was obliged to show that there had 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. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay.”***

19. This letter from the Provincial Commissioner was written on 16<sup>th</sup> April, 2004, and it is not clear what steps the appellant had taken prior to the distribution to ascertain the existence of this property. The property was listed as one of the properties of the deceased. In **Stephen Wanyoike Kinuthia (suing on behalf of John Kinuthia (Suing on behalf of John Kinuthia Marega (deceased) ) v Kariuki Marega & Another** [2018] eKLR (Civil Appeal No. 201 of 2012) this Court emphasized that:

***“an application based on the ground of discovery of new and important matter or evidence will not be granted without strict proof of such allegation.”***

20. We have carefully considered the matters raised by the appellant, all of which fault the trial court for the mode of the distribution made. These are matters that should have been canvassed before the High Court in an appeal and not in an application for review of the judgment. The appellant has not disclosed any reasons that are sufficient to warrant our interference with the judgment of the trial court in regard to his application for review. In the result, this appeal fails, and we order it dismissed with each party bearing its own costs.

**Dated and Delivered at Eldoret this 25<sup>th</sup> day of July, 2019**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**