IN THE COURT OF APPEAL

AT NAIROBI

(CORAM:TUNOI ,WAKI & DEVERELL JJ.A)

CIVIL APPEAL NO. 311 OF 2002

BETWEEN

V R M…….APPELLANT

AND

M R M

A M M…….……RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Nairobi (Visram, J.) dated 24.11.2001.

in

SUCCESSION CAUSE 989 OF 1999

CONSOLIDATED WITH

SUCCESSION CAUSE NO. 1110 OF 1999)

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JUDGMENT OF THE COURT

On 3rd March, 1999 the body of ***G J M*** (hereinafter *"the deceased"*) was found in a sitting position on his bed in his rural home in ***[particulars withheld]*** village, Embu. A postmortem conducted on it established the cause of death as *"asphyxia due to strangulation"*. There is nothing on record to establish who, if anyone, was responsible for the death. In his 65-year life-time the deceased had numerous public responsibilities including being a former Member of Parliament for Embu North Constituency, Vice-chairman of the Coffee Board of Kenya, branch manager of the Cotton Lint and Seed Marketing Board, political party official, and a national sports official among others. Indeed the national Order of Merit award of the Grand Warrior (O.G.W.) was conferred on him in 1997 for his public service. By the time of his death however, he had largely retired into private farming and business. His estate was also extensive. There were no less than 23 parcels of land spread over Embu, Meru and Nairobi; two motor vehicles; stocks and shares in five public companies; and seven accounts in different banks. Some of the properties were developed and generated substantial rental income. At the time of his death, the estate was estimated at a value of Shs.19 million.

The deceased was married to ***J M*** in 1958 but she died in January 1980 of cardio respiratory arrest. It is not clear whether there was a legal representative for her estate. But between them, ***Julia*** and the deceased had seven children - four girls and three boys - as follows: -

NAME **SEX** **AGE IN 1999**

1. **Mrs. M W N Daughter 39 years.**
2. **M R M Daughter 38 years.**
3. **J A N Son 36 years.**
4. **E W Daughter 34 years.**
5. **A M Son 32 years.**
6. **A N Son 26 years.**
7. **B W Daughter 24 years.**

The deceased was buried on 13th March, 1999. He had no written Will and therefore his estate fell for administration under the ***Law of Succession Act, Cap 160***, Laws of Kenya ("*the Act"*) which came into effect on 1st July, 1981. ***Section 2 (1)*** thereof provides:

"**Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons."**

Two months after the burial, ***V R M*** **(Veronicah)** went before the superior court and filed an *ex parte* notice of motion seeking an interim grant of Letters of Administration *ad colligenda bona*. It was **Succession Cause No. 989/99**, and she said she intended to operate various bank accounts held by the deceased for the benefit of the deceased's children and also to facilitate collection of rent. She swore that she was the wife of the deceased and listed the seven children of the deceased with ***Julia*** together with two more children: ***P W***, (Purity), a girl aged 27 and ***L J M*** (Lenny), a girl aged 25 years, as the dependants left behind by the deceased. She was the mother of the two children from another marriage.

Apparently the children of the deceased with ***Julia*** were not aware of ***Veronicah's*** move on the estate. When they did, five of them gave their consent to ***M R M*** (Margaret) and ***A M*** (Arthur) to petition for the full grant of Letters of Administration. They filed the petition in **Succession Cause No. 1110 of 1999** on 26th May, 1999 and listed ***V R*** as one of those who survived the deceased as his wife. They said nothing about ***Purity*** and ***Lenny***. In view of the earlier succession cause filed by ***Veronicah***, a citation was issued on 28th May, 1999 requiring ***Veronicah*** to indicate whether she would accept or refuse the grant of Letters of Administration being made to ***Margaret*** and ***Arthur***. At the request of the parties, both causes were consolidated by an order of the court made on 26th June, 1999 and a consent order was recorded on 20th July, 1999 for the opening of a bank account in the name of the estate for depositing future rents and payment of fees. The joint signatories would be ***Margaret***, ***Arthur*** and ***Veronicah***. There were other skirmishes and attempts at settlement which were made unsuccessfully, and eventually on 13th January, 2000, ***Veronicah*** filed an objection to the grant being made to ***Margaret*** and ***Arthur*** on the main ground that ***Margaret*** was a married woman and was not a dependant of the deceased. She asserted that she had priority over the two children of the deceased in seeking such grant because she was the deceased's wife. She went further on 1st February, 2000 and filed an answer to the petition and a cross-petition under ***Rule 17*** of the ***Probate and Administration Rules***, asserting that she should either be the sole administratrix or a co-administratrix of the estate. ***Margaret*** had earlier (on 18th June, 1999) sworn an affidavit asserting *inter alia*, that the deceased had only one wife, her late mother, ***Julia,*** who died in 1980 and there was no

other woman in his life until 1988 when he started being seen with ***Veronicah***. There never was a marriage between the two or any adoption of ***Veronicah's*** two children, she asserted, and at best ***Veronicah*** was the deceased's girlfriend. ***Margaret*** denied her own marriage to anyone, although she had two children.

An order was made on 18th February, 2000 that both the petition and cross-petition be heard together and so they were before Visram J between 9th May, 2000 and 12th July, 2001. The issue for determination was framed before the hearing by Mr. Mbigi, learned counsel for Margaret and Arthur, thus:

"**Here before the court is the issue of Letters of Administration. Who is entitled to them? The applicants who are the children or Veronicah Mbogo who claims to be the widow?"**

Viva voce evidence was then recorded from ***Veronicah*** and her one witness, and from ***Margaret*** who called two other witnesses. In his judgment made on 12th July, 2001, Visram J. framed two issues of his own which he went ahead to consider and determine, that is to say: firstly, whether ***Veronicah*** was the wife of the deceased and hence entitled to apply for grant of Letters of Administration; and secondly, whether she had capacity to marry the deceased. He found on both issues that ***Veronicah*** failed. She had not proved marriage to the deceased under customary law; secondly, she remained married to another person under a monogamous marriage and therefore had no capacity to marry the deceased. ***Veronicah's*** objection to the grant of Letters of Administration to ***Margaret*** and ***Arthur*** was dismissed. Nothing was said about her cross-petition but logically it was not granted. A decree issued forth on 1st August, 2001 containing two orders:

"*1) That the court do and hereby hold that the objector did not have capacity to marry the deceased.*

2) That the objection be and is hereby dismissed with costs."

No appeal was filed to challenge that decree. Instead, ***Veronicah*** returned to the same court on 1st August, 2001 and filed an application for review of the judgment delivered on 12th July, 2001 on the basis that she had obtained documentary evidence to prove irrefutably that she was legally divorced from her former husband before re-marrying the deceased. The matter was again placed before Visram J who, in a ruling delivered on 14th November, 2001, rejected the application on three grounds: firstly, that the purported new documentary evidence was not in fact new as it had featured in the main hearing of the consolidated causes; secondly, even if ***Veronicah*** proved she had the capacity to marry, she had not challenged the finding in the judgment that there was no proof of marriage to the deceased; and thirdly on the technicality that the decree sought to be reviewed was not annexed to the application. That is the decision which provoked the appeal now before us.

The appeal is premised on several grounds which were strenuously argued for several days on both sides by learned counsel for the appellant, Mr. Ngatia who led Mrs. Wambugu, and Mr. Mbigi for the respondents. We think however that there is one central issue upon which the appeal falls or stands and to this we shall revert shortly. We may list the seven grounds of appeal relied on by the appellant for the record:

"*1. The learned trial judge erred in law and in fact in not appreciating sufficiently or at all that the Respondent's petition in the Superior Court described by the Appellant as a "wife". Hence the issue of the Appellant's capacity to marry was a departure from the status admitted by the Respondent.*

2. The learned trial Judge erred in law and in fact in not appreciating sufficiently or at all that the appellant exercised all due diligence to obtain the decree and proceeding in Divorce Cause No. 5/1982 Nyeri.

3. The learned trial Judge erred in law and in fact in not appreciating sufficiently or at all that the decree and proceeding in Divorce Cause No. 5/1982, Nyeri confirmed that the appellant had capacity

in law to marry the deceased.

4. The learned trial Judge erred in law and in fact in not appreciating sufficiently or at all that cohabitation between the deceased and the Appellant led to a presumption of marriage and which was not dependant upon any customary law marriage.

5. The learned trial Judge erred in law and in fact in holding that the decree and proceedings in Divorce Cause No. 5/1982, Nyeri conclusively demonstrated that the Appellant had capacity to marry the deceased.

6. The learned trial Judge erred in law and in fact in holding that the Appellant's application seeking review of the judgment did not show "the basis of the application".

7. The learned trial Judge erred in law and in fact in considering that the failure to annex the order was a fatal omission to the review application."

In deciding the application for review, the learned Judge of the superior court was exercising judicial discretion. As such, this Court on appeal may only interfere with such exercise of discretion on well settled principles; that is to say, if the appellant satisfies the court that the decision is clearly wrong due to misdirection or because the court acted on matters on which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion – See **Mbogo vs. Shah [1968] E.A 93**. In the same case, the President of the Court, ***Sir Charles Newbold*** put it more succinctly:

"**A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong**

decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

It is in line with those principles that Mr. Ngatia addressed us on the one issue that bestrides the seven grounds of appeal and, as we stated earlier, is the gravamen of the appeal. It is this;

Did the learned Judge err in law and in fact in rejecting the evidence intended to be introduced on record by the appellant to prove that she had the capacity to marry?

Mr. Ngatia submitted before us that the issue was in the first place irrelevant because there was an admission in the pleadings by the respondents that the appellant was the wife of the deceased. It was not open to them to approbate and reprobate at the same time as that would offend time-tested principles in pleadings. Furthermore, the only issue framed by the parties for determination was "*who was the lawful administrator of the deceased's estate"* and it was therefore irrelevant to concentrate on the non-issue of "*capacity to marry."* There could not be a marriage without the capacity to contract it. That is why the appellant produced the only record in her possession at the trial, a copy of the certificate making *decree nisi* absolute, to show that her former monogamous marriage to another person had been dissolved absolutely on 14th June, 1984. That document, he submitted, had been produced in examination-in-chief and its authenticity was not challenged in cross-examination. It was therefore erroneous to admit the challenge made to the document in re-examination purportedly because it was neither signed nor certified. It was further erroneous to block the crucial evidence intended to put that issue beyond doubt even if the issue was a relevant one. The documents intended to be introduced were in a subordinate court file and there was confirmation by the court itself that the court file had gone missing for a long time and only resurfaced after the judgment of the superior court. That evidence was unassailed and, in Mr. Ngatia's view, it ought to have been considered, for the simple reason that if it was believed, then the decree which pronounced incapacity to marry would be altered in the appellant's favour. As it is, the decree in effect forces the appellant to stay married to a person she was lawfully divorced from since 1984 which would be an unpalatable proposition. Finally, Mr. Ngatia submitted that the application for

review was not merely based on the ground that there was discovery on new and important matter, but also on the existence of vitiating factors which entitled the court to interfere on the basis of "*any other sufficient reason"*. Such reasons included the finding made by the superior court that the legal ingredients of a valid marriage under Embu Customary Law were not fulfilled and the failure to find on the evidence on record that there was a presumption of marriage between the deceased and the appellant. It was also a vitiating factor that the superior court failed to consider the application of ***section 66*** of the ***Law of Succession Act*** and particularly the failure to make a finding as to whether the first respondent, ***Margaret***, was a suitable person to administer the estate. That was the only issue for consideration as stated by this Court in **John Ndungu Mubea v Milka Nyambura Mubea Civil Appeal No. 76** of **1990**.

In his counter arguments, Mr. Mbigi submitted that the appeal before us is misconceived as it is directed at the judgment of the superior court delivered on 12th July, 2001 and not the ruling delivered on 14th November, 2001. There was no appeal against the judgment and therefore the finding made that there was no customary marriage proved between the deceased and the appellant, and the finding that the appellant had no capacity to marry cannot be challenged in a review application. The only ground advanced in support of the application, and the ground upon which the application stood or fell, was that there was a new matter discovered which no due diligence could unearth. In Mr. Mbigi's view, the document in issue was the same document – a copy of the decree absolute – which the court had rejected in the course of the trial and it was not a new matter. Counsel appearing for the appellant also had in her possession copies of proceedings which she used for cross-examination during the trial. The only matters that had not been examined were an abstract of a court register and some court receipts, all of doubtful authenticity, which were purportedly contained in a court file. The production of the court file had however been the subject matter of a ruling made during the trial and again, that was not a new matter and it could not therefore be re-agitated. The learned judge, he submitted, was right to reject the document as it was not certified by the magistrate who had conduct of the divorce matter and who testified that he had doubts about its authenticity. No other document was produced to prove that the earlier marriage had been dissolved, hence the finding that the appellant had no capacity to marry. The Judge cannot therefore be faulted for finding that the appellant's remedy was an appeal and not an application for review. Finally Mr. Mbigi submitted that even if ***section 66*** of the Law of Succession Act was applied, the appellant would not be a suitable person to administer the estate because of her evident misconduct which is in the documents on record. She cannot be trusted by the children of the deceased.

We have anxiously considered those rival submissions and the documents in the entire record of appeal. We thank both counsel for their erudite submissions and for their industry in research which was evident in the numerous authorities cited before us. We have perused and considered those authorities even if we do not reproduce them here. On our own evaluation of the matter at the end of the day, we think the appellant must succeed on the one issue which we have attempted to summarise above.

The application before the superior court was made under ***Order 44*** which is applicable to Succession causes by dint of ***rule 63*** of the ***Probate and Administration Rules***. The learned Judge surmised, and correctly so, that the application was premised on two prongs under the rule;

(a) the discovery of new and important matter or evidence.

(b) any other sufficient reason.

The learned Judge went further and, quite admirably in our view, summarized the law applicable in consideration of those two limbs. In particular he made a finding, and we agree, that the evidence tendered by the appellant to establish her customary marriage with the deceased fell short of compliance with Embu customs which are restated in ***Cotran's*** book, "**Restatement of African Law**", Kenya Vol. I **The Law of Marriage and Divorce**" under the heading "Kikuyu" in chapter two. That finding was clearly based on the application of the facts placed before the Judge to the law as he understood it and it can only be amenable to an appeal if it was erroneous. But that finding was not the end of the matter and it is here that we part company with the learned Judge.

It was partly on the basis of that finding that the Judge considered the germane issue before him relating

to capacity to marry. He stated: -

"**Here the case was dismissed on two issues. The applicant believes that the new evidence to show that she was indeed divorced will clear the question of her capacity to marry the deceased. However, what about the other issue? This court held that she had been unable to prove her marriage to the deceased. This issue has not been disproved and the suit would still have to be dismissed on that ground. Thus the new and important evidence would not alter or cancel the decree pursuant to the judgment reached by the Court. This is sufficient to dispose of this application."**

It seems to us that the learned Judge would have been persuaded to exercise his discretion in favour of granting the review application if the evidence intended to be introduced would have resulted in the alteration or cancellation of the decree, and the only barrier in that direction was his finding that the customary marriage was unproved. With respect, there was no such barrier. For it matters not whether statutory or customary marriage requirements are strictly proved in a marriage. The court must go further and consider whether, on the facts and circumstances available on record, the principle of presumption of marriage was applicable in the appellant's favour. Such was the situation facing the predecessor of this Court in **Hortensiah Wanjiku Yaweh v Public Trustee, Civil Appeal No. 13** of **1976.** Mustafa J.A in his leading judgment stated: -

"**I agree with the trial judge that the onus of proving that she was married to the deceased was on the appellant. But in assessing the evidence on this issue, the trial judge omitted to take into consideration a very important factor. Long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant. Only cogent evidence to the contrary can rebut such a presumption, see re: Taplin – Watson v Tate (1973) 3 ALLER 105. The trial judge did not consider this factor. The trial judge was not satisfied that the appellant had established, on a balance of probabilities, that the Kikuyu customary marriage was performed in accordance with all the necessary ceremonial rituals. It is not clear whether he found that the marriage was not valid because all the rituals were not performed, or that no marriage of any kind had taken place at all. However in considering whether there was a marriage the trial judge ought to have taken account of the presumption of marriage in the appellant's favour. Such presumption carries considerable weight in the assessment of evidence. Once that factor is put into the balance in the appellant's favour, the scale must tilt in her direction."**

He continued:

"**I can find nothing in the "Restatement of African Law" to suggest that Kikuyu customary law is opposed to the concept of presumption of marriage arising from long cohabitation. In my view all marriages in whatever form they take, civil or customary or religious, are basically similar, with the usual attributes and incidents attaching to them. I do not see why the concept of presumption of marriage in favour of the appellant in this case should not apply just because she was married according to Kikuyu customary law. It is a concept which is beneficial to the institution of marriage, to the status of the parties involved and to issue of their union, and in my view, is applicable to all marriages howsoever celebrated."**

On the same issue, Wambuzi P. stated: -

"**In the first place, no authority was cited to us that the presumption does not apply to customary law marriages and secondly, the presumption has nothing to do with the law of marriage as such, whether this be ecclesiastical, statutory or customary; this must be proved. The presumption is nothing more than an assumption arising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted. It may be shown that the parties are not married after all but then the burden is on the party to assert that there was no marriage. It is at this stage that the nature of the marriage becomes relevant and the incidents thereof examined."**

Musoke J.A agreed with both.

That decision has since been faithfully applied in our courts.

In his judgment dated 12th July, 2001, Visram J was indeed alive to the issue of presumption of marriage which had been raised by the appellant. But all he said about it was in two sentences as follows: -

"**The Objector has further asked me to find that there was a presumption of marriage as the objector and the deceased had cohabited for some time before the deceased's death. It is settled law that a presumption of marriage is a rebuttable presumption."**

The rest of the judgment is devoted to examination of the issue framed by the Judge himself on the appellant's capacity to marry which led to the finding that it was lacking. And with that the issue of presumption of marriage dissipated. With respect, it was not correct to state, as the learned Judge did in his ruling, that a finding that the appellant had the capacity to marry would not have affected his finding in the judgment that there was no customary marriage. Such finding in our view, could only be made if there was a further finding that there was no presumption of marriage or that it had been effectively disproved by the respondents. It is a finding therefore that entitles us to interfere with the exercise of discretion by the learned Judge.

If the learned Judge had considered the issue of capacity to marry in favour of the appellant, he would have gone further to consider, which he did not, the evidence on record that the appellant intimately came into the deceased's life in 1984 and remained there for 15 years until the deceased's demise in 1999. There is evidence on both sides that the appellant and the deceased had a publicised function at the home of the appellant's parents where various gifts were given out by the deceased and his extended family to the parents. There is an affidavit on record sworn by both the deceased and the appellant stating that they were husband and wife. There is a national identity card and an employment card, both identifying the appellant with the deceased. There is evidence of joint ownership of some parcels of land, bank account and co-operative union membership. There is evidence on both sides that the deceased, at some point during the 15 years, seriously suffered from a heart ailment which required an operation in Britain and that the appellant with other family members organised a public fundraising for treatment expenses. It is the appellant who accompanied the deceased to Britain and stayed with him for one month until he recovered. When the deceased died ten years later, the appellant actively participated in the funeral arrangements and was publicly acknowledged as the wife of the deceased. There is also evidence that the appellant took care of some of the deceased's minor children with his first wife and it is no wonder that in their petition for grant of Letters of Administration the respondents described her as the "*wife*" of the deceased. That they later changed their mind to refer to her as "*girlfriend*" was an obvious afterthought. Such evidence of long cohabitation and general repute must surely, in our view, form a strong basis for a presumption of marriage. As stated in the ***Yawe Case*** (supra), the onus is on the person alleging that there was no such marriage to prove otherwise. But again the learned judge did not look for such proof as he was preoccupied with the issue of capacity to marry. On our own assessment there was no sufficient evidence to displace the presumption of marriage.

The issue that underpins this appeal nevertheless remains. Was the evidence intended to be introduced in the application for review properly excluded? We think not.

The appellant wanted to introduce an abstract of the court register and court receipts to confirm that indeed there were final orders relating to her previous marriage. She also wanted to introduce the proceedings pertaining to that divorce petition which had been rejected during the hearing of the case for the reason that they were being introduced after close of the appellant's evidence. The reason for rejecting that evidence was because it was neither new nor important matter or evidence which could not have been produced in spite of due diligence. In the Judge's view, the appellant simply wanted to sneak-in additional evidence after the event. The decree absolute put in evidence at the hearing was rejected in the judgment as "*shaky evidence*" because it was "*faint, not signed and not certified*". It was clearly not a new matter, but we think the other documents were, and they merited proper consideration. Nothing

was said in the ruling about the confirmation by the subordinate court itself that the court file had been missing for a long time. That answered the issue of lack of diligence which was leveled at the appellant and her counsel. That the documents were sought to be introduced after the judgment would not *per se* mean that they were meant to supplement evidence tendered at the hearing. The application for review as acknowledged by the learned Judge was not merely based on discovery of new and important matter but also "*for any other sufficient reason*". In considering the latter ground, the learned Judge stated: -

"**The grounds of review under any other sufficient reason must be something which existed at the date of the decree and the rule does not authorise the review of a decree which was right when it was made on the ground of the happening of some subsequent event"**

With respect, we think that reasoning is restrictive of the unfettered discretion donated to the court under ***section 80*** of the ***Civil Procedure Act*** and ***Order 44*** of the rules. We think the correct statement of the law was that followed by this Court in **Narodhco Kenya Ltd vs. Loria Michelle Civil Appeal No. 24 of 1998 (ur)** when it stated: -

"**There was nothing on record to disprove the defendant's allegations to the effect that the said new facts came to its knowledge only after the decree. The power to review is not confined to mistakes or errors in the decree. The power is given by Section 80 of the Civil Procedure Code (sic) and Order 44 of the Civil Procedure Rules as was stated by this court in the case of Shanzu Investments Limited. This court said:"**

"**In Wangechi Kimita & Another vs. Mutahi Wakabiru (C.A. No. 80 of 1985) (unreported) it was held that,**

Any other sufficient reason need not be analogous with the other grounds set out in the rule because such a restriction would be a clog on the unfettered right given to the court by section 80 of the Civil Procedure Act. The court further went on to hold that the other grounds set out in the rule did not in themselves form a genus or class of things with which the third general head could be said to be analogous.

The current position would, then, appear to be that the court has unfettered discretion to review its own decrees or orders for any sufficient reason".

In our view it is not incumbent upon the judges at the stage of the hearing of an application for review, such as was before the judge here, to inquire fully into the correctness of facts. It would suffice if the court is satisfied that the facts brought up after the event are such as to merit a review of the judgment."

The evidence that was intended to be introduced was crucial in determining with finality whether the appellant was still lawfully married to another person. Refusing to look at or even consider it would not be proof that she was so married. Indeed it would lead to the absurd conclusion that the appellant was married when, from all indications, she was lawfully divorced. We have looked at the documents ourselves and we find no valid reason for their rejection. Coupled with the finding we made earlier that a favourable finding in that respect would affect the decree, we think there was sufficient reason to grant the application. Whether one therefore applies the test of discovery of new and important matter or sufficient reason in the circumstances of this case, it is our judgment that this appeal should be allowed.

A technical issue was raised that the application for review was incompetent for the reason that it did not annex to the application a copy of the decree intended to be reviewed. Indeed that was one of the reasons given by the learned Judge for disallowing the review. Once again we think, with respect, that the legal position is too widely stated. The authority relied on for that proposition was **Gulamhussein Mulla Jivangi & Another v. Ebrahim Mulla Jivenji & Another (1929 – 30) KLR 41** where Pickering C.J. stated: -

"**But in my opinion, however aggrieved a person may be at the various expressions contained in a**

judgment or even at various rulings embodied therein, unless that person is aggrieved at the formal decree or the formal order based upon the judgment as a whole, the person cannot under Order XLII appear before the judge who passed the judgment and argue whether this or that passage in the judgment is tenable or untenable. The ratio decidendi expressed in a judgment cannot be called in question in review unless the resultant decree is a source of legitimate grievance to a party to a suit."

In that authority, no resultant decree had come into existence, and no attempt had been made at drawing one up, by the time the application for review was filed. That however is not the case before us. The decree ensuing from the judgment given on 12th July, 2001 was issued on 1st august, 2001 and was certified by the deputy registrar of the superior court. The summons for review on the other hand is dated 1st August, 2001, the supporting affidavit was sworn on 2nd August 2001 and the application was filed on the same day, 2nd August 2001. On that score we agree with Mr. Ngatia that there was substantial compliance with the procedure and it was a drastic sanction to dismiss the application on the mere basis that there was no copy of the decree annexed to an application filed in the same record which bore the decree.

We must now consider the final orders that we should make in this appeal. Ordinarily we would have adopted the orders similar to those made by this Court in the **Norodhco Kenya Ltd Case** (Supra) when it stated: -

"**We would go by order 44 Rule 6 of the Civil Procedure Rules. This rule reads: -**

"**6. When an application for review is granted, a note thereof shall be made in the register, and the court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fits"**

We would allow this appeal, set aside the ruling and order of Angáwa, J and substitute therefore an order remitting the application for review for hearing by another judge."

We are mindful however that a considerable period of time has elapsed since the ruling and order of Visram J. was made on 14th November, 2001. The administration of the vast estate of the deceased is still held in limbo by this litigation, and an order for remittance of the application for review to another Judge of the superior court would cause a further delay. We have already expressed our strong view on the basis of the documents on record that the application for review ought to have been granted and that there was credible and unrebutted presumption of marriage between the appellant and the deceased. We think in the circumstances of this case that those are issues which this Court may consider in the application of ***Rule 31*** of the rules of this Court in order to meet the ends of justice. The rule states:

"**On any appeal the court shall have power, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit the proceedings to the superior court with such directions as may be appropriate, or to order a new trial, and to make any necessary incidental or consequential orders, including orders as to costs."**

Accordingly, this appeal is allowed with the result that the ruling of Visram J made on 14th November, 2001 is set aside and we substitute therefor an order granting the summons for review dated 1st august, 2001. The inevitable consequence of that order is the variation of the decree ensuing from the judgment dated 12th July, 2001 to the extent that the appellant here, ***V R M*** had the capacity to marry and that there was a presumption of marriage between her and the deceased which operates in her favour. The issue submitted to the superior court for decision would then remain: Who under ***section 66*** of the ***Law of Succession Act*** is the rightful administrator of the estate of the deceased? That is a matter within the discretion of the superior court and we make no pronouncement on it. Accordingly, we direct that the matter be placed before a Judge of the superior court, other than Visram J., to exercise its discretion as to the person or persons to whom a grant of Letters of Administration should be made in accordance with the relevant law, on the basis that ***V R M*** was the wife of the deceased ***G J M*** at the time of his death on 3rd March, 1999.

Finally, it is self-evident that an unusual delay has been occasioned in the delivery of this judgment and the parties are entitled to an apology. The appeal had its peculiar complexity. It cannot also be gainsaid that this Court has been labouring under a heavy workload at half its judicial capacity for reasons beyond its control. Hopefully the situation will be ameliorated sooner than later.

Dated and delivered at Nairobi this 16th day of June, 2006.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

……

JUDGE OF APPEAL

W.S. DEVERELL

…….

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR