In re Estate of Julius Cheruiyot Ngeno (Deceased) (Succession Cause 3 of 2019) [2025] KEHC 572 (KLR) (28 January 2025) (Ruling)

Neutral citation: [2025] KEHC 572 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

SUCCESSION CAUSE 3 OF 2019

RL KORIR, J

JANUARY 28, 2025

IN THE MATTER OF THE ESTATE OF JULIUS CHERUIYOT NGENO (DECEASED)

BETWEEN

DAVID KIMUTAI CHERUIYOT ..... 1ST APPLICANT

RAYMOND CHERUIYOT ..... 2ND APPLICANT

AND

DAVIS KIPRONO CHERUIYOT ..... RESPONDENT

RULING

1. The Applicants filed an undated Notice of Motion Application where they sought a review of this court's Ruling dated 10th November 2023.

2. The Application was brought under Order 45 Rule 1 and 2, Order 51 Rules 1 of the *Civil Procedure Rules* and sections 80, 3 and 3A of the *Civil Procedure Act*. The Application was based on the grounds on the face of the Application and further by the annexed Supporting Affidavit of David Kimutai Cheruiyot sworn on 11th December 2023. The Application was received in court on 13th December 2023.

The Applicants' case.

3. The Applicants stated that this court failed to consider key information presented and relied on a few discrepancies and errors when arriving at its Ruling. That the court erred when it said in its Ruling that the authenticity of the birth certificates was not challenged during their production or during cross examination. They stated that their advocate challenged the authenticity of the birth certificates and it was reflected on the court's record.

4. It was the Applicants' case that this court failed to address the validity of the death certificates produced in court. That the Applicants and the Respondent produced different death certificates issued by two

different doctors. It was their further case that the death certificate produced by the Respondent was a forgery.

5. The Applicants stated that this court erred when it stated that the Applicants were estopped from claiming that Ann Ngeno was not a wife and the other children were not family members of the deceased. That both Applicants addressed the issue of the Consent where they stated that the same had been taken under duress when they were grieving and that they were informed the consent would only last until the burial was over. They further stated that the Consent was not proof of familial ties and this court erred when it considered it considered it as definitive proof.

6. It was the Applicants' case that the meeting that led to the Consent was an ambush and they took advantage of their vulnerable nature as they were grieving.

The Response

7. The Respondent filed his Replying Affidavit dated 27th June 2024. He stated that the Application for review had not met the threshold for the grant of review orders. He further stated that the Applicants had not shown a mistake or error on the face of the record; that they failed to show that there had been a discovery of a new and important matter or evidence which was not within the court's knowledge at the time it delivered its Ruling and they had also failed to show that there was any other sufficient reason for this court to review its Ruling.

8. It was the Respondent's case that on the issue of birth and death certificates, this court found that the Applicants did not prove their allegations of fraud. That this court analysed the issues and a conclusion was reached and that the Applicants' remedy was to appeal the Ruling and not apply to review it.

9. The Respondent stated that on the issue of whether Ann Ngeno and her children were not part of the deceased's family, this court analysed the evidence and came to a conclusion Ann Ngeno and her children were part of the deceased's family.

10. It was the Respondent's case that the issue of the Consent was an afterthought. That it was raised in the trial court (Chief Magistrate's Court in Kericho) and if the Applicants had any issue with it, they should have applied for review in the trial court and not here. It was his further case that there was nothing wrong on placing reliance on a Consent that was freely entered by parties.

11. The Respondent stated that the meeting that led to the Consent was not an ambush as alleged by the Applicants. That it was held on 5th November 2017 where the burial of the deceased was discussed, Minutes taken, conclusions reached and the Minutes were signed by the parties who attended the meeting. He further stated that the Applicants were being disingenuous by bringing up this matter at the review stage and they were acting in bad faith.

12. It was the Respondent's case that the Applicants were attempting to have a second bite at the cherry. That a wrong or incorrect exposition of the law or the evidence was not a ground for review but for an appeal.

13. The Application was canvassed through written submissions as directed by the court.

The Applicants' written submissions.

14. Through their written submissions dated 19th December 2024, the Applicants submitted that this court's failure to acknowledge and consider their pleadings, documents, evidence and arguments was a gross miscarriage of justice and this led it to reach an unfair and unjust conclusion by denying them the right to be heard. That they suffered substantial prejudice as a result. They relied on *Omote & another v*

Ogutu (Civil Appeal E005 of 2021) [2022] KEHC 16441 (KLR), *Paul Mwaniki v National Hospital Insurance Fund Board of Management* (2020) eKLR.

15. It was the Applicants' submission that the decision to take the deceased's body to the 2nd house was made by the clan and not the immediate family. Further that this court overlooked the deceased's prior African Christian marriage which was a monogamous marriage. That they produced a Marriage Certificate and there was no evidence that the deceased cohabited with Anna Ngeno.

16. The Applicants submitted that this court's failure to consider their pleadings and submissions constituted sufficient reason to warrant a review. That a Judgement that overlooked critical aspects of a party's case did not serve the interests of justice.

The Respondent's written submissions.

17. Through his written submissions dated 20th September 2024, the Respondent submitted that the Application did not meet the threshold for grant of the review order. He relied on *Republic v Advocates Disciplinary Tribunal ex-parte Apollo Mboya* (2019) eKLR, *Shanzu Investments Limited v Commissioner of Lands* (1993) eKLR and Order 45 Rules 1 and 2 of the *Civil Procedure Rules*.

18. It was the Respondent's submission that the trial court analysed the issues raised by the Applicants and came to a conclusion. That an erroneous conclusion of the law was not a ground for a review. He relied on *Francis Origo & another v Jacob Kumali Mungala* (2005) eKLR, *Abasi Balinda v Fredrick Kangwanu & another* (1963) E.A 558 and *Pancras T. Swai v Kenya Breweries Limited* (2005) eKLR.

19. The Respondent submitted that a point which may be good for an appeal may not be ground for a review. That an erroneous view of the evidence or law was not a ground for a review. He further submitted that the Application was an attempt by the Applicants at having a second bite of the cherry and it ought to be dismissed.

20. I have gone through and considered the Notice of Motion Application dated 11th December 2023, the Replying Affidavit dated 24th June 2024, the Applicants' written submissions dated 19th September 2024 and the Respondent's written submissions dated 20th September 2024. The only issue for my determination was whether the Application has met the requirements for a grant of a Review Order.

21. It is trite law that the High Court has a power of Review. The law on Review is based on section 80 of the *Civil procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*, 2010. It is salient to note that this court's power must be exercised within this circumscribed legal framework.

22. Section 80 of the *Civil Procedure Act* provides as follows:-

> Any person who considers himself aggrieved-
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> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is allowed by this Act, May apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

23. Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 provides as follows:-

> (1) Any person considering himself aggrieved-
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> (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 review of judgement to the court which passed the decree or made the order without unreasonable delay.

24. From the above provisions, it is clear that section 80 of the *Civil Procedure Act* gives the power of Review while Order 45 of the *Civil Procedure Rules* 2010, sets out the rules. The rules limit the grounds applicable for Review as follows:-

i. The discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the Decree was passed or the Order made.

ii. On account of some mistake or error apparent on the face of the record.

iii. Any other sufficient reason and that the Application has to be made without unreasonable delay.

25. The Supreme Court of India in the case of *Ajit Kumar Rath v State of Orisa & others*, 9 Supreme Court Cases 596 stated as follows:-

> "…….the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" means a reason sufficiently analogous to those specified in the rule".

26. The Court of Appeal in *Tokesi Mambili and others v Simion Litsanga* (2004) eKLR held:-

> "i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.
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> ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion."

27. On the ground of an error apparent on the face of the record, the court in *Zablon Mokua v Solomon M. Choti & 3 others* (2016) eKLR, held:-

> " In *Muyodi v Industrial and Commercial Development Corporation & another* [2006] 1 EA 243, the Court of Appeal described an error apparent on the face of the record as follows:
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> > " In *Nyamogo & Nyamogo v Kogo* (2001) EA 174 this Court said that 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 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. This laid down principle of law is indeed applicable in the matter before us."

28. Similarly, I am persuaded by Mativo J. (as he then was) in *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* (2019) eKLR, where he stated:-

> " The starting point is that 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....."

29. I have carefully gone through and considered the Application and the parties' submissions. The Applicants have not demonstrated any error that is apparent on the face of the record. The Applicants have argued that they presented a Marriage Certificate and urged the position that the deceased was in a monogamous marriage and therefore the court erred in finding that Anne Ngeno was a wife. This to the mind of the court was a ground for appeal not review. It is therefore my finding that they have not established or satisfied this ground of review.

30. Regarding the ground of discovery of new material that was not within the court's knowledge when it delivered its Ruling, Mativo J.'s (as he then was) findings in *Nasibwa Wakenya Moses v University of Nairobi & another* (2019) eKLR, stated:-

> " To qualify to be new evidence so as to fall within the ambit of order 45 Rule 1 of the *Civil Procedure Rules*, the new evidence must be of such a nature that it could not have been within the knowledge of the applicant despite the exercise of due diligence."

31. Similarly, in the case of *Rose Kaiza v Angelo Mpanjuiza* (2009)eKLR, where the Court of Appeal held that:-

> " Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed

on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."

32. Having carefully gone through and considered the Application and the parties' submissions, it is my finding that the Applicants have not demonstrated any discovery of new material that was not within this court's knowledge when it delivered its Ruling. The grounds that the Applicants have relied on, which I address in this Ruling, do not constitute any additional information that was not presented to this court before it delivered its Ruling. It is therefore my further finding that they have not established or satisfied this ground of review.

33. On the ground of any other sufficient reason, the Court of Appeal in *Registered Trustees of the Archdiocese of Dar es salaam v Chairman of Bunju Village Government & others*, Civil Appeal No 47 of 2006, observed that:-

> " It is difficult to attempt to define the meaning of the words sufficient cause. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the Appellant."

34. The Court of Appeal in *Pancras T. Swai v Kenya Breweries Limited* (2014) eKLR held that:-

> " .....As repeatedly pointed out in various decisions of this Court, the words, "for any sufficient reason" must be viewed in the context firstly of Section 80 of the *Civil Procedure Act*, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order."

35. Under this head, the Applicants stated that this court did not consider its arguments, evidence and submissions. I have looked at the grounds among them, the Applicants challenged this court's interpretation of the evidence submitted particularly on the death and birth certificates. This court analysed the evidence presented before it and came to a conclusion that the Applicants did not prove their allegations of the fraudulent birth certificates. With respect to the death certificates, this court stated at paragraph 90 of the Ruling thus:-

> " It is my finding therefore that the Objectors did not prove the allegations of fraud levelled against the Petitioner and the death certificates he used. However, it remains a mystery to this court how two death certificates were issued by the same Government department in respect of one deceased. Further proof of the genuine certificate would be called for in the ongoing proceedings."

36. It was clear that the court did not make a definitive finding on who held the genuine certificate. If the Applicants disagreed with this court's interpretation of the evidence before it and its conclusion, the proper route would be to appeal the Ruling. This was stated by the Court of Appeal in *Pancras T.*

Swai (*supra*) where it quoted *National Bank of Kenya Limited v Ndungu Njau* (Civil Appeal No 211 of 1996 (unreported) thus:-

> " 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. More 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.....
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> ..... the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same Court which had adjudicated upon it."

37. The other ground that the Applicants relied on was that this court relied on the Consent dated 7th November 2017 and filed in Kericho CMCC No 244 of 2017 to stop them from claiming that Ann Ngeno and her children were not part of the deceased's family. Again, this court considered the evidence and submissions regarding the issue of the Consent and it used the Consent among others in coming to the conclusion that Ann Ngeno, the Respondent and his siblings from the 2nd house were part of the deceased's family.

38. Flowing from the above, it is clear that this court addressed itself sufficiently on the matters raised by the Applicants as shown above. Asking for a review on the grounds cited by the Applicants would be akin to be asking this court to sit on appeal on its own decision. It is my finding that the grounds raised by the Applicant are appellate in nature and the same are not allowed in a Review Application. In the case of *Nasibwa Wakenya Moses v University of Nairobi & another* (*supra*), it was held that:-

> " .....The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible."

39. Further, the Court of Appeal in *National Bank of Kenya Limited v Ndungu Njau* (1997) eKLR held that:-

> " In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law....."

40. In the end, having considered the Application in its entirety, I find that the grounds cited by the Applicant did not qualify to be grounds for review to bring the Application within the ambit of the grounds specified in Order 45 Rule 1 of the *Civil Procedure Rules*. It is my finding that this was not a proper case for the court to grant the review sought. Accordingly, the invitation to review the Ruling dated 10th November 2023 is declined.

41. Before I pen off on this Application, I must rule on the Application dated 26th November 2024 that was filed by the 1st Applicant seeking to arrest this Ruling which had been reserved by this court for delivery on 27th November 2024.

42. The Applicant, David Kimutai Cheruiyot averred in his supporting affidavit that he had perused his response and realized that it had omitted some crucial information. He sought leave of the court to file a further affidavit for consideration by the court before delivering the Ruling.

43. This court directed the Applicant's counsel to serve the Application. On 3rd December 2024, the Respondent filed a Replying Affidavit sworn by Davies Kiprono Cheruiyot on 3rd December 2024. The Respondent averred that the Application for Review had been heard and a Ruling set for 27th November 2024. That the Applicant's Application was calculated to occasion delay and injustice to the Respondent and his siblings. That the Applicant had not attached the 'draft crucial information' to enable the court exercise discretion to arrest the Ruling and admit the new information.

44. Odunga J. (as he then was) in *Wambua Maithya v Pharmacy and Poisons Board; Pharmaceutical Society of Kenya, Pius Wanjala & Kamamia Wa Murichu (interested parties)* [2019] KEHC 4155 (KLR) held:-

> " Accordingly, it is my view that in appropriate cases, the Court is entitled to arrest the delivery of a decision in order to do justice if circumstances warrant it. However, that is a jurisdiction which cannot be exercised in a superficial and casual manner. Arresting a judgement and any judicial process for that matter is a power which ought not to be exercised lightly. It can only be properly exercised after a lot of circumspection and soul searching by the judge. In this respect, Sir Udo Udoma, CJ in *Musa Misango v Eria Musigire and others* Kampala HCCS No 30 of 1966 [1966] EA 390, expressed himself as follows:
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> > "Now it is unquestionable that, both under the inherent power of the court, and also under a specific rule to that effect under the *Judicature Act*, the court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse, ...It is evident that our judicial system would never permit a plaintiff to be "driven from the judgement seat" in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad." [Emphasis added].
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> Therefore, whereas the powers to arrest the decision may be invoked, it is a power which ought to be invoked very sparingly and in exceptional circumstances and not to assist a person who is intent upon abusing the process of the Court. Being a discretionary power, as held in *Shah v Mbogo* [1967] EA 116 at 123B, the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice."

45. Similarly in *Rev Madara Evans Okanga Dondo v Housing Finance Company Of Kenya* [2005] KEHC 506 (KLR), Kimaru J. (as he then was):-

> " .....This court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. As was stated by the Authors of *Halbury's Laws of England*, 4th Edition Volume 37 Para 14 under the heading "Inherent Jurisdiction of the Court" at Page 23;
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> > "The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise (i) control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

46. The authorities above though persuasive, offer apt guidance on the principles applicable to this application.

47. I have considered the rival affidavits in this Application. The only issue is whether this court can exercise discretion to arrest its Ruling and grant leave to the Applicant to introduce new information.

48. After going through the record, I have noted that the Application for Review was filed on 13th December 2023.The Respondent filed his Replying Affidavit on 1st July 2024. Both parties filed their written submissions on 20th September 2024. The parties then appeared before this court on 23rd September 2024 where the Ruling on the Review Application was reserved for delivery on 27th November 2024. However, due to a heavy workload the Ruling was not ready by that date and was rescheduled for delivery.

49. I have further noted that the Application for Review was filed by the firm of Kiamba and Siboe Advocates who had been on record on behalf of the Applicant. The Application for arresting the Ruling was done by a different advocate i.e. Koech Gideon & Co. Advocates. While being convinced that the review application need to be beefed up, the learned counsel failed to attach a draft summary of the information to enable the court exercise its discretion judiciously. It appears to the court that this was a well calculated scheme by the Applicant to cause delay in the delivery of this court's Ruling on their (Applicant's) Application for Review. Further, the reasons contained in Application for arresting of the Ruling were insufficient and unconvincing.

50. In the final analysis and in the exercise of my discretion, it is my finding that the Notice of Motion Application dated 26th November 2024 has no merit and is disallowed.

51. As a consequence of the above, it was proper for this court to render its Ruling on the Notice of Motion Application dated 10th November 2023. As I had earlier stated, this court declined the invitation to Review its Ruling dated 10th November 2023 with the consequence that the said application is dismissed.

52. In the end, the Notice of Motion Application filed on 13th December 2023 has no merit and is also dismissed.

53. I decline to award costs in this matter and order that each party bear their costs.

Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 28TH DAY OF JANUARY, 2025.

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of Mr. Kiamba for 2nd Objector, Mr. Kibet holding brief for Mr. Arusei for Respondent/Petitioner, No Appearance for Mr. Koech for the 1st Objector and Siele (Court Assistant).