



REPUBLIC OF KENYA



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In re Estate of Muriuki Joshua alias Mugo Kamaku (Deceased) (Succession Cause 286 of 2013) [2025] KEHC 1057 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1057 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
SUCCESSION CAUSE 286 OF 2013**

RM MWONGO, J

FEBRUARY 27, 2025

**IN THE MATTER OF THE ESTATE OF MURIUKI
JOSHUA ALIAS MUGO KAMAKU (DECEASED)**

BETWEEN

MARY WANJIRU MURIUKI PETITIONER

AND

LABAN ELIUD GICHOBII PROSECUTOR

AND

CHARLES KARANJA MURIUKI PROTESTOR

RULING

1. The applicant filed a summons dated 27th, April, 2021 seeking that:
 1. The ruling and orders of Honourable L. W. Gitari Judge made on the 9th November, 2017 and 20th December, 2019 be reviewed, varied and/or set aside.
 2. The costs of this application be provided for.
2. The application is based upon the following grounds: -
 1. That the Co-administrator herein obtained temporary orders on 9th November, 2017 to restrain the Applicants/beneficiaries of the estate from accessing the deceased's property title number Ngariama/Ngiriambu/482.
 2. That the orders were issued despite the applicants having been living in the deceased's estate.



3. That on 19th December, 2019 the Court subsequently punished the applicants for contempt and ordered them to pay Kshs.20,000 each and in default to serve 30 day's imprisonment for accessing their father's property.
 4. That the applicants were not in a position to pay the amount ordered and in the interest of justice the said orders ought to be set aside.
 5. That in the said ruling the Honourable judge made an error on the face of the record.
 6. That no appeal has been preferred against the said ruling.
3. The applicants deposed a Supporting Affidavit containing the following major averments.
1. That Mary Wanjiru Muriuki and Laban Eliud Gichobi were issued with a grant of letters for confirmation of grant on 9th November, 2013.
 2. That the deceased was polygamous and the applicants are beneficiaries of his estate from the first house.
 3. That before confirmation of their step mother and co administrator Mary Wanjiru Mugo made an application and obtained orders on 9th November, 2017 barring the applicants from accessing their father's estate.
 4. That the said co-administrator sought and even obtained orders that the applicants each pay Kshs.20,000.00 and in default serve civil jail for contempt of Court orders.
 5. That in the said ruling the Honourable judge made errors on the face of the record by:
 - a. Ruling that the applicants do not live in the deceased's property title number Ngariama/Ngiriambu/482.
 - b. Disregarding the applicant's evidence and submissions that they are beneficiaries and children of the deceased herein and their mother is buried in the deceased's property title number Ngariama/Ngiriambu/482.
 - c. Holding that the Petitioner had established that the applicants were in contempt of Court orders
 - d. Relying on the contested evidence of the Petitioner/Applicant.
 - e. Disregarding that the subject matter herein is a family dispute.
 6. That we have not lodged an appeal against the said ruling.
 7. That it is a gross injustice for the applicants to be restrained by their stepmother from accessing their father's property which is pending distribution.
 8. That the applicants do not know of any alternative home apart from their father's property title number Ngariama/Ngiriambu/482.
4. The Respondent deposed a Replying Affidavit of which the following are the major averments:
- i. That on the 9th day of November, 2017, the honourable court issued injunctive orders against the applicants herein restraining them from entering, trespassing, committing acts of wastage or interfering in any way with my use and occupation of land parcel number Ngariama/Ngiriambu/482.



- ii. That the aforesaid order was given after the Court considered the evidence tendered by both parties since the applicants herein also participated.
 - iii. That the aforesaid injunctive orders were therefore issued after the court had satisfied itself that the applicants were not in possession of the suit land and that they were merely attempting to enter thereon by commencing to put up odd structures thereon and maliciously destroying the respondent's crops.
 - iv. That upon issuance of the aforesaid orders on the 10th day of November, 2017, the applicants were served with the said orders on the same day at their residence in Kithara-ini village, Gichugu area within Kirinyaga County.
 - v. That after service, the applicants disregarded the Court orders and continued trespassing upon the suit land and continued putting up the aforementioned structure while cutting down/destroying more crops.
 - vi. That consequently, the respondent had to cite the applicant's herein for contempt of the aforementioned injunctive orders vide the application dated 7th March, 2018 which application was heard on the 15th day of October, 2018. The respondents were present and they argued their case.
 - vii. That on the 20th day of December, 2019, the honourable court held that the applicants were in contempt of the aforesaid orders and punitive measures against the applicants were taken accordingly as per the ruling adduced.
 - viii. That since the 20th day of December, 2019 more than two years down the line, the applicants have never taken up the punishment as ordered by the Court neither have they purged the said contempt yet.
5. Parties filed submissions as directed by the Court.

Applicant's Submissions

6. The applicants submit that prior to issuance of the orders of 19th December, 2019 they defended themselves as captured in the ruling. However, the learned judge made errors on the face of the record by: holding that they did not live in their father's suit property title number Ngariama/Ngiriambu/482, disregarding evidence and submissions that they are beneficiaries and children of the deceased herein and their mother is buried in their father's suit property; holding that they were in contempt of Court orders and relying on contested evidence of the Petitioner and disregarding that the subject matter herein is a family dispute.
7. They submit that they have not lodged an appeal against the said ruling. They contend that they were not in a position to get a counsel in time due to financial constraints hence the delay in making this application. That it is a gross injustice for them to be restrained from accessing their father's property which is pending distribution. They contend that they do not know of any other alternative home apart from the suit land Ngariama/Ngiriambu/482.
8. Further, they submit that it is undisputed that Laban Eliud Gichobi is a co-administrator of the estate herein. Moreover, both applicants are beneficiaries of the estate which is yet to be distributed. The orders to restrain them from accessing their fathers land where they reside were made notwithstanding the fact that the grant appointing Laban Gichobi as a co-administrator has never been revoked. The question according to the applicants is how is Laban Gichobi supposed to administer an estate which he has been barred from accessing? The orders made by the Learned Judge were impractical



for implementation without being disobeyed. Neither the Respondent nor the court provided an alternative home for the applicants so that they could obey the orders without undue hardship being visited upon them.

9. The applicants rely on Section 80 of the Civil Procedure Act which provides:

“ Any person who considers himself aggrieved: -

- a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- 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”.

10. With regard to Mistake on the face of record, the applicants submit that in the case of Republic v Cabinet Secretary for Interior and Co-ordination of National Government Ex parte Abdullahi Said Salad [2019] eKLR the Court held that the error or omission must be self-evident and will not require elaborate argumentation to be established. The applicants thus submit that the error in this case is obvious and self-evident.

11. With regard to whether the application is based on sufficient reasons the applicants cited the case of Republic v Cabinet Secretary for Interior and Co-ordination of National Government Ex parte Abdullahi Said Salad [2019] eKLR which held:

Where the application is based on sufficient reason, it is for the court to exercise its discretion and the court emphasized that the discretion must be exercised within the law and other specific parameters pronounced by the Court in various decisions. In light of the fact that this was a family matter where distribution of the estate is yet to be done, the applicant s implored the Court to vacate the aforesaid orders to pay way for distribution.

Petitioner/Respondent Submissions

12. The Petitioner/Respondent submitted that the conditions upon which a Court can review its decree or order under order 45 are well provided for. The said order provides for three circumstances under which an order for review can be made. For a party to be successful, the applicant must demonstrate to the Court:

- i. That there has been 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
- ii. that there has been some mistake or error apparent on the face of the record; or
- iii. That there is any other sufficient reason.

13. The Respondent argued that the application seems to be premised on the second ground (error apparent on the face of record). However, the respondent submits that there was no error apparent on the face of record in the judgment of this Court. The applicant referred to the case of re Estate of Simoto Omwenie Isaka (Deceased) [2020] eKLR determining an application for review under Order 45 of the Civil Procedure Rules 2010 and Muyodi Industrial and Commercial Development Corporation and Another (2006) 1 EA 243 on what the Court of Appeal considered constitutes a mistake or error apparent on the face of the record.



14. Further reliance was placed on the case of *Nyamogo & Nyamogo vs Kogo* (2001) EA 174 where it was held 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.”

15. Further, the petitioner submits that what the applicants state as forming part of the error apparent on the face of record is not so. That the applicants participated in the hearing of the application and they filed their responses. The Court retired and upon considering the application (for interim orders of injunction) found it fit to issue the said orders. They submit that the issues raised by the applicants herein (as contained in paragraph 7 of the supporting affidavit) are not errors apparent on the face of record but rather a challenge to the Court’s decision. It is clear from the wording of the said paragraph that this Court is being invited to sit on appeal of its judgement, an act which is outside the scope of the review jurisdiction.
16. Finally, the petitioner submits that the applicants did not prove that there was discovery of new and important matter or evidence which, after the exercise of due diligence, was not within their knowledge or could not be produced by them at the time when the decree was passed and neither did they depose or even prove that there was any other sufficient reason.

Issue for Determination

17. The only issue for Determination is whether the application for review should be allowed.

Analysis and Determination

18. The applicant seeks that the ruling and orders of L.W. Gitari, J made on the 9th November, 2017 and 20th December, 2019 be reviewed, varied and/or set aside.
19. The application is premised on the grounds that the co-administrator herein obtained temporary orders on 9th November, 2017 to restrain the Applicants/ beneficiaries of the estate from accessing the deceased’s property title number Ngariama/Ngiriambu/482. The applicants assert that on 19th December, 2019 the Court subsequently punished the applicants for contempt and ordered them to pay Kshs.20,000/- each and in default to serve 30 days’ imprisonment for accessing their father’s property.
20. The applicants urged that in the said ruling the Hon. Judge made errors on the face of the record by:
- a. Ruling that they do not live on their fathers’ property title number Ngariama/Ngiriambu/482.
 - b. Disregarding their evidence and submissions that they are beneficiaries and children of the deceased herein and that their mother is buried in their father’s property title number Ngariama/Ngiriambu/482.



- c. Holding that the Petitioner had established that they were in contempt of Court orders.
 - d. Relying solely on the contested evidence of the Petitioner/Applicant.
 - e. Disregarding that the subject matter herein is a family dispute.
21. The respondent deposed in her Replying affidavit that the aforesaid order was given after the Court considered the evidence tendered by both parties since the applicants also participated. That the aforesaid injunctive orders were issued after the Court had satisfied itself that the applicants were not in possession of the suit land and that they were merely attempting to enter thereon by commencing to put up odd structures thereon and maliciously destroying the respondent's crops.
22. Section 80 of the Civil Procedure Act provides;
- “ Any person who considers himself aggrieved-
- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - (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, provides for application for review of decree or order of Court as follows: -
- (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 review of judgement to the court which passed the decree or made the order without unreasonable delay.”(emphasis added)
24. The applicants assert that the Honourable Judge made errors on the face of the record by ruling that the applicants do not live on their fathers' property title number Ngariama/Ngiriambu/482.
25. The applicants submit that it is a gross injustice for them to be restrained from accessing their father's property which is pending distribution. They contend that they do not know of any other alternative home apart from the suit land Ngariama/Ngiriambu/482.
26. The applicants had filed an affidavit of protest dated 16th October, 2014 against the confirmation of grant dated 23rd September, 2014. They had protested the mode of distribution which had left out members of the 1st wife's house. The letter of the Chief dated 27th April, 2021 confirms that the applicants were children of the deceased and the 1st wife.
27. Due to the fact that this Succession Matter has a long and chequered history since 2008, I perused the file and proceedings and have noted as follows:



- a. The 1st Respondent Laban Eliud Gichobi had filed Succession No.22/2008 Gichugu in respect of the estate of the deceased, and had indicated that the deceased was survived by two wives Margaret Wambura Muriuki and Mary Wanjiru Muriuki (who was indicated as deceased) and that there were ten (10) surviving children of the deceased.
 - b. That Mary Wanjiru Muriuki filed objection proceedings and the matter was moved to Embu vide Misc. Application No.4/2012.
 - c. That the applicant Mary Wanjiru Muriuki (objector) filed summons dated 16/4/2012 seeking orders to restrain the 1st and 2nd Respondents from entering into, cultivating or occupying Ngariama/Ngiriambu/482.
 - d. That the said application dated 16/4/2012 was recorded in the proceedings of 19/4/2013 as withdrawn by consent and that Letters of Administration were agreed to be issued in the joint names of the Petitioner (Laban Eliud Gichobi) and objector (Mary Wanjiru Muriuki).
 - e. That a grant was issued to the said joint Administrators on 19th November, 2013.
 - f. That Mary Wanjiru Muriuki applied for summons for confirmation of grant dated 23rd September, 2014; and a Protest was filed by Charles Karanja Muriuki 2nd Respondent/Applicant herein on 16th October, 2014.
 - g. That the applicant Mary Wanjiru Muriuki again applied by summons dated 8th November 2017 for temporary injunction restraining the respondents from entering, trespassing, occupying or using/wasting Ngariama/ Ngiriambu/482, which application sought similar orders as those in the earlier application of 16/4/2012 that was withdrawn by consent.
 - h. That in her affidavit deponed on 16/04/2012 in support of the application of 16/04/2012, Mary Wanjiru Muriuki had stated, inter-alia: “(1) that the respondents (allegedly with others) entered the disputed land in December, 2009, March 2012, April 2012; and that she made reports at Kianyaga Police Station but the Police said they could not act as the matter was in Court; and:
 - (2) That the Respondents continue to come on the land everyday....”
28. There is no indication that the respondents ceased to enter into or utilize the disputed land, nor is it explained why the application dated 16/04/2012 was withdrawn by consent and the disputing objector and petitioner appointed as co-administrators of the deceased’s estate.
 29. The above information was not brought to the attention of the Judge when she heard the application dated 8th November, 2017 and issued the orders of 10th November, 2017.
 30. During the hearing of the contempt proceedings, the court recorded on 15/10/2018, the assertions by the 1st Respondent Laban Eliud as follows:

“I have filed an affidavit. We have always lived on that land. That is where we have known. We sub-divided the land and lived on the land for a long time. We were served with the Court order but we were already on the land....”



31. On his part Charles Karanja (2nd Respondent) is recorded by the learned Judge, in the proceedings of the same date as asserting:

“The deceased (our mother) was buried there. There was an order and Chief supervised.... We have planted 80 coffee bushes and other trees. The order was oppressive. The case has been in Court for over 20 years.”

32. In response Counsel for the applicant stated that it was not correct for the respondents to say they have been on the suit land; and he referred to a photograph of a house under construction.

33. The learned Judge in paragraph 8 of her ruling, relied on the photograph of the house undergoing construction and determined that the respondents, in so constructing, were in breach of the injunctive orders.

34. In my view, the Court made an error on the face of the record on 20th December, 2019 when it held that the applicants were constructing a house on the suit land despite the court order dated 9th November, 2017.

35. The court disregarded the applicants’ evidence and submissions that they were beneficiaries and children of the deceased herein and their mother was buried in the suit property title number Ngariama/Ngiriambu/482. The court was also not properly apprised on the history of the dispute, and in particular, the withdrawn application of 16/4/2012, and events surrounding the occupation and use of the disputed property.

36. In the case of *Republic v Cabinet Secretary for Interior and Co-ordination of National Government Ex parte Abdullabi Said Salad* [2019] eKLR the Court held that “the error or omission must be self-evident and should not require an elaborate argument to be established. Error apparent on the face of record must be such an error, which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions.”

37. Clearly, the error apparent in this case meets the above definition and thus the application should be allowed.

38. In addition, the Court can exercise review jurisdiction for “any other sufficient reason” under Order 45 Rule (1). In the case of *Republic v Cabinet Secretary for Interior and Co-ordination of National Government Ex parte Abdullabi Said Salad* [2019] eKLR

“Mativo J held: A court can review a judgment for any other sufficient reason. In the case of *Sadar Mohamed vs. Charan Singh and Another*, it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the

Conclusion and Disposition

39. Ultimately, and in the strength of the foregoing discussion, I am persuaded to allow the application dated 27th April, 2021.

40. Accordingly, this Court makes the following orders:

- a. The orders of this Court made on 9th November, 2017 and issued on 10th November 2017 are hereby reviewed by way of setting them aside entirely.



- b. Consequently, the contempt orders of this Court made on 20th December, 2019 having been founded on the orders issued on 10th November, 2017, automatically fall aside or invalid and are hereby voided.

41. Orders accordingly.

DELIVERED VIRTUALLY AT KERUGOYA HIGH COURT THIS 27TH DAY OF FEBRUARY, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

Rutere holding brief for Ms. Too for Petitioner/Respondent

No Representation for Mr. Waithaka for Protestors/Applicants

Francis Munyao - Court Assistant

