



**In re Estate of Wilson Gathungi Macharia (Deceased) (Succession Cause  
2357 of 1995) [2025] KEHC 1399 (KLR) (Family) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1399 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY**

**SUCCESSION CAUSE 2357 OF 1995**

**PM NYAUNDI, J**

**FEBRUARY 27, 2025**

**IN THE MATTER OF THE ESTATE OF THE LATE  
WILSON GATHUNGI MACHARIA (DECEASED)**

**BETWEEN**

**TITUS WAITHAKA GATHUNGU ..... 1<sup>ST</sup> APPLICANT**

**ISAAC MACHARIA GATHUNGU ..... 2<sup>ND</sup> APPLICANT**

**AND**

**PAUL NJUGUNA GATHUNGU ..... 1<sup>ST</sup> RESPONDENT**

**JAMES MUCHIRI GATHUNGU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Vide Summons dated 31<sup>st</sup> May 2024 and presented under section 47 of the Law of Succession Act and Rules 63 and 73 of the Probate and Administration Rules and Order 45 of the Civil Procedure Rules, the Applicant, James Muchiri Gathungu, who is a Co- Administrator seeks orders that
  - i. Spent
  - ii. Spent
  - iii. This honourable Court be pleased to correct and/ or review its ruling made on 03.05.2024 to include the word equivalent of Kshs 7,585,000/- in the resultant order numbers 3 (i) and (v) in accordance with the partial certificate of Confirmation of Grant made on 8<sup>th</sup> June 2009.
  - iv. Upon correction and / or review of the ruling made on 03.05. 2004, the Court be pleased to order for valuation of the properties of the deceased clustered under schedule 3 of the partial Certificate of Confirmation of Grant made on 08.06.2009 and the monetary compensation



due to the 1<sup>st</sup> House be settled by the Court based on the current market value of the said properties.

- v. That part of the ruling made on 03.05.2024 declining the reimbursement of the sums of Kshs. 13,986,967/- to the Applicant being costs of major renovations and repairs over the Nakuru/ Municipality/ Block 5/ 117 and Nakuru/ Municipality/ Bock 2/386 (1/3) share be reviewed and /or set aside and be substituted with an order of reimbursement.
  - vi. Any other orders that this Honourable Court may deem just and expedient.
  - vii. The costs of this Application be provided for
2. The Application is supported by the Affidavit of James Muchiri Gathungusworn on the 31<sup>st</sup> May 2024. The Respondents oppose the Application vide Replying Affidavit sworn by Titus Waithaka Gathungu And Isaac Macharia Gathungu.
  3. It is his contention that the exclusion of the word equivalent in the order issued on 3<sup>rd</sup> May 2024 distorts the import of the order and deviates from the order issued on 8<sup>th</sup> June 2009. He urges that on review the court should order that the properties be valued and the compensation due to the first house be based on the current market value.
  4. It is his averment that the Court in using the word equivalent intended that at the time the money was paid out to the 1<sup>st</sup> House the appreciation of the assets would be factored in and the compensation enhanced accordingly.
  5. It is submitted that this constitutes an error and should accordingly be corrected.
  6. It is further averred that the Court erred in failing to order that he be reimbursed to the tune of Kshs 13, 986,967. Monies paid out by him to preserve the estate. He has now availed correspondence to demonstrate that prior to the commissioning of the renovation, the project engineer invited the Respondents to a meeting which they failed to attend. It is therefore not right that there was lack of consultation with the other administrators on his part.
  7. In any event he states that the deceased had commissioned work worth Kshs 2,779, 380 prior to his death. It is submitted that this along with tax arrears comprise liabilities of the against the estate and the same have to be paid. It is his contention that unless the orders are reviewed he will be prejudiced.
  8. The Applicant has sworn a further affidavit on 29<sup>th</sup> July 2024 in which he reiterates his assertions in the earlier affidavit and denies that his application is motivated by malice against the 2<sup>nd</sup> House.
  9. The Respondents have sworn replying affidavit in opposition to the Summons. It is their contention that the interpretation rendered by the Applicant is not supported by the context. It is their averment that the proper interpretation of the use of the word equivalent is that the amount would be set off either by monetary means or by exchange of any other property of equal value. In support of this interpretation is the assertion that the effective date of distribution of the estate was 8<sup>th</sup> July 2009 and therefore the issue of appreciation would not arise.
  10. In any event it is contended that the Applicant has been receiving rental income from Nakuru Municipality/ Block 5/117 since 1995 and has failed to account for the same.
  11. With regard to the reimbursement that the Applicant seeks, the Respondents deny being to any meeting as alleged and further that there has been any consultation with the Applicant. It is averred that the claim for Kshs 13, 986, 967/- is not sustainable in law.



## Summary Of Submissions

12. The Applicants submissions are dated 16<sup>th</sup> August 2024, essentially the Applicant seeks review of the orders of the Court made on 3<sup>rd</sup> May 2024 and relies on the decision of the Supreme Court of India in *Ajit Kumar Rath versus State of Orisa & Others* 9 Supreme Court Cases 596 on the scope of review. Reference is also made to the decision in *John Mundia Njoroge & 9 Others versus Cecilia Muthoni Njoroge & Another* [2016] eKLR wherein the Court clarified that an application for review presented under Section 63 of the Law of Succession must meet the threshold set by Order 45 of the Civil Procedure Rules.
13. It is submitted that the exclusion of the word equivalent before the figure of Kshs 7,585,000/- constitutes a clerical or arithmetical mistake that can be corrected by the Court on its own motion or on the application of the parties.
14. It is submitted that the failure to order reimbursement of the sums of Kshs 13, 986,967 constitutes an error apparent on the face of the record as no transmission could have occurred with an administrator dead and there was need to preserve the estate.
15. It is also submitted that he has recently come into possession evidence of an attempt to reach out to the Co Administrators by the project manager prior to the commissioning of the repairs and it is the Respondents who were non-responsive. It is submitted that unless the orders are reviewed he will be prejudiced beyond recall.
16. The respondent's submissions are dated 24<sup>th</sup> September 2024. The Respondents identify the following as the issues for determination-
  - i. Whether the application meets the threshold for granting the orders of review.
  - ii. Whether the Applicant is entitled to the reliefs sought.
17. The Respondents submit that the Applicant has not brought himself within the purview of Order 45 of the Civil Procedure rules. Reference is made to the decision in *Re Estate of Tabitha Gakui Chege (Deceased)* [2020] eKLR on the prerequisites to the grant of a review order as sought.
18. The Respondents submit that the documentation submitted by the Applicant does not meet the test set out in *Paul Mwaniki v National Hospital Insurance Fund Board of Management* [2020] eKLR. The decision in *Rose Kaiza v Angelo Mpanju Kaiza* [ 2009] eKLR is cited further for the Court in exercising its discretion must be mindful to ensure that the new evidence admitted does not give the litigant an opportunity to repair his case using the back door to the detriment of the other party.
19. Further it is submitted that the material placed before the Court does not show that there was a mistake or error apparent on the face of the record. Reference is made to the decision in *National Bank of Kenya Limited vs Ndungu Njau* [1997] eKLR where the Court said the error must be obvious and need not require an elaborate explanation.
20. The Respondents submit that if the Applicant is aggrieved by the reasoning of the Court he should appeal the decision and relies on the decision in *Omote & Another v Ogutu* [2022] KEHA 16441 (KLR)

## Analysis And Determination

21. The following are the issues I deem for determination
  - i. Whether the Court should review orders of 3<sup>rd</sup> May 2024 so as to-



- a. insert the Word equivalent before the sum of Kshs 7,585,000/- in Order 3 (i) and (v)
  - b. Order a valuation of the assets so that compensation of the 1<sup>st</sup> House is based on the current market value.
  - c. direct that the Applicant be reimbursed the sum of Kshs 13, 986,967
- ii. Who should pay the costs of the Application.
22. The power and principles to guide review are derived from Section 80 *Civil Procedure Act* and Order 45 Rule 1 the *Civil Procedure Rules*, 2010. Section 80 of the *Civil Procedure Act* provides as follows:  
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 judgment 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 further provides for review in the following manner:  
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.
24. There is a plethora of decision by Courts on the issue of review. The Supreme Court in Application No 8 of 2017, *Parliamentary Service Commission v Martin Nyaga Wambora & Others* [2018] eKLR, cited with approval the findings of the East Africa Court of Appeal in *Mbogo and another v Shah* [1968] EA and laid out the following guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:
- i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this Court.
  - ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
  - iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
  - iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.



- v. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.
  - vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and as a result,
    - a. a wrong decision was arrived at; or
    - (b) it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.
25. The Court of Appeal in Civil Appeal No 2111 of 1996, *National Bank of Kenya v Ndungu Njau* observed as follows in respect of reviews applications:
- 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 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 proceeds on an incorrect expansion of the law.
26. Further in High Court in Miscellaneous Application 317 of 2018, *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR. the Court enumerated the principles for consideration in reviewing its own decisions as follows:
- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
  - ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
  - iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
  - iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
  - v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
  - vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
  - vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
  - viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
  - ix. Section 80 of the *Civil Procedure Act* provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject



to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Act does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

- x. The power of a civil court to review its judgment/decision is traceable in Section 80 of the Civil Procedure Act. The grounds on which review can be sought are enumerated in Order 45 Rule 1.
27. On the 1<sup>st</sup> issue, Applicant seeks that the Judgment be reviewed to insert the word equivalent as it appears in the Certificate of Partial Confirmation issued on 8<sup>th</sup> June 2009. He asserts that the review of the order is necessary so as to reflect the Court intended that the 1<sup>st</sup> House compensation factor in the appreciation of the assets.
28. I am unable to agree with this interpretation by the Applicant for the simple reason that by doing I would be revising the orders of the Court made on 8<sup>th</sup> June 2009 when this was not the subject or at issue in the ruling of 3<sup>rd</sup> May 2024. At issue in the earlier application was whether the Court should review the Consent order and not the interpretation of that order. Accordingly, on this 1<sup>st</sup> limb I will only review the Order to insert the word equivalent but clarify that in so doing I am maintaining the framing by the Court on 8<sup>th</sup> June 2009 and not adopting the interpretation by the Applicant.
29. It follows therefore that I will not be ordering as requested a valuation of the current value of the assets as this was not an issue in the ruling of 3<sup>rd</sup> May 2024. That dispenses with the 2<sup>nd</sup> issue.
30. On the 3<sup>rd</sup> issue, the applicant urges that the Court should revise its ruling in light of the new evidence that has been provided. In my ruling I found that the Applicant had to prove his debt against the estate or pursue his claim against the individual beneficiary as his action were ultra vires that of an administrator post confirmation as he had acted unilaterally absent the concurrence of his co administrators.
31. The new evidence submitted seeks to address this lacuna in the evidence of the Applicant in the initial application. This is outside the envisaged parameters of an application for review as stated by the authorities cited above an application for review is not an opportunity to seal gaps. If the Applicant is not in agreement with my reasoning, the avenue open to him is an appeal.
32. Accordingly, the Application dated 31<sup>st</sup> May 2024, partially succeeds to the extent that the Orders 3(i) and 3(v) are amended to insert the word equivalent just before the figure of Kshs 7,585,000/-
33. In exercise of the powers donated by Section 47 of the Law of Succession Act and Order 73 of the Probate and Administration rules, I will extend the time for the Administrators to complete the administration by an additional 90 days.
34. Mention on 14<sup>th</sup> June 2025 to confirm compliance.
35. This being a family matter there shall be no order as to costs.

It is so ordered

**SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27<sup>TH</sup> DAY OF FEBRUARY 2025.**

**P M NYAUNDI**

**JUDGE**

In the presence of:



Nyaata Faith holding for Kimondo Advocates  
Fardosa Court Assistant

