



REPUBLIC OF KENYA



**In re Estate of Late Peter Mathenge Mburuga (Miscellaneous Succession  
Application 30 of 2023) [2025] KEHC 3963 (KLR) (28 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3963 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
MISCELLANEOUS SUCCESSION APPLICATION 30 OF 2023**

**EM MURIITHI, J**

**MARCH 28, 2025**

**IN THE MATTER OF THE ESTATE OF LATE PETER MATHENGE MBURUGA**

**BETWEEN**

**DAVIS MBATIA WAMBUI ..... 1<sup>ST</sup> RESPONDENT  
WANJOHI MWEA KAMOTHO ..... 2<sup>ND</sup> RESPONDENT  
MICHAEL WACHIRA GICHUKI ..... 3<sup>RD</sup> RESPONDENT  
MANASSES NJERU NYAMU ..... 4<sup>TH</sup> RESPONDENT  
NANCY WAWIRA MIRITI ..... 5<sup>TH</sup> RESPONDENT  
ROSE WAWIRA MUTHEE ..... 6<sup>TH</sup> RESPONDENT  
PAULINE MABUTI MATHENGE ..... 7<sup>TH</sup> RESPONDENT  
NANCY WAMBUI MURIITHI ..... 8<sup>TH</sup> RESPONDENT**

**AND**

**JOYCE MABUTI MATHENGE ..... APPLICANT**

**RULING**

1. The applicant filed a Notice of Motion dated 4<sup>th</sup> April, 2024 seeking the following orders:
  - a. Spent.
  - b. Spent.
  - c. The Deputy Registrar of this Court be ordered to avail to this Court the original file for Kerugoya High Court succession Cause No.126 of 2014 within such period as the Court shall find to be reasonable.



- d. Failure to comply with order (c) above, this court be pleased to set aside the judgment delivered on 29<sup>th</sup> May, 2020 in Kerugoya High Court Succession Cause No. 126 of 2014, the case to be heard de novo and the orders of inhibition registered against the titles of land parcel numbers Kabare/Nyangati/8301,8302,8303,8304,8305,8306, 8307, 8308, 8309, 8310 and 8311 be reinstated.
2. The application is based on the supporting affidavit of Joyce Mabuti Mathenge who depones that she had filed summons for revocation of grant in Kerugoya High Court Succession Cause No. 126 of 2014, but which was dismissed on 29<sup>th</sup> May 2020. That in the meantime an order was issued for preservation of the suit parcels of land, namely Kabare/ Nyangati/8301,8302,8303,8304,8305,8306,8307,8308, 8309,8310 and 8311. The applicant proceeded to file a Notice of Appeal as she was dissatisfied with that judgment, and therefore exercised her constitutional right of appeal. That she also sought for certified copy of proceedings and judgment for purposes of the appeal but the court file was never availed. That on 25/1/2024, this Court issued orders to discharge the inhibition orders, but stayed the said orders on 5/2/2024 for a period of 60 days.
  3. Finally, she urges this court to come to her aid in granting orders to avail the court file in Succession Cause number 126 of 2014, and should that not be possible, to have the case declared a mistrial, set aside the judgment for the case to start a fresh. The new file to be placed under lock and key, and the proceedings be typed as and when they take place, and be supplied to the parties.
  4. The Respondent on 9<sup>th</sup> April, 2024 filed a Replying Affidavit indicating that this court is functus officio and has no power to proceed and issue orders on a case that has already been heard and determined on merit. That judgment was issued on 29/5/2020 and if the applicant was dissatisfied, she ought to have moved to the court of appeal in Nyeri and prosecute her appeal there. That the applicant has been silent all through until the respondents moved this court seeking prayers to discharge the orders that had been issued on the interim during the hearing and determination of the summons for revocation dated 20/4/2017. That no plausible reason has been given by the applicant as to why she has taken 4 years to come to court seeking for the above prayers the truth of the matter is because the interim orders were lapsing on 5/4/2024 and just want to keep holding the respondents' hostage in court.
  5. The Applicant's submissions rely on Article 48 right to access to justice urging that their right to an appeal is hampered by the lack of the trial court proceedings and in the interests of justice the court should exercise discretion to rehear the matter.
  6. The Respondent's submissions oppose the application and urge that the Court has already heard and determined the dispute between the parties and it therefore functus officio and it cannot reopen the case for rehearing.

**Prayer No. (d) contingent on prayer No. (c)**

7. The Court considers that the Application before the Court must be considered in a phased fashion where the Court must establish the outcome or compliance with the directive sought in prayer No. 2 of the Notice of motion before considering and making a determination on the substantive prayer No. (d) of the Motion, which is contingent on the outcome of prayer No. (c). While the directive in prayer No. (c) is not opposed by the Respondents, the relief sought in Prayer No. (d) is hotly contentious.
8. Significantly, the order for setting aside of the proceedings and judgment of this court and subsequently for a rehearing de novo is a matter of great moment, which cannot, if it is, be made lightly. Where, in an analogy with Criminal cases, it has been made such an order for setting aside a conviction and a retrial has been made it was after the Court establishing that the trial court file cannot be traced and, most



importantly, that the appellant/applicant was not involved in the disappearance of the file in order to gain some advantage.

9. In the leading case, the Court of Appeal in *John Karana Wainaina v Republic* - Criminal Appeal No. 61 of 1993 (unreported) held:

“In such a situation as this, the court must try to hold the scales of justice and in doing so must consider all the circumstances under which the loss has occurred. Who occasioned the loss of all the files? Is the appellant responsible? Should he benefit from his own mischief and illegality if he is? In the final analysis the paramount consideration must be whether the order proposed to be made is the one which serves the best interest of justice. An acquittal should not follow as a matter of course where a file has disappeared.”

10. Wainaina’s case was followed in subsequent Court of Appeal decision of *John Maina Kariuki v Republic* [2008] eKLR where the Court observed that:

“Of course, the basic truth is that it is the duty and responsibility of the courts to safely and securely keep such documents. But it is known that documents can be made to disappear particularly by those who stand to gain from such disappearance. That is the basis of the Court’s insistence that an acquittal cannot automatically follow upon such loss.”

11. This insistence avoids a situation as Joel Ngugi, J. (as he then was) in *James Onyango Nyakoiro v Republic* [2020] eKLR identified as the injudicious prospect of a person benefitting from his own wrong-doing as follows:

“Once certified lost, in determining the appropriate orders to make, the Court must determine whether there is any evidence or indications that the Appellant was involved in the loss of the file. If there is any evidence of such involvement or collusion, the Court declines to make any orders in favour of the Appellant. The legal principle in application there is nullus commoedum capere protest de injuria sua propria: no one should be allowed to profit from his own wrong. Thus our Courts have uniformly held that if it is shown that an Appellant colluded in the disappearance of the file, he will not benefit from any favourable orders of the Court.”

12. While it is settled, as pointed in the Court of Appeal decisions, that an order for retrial or acquittal is not automatic, or in this case an order for rehearing, the position of the availability of the file and the involvement of the parties in the loss or misplacement thereof are some of the primary considerations by the Court when determining the application for retrial or rehearing.

## Conclusion

13. Accordingly, the order that commends itself to this Court at this stage of the inquiry is the grant of the prayer for the direction to the Deputy Registrar to produce before the Court original court file or the certification is misplaced so as to factually found the consequent application for rehearing.
14. This Court takes a serious view of the matter of loss of court files for its effect on the administration of Justice, and, respectfully agree with Mativo J. (as he then was) in *Yeri v Republic* (Criminal



Miscellaneous Application 78 of 2014) [2021] KEHC 182 (KLR) (3 November 2021) (Ruling) on the importance of integrity of court records in that:

“Disappearance of court records constitutes a serious assault on the justice delivery system. It erodes public confidence in the administration of justice. It is not an injury to the appellant alone. It hurts the prosecution, the public who have an interest in ensuring that offenders are lawfully punished and the guilty are acquitted. Disappearance of court files is inconsistent with two fundamental requirements for due administration of justice. First, that the court protects its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike. Second, is that unless the court protects its ability to function in that way, its failure will lead to erosion of public confidence. The court processes will be seen as lending themselves to oppression and injustice if courts were to tolerate disappearance of court records. Court records play a pivotal role and overlap with the obligation of a court to provide a fair trial. How can a fair trial be guaranteed when court proceedings vanish in the hands of those obligated by law to protect them?”

15. It is imperative that the Court takes proactive measures to remedy and contain incidents of loss of court files otherwise, as Mativo J. says “This court will be condoning this grave assault on the due administration of justice if it turns a blind eye on disappearance of court files. It will be a serious dereliction of duty if the court fails to act in the circumstances. The court will not allow itself to appear helpless in the hands of those entrusted with files.”
16. As in Yeri’s case, the Court direct both internal administrative and public criminal police investigations in the alleged disappearance of the court file in this case before further orders in the matter.

#### Orders

17. Accordingly, for the reasons set out above, the Court directs the Deputy Registrar immediately to write to the Director of Criminal Investigations, Kirinyaga to file a complaint on the disappearance of the original court file on Kerugoya High Court Succession Cause No.126 of 2014 *Estate of Peter Mathenge Mburuga (Deceased)*, with a request that the DCI investigates the circumstances of the alleged disappearance of the file and take necessary legal action.
18. For information and further action as necessary, a copy of this ruling shall be sent to the Directorate of Public Prosecution, Kirinyaga County.
19. The Court also directs that the Deputy Registrar in terms of Prayer No. (d) of the Notice of Motion dated 4<sup>th</sup> April, 2024 to avail before this Court the original file for Kerugoya High Court Succession Cause No.126 of 2014 *Estate of Peter Mathenge Mburuga (Deceased)* within a period of thirty (30) days from today.
20. This matter will therefore be mentioned for further order and or directions on the 3/6/2025.
21. Costs in the Cause.

Orders accordingly.

**DATED AND DELIVERED THIS 28<sup>TH</sup> DAY OF MARCH 2025.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:



Ms. Wambui for the Appellant.

Ms. Kimotho for the Respondent.

