



REPUBLIC OF KENYA



In re Estate of Samuel Simekha Chalingo (Deceased) (Succession Cause 485 of 2021) [2025] KEHC 5649 (KLR) (29 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5649 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 485 OF 2021**

G MUTAI, J

APRIL 29, 2025

IN THE MATTER OF THE ESTATE OF SAMUEL SIMEKHA CHALINGO (DECEASED)

BETWEEN

SAMUEL ETALE ETETWE 1ST APPLICANT

MOSES MASIGA CHALINGO 2ND APPLICANT

PETER CHALINGO 3RD APPLICANT

AND

ROSE LOUISE NGOYA ODHIAMBO RESPONDENT

RULING

1. Before this honourable court is a summons for review dated 18th September 2024, through which the following orders are sought:-
 - a. Spent;
 - b. That this honourable court be pleased to review by setting aside the court ruling given on 24th November 2017;
 - c. That this honourable court be pleased to order that the applicant's summons for revocation dated 23rd November 2015 and amended on 30th March 2016 be heard by way of viva voce evidence; and
 - d. That the costs of and incidental to this application be provided for.
2. The application is premised on the grounds stated in the body of the Summons and the supporting affidavit of Samuel Eitale Etetwe, sworn on 18th September 2024.



3. In his deposition, Mr Etetwe averred that the court delivered a ruling on 24th November 2017 to the effect that the certificate of confirmation of grant dated 6th September 2013 be set aside and a fresh certificate be issued to include the 1st and 2nd Applicants as beneficiaries of Title No E/Bunyore/Ebulonga/458.
4. He contended that the effect of the said ruling was that they, as applicants, had only been given a share out of Title No E/Bunyore/Ebulonga/458, to be shared out amongst seven other beneficiaries. In contrast, Title No W/Bunyore/Ebusikhale/2042 was given to one beneficiary. He further contended that the deceased had allocated a share out of Title No E/Bunyore/Ebulonga/402 & 500 to them and that they have always made use of their respective shares, and thus the distribution as per the grant is meant to displace them from their portions.
5. He further stated that the hearing of the summons for revocation took place on 27th July 2016; however, the 2nd and 3rd applicants did not testify as they were taking care of their ailing mother, who also ought to have testified. He accused their former advocates, Marende Necheza & Co. Advocates, of failing to advise them to call other key witnesses, including the 2nd & 3rd applicant and their mother. The said key witnesses would have testified to the subdivision of the subject properties by the deceased and their allocation to the applicants' family. They could also have called the area administrator, who could have offered oral testimony that they had been residing on Title No W/Bunyore/Ebusikhale/2042 during the deceased's lifetime and after his demise. He urged the court to allow the application as prayed.
6. In response, the respondent filed an affidavit sworn on 16th October 2024.
7. She stated that the court, in its ruling regarding Title No E/Bunyore/Ebulonga/458, gave reasons for doing so as being that the mother of the applicants, and the applicants themselves, have their homesteads.
8. She further stated that the applicants did not raise the issue that key witnesses had not testified. She thus urged the court to dismiss the application with costs.
9. The applicants filed a further affidavit sworn by the 1st applicant on 1st November 2024. In the said affidavit, he reiterated his position in his supporting affidavit. He stated that orders of review were necessary to correct an error in the distribution of the estate and for all the relevant issues to be considered. He urged the court to allow the application.
10. The summons was canvassed by way of written submissions. Through their advocates, Fred K Musyimi & Associates Advocates, the applicants filed written submissions dated 25th October 2024.
11. Counsel reiterated the applicant's position in their affidavits and submitted the foregoing amounts to a sufficient cause, which is a ground for review, and urged the court to set aside the ruling of 24th November 2017 and grant the applicants a chance to be heard. Counsel urged the court to allow the application as prayed.
12. The respondent, on the other hand, through her advocates, Moses Mwakisha & Company Advocates, filed written submissions dated 28th January 2025. Mr Mwakisha learned counsel for the respondent reiterated her position and submitted that the applicants were heard before the Court made its determination. He urged that they never raised the issue of witnesses before the court. It was his submission that the application was made after an inordinately long delay and that the same is an abuse of court process, and no valid grounds for review had been raised. In his view, the applicants were attempting to relitigate, through review application, the matters which had previously been determined. Counsel urged the court to dismiss the application with costs.



13. I have considered the application and the response thereto. I have further considered the submissions of the parties. In my view, the sole matter coming up for determination is whether a case has been made for review of a decision that this Court made in 2017.
14. The power to review is derived from Section 80 of the [Civil Procedure Act](#), which 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 the judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
15. The foregoing provision is given effect by Order 45 rule 1(1) of the [Civil Procedure Rules 2010](#), which provides 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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.”
16. Review is a discretionary remedy. Like all discretions, review of decisions should be done judiciously and not capriciously or whimsically. The Court of Appeal, while considering the conditions under which a decision may be reviewed, stated as follows in the case of [Otieno, Ragot & Company Advocates v National Bank of Kenya Limited](#) [2020] KECA 894 (KLR):-
- “Section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 of the [Civil Procedure Rules](#) give the court unfettered discretion to make such an order as it thinks fit on sufficient reason being given for review of its decision. However, as it has been constantly stated, this discretion should be exercised judiciously and not capriciously.”
17. The court in the case of [Smartkar Enterprises & another v Mary Kemunto Ogendo](#) [2021] KEHC 7801 (KLR) stated that:-
- “It is now settled that for courts to review their decision, they must do so in compliance with Section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 of the [Civil Procedure Rules](#). Mativo J in [Nasibwa Wakenya Moses v University of Nairobi & another](#) [2019] eKLR observed that:-
- “Section 80 gives the power of review, while Order 45 sets out the rules. The rules restrict the grounds for review. Put differently, the rules lay down the jurisdiction and scope of review. They limit it to the following grounds; (a) 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 or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

.....

A review is permissible on the grounds of discovery by the applicant of some new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order was passed. The underlying object of this provision is neither to enable the court to write a second judgment nor to give a second innings to the party who has lost the case because of his negligence or indifference. Therefore, a party seeking a review must show that there was no remiss on his part in adducing all possible evidence at the trial.”

18. Upon perusal of the ruling of the court delivered on 24th November, 2017 by Lady Justice M. Thande, I have noted that the issues raised in this matter were dealt with by the honourable judge who stated:-

“Although the 1st applicant states that he claims the property on behalf of his father’s family, none of the other applicants testified. Not even his mother, who is alive, swore an affidavit to support the claims by the 1st applicant. In the circumstances, from the material placed before me, I am not persuaded that the deceased gave Plot No W/Bunyore/Ebusikhale/2042 to the applicants as claimed. As regards Plot No E/Bunyore/Ebulonga/458, it is noted that both the 1st applicant and his mother have built their houses thereon, and moreover, that is where the applicant’s father was buried, and this is not denied by the applicants.”

19. In her final orders the learned judge held as follows:-

“Having evaluated all the evidence before me, I do find that the grant was obtained by non-disclosure of material facts, namely that the 1st and 3rd applicants are beneficiaries of the estate of the deceased. This non-disclosure would be adequate ground for revoking the grant. Section 76 is, however, not couched in mandatory terms. The court may or may not exercise its discretionary power to revoke a grant where it is demonstrated that there were defects in the process of obtaining a grant. In the present case, I am not persuaded to revoke the grant as I have seen no fraud on the part of the respondent. Given that the 1st and 3rd applicants have been excluded in the distribution, the justice of the case requires that they be included in the distribution of the estate of the deceased. I do hereby set aside the certificate of confirmation of grant and direct that a fresh certificate of confirmation of grant be issued to include the 1st and 2nd applicants as beneficiaries of Plot No E/Bunyore/busikhale/458. Each party to bear own costs.”

20. I note that what is sought is a review of a decision made by this Court 7 years ago. Order 45 Rule 1 is clear that a review application must be made without unreasonable delay. I have not seen in this case an explanation for the delay in seeking the review of the decision of the court. That, in my view, is sufficient ground for this court to decline to review its previous orders. There is a need for finality in court process. Litigants also ought to act with speed and must not subject their opponents to old, stale claims.

21. Even if the application was brought without undue delay it does not seem to me as though the application has merit. There is no error apparent on the face of the records. There is also no discovery of any new facts that would warrant disturbing the decision of this Court.



22. Although the applicants allege that being denied a chance to call all the witnesses is sufficient grounds, I am unable to agree. What amounts to a sufficient ground must be seen ejusdem generis, qua the other 2 grounds.
23. From the court records, it's evident that since the delivery of the court's ruling in 2017, the applicants have never moved the court on any ground until September 2024, when they filed this application. No explanation or reasons were given for the delay of almost eight years and/or for failure to either apply for review or file an appeal to show their dissatisfaction with the court's ruling. The only conclusion this court can make is that the applicants were satisfied with the ruling of the learned judge.
24. The upshot of the foregoing is that I find and hold that the application dated 18th September 2024 has no merit. The same is hereby dismissed with no order as to costs.
25. It is so ordered.

DATED AND SIGNED IN MOMBASA THIS 29TH DAY OF APRIL 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Musyimi, for the Applicants;

Mr Mwakisha, for the Respondent; and

Arthur - Court Assistant.

