



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 59 OF 1997

IN THE MATTER OF THE ESTATE OF KIPKOSGEY KIPLAGAT KAMAR (DECEASED)

IN THE MATTER OF AN APPLICATION FOR SETTING ASIDE A CONSENT ORDER

BETWEEN

TOIYOI TABARNO KAMAR.....1ST PETITIONER

TAPYOTIN KIMOI KAMAR.....2ND PETITIONER

JOSEPH KIPKOSGEI KAMAR.....3RD PETITIONER

DR. KIMITEI KIPKOSGEL.....4TH PETITIONER

AND

CHARLES KIBIWOTT KAMAR.....OBJECTOR

RULING

[1] The application that is the subject of this ruling is the one dated **4 December 2017**. It was filed herein on **11 December 2017** by the four applicants, namely **Ruth Jemutai Kamar, Elizabeth Jepyego Kamar, Hellen Jesire Kipkemoi** and **Jane Jesanai Nakodony** under **Rules 49 and 74** of the **Probate and Administration Rules**. As prayers (a) and (b) thereof are spent, what is outstanding is the prayer that the Court be pleased to set aside Clauses (3) and (4) of the Consent Order recorded herein on **14 November 2016**; and that the deceased's estate, and more specifically **LR No. 7439 (SIGOWO)** comprising 846 acres and **ELDORET MUNICIPALITY BLOCK 7/26**, be distributed to the beneficiaries as per the Judgment of the Court dated and delivered on **22 December 2015**. They also prayed that the costs of the application be borne by the Objector.

[2] The application was premised on the grounds that the Court delivered a fair and just judgment on the mode of distribution of the deceased's estate on **22 December 2015**; and that the said judgment is acceptable to the majority of the beneficiaries. It was further stated that, subsequently, the Objector applied for review of the judgment, which application was compromised by a Consent Order dated **14 November 2016**. The contention of the applicants was that they were neither consulted by the administrators nor the Objector before the Consent Order was made; and that they are greatly prejudiced thereby, as its effect is to take away from them property rights that had accrued from the judgment.

[3] The application was supported by the four affidavits annexed thereto, sworn by the applicants on **4 December 2017**. In her affidavit, **Hellen Jesire Kipkemoi** deposed that her co-applicants are her sisters; and that their deceased father died intestate and was survived by two widows and 16 children. It was further averred by **Hellen Jesire Kipkemoi** that, since the beneficiaries were in agreement on how to share the estate, save for **LR No. 7439/SIGOWO** (hereinafter, "**the Sigowo Property**") and **ELDORET MUNICIPALITY BLOCK 7/26 (the Eldoret Town Property)**, the Court (**Hon. Githua, J.**) was called upon to make a determination only in respect of the distribution of those two assets; which it did vide the Judgment dated **22 December 2015**, adopting the ratio of 10:8 based on the number of children in each house along with their respective mothers as separate units.

[4] At paragraphs 7 to 11 of her affidavit, **Hellen Jesire Kipkemoi** further deposed that, it subsequently came to her attention that the Objector, who is her step-brother, had filed a review application which was compromised in terms of the impugned Consent Order dated **14 November 2016**. In her view, the Consent Order is a reversal of some of the orders made in the judgment and therefore ought not to be allowed to stand. In particular, **Hellen Jesire Kipkemoi** deposed that:

[a] the Consent Order had the effect of reducing the size of what the rest of the beneficiaries will receive from **the Sigowo Property**;

[b] The effect of Clause 3 of the Consent Order was to divide **the Sigowo Property** into three portions; including a portion of 23 acres for the Objector, yet the Court had already ruled out the Objector getting 23 acres from the farm;

[c] The Consent Order had the effect, *inter alia*, of reducing the deceased's ownership of **LR No. ELDORET MUNICIPALITY BLOCK 7/26** from full ownership to one-quarter.

[5] The other Applicants, **Ruth Jemutai Kamar, Elizabeth Jepyego Kamar** and **Jane Jesanai Nakodony**, also made their separate depositions, averring that they did not subscribe to the impugned Consent Order, particularly Clauses 3 and 4 thereof; and that they were never consulted before the said Consent Order was made. Accordingly, it was their averment that they fully supported the application by their sister, **Hellen Jesire Kipkemoi**, for stay and setting aside of the said Consent Order.

[6] In response to the application, the Administrators relied on the Replying Affidavit sworn by **John Kibet Kamar** on **20 May 2019**. In that affidavit, it was deposed that the beneficiaries have all along been represented by Counsel; and that the members of both houses were aware of the proceedings, including the circumstances under which the Consent Order of **14 November 2016** was made. **John Kibet Kamar** further averred that the Consent Order was made in the presence of all the Advocates on record and with the full knowledge and instructions of their respective clients. Hence, it was his assertion that the application has been brought in bad faith, for the sole purpose of further delaying the conclusion of these proceedings.

[7] It is noteworthy too that **Mr. David Rioba Omboto**, Advocate, who was then acting for the 2nd House, to which the Applicants belong, also filed own Replying Affidavit, sworn on **30 March 2019**. He affirmed that he had been representing the two Administrators from the 2nd House, namely: **Tapyotin Kimoi Kamar** and **Joseph Kipkosgei Kamar**; and that throughout the proceedings he consulted and obtained instructions from the two Administrators as well as from **Prof. Margaret Jepkoech Kamar** and **Everline Jeruiyot Kipkoech Kamar**. He therefore averred that it was on that basis that they negotiated and agreed on the terms of the Consent Order dated **14 November 2017**. He therefore denied the allegations that he never consulted the beneficiaries. Indeed, it was the assertion of **Mr. Omboto** that the review was inevitable, granted that the Judgment had several errors which needed to be rectified. He gave examples of the apparent errors thus:

[a] Some of the names of the dependants were missing from the list of the beneficiaries/dependants;

[b] Some of the names were not correctly captured and therefore appeared strange to the Succession Cause, such as the name "**Christopher Kimutai Kamau**" captured at paragraph 19 of the Judgment;

[c] The failure to take into account the reality that **the Eldoret Town Property** is registered and owned by four people as tenants in common with equal shares.

[8] **Mr. Omboto** annexed to his affidavit copies of the Title for the **Eldoret Town Property**. It does show that the said property is registered in the names of **Kipkosgei Kiplagat, Joseph Cheron, Kimitei Kamar** and **Joseph Kipkosgei** as tenants in common with equal shares. **Mr. Omboto** also annexed to his affidavit an application filed herein by **Joseph Cheron** on **15 March 2016** to assert his rights by way of review of the Judgment. Thus, according to **Mr. Omboto**, the Consent Order was not at all prejudicial to the Applicants' proprietary interests.

[9] Directions having been issued on **24 June 2019** that the application be disposed of by way of written submissions, Counsel for the Applicants filed his written submissions on **18 July 2019**. He pointed out that each of the beneficiaries acquired their respective shares upon confirmation of Grant on **22 December 2015**; and therefore, that any subsequent application whose import was to interfere with an individual's share in the estate had to be brought to the attention of every individual beneficiary and not just a representative of the house. According to him, whereas the concept of houses is recognized in **Section 3** of the **Law of Succession Act**, it does not constitute a house as a legal entity.

[10] Counsel for the Applicants further submitted that since it was not in dispute that the Consent Order made monumental adjustments to the Judgment, it was imperative that the same be reviewed. In particular, he pointed out that the Consent had the effect of reducing the interest of the estate of the deceased in **the Eldoret Town Property** from three-quarters to only one-quarter, thereby disinheriting the beneficiaries of the deceased and giving their rights to third parties. While conceding that an advocate has the authority to compromise a suit on behalf of his client, it was the submission of Counsel that such an advocate must act *bona fide* and respect the wishes of his client. He added that, in this instance, the Applicants were not informed of the Consent and therefore ought not to be bound by the said Consent.

[11] On behalf of the Administrators and the 1st House, submissions were filed herein on **9 July 2019** by **Ms. Tum**, instructed by the firm of **M/s Birech, Ruto & Company Advocates**, reiterating the fact that all the beneficiaries were represented and therefore participated, not only in the negotiation of the Consent Order, but were also present when the said Consent Order was made and adopted by the Court. He therefore argued that the Applicants have not given any justification to warrant a review of the said Order. Reliance was placed on the cases of **Samuel Mbugua Ikumbu vs. Barclays Bank Limited** [2015] eKLR and **Kenya Commercial Bank Ltd vs. Specialized Engineering Co. Ltd** [1982] eKLR, for the principle that an advocate has general authority to compromise a suit on behalf of his client as long as he is acting pursuant, and not contrary, to the clients's express negative direction.

[12] It was further the submission of **Ms. Tum** that the Applicants were under obligation to demonstrate that the Consent Order was obtained by fraud or collusion or by an agreement contrary to public policy; or that it was given without sufficient material facts or through misapprehension or ignorance of material facts. In her submission, the Applicants failed to discharge this duty; and therefore did not demonstrate sufficient cause to warrant a review. She referred the Court to **Samuel Wambugu Mwangi vs. Othaya Boys' High School** [2014] eKLR and urged the Court to dismiss the application with costs.

[13] On behalf of the Objector, **Charles Kibiwott Kamar**, written submissions were filed herein on **13 September 2019** by **Mr. Miyienda**. He, likewise, asserted that the Consent Order of **14 November 2016** was reached after deliberations involving the two houses and the Objector; and that it was adopted as an order of the Court in the presence of Counsel. He proceeded to explain the purport of each of the contested clauses, namely: Clauses 3, 4 and 7; and urged the Court to find that no sufficient cause has been shown to warrant the setting aside of those clauses. Thus, **Mr. Miyienda** urged the Court to dismiss the application dated **4 December 2017** with costs.

[14] And, on behalf of the 2nd House, **Mr. Omboto**, filed written submissions on **24 July 2019** reiterating his stance that he consulted the representatives of the dependants in the 2nd House, and in particular, **Prof. Margaret Kamar** and **Joseph Kipkosgei Kamar**. He submitted that it was improper for the Applicants, who all belong to the 2nd House, to allege that he did not consult them for purposes of the impugned Consent Order. Counsel further submitted that the Consent Order was negotiated for the sole purpose of correcting errors that were apparent in the Judgment and therefore was made in the interests of justice and for the benefit of all; particularly the interests of the beneficiaries whose names were left out in the Judgment and the third party whose interest in **the Eldoret Town Property** had not been taken into account by the Judgment. Thus, in **Mr. Omboto's** submission, the Consent Order was not in any way inimical to the Applicant's proprietary rights and therefore ought to remain in place. He however suggested that the distribution be made in blocks for each house as opposed to the beneficiaries' current places of occupation.

[15] I have given careful consideration to the application, the affidavits filed in respect thereof by the disputants as well as the written submissions filed by their respective Counsel. I have similarly perused the record of the proceedings and what emerges therefrom, by way of background, is that a Petition for Grant of Letters of Administration Intestate in respect of the estate of the deceased, **Kipkosgei Kiplagat Kamar**, was filed herein on **12 March 1997** by **Joseph Kipkosgei Kamar** and **Dr. Kimitey Kipkosgei Kamar**. The depositions filed by the two Petitioners indicate that the deceased died intestate on **20 October 1993**; and that he was survived by two widows and 16 children. In the course of time, the two widows of the deceased, namely, **Toiyoi Tabarno Kamar** (the 1st widow) and **Tapyotin Kimoi Kamar** (the 2nd widow) were enjoined as Petitioners and a Grant issued in the names of the four Administrators on **24 December 1997**.

[16] The deceased's estate comprises of several assets which, as of 1997 when the Petition was filed, were worth approximately **Kshs. 60,000,000/=**. The assets include **the Sigowo Property, LR No. 739** measuring about 856 acres, and **the Eldoret Town Property**; which are at the centre of the instant application. The record further shows that, although several attempts were made to have the Grant confirmed with a view of distribution of the estate, the beneficiaries were unable to fully agree on the mode of distribution. By **4 May 2015**, in spite of several applications having been filed for confirmation of grant, no agreement could be reached, particularly with regard to the distribution of **the Sigowo Property** and the **Eldoret Town Property**. An Objection had also been filed by one of the beneficiaries, **Charles Kibiwott Kamar**, and one of the grounds he raised was that **the Eldoret Town Property** was co-owned by the deceased jointly with three others whose interest had not been taken care of in the Judgment. Accordingly, the Court was invited to step in and make a decision on the mode of distribution of the deceased's estate, on the basis of written submissions filed in that regard by Counsel. It is also noteworthy that, by that time, one of the Administrators, **Dr. Kimiti Kipkosgei Kamar**, had passed away.

[17] It was in the light of the foregoing that the Judgment of **22 December 2015** was delivered, whereby it was ordered that **the Sigowo Property** be shared on the basis of 10:8, taking into account the number of children in each house and the two widows. Thus, 470 acres of **the Sigowo Property** were to go to the 1st House, to be shared equally by the 1st widow and her 9 children, while the 2nd House was to receive 376 acres thereof, to be shared equally among the 2nd widow, **Tapyotin Kimoi Kamar**, and her 7 children. As for **the Eldoret Town land**, the Court held that:

“In view of the fact that this appears to be a commercial property on which an undisclosed number of rental units have been erected, it is my opinion that because it cannot be physically subdivided into different parts to be shared by the beneficiaries and in order to avoid the logistical hassles of rent collection; the foreseeable difficulties in the actual sharing of rental proceeds taking into account the number of the beneficiaries and the attendant conflicts in the family in the event that the administrators or their representatives fail to in future properly account for the rental income, it is my finding that the most equitable and fair mode of distribution for this property is that the same be sold and the sale proceeds be shared on terms this court shall order.”

[18] That some of the beneficiaries were unhappy with the Judgment is manifest in the number of Notices of Appeal filed herein. One of the Notices of Appeal was filed by **Joseph Cheronno**, who was said to have jointly bought **the Eldoret Town Property** as tenants in common with the deceased, and whose interest was unsuccessfully championed by the Objector. The Court was later convinced that the said property was co-owned by the deceased and three others, who included **Joseph Cheronno**. Thus, in the proceedings of **27 July 2016** the Court granted temporary reprieve in respect of the sale of the **Eldoret Town Property** and acknowledged that:

“I have read the Certificate of Urgency dated 26 July 2016, the affidavit sworn in its support and the annexures thereto. The annexures confirm that the parcel of land known as LR No. Eldoret/Municipality Block 7/26 is jointly owned by three people including the applicant as tenants in common in equal shares. This evidence was not availed to the court during the Succession proceedings...”

[19] It was within the foregoing backdrop that the impugned Consent Order of **14 November 2016** was made. It states as follows:

“By consent, the Judgment of this Honourable court dated 22nd December 2015 be and is hereby reviewed on the following terms:

- 1) The names of Charles Kibiwott Kamar and Susan Jeplangat Mibei be and is hereby included in the list of the beneficiaries indicated in the Judgment.**
- 2) The name of one of the beneficiaries indicated as Christopher Kamau as captured in paragraph 19 of the**

Judgment be corrected to read Christopher Kimutai Kamar.

3) That L.R. No. 7439(Sigowo) comprising of 846 acres be distributed by allocating 23 acres therefrom to Charles Kibiwott Kamar, a further 40 acres at the trading centre be distributed to all the beneficiaries including the Objector in equal shares. The remainder of 783 acres be and is hereby distributed to all the beneficiaries at the ratio of 10:8 as captured in the Judgment at paragraph 19. That a government surveyor be invited to demarcate each beneficiary's respective share taking into account the portions occupied by each beneficiary on the ground and provide access roads to each beneficiary's portion.

4) The deceased's ¼ share of the rent proceeds in L.R. No. Eldoret Municipality/Block 7/26 be distributed to the beneficiaries in the two houses in the ratio of 10:8. The other co-owners of the property shall be at liberty to move the appropriate court for determination of their respective shares in the property as per the title document (Certificate of Lease).

5) That L.R No's Mosop/Chepkorio/21, Mosop/Choroget/236, Tembeleo/Illula/Block (Munyengwet/32 and L.R. Chepkorio Plot 11 be distributed to the beneficiaries as per the consent of the parties adopted at paragraph 12 of the Judgment.

6) The survey costs to be borne by the Estate.

7) The legal costs be paid by the Estate. The said costs shall be agreed upon by the parties or be taxed by the Deputy Registrar of the Court."

[20] The Consent was accordingly adopted as an order of the Court in the hopes that it would completely compromise and settle the dispute as regards the mode of distribution. To the contrary, it provoked the filing of not only the instant application, dated **4 December 2017** by four of the beneficiaries belonging to the 2nd House, but also several others. Since only prayer c) of the Chamber Summons remains unresolved, the issue for determination is whether sufficient cause has been shown by the Applicants for the setting aside of Clauses (3) and (4) of the Consent Order aforementioned.

[21] **Section 47 of the Law of Succession Act, Chapter 160 of the Laws of Kenya**, gives this Court the powers to entertain any application and determine any dispute under the Act; and to pronounce such decrees and make such orders as may be expedient; while **Rules 49 and 63 of the Probate and Administration Rules** provide for the manner of approach to the Court. In particular, **Rule 63(1) of the Probate and Administration Rules** expressly imports and sanctions the application of **Order 45 of the Civil Procedure Rules** to succession matters, where relevant. Thus, the instant application is competently before the Court; and therefore the pertinent issue to resolve is whether sufficient cause has been shown for the review and setting aside of Clauses 3 and 4 of the Consent Order dated **14 November 2016**.

[22] It is trite that a consent order is a valid contract between the parties thereto, and can only be set aside or varied upon proof of certain prerequisites. In Flora Wasike vs Destimo Wamboko [1988] 1 KAR 625, **Hancox, JA**, reiterated this principle thus:

"It is now settled law that a consent judgment or order has a contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled which are not carried out."

[23] The same principle was expressed in the case of Brooke Bond Liebig (T) Ltd vs Mallya [1975] EA 266, wherein a passage from **Seton on Judgments and Orders, 7th Edition, Vol. 1 p. 124** was quoted with approval, thus:

"Prima facie, any order made in the presence and with the consent of Counsel is binding on all parties to the proceedings or action and those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court ... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement."

[24] Similarly, in Kenya Commercial Bank Ltd vs. Specialized Engineering Co. Ltd, Civil Case No. 1728 of 1979 [1980] eKLR, the same point was made that:

"...the making by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates and when made, such an order is not lightly to be set aside or varied save by consent or an order on one or either of the recognized grounds..."

[25] It is manifest from the application and its Supporting Affidavits that the Applicants are not alleging fraud or collusion. It is not their contention that the Consent Order contravenes the policy of the court; or even that it was given without sufficient material facts. Instead, the Applicants raised the following three grounds in support of their application, namely:

[a] That they were never consulted before the Consent Order was made;

[b] That the two impugned clauses of the Consent Order amount to a claw-back of their accrued proprietary rights;

[c] That the Consent Order was founded on misrepresentations by the Objector with the sole intention of bestowing an undue advantage on the Objector;

[a] On Consultation:

[26] There is no controversy that the protagonists were all represented by Counsel in the proceedings culminating in the Consent Order of **14 November 2016**. The 1st House was represented by **Mr. Paul Birech** of **Birech Ruto & Company Advocates**. The 2nd House was represented by **Mr. David Rioba Omboto** of **Omboto & Company Advocates**; while the Objector was represented by **Mr. Miyianda** of **Miyianda & Company Advocates**. All these Advocates were present when the impugned Consent Order was made and they duly signed the court record in acknowledgement of their involvement and participation in the negotiation, crafting and endorsement of the Consent Order. The record also shows that **Mr. Miyianda** also had instructions at the time to hold brief for **Joseph Cherono** as an Interested Party.

[27] In respect of the 2nd House, to which the four Applicants belong, **Mr. Omboto** deposed in paragraphs 4 to 17 of his Replying Affidavit that he made thorough consultation not only with the two Administrators representing the 2nd House, namely, the widow **Tapyotin Kimoi Kamar** and her son **Joseph Kipkosgei Kamar**, but also with two other daughters of **Tapyotin**, namely **Prof. Margaret Kamar**, who was the key contact person, and **Everline Jeruiyot Kipkoech Kamar**.

[28] Under those circumstances, it cannot be said that the Consent Order was made without authority or sufficient instructions, particularly taking into account the averment of **Mr. Omboto** that he consulted the two Administrators representing the 2nd House as well as **Prof. Margaret Kamar** and **Everline Kamar**. Neither **Joseph Kipkosgei Kamar** nor **Prof. Margaret Kamar** have come up to refute the averments by **Mr. Omboto** that he consulted them and sought their views on behalf of the others beneficiaries in the 2nd House. The same goes for **Everline Kamar**. The assertions by **Mr. Omboto** that the negotiations took a while and that several adjournments were sought and granted by the Court to enable them iron out an acceptable position that would well take care of the interests of all concerned, are not only unrefuted, but are also borne out of the court record.

[29] I note that, whereas the Applicants acknowledged that they were duly represented as a house, their cause for complaint was that they were not contacted as individuals, or their views sought as to the proposed changes before the Consent Order was made. They posited that, since each of the beneficiaries had acquired their respective shares upon confirmation of Grant on **22 December 2015** on the basis of the Judgment of the Court, any subsequent application whose import would interfere with an individual's share in the estate had to be brought to the attention of every individual beneficiary and not just a representative of their house. It was in this respect that Counsel for the Applicants argued that, since it was not in dispute that the Consent Order had the effect of reducing the interest of the estate of the deceased in **the Eldoret Town Property** from three-quarters to only one-quarter, the Court should find that it thereby disinherited the beneficiaries of the deceased and giving their rights to third parties. He accordingly questioned the *bona fides* of the Advocates concerned. No wonder then that **Mr. Omboto** found it necessary to file a Replying Affidavit in the matter to explain the steps he took in connection with the recording of the impugned Consent Order.

[30] In my careful consideration, there was no obligation on the part of **Mr. Omboto** to contact each member of the 2nd House for purposes of the Consent Order. This is because he had ostensible authority to do what he deemed was in the best interests of the 2nd House, having obtained instructions and authority from the two Administrators representing that house, as well as **Prof. Margaret Kamar** and **Everline Kamar**, in their capacity as representatives of the 2nd House. Indeed, in **Kenya Commercial Bank Ltd vs. Specialized Engineering Co. Ltd** (supra), which was followed in **Samuel Mbugua Ikumbu vs. Barclays Bank of Kenya Ltd** (supra) it was held that:

“An advocate has general authority to compromise on behalf of his client as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding.” (see also **Samuel Wambugu Mwangi vs. Othaya Boys High School** (supra))

[31] Thus, the Applicants were under obligation to demonstrate either that the Consent Order was made in disregard of express negative direction from the beneficiaries or any of them, or that there existed bad faith on the part of Counsel. There is absolutely no proof on both fronts and that being the case, lack of consultation or authority cannot be a justifiable ground for impugning the Consent Order.

[b] On the effects of the Consent Order:

[32] The gravamen of the Applicant's application is that the Consent Order made fundamental changes to the Judgment on distribution of the estate of the deceased in that it not only had the effect of reducing the shares of the beneficiaries, but also expropriated part of the estate comprised in **the Eldoret Town Property** to third parties. And so, in the Replying Affidavit sworn by **Mr. Omboto**, the purpose of the Consent Order was painstakingly explained. He explained that it was imperative to review the Judgment because of the following reasons:

[a] Some of the names of the dependants were missing from the list of the beneficiaries/dependants;

[b] Some of the names were not correctly captured and therefore appeared strange to the Succession Cause, such as the name **“Christopher Kimutai Kamau”** captured at paragraph 19 of the Judgment;

[c] The failure to take into account the reality that **the Eldoret Town Property** is registered and owned by four people as tenants in common with equal shares.

[33] A perusal of the Judgment dated **22 December 2015** confirms that, at paragraph 19 thereof, the names of two of the beneficiaries belonging to the 1st House were omitted. These are **Charles Kibiwott Kamar** and **Susan Jeplangat Mibei**. There is no dispute that their names appear in the paragraph 8 of the Affidavit in Support of Petition, as beneficiaries. It is also manifest from paragraph 19 of the Judgment that the name of **Christopher Kimutai Kamar**, a beneficiary in the 1st House was misspelt, to read **“Christopher Kimutai Kamau”**. This was a fundamental error for purposes of distribution and I would agree with **Mr. Omboto** and the other Counsel on record that these omissions and misspellings needed to be corrected by way of a review. Indeed, Clauses 1 and 2 that relate to the aforesaid amendments have not been challenged by the Applicants.

[34] As to whether the interests of the deceased in the **Eldoret Town Property** have been minimized or expropriated to third parties, **Mr. Omboto** averred that the said property was bought by the deceased jointly with **Joseph Cherono**; and that it was thus registered in the joint names of the deceased, **Joseph Cherono** and the deceased's two sons, namely: **Kimitei Kamar** and **Joseph Kipkosgei**, as tenants in common with equal shares. Annexed to the Replying Affidavit sworn by **Mr. Omboto** is a copy of the Certificate of Lease for the **Eldoret Town Property** and it confirms the averments of **Mr. Omboto** as to proprietorship.

[35] **Mr. Omboto** also annexed to his affidavit copies of an application filed herein by **Joseph Cherono** on **15 March 2016** by which he sought a review of the Judgment dated **22 December 2015**. In the Supporting Affidavit, **Mr. Cherono** explained that he only came to know of the Judgment when the subject property was put up for sale. This assertion was not countered by the Applicants. It is therefore plain from the Certificate of Title that the deceased estate is entitled to only $\frac{1}{4}$ of the value of the **Eldoret Town Property**; and therefore the parties were perfectly entitled to correct that aspect of the Judgment by the Consent Order. That being the case, it cannot be said that the Consent Order had the effect of reducing the proprietary interest of the beneficiaries of the deceased in the **Eldoret Town Property**. To the contrary, the interest of the estate of the deceased is circumscribed by the Certificate of Lease to only $\frac{1}{4}$ share.

[36] As regards **the Sigowo Property**, the Applicants' complaints were two-fold. Firstly, they lamented that the Consent Order had the effect of reducing the size of what the beneficiaries will receive from **the Sigowo Property**. Secondly, they were not happy that the effect of Clause 3 of the Consent Order if implemented as it is, will be to divide **the Sigowo Property** into three portions; including a portion of 23 acres for the Objector, yet the Court had already ruled out the Objector getting 23 acres from the farm. Having acknowledged the interest of Objector in **the Eldoret Town Property** as demonstrated hereinabove, it is only logical that adjustments be made to cater for the debt that the estate owed the Objector, as captured in paragraph 24 of the Judgment dated **22 December 2015**. That portion of the Judgment reads:

“As the administrators and the beneficiaries were all in agreement that the Estate was indebted to the objector and that 23 acres of LR. NO. 7439/Sigowo was sufficient to pay off his debt, the cash equivalent of the value of the 23 acres will be paid to the objector to liquidate the debt owed to him by the Estate.”

[37] Hence, instead of paying the deceased a cash equivalent of 23 acres at **the Sigowo Property**, the parties consented to giving him the 23 acres in kind. Needless to say that, in that event, the cash equivalent that would have been taken from the proceeds of sale of **the Eldoret Town Property** remains intact for the benefit of all the beneficiaries. Clearly, there is no undue advantage to the Objector and it cannot be said that any prejudice will befall the other objectors in terms of their accrued proprietary interests, for either way, the debt has to be paid; and it is a debt that was clearly acknowledged in the Judgment.

[38] The same can be said of the 40-acre portion of **the Sigowo Property** that abuts **the Eldoret Nakuru Road**. It only makes economic sense that each of the beneficiaries be given the advantage of owning a portion of that property in equal measure. The Applicants have not given any particular reason for opposing this arrangement. Moreover, it cannot be true that the ultimate portions of the beneficiaries would be reduced, granted that the reduction of the two blocks due to each house by 40 acres would be compensated for by the 40 acres they would receive from the portion abutting the main road.

[39] In the result, I find no merit in the application dated **4 December 2017**. The same is hereby dismissed. However, owing to the nature of the dispute, it is hereby ordered that the costs of the application shall be costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF APRIL 2020

OLGA SEWE

JUDGE