REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

SUCCESION CAUSE NO.311 OF 2007

IN THE MATTER OF THE ESTATE OF THE LATE KIBET ARAP KIRUI alias KIBET KIRUI

SILVESTER MARITIM KIRUI……..……..1ST PETITIONER/APPLICANT

CHRISTINE BETT…….……..…..2ND PETITIONER/APPLICANT

FRANCIS KIPKORIR BETT…….……..3RD PETITIONER/APPLICANT

VERSUS

HILLARY KIPROTICH TIROP……..…...1ST OBJECTOR/RESPONDENT

EDWIN CHERUYOIT KIRUI……...…….2ND OBJECTOR/RESPONDENT

RULING

1. The applicants and respondents in this matter are all beneficiaries of the estate of Kibet Arap Kirui alias Kibet Kirui. An application for grant of letters of administration intestate was made and issued to Tabelga Chelangat Kirui, Silvester Maritim Kirui, Edwin Cheruiyot Kirui and Hilary Kiprotich Tirop on 27th July 2010. It was confirmed on 24th September 2013.

2. The certificate of confirmation of grant indicated that the 1st administrator, Tabelga Chelangat Kirui, was to hold the sole asset of the estate of the deceased, Kericho/Kipchimchim/238 measuring 17.0 hectares in trust for the beneficiaries of the estate.

3. Thereafter, the respondents in this application, grandchildren of the deceased, filed an application for rectification of grant dated 28th May 2014. They sought rectification of the grant on the basis that the respective shares of the beneficiaries had not been indicated in the schedule, and they had been threatened with eviction from the land.

4. In her ruling dated 24th March 2016, Ong'udi J allowed the application and directed that the property should be distributed in accordance with the mode of distribution proposed by the applicants, the present respondents.

5. In their application dated 18th May 2016, the applicants, Silvester Maritim Kirui, Christine Bett and Francis Kiprotich Bett seek the following orders:

> ***1. That this Honourable Court be pleased to review and set aside its ruling of 24th March 2016 and order the hearing of the application dated 28th May 2014 by way of viva voce evidence so as***

to establish facts on the ground before proceeding to issue an order on the mode of distribution of the estate herein.

2. That necessary and further directions be given.

3. That the costs of this application be provided for.

6. The application is based on the following grounds:

1. That the respondents herein would carry out the survey on the subject estate on the 20th May 2016 for the purposes of sub-dividing the same and which will result in demolishing applicants' permanent structures thereon and thus the applicants stand to suffer irreparable loss and damages which might not be adequately compensated in monetary terms.

2. That the application dated 28th May 2014 was not heard by way of viva voce evidence so as to establish facts on the ground before proceeding to issue an order on the mode of distribution of the estate herein.

3. That the said ruling of 24th March 2016 failed to take into account the wishes of the petitioners/applicants' father who is the deceased herein.

4. That before his demise on 16th June 1978, the father to the petitioners/applicants had shown all the beneficiaries he left behind their position on ground on LR. NO. Kericho/Kipchimchim/238.

5. That the petitioners/applicants have done permanent developments on the portions of land which their late father showed them including permanent houses and also tea plantations.

6. That implementing the court's ruling dated 24th March 2016 will result in demolishing permanent structures which were constructed over 30 years ago.

7. That the application herein is made out of utmost good faith.

8. That unless the ruling is reviewed as prayed, the same would be rendered ineffectual and the petitioners/applicants would be unable to enforce the same.

9. That in view of the foregoing, there is good and sufficient cause for setting aside and reviewing of the said ruling as prayed.

10. That accordingly, in the interests of justice and fairness, the said Ruling ought to be reviewed as prayed.

11. That unless the orders herein are granted the petitioners/applicant stand to suffer irreparable loss and damages which might not be adequately compensated in monetary terms.

7. The application is supported by an affidavit sworn by Mr. Silvester Maritim Kirui on behalf of the other applicants on 18th May 2016. Mr. Maritim deposes that the application by the respondents dated 28th May 2014 which resulted in the ruling of 24th March 2016 was not heard by way of oral evidence in order to establish the facts on the ground before the court issued an order on the mode of distribution of the estate.

8. The applicants depose that the ruling failed to take into account the wishes of the deceased who, prior to his death, had shown the applicants their positions on the ground on the subject land, Kericho/Kipchimchim/238. They assert that they have done permanent developments and tea plantations on their respective portions of land which their late father had shown them. They contend therefore that

implementing the court's ruling dated 24th March 2016 will result in demolition of the permanent structures which were constructed over 30 years ago. Subdivision of the land in accordance with the ruling of the court would lead to their suffering irreparable loss which cannot be compensated in monetary terms.

9. The respondent filed an affidavit in response sworn by Mr. Edwin Cheruiyot Kirui on 15th June 2016. Mr. Cheruiyot Kirui deposes, *inter alia,* that the ruling of 24th March 2016 was made in conformity with the law and should therefore not be set aside. He further deposes that the applicants are out to deny the respondents their inheritance and leave them destitute. He states that the land was to be subdivided in accordance with the certificate of confirmation of grant dated 12th April 2016 and no houses were to be interfered with. He further deposes that all the beneficiaries have carried out development in various parts of the land. The applicants should therefore have sought negotiation on the manner of subdivision.

10. Submissions were made on behalf of the parties by their respective counsel. Ms. Kitur for the applicants submitted that the applicants, as indicated in their application, were seeking a review of the ruling dated 24th March 2016. She referred the court to the photographs annexed to the affidavit of Mr. Silvester Maritim which indicated the permanent structures constructed by the petitioners. Her submissions were that if the ruling is not reviewed, the permanent developments and structures will be destroyed, and there will be dislocation if the mode of distribution proposed by the respondents is followed. She therefore prayed that the application be allowed and the ruling set aside.

11. In response, Mr. Orina noted that the applicants were seeking to set aside a ruling that arose from an application for rectification of grant which had been confirmed in favour of the applicants without specification of the acreage. He noted that the applicants were not contending that the grant was wrongly confirmed. The respondents had in their application which resulted in the ruling of 24th March 2016 asked the court to specify the share that each beneficiary was entitled to, which is a matter anchored in law. In its ruling that the applicants now seek to review, the court had found that the distribution of the estate ought to have been equal between the beneficiaries. There was therefore nothing to be heard by way of *viva voce* evidence, nor is there an error on the face of the record in respect of the ruling dated 24th March 2016.

12. Counsel further observed that from the photographs placed before the court by the applicants, the portion occupied by buildings is very small. As the respondents had not said they were interested in a particular part of the land, the portion that each beneficiary is entitled to could be curved out if the applicants allowed the surveyor to carry out the subdivision. In his view, the present application was meant to delay the finalization of this matter, is an abuse of the court process, had no basis in law and should be dismissed.

Determination

13. I believe that the sole issue for determination in this matter is whether there is a basis for reviewing the ruling of the court made on 24th March 2016. The gist of the applicant's case is that the application dated 28th May 2014 which resulted in the said ruling was not heard by way of oral evidence, and therefore the implementation of the order of 24th March 2016 will lead to dislocation on the ground.

14. The provisions of law with respect to review of judgments and orders are fairly straight forward and are set out in order 45 of the Civil Procedure Rules. Order 45 is applicable to succession matters by dint of Rule 63 of the Probate and Administration Rules. Order 45 Rule 1 provides as follows:

> ***1. (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.

15. I have considered the ruling of the court sought to be reviewed, the present application and the averments and submissions in respect thereof, and the record of the court on this matter generally. I note, first, that the applicants are not alleging that they have discovered ***"new and important matter or evidence which, after the exercise of due diligence, was not within (their) knowledge or could not be produced …at the time when the decree was passed or the order made."***

16. From the record, it is evident that they did not file any affidavit in response to the respondents' application, an omission that the court noted in its ruling. Instead, their counsel, Ms. Kitur, attempted to proffer evidence in her written submissions, which the court decried in its ruling. There, is therefore, no new evidence that could allow the applicants re-open the decision of Ong'udi J dated 24th March 2016.

17. Can they do so on the second condition, namely "***on account of some mistake or error apparent on the face of the record***"? The applicants have not alleged that the court made an error or mistake that is apparent on the face of the record. They have not, in fact, alleged that the court made any error whatsoever in reaching its decision. Their problem, as I understand it, is that the court did not hear them orally so that it could understand the situation on the ground. That however, is not ***"an error or mistake"*** apparent on the face of the record. It cannot therefore form a basis for review.

18. Order 45 provides, thirdly, for review for "***any other sufficient reason"***. Is the fact that the court did not take oral evidence from the parties a ***"sufficient reason"*** to justify re-opening the matter? The applicants are not saying that the court made an error of law, or applied the law incorrectly. They have not, in fact, challenged the decision of the court in any material way. What I understand them to be saying is that they are settled on the estate of the deceased in a manner that they do not want disturbed; that they have made developments and planted tea plantations that they wish left as they are. In other words, even if the respondents are entitled to a share of the estate, they should not be granted such share as it will disturb the applicants from their well settled lives.

19. Unfortunately for the applicants, and fortunately for their sister's children, the respondents, this is not a basis in law for disturbing a decision of the court made in accordance with the law. Were it a basis, then all parties in the circumstances of the applicants would need to do to disinherit their kin is to carry out developments on land, then allege that they have made sizeable developments that cannot be compensated in monetary terms.

20. However, even were the court inclined to consider the consider the developments on the ground, it is apparent, as averred by the respondents, that the "permanent developments" referred to by the applicants are only on small portions of the land. The land in question measures 17.0 hectares, which is 34 acres or thereabouts. The respondents have averred that they are not interested in any particular portion of the land, nor do they want the houses already on the land demolished. What they ask is that the parties negotiate on where the shares of the respondents will be. This seems to me to be a reasonable way of dealing with the matter.

21. In any event, I can find no basis for disturbing the decision of my sister, Ong'udi J, in her ruling of 24th March 2016. The respondents are entitled, as decreed by the court in that ruling, to their mother's share of the estate of the deceased. The applicants, as uncles and aunt of the respondents, should sit with them and agree on how that share will be realized.

22. In any event, the decision of the court made on 24th March 2016 still stands as there is no basis for its review. The application dated 18th May 2016 is here by dismissed.

23. Each party shall bear its own costs of the application.

Dated Delivered and Signed at Kericho this 19th day of April 2017.

MUMBI NGUGI

JUDGE