

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO

Succession Cause 134 of 2001

IN THE MATTER OF THE ESTATE OF THE LATE TIGIRER ARAP MUTAI (DECEASED)

AND

JOSEPH SIGILAI MUTAI.....1ST PETITIONER

MARIA CHEPKEMOI LELEI.....2ND PETITIONER

TAPSABEI CHEPKEMOI LELEI.....3RD PETITIONER

VERSUS

PHILIP KIPYEGON LELEI.....OBJECTOR

RULING

On 30th October 2006, this court delivered its judgment as regards the dispute between the beneficiaries of the estate of the Tigerer Arap Mutai – deceased. The dispute was in relation to the distribution of the properties that comprised the estate of the deceased. Philip Kipyegon Lelei and Christopher Kipngetich Lelei (*hereinafter referred to as the objectors*) two of the said beneficiaries of the estate of the deceased, were dissatisfied with the said judgment. On the 8th February 2007, they made an application under the provisions of **Order XLIV rule 1 & 2** of the **Civil Procedure Rules and rule 63 (1)** of the **Probate and Administration Rules** seeking to review the said judgment. The objectors stated that this court should review its judgment since it had not taken into account that parcel **No. Kericho/Kapkatet/1226** (*hereinafter referred to as the suit land*) ought to have been shared equally among the four houses that comprised the estate of the deceased.

The grounds in support of the application were that the objectors contend that the petitioner had fraudulently concealed material facts and therefore deliberately mislead the court into awarding him the suit land. They contended that the court fell in error when it ruled the deceased had settled his wives before his demise. They stated that the award was manifestly harsh and unfair to the other houses that comprises the estate of the deceased. They urged this court to review its judgment on grounds of a discovery of new and important matter which was not within the knowledge of the objectors at the time of hearing. The application is supported by the annexed affidavit of the objectors.

The application is opposed. The petitioner filed grounds in opposition to the application. He stated that the application was misconceived and abuse of the process of the court and was solely aimed at delaying the just conclusion of the case. He stated that the application was mischievous, misplaced and incompetent. He averred that the relief sought was not available as all the grounds advanced were effectively dealt with in the judgment.

At the hearing of the application, Mrs. Bett for the objector reiterated the contents of the application and the supporting affidavit thereof. She submitted that had the court been made aware of all the facts of this case, it would have ruled differently. She submitted that the petitioner had misled the court into reaching a finding that the deceased had settled his four wives and their children before his death. She explained that was not the true position. She submitted that the properties of the deceased were distributed upon his death by the family members who had agreed to share the estate of the deceased equally between the four

families of the deceased. She maintained that this fact was not brought to the attention of the court and therefore the said fact constituted a new and important matter which this court ought to consider in this application.

Mrs. Bett submitted that the petitioner had concealed the fact that he had equally benefited from part of the deceased's parcel of land at Transmara. She maintained that the petitioner had misled the court into believing that the parcels of land occupied by two of the beneficiaries at Transmara initially belonged to the deceased yet in actual fact the said parcels of land were purchased by the said two beneficiaries. She submitted that the judgment of the court had resulted in an unfair distribution of the deceased's estate to the disadvantage of the three families of the deceased that reside at Transmara. She maintained that the court should set aside its judgment and substitute it with an appropriate judgment distributing the suit parcel of land equally between the four families of the deceased. She urged the court to allow the application for review.

Mr. Maengwe for the petitioner opposed the application. He relied on the grounds of opposition filed. He submitted that there were no new matters which had arisen and which could make this court review its judgment. He maintained that all the issues which are raised in this application were dealt with by the court when it considered its judgment. He submitted that the decision which was arrived at by the court was just and should not be interfered with. He urged the court to disallow the application since it was meant to delay the just determination of this case.

I have carefully considered the grounds raised by the objectors in their quest to have this court review its judgment. I have also carefully considered the rival submissions made by Mrs. Bett for the objectors and by Mr. Maengwe for the petitioner. The issue for determination by this court is whether the objectors have established sufficient grounds to enable this court review its judgment. The thrust of the objector's application for review was that this court should consider certain important and new material facts which were not within the knowledge of the objectors at the time the case was heard. The objectors are of the view that if this court considered the new and important facts, then it would arrive at a different decision than it did when it delivered its judgment. **Order XLIV Rule 1 of the Civil Procedure Rules** allows any party who is aggrieved by a decree or order of the court to make an application to the court to review its decree or order. If party aggrieved is relying on the ground of the discovery of a new and important matter of evidence, he must establish that the said matter or evidence, after the exercise of due diligence, could not be produced by him at the time the decree or order was passed.

In the present application, the objectors contend that the evidence that they have now placed before this court in this application for review, is a new matter which was not considered by the court when it rendered its judgment. It is worth pointing out at this juncture the parties to this application agreed by consent for this court to determine the issue of distribution by considering the affidavit evidence which were filed by the parties. It is evident that the parties were satisfied that the facts which were contained in the affidavits were sufficient to enable this court reach a just determination. The objectors did conceal from the court the fact that the parcel of land of the deceased at Transmara had already been subdivided between the beneficiaries of the deceased and title deeds issued to them. This fact was brought out by the petitioner in his affidavit. The objectors did not challenge the statement by the petitioner that the deceased had settled his four wives and their families in their respective parcels or portions of land. The objectors did not bring to the attention of the court that the petitioner's family had benefited from the Transmara land. In fact, the objectors were firm in their insistence that the only parcel of land registered in the name of the deceased was the 1.38 hectares of land at Transmara. This was the parcel of land that they were proposing should be distributed equally between the four families.

It was evident to this court that the objectors were not candid when they failed to disclose that they were already registered as owners of parts of the parcels of land that belonged to the deceased. The objectors cannot therefore purport that the petitioner misled this court into arriving at the said decision in his favour. Have the objectors raised any new and important evidence that would persuade this court to review its judgment? This court does not think so. It was the duty of the objectors to place all the facts to this court at the time this court was considering the issues in dispute between them. The issues that the objectors are purporting to place before this court in this application for review are issues which were

within their knowledge, which with the exercise of due diligence, they would have availed to the court. In any event, this court is of the view that the issues raised by the objectors in this application for review are issues which ought to be raised on appeal and not on an application for review. The objectors are of the view that this court erred when it considered the evidence that was placed before it at the time it rendered its judgment. That is an issue of appeal and not a ground for review.

Taking into account the totality the grounds advanced by the objectors in this application for review, it is clear that the objectors are seeking to have this court render a second opinion over a matter it has already made a decision. That cannot be. The objectors cannot seek to re-argue their case under the guise of an application for review. They cannot have a second bite at the cherry. The application for review lacks merit. There are no new or important matters placed before this court which was not within the knowledge of the parties at the time this court considered the issues in dispute and rendered its judgment.

The application for review is hereby dismissed with costs to the petitioner.

DATED at KERICHO this 7th Day of November 2007.

L. KIMARU

JUDGE