In re Estate of Kipsoger arap Chesoen (Deceased) (Succession Cause E141 of 2008) [2025] KEHC 2459 (KLR) (21 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2459 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE E141 OF 2008

RN NYAKUNDI, J

FEBRUARY 21, 2025

IN THE MATTER OF THE ESTATE OF KIPSOGET ARAP CHESOEN (DECEASED)

BETWEEN

ALFRED KIBIY SUGE ..... 1ST PETITIONER

AMOS KIMURGOR KERONEY ..... 2ND PETITIONER

AND

RODAH CHEPTOO LELEI ..... OBJECTOR

RULING

1. Before me for determination is a Notice of Motion expressed to brought under the provisions of Order 45 Rule 1 & 5 of the Civil Procedure Rules, section 47 of the *Law of Succession Act*, Rule 73 of the Law of Succession Rules. The Objector/Applicant seeks orders as follows:

    a. Spent

    b. That pending the hearing and determination of this application inter parties, there be stay of execution of the certificate of confirmation of grant issued on 22nd March, 2022.

    c. That this court do set aside its rulings delivered on 20th March, 2024 and 25th April 2024 in light of the mediation agreement dated 22nd October, 2019 and adopted by H. Omondi on 4th February, 2020.

    d. That upon the grant of prayer (3) above, the grant be confirmed in terms of the aforesaid mediation agreement dated 22nd October, 2019.

    e. That the cost of this summons be provided for.

2. The application is supported by an affidavit sworn by Rodah Cheptoo Lelei and on grounds enumerated as follows:

a. That this matter herein was referred to mediation.

b. That the parties reached an agreement dated 22nd October, 2019 on how LR No. Nandi/Ndalat/241 would be distributed amongst the deceased's beneficiaries including the applicant herein.

c. That the above mediation was adopted by H. Omondi, J as she then was on 4th February, 2020 as a decree of the court.

d. That the above mediation agreement and its subsequent adoption has never been set aside, reviewed and/or appealed against.

e. That parties subsequently filed various applications oblivious of the adoption of the mediation agreement which culminated to delivery of the rulings dated 20th March, 2024 and 25th April, 2024.

f. That the trial court, Nyakundi J. was not informed of the adoption of the mediation agreement on record hence leading to divergent decisions amounting to an error on the face of the record.

g. That there are two divergent orders in force issued by courts of concurrent jurisdiction creating a quagmire in their implementation.

h. That the rulings on record were issued without material facts being placed before the trial judge.

i. That the divergent orders have created a confusion hence rendering appropriate orders necessary in the best interest of justice.

j. That there is need to stay the implementation of the Certificate of confirmation of grant in force until the confusion inherent on the record can be ironed out.

3. In response to the application, the 1st petitioner filed a replying affidavit challenging the application in its entirety and deposed as follows:

a. That it is very clear from the face of the annexed order, the purported mediation order was not signed by the Honourable judge as alleged and thus the application is without any basis.

b. That I did not sign any mediation settlement agreement and to my knowledge the mediation ended without any settlement. That on the day of the mediation the mediator told me to go out and when I came back he dismissed the meeting as there was no settlement.

c. That the mediation Deputy Registrar, Hon. G.N. Sitati vide the orders issued on 9th June, 2020 she clearly stated that mediation collapsed and referred the file back to the trial court for mention 20th July, 2020.

d. That the court upon being informed that there was no agreement and ordered the matter proceeds to hearing.

e. That parties subsequently testified in court and were cross-examined and each party closed their respective cases and a ruling was delivered on 22nd March, 2022 for the estate to be distributed accordingly.

f. That pursuant to the ruling the certificate of confirmation of grant was issued on 22nd March, 2022.

g. That the issue of the mediation settlement agreement and the purported orders was not raised by the applicant in court during the hearing and this issue is now being raised when execution has already taken place.,

h. That the application has since been overtaken by events.

i. That the application has been brought after inordinate delay over 2 years since the ruling was delivered and no explanation has been given for the delay.

j. That the applicant had previously filed the application dated 14th April, 2022 which has since been overtaken by events pursuant to the ruling delivered on 25th April, 2024.

k. That the surveyors visited the estate property on 14th June, 2024 and carried the sub-division as per the certificate of confirmation of grant.

l. The applicant together with her children benefited from the estate of the deceased herein by way of inheriting parcel number Nandi/Ndalat settlement scheme/22 which was purchased by the deceased herein.

m. That Nandi/Ndalat Settlement Scheme/22 measuring approximately 15 acres was registered in the name of Kiplel Suge who is my brother and the husband to the applicant whom the deceased herein had put to stay on the land when he married the Objector/Applicant.

n. That the land is a settlement scheme and the registration was done after a long time when the deceased had already passed on a fact which the Objector/applicant and her advocate acknowledged n court that the land belonged to the deceased in this cause.

The Petitioner's written submissions

4. The Petitioner/Respondent filed written submissions dated 28th November, 2024 through learned counsel Mr. Sambu. In urging this court to dismiss the said application, learned counsel couched the following issues for determination:

   a. Whether the purported mediation settlement agreement was adopted by the court.

   b. Whether the application been brought without unreasonable delay.

   c. Whether there is an error apparent on the face of the record.

5. On the first issue regarding whether the purported mediation settlement agreement was adopted by the court, learned counsel submitted that the Application sought review of rulings delivered on 20th March, 2024 and 25th April, 2024, in light of a mediation agreement dated 22nd October, 2019 allegedly adopted by H. Omondi on 4th February, 2020. Counsel pointedly submitted that there was no ruling delivered by the court on 20th March, 2024.

6. Learned counsel further argued that the basis of the application - the alleged adoption of a mediation settlement agreement - was fundamentally flawed. He maintained that no such agreement existed, asserting that the document dated 22nd October, 2019 could not be regarded as an agreement. Counsel noted that the Petitioner denied knowledge of the agreement and maintained that neither the Petitioner nor the advocates for the parties had signed it. Additionally, counsel emphasized that the purported adoption order lacked the Honourable judge's signature.

7. In support of his submissions, learned counsel cited the case of John Juma & 2 others v Patrick Lihanda & 3 others; Zedekiah Orera & 466 others (Interested Parties) [2019] eKLR regarding the requirements for valid mediation agreements.

8. On the second issue of unreasonable delay, learned counsel submitted that the application was filed after an inordinate delay of more than two years. He cited Order 45 Rule 1 and referenced the case of In re Estate of the Late Kipkosgei Arap Moita (Deceased) (Succession Cause 25 of 1995) [2022] KEHC 2991 (KLR) where similar delay was addressed. Counsel also drew the court's attention to Nginyaga Kavole vs Maitu Gideon, where even a five-month delay required satisfactory explanation.

9. Regarding the third issue on whether there was an error apparent on the face of the record, learned counsel submitted that no such error existed. He supported this position by citing Paul Mwaniki vs. National Hospital Insurance Fund Board of Management [2020] eKLR on the criteria for review applications.

10. In conclusion, learned counsel submitted that the application dated 25th June, 2024 sought to set aside proceedings of 19th June, 2024 and fix the application dated 23rd May, 2024 for hearing interpartes. He noted that this application was rendered overtaken by events as the Objector had not responded to it.

Analysis and determination

11. The matter before this court concerns a succession dispute that was initiated in 2008 as Succession Cause No. E141 of 2008, wherein the distribution of the estate of Kipsoget Arap Chesoen (deceased) remains contentious. At the heart of this dispute is a parcel of land known as LR No. Nandi/Ndalat/241, whose distribution has spawned numerous proceedings, including a purported mediation process and subsequent court applications by the concerned parties.

12. The chronology of events reveals that on 22nd October, 2019, the parties allegedly participated in a mediation process, culminating in what the Objector claims was a settlement agreement. This agreement was purportedly adopted by Justice H. Omondi on 4th February, 2020. However, the court record indicates that on 9th June, 2020, the Mediation Deputy Registrar, Hon. G.N. Sitati, issued orders declaring that the mediation had collapsed and referred the matter back to the trial court. The record further indicates that on 18th December, 2019, some of the beneficiaries being Rohan Kiplimo, Christopher Kibiwott testified that they were misled to sign the purported settlement agreement and as such they had not endorsed any kind of proposal.

13. The present application, brought by way of Notice of Motion under Order 45 Rule 1 & 5 of the Civil Procedure Rules, section 47 of the *Law of Succession Act*, and Rule 73 of the Law of Succession Rules, seeks to reconcile what the Objector characterizes as divergent orders from courts of concurrent jurisdiction. The Objector contends that the existence of the purported mediation agreement, which allegedly was never set aside or appealed against, creates a legal quagmire that requires judicial intervention.

14. The application has been met with strenuous opposition from the Petitioners, who maintain that no valid mediation agreement ever existed, pointing to both the absence of the judge's signature on the purported adoption order and the documented collapse of the mediation process. They further assert that the application is brought after an inordinate delay and has been overtaken by events, noting that surveyors had already commenced the subdivision of the estate property on 14th June, 2024, in accordance with the certificate of confirmation of grant.

15. This court is thus called upon to determine whether the circumstances warrant the exercise of its review jurisdiction, considering the contested mediation agreement, the question of delay, and the allegation of error apparent on the face of the record.

16. On the first issue, the Objector/Applicant contends that a mediation agreement dated 22nd October, 2019, was adopted by Justice H. Omondi on 4th February, 2020. This court has carefully examined the court record and finds several critical flaws in this assertion. First, the purported adoption order lacks the requisite judicial signature, a fundamental requirement for any valid court order. Secondly, the record explicitly shows that the Mediation Deputy Registrar, Hon. G.N. Sitati, through orders issued on 9th June, 2020, declared that the mediation had collapsed and directed the matter back to the trial court for mention on 20th July, 2020.

17. Regarding the second issue of delay, it is noteworthy that the Applicant filed this application more than two years after the ruling and issuance of the certificate of confirmation of grant on 22nd March, 2022. No satisfactory explanation has been provided for this substantial delay. The law is clear that applications for review must be brought without unreasonable delay. In the present case, the delay of over two years, unexplained and in a succession matter where finality is crucial, cannot be countenanced.

18. Order 45 Rule 1 of the Civil Procedure Rules, 2010 further provides for review in the following manner: -

> " Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (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."

19. The Court of Appeal in Civil Appeal No 2111 of 1996, National Bank of Kenya v Ndungu Njau observed as follows in respect of reviews applications: -

> " A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceeds on an incorrect expansion of the law."

20. In the significant case of *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR (Miscellaneous Application 317 of 2018)*, the High Court undertook a comprehensive analysis of Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. The Court,

drawing upon comparative jurisprudence, established definitive principles governing the review of its own decisions as follows:

> " i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
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> ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
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> iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
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> iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
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> v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court. vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
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> vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
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> viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
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> ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.x.The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1."

21. Applying these principles to the present application, this court finds no basis for exercising its review jurisdiction. First, the Objector/Applicant has not demonstrated any error apparent on the face of the record that would warrant review. The alleged mediation agreement's existence and validity were contested from the outset, with clear documentary evidence showing its collapse through the Mediation Deputy Registrar's order. Second, the substantial delay of over two years in filing this application, without any reasonable explanation, runs contrary to the procedural requirements for review applications. Third, the matters raised by the Objector/Applicant would require extensive

examination and analysis of evidence, which falls outside the scope of review jurisdiction as established in Apollo Mboya. Furthermore, the execution of the certificate of confirmation of grant has already commenced, with surveyors having undertaken subdivision of the property. In these circumstances, and considering the paramount importance of bringing finality to succession matters, this court finds no compelling reason to exercise its review jurisdiction. Consequently, the application dated 25th June, 2024 is hereby dismissed with costs to the Petitioner/Respondent.

22. The court is particularly concerned with the Objector's attempt to resurrect a purportedly failed mediation agreement after such a considerable lapse of time. This is especially problematic given that the parties had ample opportunity to raise any concerns regarding the alleged mediation agreement.

    The principle of finality in litigation, particularly in succession matters, serves the crucial purpose of bringing certainty to the administration and distribution of estates.

23. The court has also noted with concern the Objector's selective presentation of facts regarding the mediation process. The court record clearly demonstrates that on 18th December, 2019, some beneficiaries, including Rohan Kiplimo and Christopher Kibiwott, testified that they were misled into signing the purported settlement agreement. This revelation, coupled with the subsequent formal declaration of the mediation's collapse by the Deputy Registrar, renders the Objector's current reliance on the purported agreement particularly unconvincing.

24. Based on the analysis, the court concludes that on record, there is no mediation agreement capable of being enforced as an order and decree of the court. So this court cannot be beseeched to endorse, adopt, make reference to a non-existent mediation agreement on the distribution of the deceased estate. The beneficiaries under the law were entitled to comply with the law and the provisions and the rules on mediation negotiations, the terms of that agreement for it to be invoked as an order of the court. The record is crystal clear that no mediation agreement was reached or adopted by any of the session judges of this court.

25. In conclusion, having carefully considered the application, the supporting affidavit, the replying affidavit, and submissions by counsel, this court finds that the Objector/Applicant has failed to establish any grounds that would justify the exercise of this court's review jurisdiction under Order 45 Rule 1 of the Civil Procedure Rules. The application is devoid of merit and appears to be an attempt to reopen matters that have been conclusively determined by this court.

26. Accordingly, the Notice of Motion dated 25th June, 2024 is hereby dismissed with costs to the Petitioner/Respondent.

DATED AND DELIVERED VIA CTS AT ELDORET THIS 21ST DAY OF FEBRUARY 2025

R. NYAKUNDI

JUDGE