In re Estate of the Late Philiph Chumba Sirma alias Sirma s/o Chumba, Philiph Sirma s/o Chumba, Philiph Sirma Arap Chumba alias Philiph Sirma Chumba (Deceased) (Succession Cause 395 of 2015) [2025] KEHC 1891 (KLR) (21 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1891 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 395 OF 2015

RN NYAKUNDI, J

FEBRUARY 21, 2025

IN THE MATTER OF THE ESTATE OF THE LATE PHILIPH CHUMBA SIRMA ALIAS SIRMA S/O CHUMBA, PHILIPH SIRMA S/O CHUMBA, PHILIPH SIRMA ARAP CHUMBA ALIAS PHILIPH SIRMA CHUMBA (DECEASED)

BETWEEN

JARED KIPROTICH MUTAI .... 1ST PETITIONER

BOAZ KIPSIGEI BIWOTT .... 2ND PETITIONER

AND

EMILY JELIMO .... 1ST OBJECTOR

EDWIN KIPKOECH KEMBOI .... 2ND OBJECTOR

JOSEPHAT SIRIMA .... 3RD OBJECTOR

RULING

1. On 25th October, 2024 this court brought this matter to closure by finally distributing the estate of the deceased amongst the beneficiaries in equal share as follows:

Beneficiary	Property	Share
Josephat Sirma Emily Jelimo Rosa chumba Alice Kegir Ludia Chumba Florence Chumba Jonah Sirma (deceased) Aggrey Kipkemboi Kosgei (deceased)	Kibagenge/chepyekoris measuring 25 acres.	To be shared equally amongst all the beneficiaries
Josphat Sirma Emily Jelimo Rosa chumba Alice Kegir Ludia Chumba Florence Chumba Jonah Sirma (deceased) Aggrey Kipkemboi Kosgei (deceased)	Pension And Shares At NCBA	To be shared equally amongst all the beneficiaries

2. The 3rd Objector/Applicant has since approached the court with an application expressed to be brought under the provisions of Order 40 Rule 1 & 2 of the Civil Procedure Rules and sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act* seeking reliefs as follows:

    a. Spent

    b. That pending the hearing and determination of this application interparty, a temporary injunction do issue to restrain and prevent the respondent's or any party authorized or otherwise either by themselves or through authorized agents from effecting the directions and/or orders contained in the ruling delivered by the honourable court on 25th October, 2024.

    c. That pending the hearing and determination of this application interparty, the court be pleased to reopen the case in its totality and allow the 3rd Objector/applicant to present their case and file all their requisite documents.

    d. That the court be pleased to re-open the case in its totality and allow the 3rd Objector/applicant to present their case and file all their requisite documents.

    e. That an injunction do issue to restrain and prevent the Respondent's or any party authorized or otherwise either by themselves or through authorized agents from effecting the direction

and/ or orders contained in the ruling delivered by the honourable court on 25th October, 2024 pending rehearing and determination of this succession cause.

3. The application is supported by an affidavit sworn by Joseph Sirma and on grounds that are captured as hereunder:

 a. The entire family had contracted one advocate to represent them in this succession cause save for one Emily Jelimo the 1st objector herein.

 b. Throughout, the administrator has been representing the family in court matters all through.

 c. The administrator and 3rd Objector came to know after perusing the court record that their witnesses were never called, their advocate on record at that time opted to file submission on their behalf thereby denying the court the opportunity to hear very valuable information, that is fundamental and would have been instrumental in the court reaching its decision.

 d. At the pendency of the suit, the family including now the 3rd Objector/applicant instructed the advocate and provided a Will by the deceased to be used as a means of division of property, they lined up witnesses to testify and some actually recorded witness statements but they were never called to give evidence at any point in time thereby leading to a miscarriage of justice.

 e. It is trite law that no man should be condemned unheard and in this case, the 3rd Objector has been condemned without any hearing, without his evidence seeing the light of day hence he feels unfairly admonished.

 f. It is always the duty of the court and parties to ensure as much as possible that the wishes of the deceased person is realized to the latter hence the Will should be first propounded before a decision to proceed with succession under intestacy.

 g. It is therefore only fair that the applicant is allowed to ventilate his case, allow the court to look at his documents which include as Will so that justice is not only seen to be done but it be done to him.

 h. That it is only fair that the wishes of the deceased are realized as much as possible

4. In response to the application, the 1st Objector swore a replying affidavit and deposed as follows:

 a. That the application more so the affidavit in support is fatally incompetent and ought to be dismissed with costs as this is a belated attempt at this late stage of the proceedings to adduce evidence whose sole purpose is to plug in the gaps in their case which had been caused by insufficient evidence.

 b. That the first and second petitioners together with the 3rd objector/applicant herein have had legal representation herein from the time this cause was filed in court.

 c. That pursuant to paragraph four above, the applicant herein cannot purport to have been ambushed by the ruling of the court when all along he and the other parties had legal representation.

 d. That the applicant and the petitioners herein had a chance to testify and bring their evidence but deliberately failed to do so because they knew they had no triable case before this honourable court.

 e. That the application at hand is only meant to obstruct justice on the part of both the first and the second objector and waste the courts time as the application is just an afterthought. The

applicant cannot wait until the case has been determined just to bring in an application that is defective and unmerited on its face.

f. That when the case was ripe for submissions, counsel for the petitioners and the third objector was aware and as such the latter was also aware, therefore good faith would have been demonstrated by the applicant herein at that time and not at this point when the court has already rendered its decision on the same.

g. That the only available avenue for the dissatisfied applicant would have been to appeal to a superior court as the trial court is now functus officio having rendered its final decision or seek that the ruling be set aside as the law requires.

h. That further applicant herein is no longer the administrator of the estate of the late Chumba Sirma having renounced the same on 30th march April 2015 while in the United States of America. The applicant consented to letters of administration to the estate of the deceased being granted to one JARED KIPROTICH MUTAI, the 1st petitioner herein.

i. That pursuant to paragraph ten above JARED KIPROTICH MUTAI being the administrator of the estate participated in the proceedings of the case with the assistance of counsel's legal representation.

j. That the applicant, has not demonstrated to this Honourable Court, the allegations made in his instant application and the supporting affidavit thereto and therefore the leave sought is not a matter of right but the courts discretion which should be exercised carefully.

k. That the applicant has sought an order of temporary injunction but has failed to demonstrate the principles for granting the same.

5. Parties canvassed the application by way of written submissions, which have been highlighted as hereunder:

Applicant's written submissions

6. Learned Counsel Mr. Aloo submitted on behalf of the third objector/applicant, who is a son to the deceased. The applicant contends that he was not personally represented by counsel in the matter, which resulted in the estate being shared according to intestacy rules despite the existence of a will.

7. Counsel urged the court to set aside and rehear the succession cause on two primary grounds: first, that there exists a will by the deceased which has not been propounded, consequently failing to fulfil the deceased's wishes; and second, that the third objector/applicant lacked representation in the case, leading to an adverse grant that condemned him unheard.

8. In addressing the issue of whether the court should consider the will, counsel argued that it is the court's duty, along with the beneficiaries, to actualize the deceased's wishes to the extent possible and ensure proper distribution of properties. He substantiated this by demonstrating that the presented will meets the testamentary threshold under section 11 of the *Law of Succession Act*, which outlines the requirements for a valid will. Counsel cited the case of Hellen Cherono Kimurgor v Esther Jelagat Kosgei [2008] eKLR, where the court emphasized the duty to ensure the deceased's wishes are met.

9. On the matter of representation, counsel demonstrated that the objector/applicant was out of the country and had placed his trust in the estate administrators, who subsequently failed or neglected to represent his interests. This resulted in a decision being made without hearing the applicants, violating the fundamental legal principle that no person should be condemned unheard.

10. In conclusion, counsel submitted that the applicant has satisfied the threshold for setting aside or reviewing the orders, emphasizing that as the current occupant of the land, he needs to be heard to avoid disinheritance.

1st & 2nd Objectors' written submissions

11. Learned Counsel Mr. Keter, representing the 1st and 2nd objectors/respondents argued that the application is fatally incompetent and should be dismissed with costs, characterizing it as a belated attempt to introduce evidence merely intended to fill gaps in the applicant's case. He submitted that since the court had already determined the matter, any orders could only be set aside pursuant to Order 45 of the Civil Procedure Rules.

12. To buttress his position, counsel cited the Court of Appeal decision in Telkom Kenya Limited vs John Ochanda [2014] eKLR, which established that functus officio is an enduring principle preventing the reopening of matters already decided. He further referenced John Gilbert Ouma vs Kenya Ferry Services Limited [2021] eKLR to demonstrate that the doctrine bars merit-based re-engagement once final judgment is entered.

13. Counsel argued that the applicant's claims of lack of representation were unfounded, as all parties, including the 3rd objector/applicant, had legal representation from the case's inception. He noted that the matter had even proceeded through mediation, with a mediation report adopted as a court order. Counsel pointed out that the applicant had opportunities to present evidence but deliberately failed to do so, suggesting they knew they had no triable case.

14. Regarding the purported will, counsel observed that it raised validity concerns, as it was in the applicant's possession during proceedings but was never disclosed to the mediator or the court. He cited Samoei vs National Housing Corporation & Another (Civil suit E008 of 2020) [2023] KEHC 17919(KLR) to demonstrate that the current application amounts to an afterthought and abuse of court process.

15. Counsel further supported his argument by referencing Wavinya Mutavi vs Isaac Njoroge & Another (2020) eKLR, which outlined principles guiding case reopening, including the requirement to explain delays and demonstrate that evidence could not have been obtained earlier with reasonable diligence.

16. In conclusion, counsel highlighted that the applicant had renounced his position as administrator in March 2015 while in the United States, consenting to administration being granted to Jared Kiprotich Mutai. Given that the matter was filed ten years ago, counsel urged the court to find the application lacking merit and dismiss it with costs.

Analysis and determination

17. This application presents a peculiar scenario where the 3rd Objector/Applicant seeks to reopen succession proceedings that were conclusively determined through a combination of mediation and judicial intervention. The court notes that on 13th May 2024, a partial mediation settlement was achieved regarding the distribution of the estate, with only two items - the land known as KIBAGENGE/CHEPYEGORIS/2198/2 and NCBA shares - being referred back to court for determination. Subsequently, on 25th October 2024, this court made a final determination on these remaining aspects, ordering equal distribution of the estate among all beneficiaries, including the present applicant.

18. The application raises two primary contentions: first, the existence of a purported will that allegedly was not presented during the proceedings, and second, an alleged lack of representation during the

proceedings. These claims must be examined against the backdrop of the extensive history of this matter and the principle of finality in litigation.

19. The threshold question before this court is whether it can entertain such an application after having rendered its final determination. The court record reveals several pertinent facts. Throughout the proceedings, all parties, including the 3rd Objector/Applicant, had legal representation. The matter progressed through mediation, resulting in a partial settlement that was adopted as a court order. Significantly, the applicant is already included as a beneficiary in the final distribution scheme, having been allocated an equal share of both the land and the NCBA shares and pension.

20. Regarding the purported will, questions arise about its timing and previous availability. Despite the matter being before the court for approximately ten years, this document was never presented during the substantive proceedings or the mediation process.

21. A crucial consideration is the applicant's prior conduct in these proceedings. The record shows that he had renounced his position as administrator in March 2015 while in the United States, voluntarily consenting to administration being granted to Jared Kiprotich Mutai. This action suggests active engagement with the succession process, rather than exclusion from it.

22. The central question thus becomes whether reopening these proceedings would serve any meaningful purpose in advancing justice. The court must balance several competing interests: the principle of finality in litigation, the need to ensure justice is done, and the practical impact on all beneficiaries who have already been allocated their shares through a combination of mediation and judicial determination.

23. The court must be particularly cautious about allowing cases to be prosecuted in instalments. This principle is especially relevant in succession matters where certainty and finality are paramount. The applicant had ample opportunity during the substantive hearing to present the will and call witnesses. Instead, this evidence is being presented only after an unfavourable outcome, suggesting an attempt to reopen settled matters rather than address a genuine miscarriage of justice.

24. This position becomes even more problematic when considering that the applicant had previously renounced his position as administrator in March 2015, consenting to administration being granted to Jared Kiprotich Mutai. To now seek to introduce new evidence that was within his possession throughout the proceedings would not only prejudice other beneficiaries who have legitimate expectations based on the court's determination but would also undermine the integrity of judicial processes.

25. In Hassan Hashi Shirwa vs. Swalahudin Mohamed Ahmed [2011] eKLR the Court appreciated the view expressed in A.I.R. commentaries on the Code of Civil Procedure 8th Edition pg. 359 that:

> “ A court has a duty to find out the truth, the fact that it is shrouded in mystery and the parties have allowed it to remain so, should not prevent the court from playing its part in guiding the parties to take such steps as may be necessary, to unearth the mystery and to ascertain the truth.”

26. The learned Judge however expressed herself as hereunder:

> “ Re-opening a case is NOT an impossibility, but there must be cogent reasons for re-opening, and not because a party has suddenly had a brain wave and spotted a loophole in its case, which it can now seal by re-opening the case. The only reason given by Mr. Kiarie as to why the plaintiff’s case should be re-opened is that Mr. Gethi is a crucial witness who will

clear the air. I wonder at what point that realization dawned on him. Surely defence had not indicated at any time their desire to call Mr. Gethi as a witness. The impression I get from Mr. Kariuki's application is that he now wishes to patch up the plaintiff's case and pull the rug from right under the defendant's feet. I am keenly alive to the need of truth being unearthed and the duty of the court to find out the truth, yet in a rejoinder to AIR's commentaries I would say this:

> 'A court has a duty to ensure parties are fair to each other and not conduct trial by ambush. The role of the court in this shroud of mystery is to be an impartial umpire ensuring that there is no rough tackle and offside play. Litigants are not in a game of chess where for every one move made, there must be a counter move and re-introduction of the checkmate. If the court allowed that, litigation would never end.'
>
> My view is that in the present situation, allowing the application will not only be prejudicial to the defendant, but it amounts to an abuse of the court process and I decline to grant the prayer sought."

27. Similarly, in Michael Kiplangat Cheruiyot vs. Joseph Kipkoech Korir [2019] eKLR, the Court expressed itself as hereunder:

> " There is a window for disclosing additional evidence but this needs to be done before trial commences. Save for the above, I know of no other provision for recalling a witness or allowing a party to re-open their case to present new evidence not disclosed before. It would thus fall within the discretion of the court whether or not to allow a party to re-open his/her case to adduce additional evidence, but this is a power that needs to be used with lots of restraint for the reason that the rules do set out that parties need to disclose their evidence before trial commences, and it is the duty of a party to ensure that he/she is satisfied with the evidence they wish to present before trial commences. A trial should not be used as fishing ground for new evidence to fill in the gaps that the opposing party may have created, for this negates the very essence of pre-trial disclosure. It must be clear that the new evidence could not be available to the applicant even after exercise of due diligence. The position should not be for one party, after the other has tabled his evidence, to now start looking for evidence specifically to counter what the other party has said. That would be encouraging parties to go on a fishing expedition and a hearing will never end. Indeed, the structures in the *Civil Procedure Act*, and the Civil Procedure Rules, provide what would pass for a fair trial of a civil suit and it would need exceptional and/or extraordinary circumstances for a court to depart from them. This is what the applicant asks me to do but I am not persuaded to exercise my discretion in his favour. It is not said that the evidence that the applicant now wishes to introduce could not be made available to him before the trial commenced. The applicant already knew what the respondent was going to present at the pre-trial stage, and if he thought that what he had was inadequate, or that it was necessary to present some additional evidence to counter that which the respondent proposed to present, he could have sought for time to find and adduce it. He never did. What is now sought to be introduced could certainly have been made available all this time and of course we are not dealing with a situation where it is said that the respondent had hidden this evidence so that it could never have been available to the applicant there before. It is clear to me that it is an afterthought by the applicant to seek the mentioned additional evidence after the

respondent has already closed his case. Such practice should be frowned on and ought not to be encouraged."

28. The High Court of Uganda in Simba Telecom vs. Karuhanga & Anor (2014) UGHC 98 in dealing with a similar application referred to an Australian case Smith –vs- New South Wales [1992] HCA 36; (1992) 176 CLR 256 where it was held:

> " If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised."

29. When a litigant has been given sufficient opportunity to present their case but fails to do so, they cannot subsequently claim that the evidence before the Court is inadequate for reaching a fair decision. This fundamental principle was reaffirmed by the Court of Appeal in Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. 179 of 1998 where the court stated:

> " Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."

30. I am in concurrence with the position adopted in Samuel Kiti Lewa vs. Housing Finance Co. of Kenya Ltd & Another [2015] eKLR where the Court expressed itself as hereunder:

> " The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also such prayer for re-opening of the case will be defeated by in ordinate and unexplained delay. In this case Plaintiff's counsel stated that the Plaintiff if allowed to re-testify would show that the charge document, which he did not produce in evidence, was diametrically different to the one produced by 1st Defendant's witness, in evidence. In my view if the Plaintiff was allowed to re-open his case to so prove it would amount to allowing the Plaintiff to fill the gaps in his evidence. That would be prejudicial to the defendants. But more importantly the Plaintiff did not submit in evidence a charge instrument to be compare to the one produced by 1st Defendant. The Plaintiff also slept on his rights to apply to re-open his case. He should have made that application in August, 2010, when he obtained leave to re-amend his plaint. Having slept on his rights, the unexplained delay defeats his prayer."

31. Having considered the arguments presented, the evidence on record, and the applicable legal principles, I am not persuaded that reopening this case would serve the interests of justice. The applicant has been afforded adequate opportunity to present his case throughout these proceedings, and the current distribution scheme already ensures his interests are protected through an equal share allocation. The purported will, which was within the applicant's possession during the entire proceedings, cannot now be introduced as a basis for reopening the case. Such an approach would not only prejudice the other beneficiaries who have legitimate expectations based on the court's determination but would also undermine the fundamental principle of finality in litigation.

32. Consequently, the application dated 31st October, 2024 is hereby dismissed with costs to the respondents.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 21ST DAY OF FEBRUARY 2025

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R. NYAKUNDI

JUDGE