In re Estate of David Kibor Rugut (Deceased) (Probate & Administration 254 of 2007) [2025] KEHC 4682 (KLR) (11 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4682 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

PROBATE & ADMINISTRATION 254 OF 2007

RN NYAKUNDI, J

APRIL 11, 2025

BETWEEN

PHILEMON KIPTANUI SITIENEI .... PETITIONER

AND

JOEL RUGUT .... 1ST OBJECTOR

OBADIAH KIPLAGAT BOR .... 2ND OBJECTOR

RULING

1. This ruling is a furtherance to the one dated 28th March, 2025 in which the applicant's advocate was allowed to come on record after judgment and time was enlarged for the Petitioners to respond to the said application. The application in question is dated 28th February, 2025 expressed to be brought under the provisions of section 49 of the *Law of Succession Act*, Rule 63, 73 of the Probate and Administration Rules and Order 45 of the Civil Procedure Rules. The applicant seeks the following reliefs:

   a. Spent

   b. Spemt

   c. That the Honorable court be pleased to grant stay of execution of the judgment delivered on 14th February, 2025 pending further orders of the court.

   d. That the honorable court be pleased to review, vary, rectify or set aside the judgment delivered on 14th February, 2025

   e. That an order be made removing Philemon Kiptanui Sitienei and replacing him with Joel Rugut and Obadiah Kiplagat Bor as administrator of the estate.

2. The application is anchored on grounds that:

a. This honorable court delivered judgment on 14th February, 2025.

b. The objectors/applicants on behalf of the rest of the beneficiaries and other dependents are dissatisfied with the said judgment.

c. This objectors/applicants and other family members were never consulted on the appointment of the petitioner/respondent as the sole administrator when the Grant issued on 1/2/2022 was made.

d. Ordinarily it follows that where the estate was polygamous, each unit or house of the deceased should be represented.

e. The confirmation of the Grant was done without the objectors/applicants despite being represented by counsel and they did not attend court during confirmation as is required.

f. The decision reached by court the shares in Standard Chartered Bank Kenya Limited be divided among all family members is unilateral.

g. The decision reached by court that LR NO. ELDORET MUNICIPALITY/BLOCK 1/163 be valued within 60 days, be sold within 120 days of judgement and proceeds thereof be shared equally among the beneficiaries, is unilateral and approval of the objectors and all beneficiaries.

h. The objectors/applicants and all family members and beneficiaries are not opposed to Kshs. 1,193,000/= being paid to Philemon Kiptanui Bor being his unpaid share from the rental income.

i. When the Grant of Letters Administration is confirmed without the consent of all beneficiaries and the petitioner(s) as the case may be, then that Grant must be nullified, varied, rectified or reviewed accordingly.

j. Confirmation of a grant cannot be done through an order made in a judgment.

k. The objectors/applicants have stated expressly herein that the petitioner/respondent does not have their support whatsoever.

l. The objectors/applicants do not understand the circumstances under which the initial petitioner were removed despite the 2nd petitioner (mother) being deceased by now.

3. In response to the application the Petitioner/Respondent swore a replying affidavit in which he deposed as follows:

a. That save for the prayers 1 & 2 of the Application which are now spent, the rest of the Application is an afterthought, frivolous, bad in law and the same ought to be struck out at the first instance as it is only meant to delay the ends of justice from being met.

b. That I am advised by my advocates on record which advice I trust and believe to be true that litigation ought to and must come to an end and the Orders sought in the Application are aimed at prolonging the closure of this matter that has been in Court since the year 2007.

c. That I am aware that there are no Objectors in this matter and the Applicants therefore lack the capacity to prosecute any Objection proceedings given all parties/beneficiaries in this matter have always been aware of the proceedings and fully participated each time the matter came up in court personally and through Counsel Dr. John Chebii who has been on record for the Applicant's since the year 2021 when he filed an Application dated 19th November 2021 seeking stay of Orders issued on 5th July 2021 by the Hon. Justice Stephen Githinji.

d. That I am aware that on 28th March 2022, this Honourable Court amended the Grant of Letters of Administration previously issued in my sole name and appointed the 1st Applicant as a Co-Administrator to the estate with the knowledge and approval of all beneficiaries and I am utterly surprised that the 1st Objector has opted to mislead the Court that he and his Co-Applicant were never consulted during the Appointment of Administrators.

e. That given the 1st Applicant is a Co-Administrator to the Deceased's estate, it would have been prudent for him and his Co-Applicant to seek review of the Ruling only to the extent that the Ruling delivered by this Honourable court referred to me as the sole administrator if they were acting in good faith.

f. That I do not have an objection with the Ruling being reviewed to reflect the true position that the 1st Applicant is my Co-Administrator as per the orders made by this Honourable Court on 28th March 2022.

g. That I am however opposed to the prayers for an complete overhaul of this Court's Ruling more particularly on the determination by the Court on distribution of the estate as the reasons given by the Applicant's do not meet the threshold for grant of Orders of Review as the Applicant has failed to;-

    i. Demonstrate discovery of new and important matter or evidence which, after the exercise of due diligence, was not within their knowledge or could not be produced by them at the time when the Court's Judgment was delivered.

    ii. Demonstrate any mistake or error apparent on the face of the record.

    iii. Demonstrate any sufficient reason for the Court to interfere with/ review its decision.

h. That the Applicants are deliberately misleading the Court that confirmation of the Grant was done without their participation or knowledge yet they were duly represented by Counsel who had the opportunity to respond to the Application dated 25th January 2022 that was the subject of the Judgment dated 14th February 2025 and even participated in the filing of a probate account and an Affidavit of distribution that were duly considered by the Court in the impugned judgment.

i. That it is shockingly dishonest for the Applicants to claim that they are not aware the circumstances under which the initial grant issued in the names of the 1st Applicant and the Late Milka Rugut was revoked yet the record is clear that the same was revoked by the Hon. Justice John Mativo (as he then was) on 09.07.2015 after they failed to administer the estate as per law required.

j. That my appointment as an administrator was undertaken procedurally pursuant to a considered Ruling delivered by Hon. Justice Stephen Githinji after due consideration of all factors including service of the Application upon the Applicants who then chose not to attend court.

k. That my appointment as an administrator has never been challenged on Appeal by the Applicants who have been aware of this appointment since its making and as such, the orders seeking my removal and introduction of the 2nd Applicant as a Co-administrator is malicious and an abuse of the Court's process.

l. That all the issues raised in the Application have already been considered and determined through the Court's Judgment on their merits and the current Application is only meant to

prolong litigation which must come to an end as equity demands that justice ought not to be delayed.

m. That the depositions that the Applicants no objection to me being paid the sum of Kes. 1,193,000/= owed to me from the previous distribution of rental proceeds is nothing but a red herring meant to hoodwink the Court into granting the Applicants Undeserved Orders given I have been begging the 1st Objector to release the said funds since the year 2019.

4. In a further affidavit dated 9th April, 2025 Philemon Kiptanui Sitienei deposed that the applicants Joel Rugut and Obadiah Rugut failed to disclose to the court that they had recently caused the lessee to pay them a sum of Kshs. 24,375,000/= as the rent premium for the years 2025-2030 over the only property owned by the estate known as title No. Eldoret Municipality/Block 1/163 without involving him and has since then distributed the said funds among the beneficiaries excepts him. Nathaniel Kimeli Bor and Peter Kipkeoch Keter being sons to the beneficiaries of the estate also made the same averments.

Analysis and determination

5. Having carefully considered the application, the response, and the further affidavit, I find that this matter requires a balanced approach that acknowledges the concerns raised by both parties and while at it consider this Court's judgment of 14th February, 2025, which confirmed the Grant of Letters of Administration Intestate issued to Philemon Kiptanui Sitienei on 1st February, 2022.

6. At a glance of the instant application, the Applicant appears to challenge the appointment of Philemon Kiptanui Sitienei as the sole administrator of the estate without the involvement of the others. Regarding the allegation that the confirmation of Grant was done without the objectors' participation, the evidence indicates that the objectors were represented by counsel who had the opportunity to respond to the application dated 25th January, 2022, which was the subject of the judgment dated 14th February, 2025. The objectors also participated in filing a probate account and an Affidavit of distribution that were considered by the Court. Therefore, the claim of lack of participation is not substantiated by the record. However, the estate in question originates from a polygamous family arrangement, which adds complexity to the administration. It is a well-established principle in succession matters that where the deceased was polygamous, each house should ideally be represented in the administration of the estate to ensure transparency and fairness. The Court notes that the deceased left two houses with a total of sixteen beneficiaries as identified in the judgment of 14th February, 2025.

7. I find no compelling reasons to remove Philemon Kiptanui Sitienei as an administrator of the estate. In fact, the record shows that the initial grant issued to Joel Rugut and the late Milka Rugut was revoked on 9th July, 2015 by Hon. Justice John Mativo (as he then was) after they failed to administer the estate as required by law. Mr. Sitienei's appointment was undertaken procedurally pursuant to a considered ruling by Hon. Justice Stephen Githinji after due consideration of all factors. Moreover, this appointment has never been challenged on appeal by the applicants who have been aware of it since its making.

8. The Court now turns to the principles governing review of judgments under Order 45 of the Civil Procedure Rules and Section 49 of the *Law of Succession Act*. For a Court to review its judgment, the applicant must satisfy the Court that: (i) there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by the applicant at the time when the decree was passed or the order made; or (ii) there is a mistake or error apparent on the face of the record; or (iii) there exists any other sufficient reason.

9. Order 45 provides as follows:

> "1. Any person considering himself aggrieved—
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> (1) (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.
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> (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review"

10. Courts have the discretion to allow review on three grounds; where there is discovery of new and important matter of evidence, where there is an apparent error on the face of the record and where there is sufficient reason to do so.

11. In Muyodi v Industrial and Commercial Development Corporation & another [2006] 1 EA 243, the Court of Appeal described an error apparent on the face of the record as follows:

> "...In Nyamogo & Nyamogo v Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."

12. The court of appeal in National Bank of Kenya Limited v Ndungu Njau (1997) eKLR stated as follows;

> "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."

13. In the instant application, the applicants have failed to demonstrate any of these grounds. They have not presented any new evidence that was not available at the time of judgment. There is no mistake or

error apparent on the face of the record. The record clearly shows the events leading to the appointment of the petitioner as an administrator, and this was available to all parties. Furthermore, the applicants have not provided any other sufficient reason that would warrant a review of the judgment. Their dissatisfaction with the Court's decision to divide the shares and sell the property does not constitute a ground for review.

14. The matter of appointment of administrators is one in which the final discretion lies with the Court. Section 66 of the *Law of Succession Act* is explicit on this and on the order of priority. It provides that:

> " When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-
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> (a) surviving spouse or spouses, with or without association of other beneficiaries;
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> (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
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> (c) the Public Trustee; and
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> (d) creditors"

15. The administration of the intestate estate is underpinned within the scope of the doctrine of inclusivity and participation from the initiation of the petition of grant of letters of administration all the way to the summons for confirmation of grant on the distribution of the shares to the legitimate beneficiaries. It is the law in Kenya that even with appointment of administrators who act on behalf of the deceased in the governance structure of identifying the net estate and the legal beneficiaries or dependents cannot on their own motion make an executive decision on matters to do with the estate administration without the consent of the rest of the beneficiaries eligible to benefit from the identified assets. Essentially an administrator is first among equals and enjoys no superior rights with the rest of the beneficiaries or heirs. It is the procedural and substantive law in our legal system that in a polygamous marriage, each household must be represented when it comes to the appointment of the administrators under section 66 of the Act. The succession law therefore has taken measures to recognize both formal and substantive equality. Formal equality means sameness of treatment, the essence if which the law must treat individuals in the same manner regardless of their circumstances. It just simply requires that all persons are equal bearers of rights. The specifics of formal equality do not take actual or social and economic disparities between groups or individuals into account when it comes to the decision making by the probate court in the distribution of the estate. On the other hand, substantive equality under the *Law of Succession Act* takes various factors into account and demands of the court, equality of outcome. The stages of inquiry in these proceedings transcend from the very first day, the petition was lodged with an object of identifying the assets and beneficiaries survived of the deceased. The question then is whether in the process of decision making by the probate court presided over by the various judges. On appointment of administrators, there was a differentiation which bear a rational connection to a legitimate purpose to section 66 of the Act. if there is evidence that the second house was left out during the making of grant of letters of representation without them repudiating that right it might nevertheless amount to discrimination under Art. 27(4) of *the Constitution*. The affidavit in opposition to this review, on appointment of administrators to this estate has basically failed to answer this threshold test.

16. In the interest of fairness and to ensure equitable representation of all houses in this polygamous family arrangement, the Court finds it appropriate to review the impugned judgment to the extent

of appointing additional administrators to act jointly with Philemon Kiptanui Sitienei. Accordingly, Joel Rugut, Obadiah Kiplagat Bor and Julia Jepkorir Rugut are hereby appointed as co-administrators of the estate of the late David Kibor Rugut. This appointment is made with the understanding that all four administrators shall act jointly and in good faith in administering the estate for the benefit of all beneficiaries. With regard to the order directing that property LR No. Eldoret Municipality/Block 1/163 be valued and sold, the Court notes with grave concern the revelation that despite a clear judgment of this Court dated 14th February, 2025, the said property has since been leased out for a period of five years (2025-2030) with a premium of Kshs. 24,375,000/= allegedly paid and distributed among some beneficiaries, excluding Philemon Kiptanui Sitienei. This unilateral action in the face of a valid court judgment adds another layer of complexity to the administration of this estate and demonstrates the necessity for proper oversight by multiple administrators.

17. The Court observes that the lease agreement and its terms have merely been averred in affidavits without proper documentation being presented before this Court. Therefore, all four administrators are hereby directed to within 14 days of this ruling, jointly access, retrieve, and file in court certified copies of the purported lease agreement, payment receipts, and any other relevant documentation relating to the leasing of property LR No. Eldoret Municipality/Block 1/163.

18. The provisions of section 76 of the *Law of Succession Act* hovers around the administration of this estate for reasons that the administrator has failed to proceed diligently with administration, render final accounts in terms of section 83 (g) of the Act given the character and the nature of the decree of this court. It appears from the record that the estate seems to have been leased without leave of this court. The accounts receivables seems also to be shrouded in some form of opaqueness as to how they are to be fairly and proportionately shared with the beneficiaries. The management and governance of the account where the quantum of the lease is deposited is not very clear on its usage, expenditure and net value as at the time of these proceedings. In the event on 9th May, 2025 it is established there has been no diligence in the administration of the estate this court may as of necessity invoke the provisions of section 76 to revoke the appointment of administrators.

19. That is why the court ought to remind the administrators that their appointment is not a perpetual role but a position of trust with the specific purpose of facilitating the expeditious administration and distribution of the estate. The administrators are expected to act with diligence, transparency, and in strict adherence to their fiduciary duty toward all beneficiaries. The administrators shall work together to finalize the administration of this estate, which has been ongoing since 2007, within a reasonable timeframe. As a result, the following orders:

    a. Joel Rugut, Obadiah Kiplagat Bor and Julia Jepkorir Rugut are hereby appointed as co-administrators of the estate of the late David Kibor Rugut to act jointly with Philemon Kiptanui Sitienei;

    b. The Registry shall issue an amended Grant of Letters of Administration to include all four administrators as named in order (a) above

    c. Before the grant can be confirmed pursuant to the judgment dated 14th February, 2029 Joel Rugut and Obadiah Kiplagat Bor who have been accused of leasing property LR No. Eldoret Municipality/Block 1/163 shall appear before this Court on 9th May, 2025 to provide better particulars regarding the alleged lease agreement and the premium of Kshs. 24,375,000/= reportedly received and distributed.

    d. That the new administrators work with Philemon Kiptanui Sitienei on the account receivables and expenditure as far as this estate is concerned.

e. That this intestate comprises only one asset, the beneficiaries and the administrators ought to comply with section 83(g) of the Succession Act by submitting a final probate account so that this court can liquidate the estate and discharge the beneficiaries.

f. Pending the hearing on 24th April, 2025, all proceeds from the estate property shall be preserved and no further distributions shall be made without court approval.

20. It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 11TH DAY OF APRIL 2025

....

R. NYAKUNDI

JUDGE