



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Mary Jepkorir Sisei (Deceased) (Civil Appeal
2 of 2024) [2025] KEHC 5612 (KLR) (5 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5612 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL 2 OF 2024**

RK LIMO, J

MAY 5, 2025

IN THE MATTER OF THE ESTATE OF MARY JEPKORIR SISEI (DECEASED)

BETWEEN

MARTIN KIPLIMO APPELLANT

AND

PRISCAH CHEMTAI RUGUT RESPONDENT

*(Appeal arising from the ruling of Hon. S.K.Mutai (Senior Principal Magistrate) in Kitale
Chief Magistrate's Court Succession Cause No. 147 of 2021 delivered on 22nd January, 2024)*

JUDGMENT

1. This appeal is in respect to a ruling dated 22/1/2024 delivered in Kitale CMCC Succession Cause No.147 of 2021 by Hon. S.K. Mutai Senior Principal Magistrate.
2. The cause in that court related to the estate of the late Mary Jepkorir Sisei (dcd) who died intestate on 24th July 2000 at Nandi Hills. The deceased as per the record from the subordinate court died leaving behind the following dependants namely;
 - i. Martin Kiplimo
 - ii. Joseph Kipkemei Maritim
 - iii. Margaret Chebet Kibor
 - iv. Pauline Chepkoech Kiptalam
 - v. Fred Kiptum Ngetich
 - vi. Elizabeth Chepkemboi Sisei



- vii. Susan Jelagat Peter
- viii. Prisca Chemtai Rugut (daughter in law and mother to Angelah Cherop Tenai and Grace Jeptoo Tenai)
3. The estate left behind by the deceased comprised one property namely;
Land Parcel No.Kapkoi/Mabonde Block 1/Mokoiyet/84 measuring approximately 1.538ha (Approximately 3.77 acres)
4. The proceedings further indicate that Martin Kiplimo, the appellant herein was granted letters of administration in respect to the estate of the deceased therein on 13/1/22 and on 14/10/22 the grant was confirmed with the estate being divided equally among the following;
 - i. Joseph Kipkemei Maritim – 0.5acres
 - ii. Martin Kiplimo - 0.5acres
 - iii. Margaret .C.Kibor -0.5acres
 - iv. Pauline .C. Kiptalam -0.5acres
 - v. Fred .K. Ngetich -0.5acres
 - vi. Elizabeth .C. Sisei -0.5acres
 - vii. Susan Jelagat Peter -0.5acres
 - viii. Prisca Chemtai Rugut -0.5acresto hold in trust for Angelah Cherop Tenai & Grace Jeptoo Tenai
5. The respondent, Prisca Chemtai Rugut on 1/11/2022 moved the trial court for revocation of grant vide summons for revocation of grant dated 1/11/2022.
6. The gist of her application was that the Succession Cause was done secretly and through concealment. According to her the estate had been gifted to her late husband Stephen Cosmas Kiprotich Tenai who died on 22/10/2018.
7. The application was strongly resisted by the appellant who denied the respondent's contention and insisted that the estate belonged to their late mother.
8. The trial court entertained the application and through a ruling delivered on 13/6/23, the application to nullify the grant was dismissed.
9. The respondent undeterred filed an application dated 5/7/23 for review and setting aside of the ruling delivered on 13/6/2023. Her main grounds were listed as follows;
 - a. That there was new evidence discovered.
 - b. That the appellant herein concealed material facts regarding the estate of the late Mary Jepkorir Sisei (dcd) and stood to benefit twice to the detriment of other beneficiaries.
10. The respondent averred that the deceased happened to be owning another 7 acres of land at a place known as Kipkorian and relied on an affidavit of one Selestina Jepbungei Kipkemei.



11. She further deponed that there was a family reconciliatory meeting in 2018 when her husband was still alive and that in that meeting the parcel comprising the estate was given to her late husband. She relied on the alleged minutes of the said meeting to buttress her case.
12. The appellant herein opposed the application for review and insisted that the parcel of land known as Kaisagat/Chepkoilel Block 4/Kipkoriony/18 was never part of the estate but was his own parcel having personally bought it in 1984. He exhibited a copy of title deed indicating that he was a registered owner.
13. He also conceded that a reconciliatory family meeting took place but in his view the subject of the reconciliation was for her return to matrimonial home since she had reportedly left leaving behind her seriously sick husband.
14. He contested the contents of the minutes of the meeting stating that they were fake and that no one signed them.
15. The trial court upon hearing the said application found that the applicant had established good grounds for review and the court listed the grounds as follows in summary;
 - i. That the respondent herein was not present during the confirmation of grant.
 - ii. That there was evidence of concealment of the material fact which was to the effect that the deceased also owned Plot 18 Kipkoriony Farm besides the parcel in dispute which was Kapkoi/Mabonde Block 1/Mokoiyet/84 where the applicant's matrimonial home was situate. The trial court found this to constitute a new and important matter to warrant a review of the ruling delivered on 13/6/2023.
 - iii. That the minutes of 14/8/2018 were not fake since both the appellant and respondent confirmed that the meeting took place.

The trial court then proceeded to review the ruling earlier given and revoked the grant and issued the grant to the respondent and confirmed the estate in her favour.

16. The appellant felt aggrieved by the ruling which was delivered on 22/1/2024 and listed the following grounds namely;
 - i. That the learned trial magistrate erred in law in holding that the respondent's application met the threshold for granting of review orders.
 - ii. That the learned magistrate purported to sit on appeal from the findings/ruling of a magistrate of equal jurisdiction in holding that Kaisagat/Chepkoilel Block 4/Kipkoriony/18 registered in the name of the appellant was part of the estate therefore overturning the ruling of Hon. C.M. Kesse Principal Magistrate dated 13/6/23.
 - iii. That the learned magistrate misdirected himself in holding that the alleged absence of the respondent on the date of confirmation of the grant was a sufficient ground to grant review thus disregarding the fact that the respondent's application for revocation of grant had been found without merit.
 - iv. That the learned magistrate misdirected himself in holding that the alleged concealment of the fact 'that Plot 18 Kipkoriony Farm belonged to the deceased' is a new and important matter whereas, the issue had been raised in the application for revocation of grant, canvassed in the respective submissions and the court ruled on the same.



- v. That the learned magistrate misdirected himself by holding that the appellant had failed to discharge the burden of proof that he bought Plot No.18 Kipkoriony Farm contrary to Section 107 and 108 of the Evidence Act.
 - vi. That the ruling of the learned magistrate demonstrated extreme bias against the appellant and caused miscarriage of justice to him and other beneficiaries.
 - vii. That the learned magistrate erred in law by simply revoking the grant and issued one in favour of the respondent without considering the interests of other beneficiaries all of whom had a higher priority being children on the deceased as stipulated in Section 66 of Law of Succession Act.
 - viii. The learned magistrate exercised his discretion wrongly in condemning the appellant to pay costs to the respondent without due regard that parties were a family and without giving reasons for doing it.
17. In his written submission through learned counsel M/s Samba & Co Advocates, the appellant contends that the respondent’s application for review relied on discovery of new evidence and material non-disclosure. It is his contention that the new issues raised did not meet the criteria for review under Order 45 Civil Procedure Rules pointing out the criteria and guidelines for a review under Order 45 Civil Procedure Rules. He buttresses those guidelines with the decision of Mary Wangari Karenju – vs- Francis Muiruri Kinyanjui (2019)eKLR.
 18. The appellant points out that the alleged “discovery of evidence” was nothing new because the respondent was fully aware of the appellant’s ownership. He avers that the same issue was raised in her application for revocation of grant dated 1/11/2022. He has drawn the court’s attention to the supporting affidavit sworn on 1/11/2022 by the respondent.
 19. The appellant submits that the question of ownership of Kapkoi/Mabonde Block 1/Mokoiyet/84 was raised in the summons for revocation of grant and the same was determined vide the ruling of 13/6/2023.
 20. The appellant faults the trial court for relying on unsigned minutes as ‘new evidence’. The appellant contends the unsigned minutes related to the distribution of the estate of the deceased at a time when no grant had been made.
 21. The appellant submits the respondent in her applicant for review was merely re-litigating a previously determined mater under the guise of presenting new evidence. He submits that the doctrine of res-judicata applied and relies on Fredrick Otieno Outa –vs- Jared Odoyo Okello & 3 Others (2017)eKLR where the Supreme Court inter alia held that an application for review is not meant to afford the losing party an opportunity to re-litigate or re-open a matter merely because such party is unhappy with the outcome. The case of Parliamentary Service Commission –vs- Martin Wambora & Others (2018)eKLR has also been cited in the same breadth.
 22. The appellant contends that the respondent should have appealed against the ruling of 13/6/2023 because the court pronounced itself on the issues presented to it. He relies on Ernest Amuguni Siva – vs- Director of Public Prosecution & Anor (2015)eKLR.
 23. He submits that there was no prove presented to the trial court that Kaisagat/Chepkoilel Block 4/ Kipkoriony/18 belonged to the deceased.
 24. He faults the trial court for disregarding the interests of other children of the deceased who rank higher in priority than the respondent as stipulated under Section 66 of Law of Succession Act.



25. He contends that while Section 38 of *Law of Succession Act* provides for equal distribution of the estate to surviving children, the trial court in the impugned ruling disregarded it.
26. On costs, the appellant also faults the trial court for condemning him to pay costs without justification. He relies on *Akram & Another –vs- Akram & 5 Others (2024)K E H C 4887 KLR* where the court held the view that in family disputes an award of costs would not be appropriate because it would not promote reconciliation.
27. The respondent on the other hand has opposed this appeal vide written submission by counsel M/s Arusei, Chepchumba & Co Advocates dated 17/2/2025.
28. The respondent contends that there was no dispute that Kapkoi/Mabonde Block 1/Mokoiyet/84 comprised the estate of the deceased in this matter.
29. It is the respondent’s case that the deceased had fully settled her 3 sons in their respective parcels with the parcel in dispute going to the respondent’s deceased husband.
30. She contends that the appellant concealed material facts in respect to Kaisagat/Chepkoilel Block 4/ Kipkoriony/18 and the fact that it was owned by the deceased. She submits that the allegation by the appellant that he bought the parcel was not corroborated with any evidence.
31. The respondent submits that her contention that the said parcel was part of the estate was corroborated by an affidavit by one Selestina Jepbungei Kipkemei and the minutes of a family meeting.
32. The respondent submits that her application for review met the threshold for review and that the trial court did not sit on appeal from the finding of Hon. Kesse (PM) because in her view the court did not address the question on Kaisagat/Chepkoilel Block 4/Kipkoriony/18.
33. She submits that the grant confirmed was done in her absence which infringed on her right to be heard. It is her contention that it was important and just that all beneficiaries were present during confirmation of grant adding that she was not accorded an opportunity to state her position with respect to the proposed mode of distribution of the estate by the appellant.
34. She concedes that she raised the issue of Plot No.18 Kipkoriony in her first application but maintains that the learned magistrate never addressed the issue in her ruling due to an oversight. She submits that the oversight was a new and important factor which necessitated review. She supports the trial court’s decision to review the ruling earlier given.
35. She submits that her evidence with regard to Plot No.18 Kipkoriony was not controverted citing the examples of the affidavit of Selestina Jepbungei and minutes of a family meeting. She contends that the evidence shifted the burden of proof to the appellant to prove how he acquired Plot No.18 Kipkoriony. She relies on *Raila Amollo Odinga –vs- IECB & 2 Others (2017)eKLR*.
36. She denies the appellant’s claim that the trial court was biased arguing that the allegation of bias has not been substantiated.
37. In her view the court considered the fact that all the sons of the deceased had been settled in their respective shares. She denies the contention that the interests of other beneficiaries were not considered.
38. On costs she submits that Section 27 of *Civil Procedure Act* provides that costs follow the event adding that costs is a question of court’s discretion. She however contends that she does not wish to have the costs taxed or pursue it.



39. This court has set out both the appellant's case and the respondent's case. The duty of this court as a first appellant court is to re-examine the evidence adduced at the trial court and draw own conclusions.
40. The issue for determination in this appeal is whether the trial court fell into error by reviewing a ruling delivered by a court of concurrent jurisdiction and/or whether the threshold for review was reached by the respondent's application dated 5/7/23.
41. I have already set out the history or the background of this matter so I will go straight to the issues at hand in this appeal.
42. I will begin with less contested issue of costs. It has been good practice adopted by many courts that in family disputes/matters, costs are rarely awarded to a successfully litigant given that both the victor and the loser at the end of that day remain related or connected to each other as a family and therefore to promote reconciliation the order of costs is not made unless there are other intervening factors that make is just and fair to penalize one of the parties with costs. In situations for example where one of the family members fraudulently takes all the family property to the exclusion of others and refuses to cede until order is given, an award of costs to the prejudiced party would suffice. A court should however qualify or give reasons for awarding of costs. In this instance the trial court erred by not giving reasons why he though it fit to penalize the appellant with costs yet the matter involved family members.

Whether the threshold for review was met.

43. The *Law of Succession Act* has its own set of rules on procedure and the rules under Civil Procedure Rules do not usually apply save for what is provided under Rule 63 P&A Rules. The provisions of Rule 63 of P&A Rules provides that the provisions of Order 45 of the Civil Procedure Rules applies. Order 45(1) of Civil Procedure Rules 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.

It is therefore true as pointed out by the appellant that a review of order or judgment can be granted following the following guidelines;

i. A discovery of a new and important matter not within the knowledge of the applicant upon exercise of due diligence and could not be adduced or procured at the time the order or judgment was being made.

ii. A mistake or an obvious error on the face of record.



iii. Any other sufficient reason.

44. A trial court is required to exercise its discretion based on the above guidelines.
45. Now let me re-evaluate the facts or evidence presented to the trial court by the respondent when invoking the discretion of that court to review a ruling dated 13/6/23. The respondent in her application dated 5/7/23 raised basically two grounds;
- i. Discovery of new evidence.
 - ii. Concealment of material fact.
46. On the question of new discovery of fact, the respondent in her application pointed out that she had discovered that Plot No.18 Kipkoriony occupied by the appellant belonged to the deceased. In that regard she relied on an affidavit sworn by one Selestina Jepbungei Kipkemei sworn on 5/7/23.
47. The respondent has however conceded that in her previous application dated 1/11/22, she had raised the same issue. I have perused through the summons for revocation of grant dated 1/11/2022 in the record and I note that the issue was raised in paragraph 8 of her affidavit in support of the summons for revocation of grant. The issue of ownership of parcel No.18 Kipkoriony was canvassed before the trial court and was not a discovery of a new matter or evidence.
48. The respondent argues in this appeal that the trial court in her ruling dated 13/6/2023, never addressed the question but I am not persuaded by that argument for 2 reasons;
- i. In her application for review dated 5/7/2023 the respondent did not flag out the alleged omission by the trial court.
 - ii. The trial court in her ruling dated 13/6/23 found that the respondent's allegations had not been proved to the required standard.
49. If the respondent felt aggrieved by the finding of the trial court in the ruling dated 13/6/23 then the forum to challenge the finding was through appeal not review. This is because the relief sought by the respondent in the application dated 5/7/23 was outside the purview of review orders contemplated under Order 45(1) Civil Procedure Rules.
50. It was erroneous for the trial court to make a finding that the respondent herein was not present during the confirmation of grant. That finding in effect overturned a finding made by Hon. Kesse, in her ruling dated 13/6/2023. Hon S.K. Mutai in entertaining the application dated 5/7/23 was exercising a concurrent jurisdiction with Hon. Kesse who entertained the summons for revocation of grant dated 1/11/2022.
51. The trial magistrate (read Hon S.K. Mutai) overturned the finding of Hon. Kesse (PM) and was in effect sitting on appeal because part of the grounds raised in the summons to revocation of grant dated 1/11/2022 was that the succession proceedings were done secretly without involving her. Hon. Kesse rendered herself on that issue and other issues raised. The respondent again may have been dissatisfied but as held in Parliamentary Service Commission –vs- Martin Wambora Case (supra), an application for review is not an opportunity for a litigant to re-litigate issues or have a second bite of the cherry.
52. This court is persuaded by the appellant's contention that the issue of her absence during confirmation of grant having been dealt with fully vide a ruling dated 13/6/23, it was not open for the trial court to relook at the issue again because the doctrine of res-judicata estopped it from doing so. In short this court finds that the trial court fell into error to that extent.



53. The issue of concealment of material facts was raised by the respondent in her first application dated 1/11/22. In her affidavit sworn on 1/11/22 she clearly brought out the facts constituting concealment which included the allegation of fact that the appellant had been gifted 5 acres by the deceased separate from the estate of the deceased. The allegation raised were resisted in equal measure by the appellant vide a replying affidavit sworn on 16/11/22. The trial court upon hearing the matter rendered herself and found that the respondent's allegations were unproven. The question was therefore settled by a decision of the magistrate and it was not open for another magistrate to come and set aside the finding under the provisions of Order 45 of the Civil Procedure Rules. The threshold for review was simply not met and it was a misdirection for the trial court (Hon. S.K. Mutai) to make a contrary finding.
54. The trial court finding that the appellant did not provide proof on how he acquired Plot 18 Kipkoriony was wrong in principle. This is because of the provisions of Section 107 of the *Evidence Act* that placed the burden on the respondent to prove that the said Plot was part of the estate or had been gifted to the appellant. The trial court found that the appellant's title deed of Plot No. 18 Kipkoriony was obtained on 13/6/2011 eleven years after the demise of the deceased but that alone cannot impute that the acquisition of the title was improper. There was no evidence showing that the said Plot was part of the estate of the deceased in the first place. It was upon the respondent to show or demonstrate the same and in the absence of any proof, it was quite erroneous to shift the burden of proof to the appellant and state that he did not prove how he acquired it.
55. This court further finds argument that all the sons of the deceased had been catered for to be misleading. This is because the deceased had both sons and daughters and so even if I was to find that the sons had been catered or vide gift "intervivos", there is nothing to show that the daughters were catered. As a matter of fact, the respondent in her written submissions is quite silent about the fact that the impugned ruling appears to have totally disregarded the interests of other beneficiaries to the estate who as a matter of law rank higher than the respondent by virtue of being children to the deceased. The impugned ruling locked them out completely without being accorded a chance to be heard.

This court has said enough to show that this appeal is merited. For the aforesaid reasons this appeal is allowed. The ruling made by the trial court dated 22/1/24 is set aside plus all the consequential orders including the transfer of Kapkoi/Mabonde Block 1/Mokoiyet/84. That property will be distributed equally among all beneficiaries as per certificate of confirmation dated 4/10/22. For avoidance of doubt, I make no order as to costs.

DELIVERED, DATED AND SIGNED AT KITALE THIS 5TH DAY OF MAY , 2025.

HON JUSTICE R.K. LIMO

KITALE HIGH COURT

Judgment delivered in open court

In the presence of;

Gemenet for respondent

Nafula holding brief for Samba for appellant

Court assistants – Duke/Chemosop

