In re Estate of Kite Arap Tiren (Deceased) (Succession Cause 52 of 1994) [2024] KEHC 6968 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6968 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 52 OF 1994

RN NYAKUNDI, J

JUNE 13, 2024

BETWEEN

ROSE JERONO TIREN ..... APPLICANT

AND

SILAS KIPKOECH TIREN ..... RESPONDENT

AND

MARY SUMBEIYWO ..... INTERESTED PARTY

KENNETH TIREN ..... INTERESTED PARTY

SHEILA TIREN ..... INTERESTED PARTY

RAYMOND KOSCOM ..... INTERESTED PARTY

ASHA TIREN ..... INTERESTED PARTY

MAURICE TIREN ..... INTERESTED PARTY

RULING

1. Rose Jerono Tiren and so the other beneficiaries must learn to let go, for litigation must come to an end. Kite Arap Tiren died on 7.2.1993 leaving a last written will. The beneficiaries of the will Susan Rotich Tiren, Silas Kipkoech Tiren and Rose Chereno Tiren (the present applicant) took out a citation filed on 22.3.1993 in the respect of the same against the executors. After the executors of the deceased's will filed for probate of the will, some of the beneficiaries raised an objection on grounds that not all the deceased's beneficiaries were provided for. The objection was heard and determined and this court presided by Hon. Nambuye, J made findings as follows:

> " That the distribution by the deceased's last will be and is hereby varied as hereunder taking the house of Susan on one hand as a unit and the houses of the objectors as another unit.

> Each unit will then go and share out the property disposed to it on its own and in the event of any disagreement the matter will be referred back to the court for distribution or ruling on the matter."

2. In the said decision, this court made distribution of the properties, particularly parcels of land as follows:

   Land

   Irong/Iten/545 comprising 109 acres to the objectors

   LR. 3765 comprising 2017 acres

   1008.5 acres to Sila Tiren as per succession to the estate of the late John Tiren

   1008.5 acres to the house of Susana

   LR. 8709 – a portion of it comprising 209 acres

   66 acres to Rose Cherono Tiren

   66 acres to the House of Susana

   99 acres to the house of objectors

   LR. 8344 comprising 858 acres

   450 acres to Susan Tiren

   408 acres to the objectors

   Town Plots

   To the house of Susana

   Iten township/50 comprising 0.00604 hectares

   Iten township/50 comprising 0.6631 hectares

   Plot No. 52 Tambach township

   Eldoret Municipality Block 12/355

   Objectors

   Iten township/22

   Plot No. 53 Tambach township

   Eldoret Municipality Block 12/262

   Unnamed plot in Tambach township

3. True to this court's speculation, a disagreement arose as to the distribution of the properties allocated to the objectors, which triggered an application dated 23rd April, 2008, in which the Applicants; Eileen Kurumei and Mary Joan Cherono sought the following reliefs:

   > This honourable court be pleased to distribute the residue of the estate among the beneficiaries from the 1st to the 4th Households
   >
   > The costs of this application be in the cause

4. The application was anchored on grounds that in this court's judgment delivered on 22nd February, 1998, provisions were made for all the five respective houses of the five wives of the deceased. That

the 5th house was absolutely taken care of by the honourable court while the other first four houses were directed to agree on distribution among themselves of the property devolved them. That the said first four houses have failed to agree on a mode of distribution of the portion of the deceased's estate devolving to them pursuant to the aforementioned judgment. Finally, that the proceedings have taken a very long period pending in court and a final distribution with promptness is paramount to enable the beneficiaries to enjoy their respective entitlements.

5. This court presided by Hon. P.J Mwilu (as she was then) considered the application and made a determination as follows:

> " Doing the best I can in the circumstances and guided by these principles I now distribute the estate as hereunder:
>
> The property known as IRONG/ITEN/545 being land measuring 109 acres to be distributed between the four houses not catered for in the will. This will be share as follows; - The first house of Kimoi Tiren now represented by Eileen Kurumei will get 10 acres of land to be excised around the place where the later Kimoi Tiren's house stood. The fourth house of Tingo Tiren now represented by Mary Joan Cherono will get 10 acres of land to be excised around the place where the late Tingo Tiren's house stood. An equal share of the entire 109 acres divided between the four houses would be 27.3 acres per house. In distributing as above I have considered that there is now left only one child in the remaining two houses. As regards the parcel of land known as LR. No. 8344 measuring 408 acres the first house of Kimoi Tiren now represented by Eileen Kurumei will get 40 acres and that the unnamed plot in Tambach to house No. 4. I do not consider it prudent to give any motor vehicles to house No. 1 and 4 for the same reasons given in respect of the distribution of parcel of land known as IRONG/ITEN No. 545.
>
> House number two and three have worked in unison and consent and proceeded by consent in the distribution of the estate. In light of that I order that continuing in their such unison and consent they shall proceed to share the residue of the estate as they have proposed with minor alterations to accommodate the distribution to house numbers 1 and 4 above as ordered. Either party is at liberty to apply, however it is hoped that this long outstanding matter may now be brought to a close and the beneficiaries may have time to enjoy their share while they still appreciate the taste of it without that taste being diluted by age and the passage of time."

6. That was not the end of it. Philip Tiren and James Tiren again filed an application dated 13th September, 2010 seeking review of the orders made by Justice P. Mwilu. The application sought review orders as follows:

> That this Honourable Court be pleased to review orders made on 28.07.2010 by Justice P. Mwilu.
>
> That this Honourable Court be pleased to order distribution of the deceased's estate among the deceased's households as per the schedule of distribution annexed hereto.
>
> That this Honourable Court's Order dated 28.07.2010 made by the Hon. Justice P. Mwilu be varied and or amended to bequeath fairly to all the deceased's dependant's according to intestate disposition.

7. Two years later, on 5th July, 2012 Philip Kiplagat Tiren filed another application dated 4th July, 2012 seeking stay of implementation of this court's order dated 28th July, 2010. He sought the following reliefs:

> That there be stay of implementation of the court order/ruling dated 28th July, 2010 and all its consequential orders and/or on order of status quo be maintained pending the hearing of this application inter-parties.
>
> That this honourable court be pleased to set down the Applicant's Application dated 13th September 2010 for hearing inter-parties on priority basis.

8. The said application was majorly premised on the grounds that this honourable court's ruling dated 28-07-2010 substantially contradicted the judgment delivered by Justice Nambuye on 22nd February, 1998.

9. Needless to state, there have been numerous applications that have been filed regarding this matter. I have made effort to capture some of them in view of putting this whole matter into perspective and for the benefit of the litigants herein who are not willing to let go.

10. Regarding the property known as L.R NO. 8709, the parties recorded a consent to have the application dated 26th May, 2005 compromised in the following terms:

    a. That this honourable court be and is hereby pleased to review and/or set aside the Judgment/Ruling and Decree delivered on 22nd February, 1998 to the extent that it affects all and/or part of all that piece of land known as L.R. NO. 8709.

    b. Any order/finding that all that property known as L.R. NO. 8709 was part of the estate of the late KITE ARAP TIREN is hereby set aside including the orders of distribution thereof.

    c. The said property was not in law part of the said estate and not available for distribution at the time of judgment.

    d. Distribution in respect of the remaining property to proceed.

11. Rose Jerono Tiren subsequently filed an application dated 5th July, 2008 seeking the following orders:

    a. That further to the orders made on 14.4.2008 touching on title No. L.R. 8709 alias Title No. KARUNA/KARUNA BLOCK 4(CHEPLASKEI)11 belonging to the applicant, be and is hereby restored to the applicant.

    b. The erroneous subdivision, the mutation forms and the survey maps subdividing title no. KARUNA/KARUNA BLOCK 4(CHEPLASKEI)11 among the respondents and any other beneficiaries of the estate of the late KITE ARAP TIREN be set aside and or quashed.

    c. The respondents jointly and individually be ordered to account for their farming activities on title No. KARUNA/KARUNA BLOCK 4(CHEPLASKEI)11 in the period after 14.4.2008.

    d. The respondents by themselves, their agents and or servants be strained from entering, working upon, cultivating, grazing, leasing, selling or offering for lease or sale any part of all that land comprised in Title No. KARUNA/KARUNA BLOCK 4(CHEPLASKEI)11 belonging to the applicant henceforth

12. I must state at this point that the property known as L.R. 8709 alias Title No. KARUNA/KARUNA BLOCK 4(CHEPLASKEI)11 has been the subject of numerous applications brought before this court. A recent one is that dated 24th March, 2016 where the applicants namely, Philip Tiren, James Tiren and Thomas Tiren sought reliefs as follows:

> A temporary injunction be issued to restrain the Respondents from sub-dividing and/or selling land parcel Number L.R. No. 8709, L.R. No. 8344/2 and IRONG/ITEN 545;
>
> That the court do vary/or set aside the order issued herein dated 14th April, 2008;
>
> That pursuant to prayer (a) above, the court be pleased to redistribute the estate asset, L.R. No. 8709 measuring 209 acres to the beneficiaries of the deceased as ordered in the judgment dated 22nd February, 1998.
>
> That the process of subdivision relating to L.R. No. 8344/1, 8344/2 and IRONG/ITEN/545 be stopped pending the hearing and determination of this suit.

13. This court presided by Hon. Olga Sewe considered the application and made a finding that the application lacked merit. The court spoke in the following language:

> " As has been pointed out herein above, there is not a single averment in the supporting affidavit alleging fraud or mistake. Indeed, the applicants blamed the court, as opposed to the parties, for the order dated 14th April, 2008. It is plain therefore that the conditions for setting aside of a consent Order have not been met by the Applicants.
>
> It is in light of the foregoing that I find that the application dated 24th March, 2016 is totally lacking merit. The same is hereby dismissed."

14. Perhaps we are still here today because of the indolence on the part of the executors of the will to perform their duties of distributing the estate of the deceased to the beneficiaries accordingly. In fact, at one point, as the record reveals, this court presided by Hon. Jeanne Gacheche on 12th March, 2007 made an order in the following terms:

> " (i)The executors of the will have declined to take up their appoints and are hereby removed.
>
> (ii)The Public trustee is and hereby appointed to administer the unconfirmed portion of the state to its finality."

15. On 24th February, 2021, Silas Kipkoech Tiren filed an application dated 12th February, 2021 seeking an amendment to delete the names of BARKOKWET KIMARGET and KIPLAGAT KIBUSIA as executors of the will of the late KITE ARAP TIREN and in their place the name of SILAS KIPKOECH TIREN be inserted as the executor of the will.

16. Subsequently, the parties filed a consent on 7th September, 2021 in the following terms:

    i. That the Grant of Letters of Administration with written will annexed to the Estate of Kite Tiren (deceased) be issued to:-

       SILAS KIPKOECH TIREN &

       ROWLANDS KIPCHIRCHIR TIREN

    ii. The shares with Standard Chartered Bank Kenya Ltd and Kenya Commercial Bank Limited in the name of the deceased which were left out in the assets of the deceased be included and

distribution thereof made and the said distribution do follow the general pattern contained in the decree/order dated 22nd February, 1998 and issued on 20th April, 1999.

iii. The certificate of confirmation of confirmation of Grant be issued in terms of the Decree/ Order dated 22nd February, 1998 and issued on 20th April, 1999 taking into account the shares indicated in clause (ii) above.

17. It is the said consent that resulted to the grant of letters of administration being granted to SILAS KIPKOECH TIREN on 3rd March, 2022. This court thereafter issued a certificate of confirmation of grant on 11th May, 2022 with a schedule of distribution taking a model similar to the one contained in the Decree/Order dated 22nd February, 1998 and issued on 20th April, 1999.

The instant Application

18. Unfortunately, we are in 2024 and the matter has not been brought to conclusion. One thing is clear. The unending litigation in this matter is as a result of parties not being satisfied with the orders issued by this court. Ideally, if the parties were not satisfied from the beginning, an appeal should have been lodged at the court of appeal. Instead, several applications have been brought to this court in an attempt to have this court review its prior orders without clear grounds. All these applications for review have been appeals in disguise. Curiously, I have noted from the record that this matter has benefited from the wisdom of 8 judges. I am now the 9th and they could not all be wrong in the various issues addressed. This court cannot be used as a means of delaying justice. It is enjoined by Article 159 2(c) of *the Constitution* of Kenya to determine disputes and render justice without undue delay. Failure to do so will infringe upon the legitimate expectation of a Defendant that the dispute against it will be determined timeously.

19. The certificate of confirmation issued on 11th May, 2022 triggered the present application which I am called to determine. The application dated 4th December 2023, seeks the following reliefs:

1. Spent

2. Spent

3. Spent

4. THAT orders do issue, that pending any other or further orders the Applicant (i) Rose Jerono Tiren/Applicant, and (ii) Mrs. Elizabeth Komen beneficiary, (iii) Silas K. Tiren, Respondent/ Administrator from 5th House, House of Susana Tiren be allowed to use 673.32 Acres each in LR 3765 measuring a total of 2017 Acres, for the planting season 2024 with effect from December 2023, till further orders from court.

5. THAT an Order do issue to reverse estate titles disposed of before the grant was confirmed including (i)Iten/Township 50, measuring 0.0631 Hectares (ii) Eldoret Municipality 13-257 and (iii) Eldoret Municipality 12-355.

6. THAT orders do issue declaring that land parcel LR 8709 measuring 179 Acres wholly and solely belongs to Rose Jerono Tiren.

7. THAT orders of review do issue removing and excluding land parcel LR 8709 from assets of the estate of Tiren Arap Kite.

8. THAT order of Review do issue to assign, so as to hold in trust for the respective homes/ houses, the parcels set out in the "will" as read together and as adjudged by this court in its at least four (4) decisions of 7th July, 1998 [Hon. J. Nambuye], 28th July, 2010, [Hon. J. Mwilu],

28th August, 2019,[Hon. J. Sewe] and on 12th February, 2022 issued on 11* May, 2022, [Hon. J. Nyakundi]

9. 1st house Kimoi Tiren (Deceased)

   Eileen Tiren (deceased), to be held in trust for the 1st House, by Mary Sumbeiywo or whoever the 1st house decides;-

   i. LR. No, Irong/Iten 545- 27.3 Acres.[Kapkesum]

   ii. LR. No. 8344-102 Acres.[Abarbuch, Moiben]

   iii. Commercial Plot, Eldoret Municipality 262

10. 2nd house Kimoi Tiren [Deceased)

    To be held in trust for the 2nd house by Kenneth Tiren, or whoever the 2nd house decides;2nd house being composed of;

    a. Philip Tiren

    b. Alice Tuiyott

    c. Lilian K. Chemweno

    i. LR. No. Irong/Iten 545- 27.3 Acres

    ii. LR. No. 8344- 102 Acres

    iii. LR. No. Iten Township/22

11. 3rd house -Tingo Tiren

    To be held in trust for 3rd house by Sheila Tiren, or whoever the 3rd house decides;. The 3rd house being composed of;

    (a) James Tiren

    (b) Michael Tiren (now deceased)

    (c) Fredrick Tiren (now deceased)

    (d) Thomas k. Tiren

    (e) Jane Tiren

    i. LR. No. Irong/Iten 545- 27,3 Acres.

    ii. LR. No. 8344- 102 Acres,

    iii. Commercial plot.

12. 4th house Taplelei Tiren

    To be held in trust for the 4th house by Raymond Kosiom, or whoever else the 4th house decides. The 4th house being composed of Mary Joan Cherono:-

    i. LR NO. IRON/ITEN 545 - 27.3 Acres.

    ii. LR NO 8344 -102 Acres.

    iii. Unnamed Plot - Tambach Township.

13. To be shared and to be held jointly and in trust for all members of 4 houses Objectors by members of the 1st four homes, house No. 1,2, 3, and 4/ Objectors. The said plots, resources and shares being;;

    a. Plot No.53 Tambach Township

    b. Eldoret Municipality Block 12/262

    c. ¼ shares at Standard Chartered Bank

    d. ¼ shares at Kenya Commercial Bank

14. 5th house Susana Tiren

    The 5th house constituted of;

    a. Elizabeth Komen

    b. John Tiren (deceased)

    c. Rose Jerono

    d. Sila Tiren

    14.1 The 1008 Acres constituted in LR 3765 [Spring-Valley, Tachasis, Moiben] due to the house of Susana Tiren to be shared equally by the three (3) children of Susana viz;

    I. Elizabeth Komen -336.16 Acres.

    II. Rose Jerono Tiren-336.16 Acres.

    III. Sila Kipkoech Tiren -336.16 Acres

    14.2 The 1008 Acres constituted in LR 3765 due to the late John Tiren, to his two (2) children Asha Then and Maurice Tiren.

    14.3 In the alternative, the said 1008.5 acres due to the late John Tiren be shared equally into three (3) by two (2) sisters and one (1) brother as the ranking next of kin, in case the children cannot be established, as stated at "14.2" above, viz;-

    I. Elizabeth Komen -336.16 Acres

    II. Rose Jerono Tiren-336.16 Acres

    III. Sila Kipkoech Tiren -336.16 Acres.

15. THAT orders of Review do issue to assign equal land sizes measuring 150 Acres each to the three (3) children of Susana Then/5th house in the residue measuring 450 acres out of 858 Acres constituted in LR 8344. The children and acreage each being, (1) Elizabeth Komen, 150 acres, (2) Rose Jerono Then, 150 acres and (3) Sila Kipkoech Tiren 150 acres.

16. THAT orders of Review do issue to have the plots due to the house, Susana Tiren registered jointly in tire names of three (3) children (1) Elizabeth Komen, (2) Rose Jerono Tiren, and (3) Sila Kipkoech Tiren. The plots being; -

    16.1. LR. No Iten Township 50, the three (3) jointly.

    16.2. LR. No Iten Township 5, the three (3) jointly.

    16.3. LR. No. Plot No.52, Tambach Township, the three (3) jointly.

16.4. LR. No. Eldoret Municipality Block 12/355, the three (3) jointly.

17. THAT the ¾ shares in Standard Bank due to the house of Susana Tiren, be assigned, ¼ share each to Susana Tiren's three (3) surviving children;

    i. Elizabeth Komen; ¼ share

    ii. Rose Jerono Then; ¼ share

    iii. Sila Kipkoech Tiren; ¼ share

18. THAT the ¾ shares in Kenya commercial bank due to the house of Susana Tiren be assigned to ¼ share each to the three (3) surviving children of Susana Tiren namely

    i. Elizabeth Komen; ¼ share

    ii. Rose Jerono Then; ¼ share

    iii. Sila Kipkoech Tiren; ¼ share

19. That orders do issue compelling the Respondent to;

    A. Give an account of status of all commercial plots belonging to the estate, and the income.

    B. All assets disposed of or sold and the income.

    C. Accounts for his management of the estate since appointment, up to the date of giving account

20. That orders do issue compelling the Respondent that within ninety[90] days of this court's orders herein, or such time as the court may deem fit and just, to cause and effect mutations, survey works, conveyance, transfer, and titling to each estate beneficiary as determined.

21. That orders do issue as to timelines within which the titles to be reversed are to be effected and re-transferred to the estate beneficiaries.

22. That the respondent do pay costs of this Application.

23. That the court be pleased to issue any other or such further orders it may deem fit and just in the interest of justice.

20. The application is premised on the grounds set out therein and the averments of the applicant in the supporting affidavit. The applicant contends that the application meets the threshold for review of the grant and further, that the review will enable the distribution to stand reconciled and aligned to the deceased's "Will" which has not been ousted. He averred that the review will remove assets that are not part of the estate and were falsely added to the estate whilst they were never part of the estate asset; particularly parcel LR 8709. That the review will clarify what asset belongs to which beneficiaries.

21. The applicant stated that the review will procure clarifications on boundaries and edges of family members' acreages and end conflicts. It will also enable the other estate beneficiaries also enjoy the estate assets. He stated that a review will end the discrimination and settle the family feuds plaguing the estate. Additionally, he stated that it is a settled fact that in LR 3765, measuring 2017 Acres, is all registered in the name of the deceased. He stated that the deceased did not make out a 'Will" over his 100.85 Acres and was not married as at the time of his demise. He urged that the 1008.5Acres should devolve to his two (2) children, Asha Tiren and Maurice Tiren. In the alternative and without prejudice, if the two (2) children cannot inherit, then the said 1008.5 Acres should be shared on equal basis by his next of kin, his three (3) siblings his one (1) brother and two (2) sisters at the rate 336.1 Acres each.

22. The deponent averred that none of the deceased's five(5) wives now deceased, owned any of the land's parcels at any time. None of them, including Susana Tiren could make a "Will" nor dispose of assets to her co-beneficiaries. All assets belonged and were owned by the late Tiren Arap Kite. Any "Will" allegedly by Susana Tiren purporting to assign assets, especially land belonging to, and inherited from the late Tiren Arap Kite to the Respondent would be void and empty as Susana Tiren did not own any land that she could "will" away. Additionally, the applicant stated that some assets were illegally transferred by the Respondent before grant was confirmed and funds out of charges transfers and some legal proceeds were used by the Respondent for personal benefit. The Respondent was given funds to dissolve the estate but has unnecessarily taken inordinate time to effect distribution of the estate. These were funds held in the deceased's accounts.

23. The Applicant was not made aware of the request for the confirmation of the grant, the terms of the proposed confirmation, and of the issuance of the Confirmation of Grant orders. It is the Applicant's cause that final distribution to be achieved through this application for review and related orders should be done so as to accord with what is contained in the deceased's "Will", Hon Nambuye's decision made on 7th July 1998, Hon. J. Mwilu's decision made on 28th July, 2010 and Hon. O. Sewe's decision made on 28th August 2019. The manner of the said distribution is as set out in the application and in the supporting affidavit. Counsel urged the court to exercise its discretion and issue a review.

Respondent/ Administrators' Replying Affidavit

24. The respondent opposed the application vide a replying affidavit dated 19th February 2024. He urged that the last written will of the deceased was propounded which thereafter resulted into a litigation and after a vigorous hearing, Judgment was made and a decree was given on 22nd February, 1998 and issued on 20th April 1999. The Last Will and Testament of the deceased provided for Executors being Bargokwet Kiraargat and Kiplagat Kabusia who have since passed. The Estate remained un administered after the death of the two Executors and on 12th February 2021, he made an application to be appointed as an administrator of the estate in order to wind it up. The application was served on the firm of Advocates who were then representing various beneficiaries and none of the parties served opposed the application and was subsequently prosecuted and allowed. The Grant was amended and issued on 3rd March, 2022 and he then obtained the Grant of probate for purposes of distributing the Estate as per the decree of the court and to wind it up.

25. The respondent averred that he has not been an Administrator of the Estate since 1994 when the petition was filed. Further, that he is aware that Judgment in this matter was made on 22nd February, 1998 and a decree issued and no appeal has been preferred against it. He acknowledged that he learnt of the various applications that have been made by some beneficiaries to which he was not a party and neither was any Administrator then. He also learnt of a Ruling in respect to an application by Philip Tiren, James Tiren and Thomas Tiren delivered on 28th August, 2019 by Lady Justice G.A Sewe which dismissed the application and which did not alter the decree/Judgment of the court. Additionally, he learnt of the Ruling delivered by Lady Justice P.M Mwilu on 28th July, 2010 in respect to an application by one Eileen Kurumei and Mary Joan Cherono. rom the Ruling of 28th July,2010. He stated that the estate was distributed verbatim as per the judgment.

26. The respondent averred that from the ruling of 28th July, 2010 it appears that the beneficiaries who are the objectors and are members of the other four houses made an application for a further distribution of the Estate. The Ruling, then it settles the issue of distribution in the four houses whose members were the Objectors in the proceedings. The Respondent cannot purport to apply for distribution on behalf of the other houses, which in any case, it has been settled by the Ruling made on 28th July, 2010.

27. The applicant urged that with regard to the house of Susana Tiren, she died testate on 6 August 2021 and a Grant of probate of written will has already been filed at the High Court and being Eldoret Succession Cause No. 157 of 2023. In regard to that estate, any property and distribution ought to be dealt with and be made in the said petition. Susana Tiren was bequeathed part of the Estate of the late Kite Tiren in respect of the proceedings and therefore what is due to her Estate can then be dealt with in the said petition. It is through that petition that the beneficiaries, assets and liabilities of the Estate of Susana Tiren can be ascertained and further, the will and testament can be propounded and proven.

28. The applicant introduced in issues of the Estate of our late brother John Kimutai Kite Tiren to which the respondent addressed by stating that the late John Kimutai Kiter predeceased their father. Further, that he never married and did not have any children. A succession cause in respect of their late brother was filed at the High Court in Eldoret and being Eldoret Succession Cause No. 23 of 1988 and which was concluded and his Estate distributed and wound up. He stated that there is nothing therefore due to the Estate of the late John Kimutai Kite Tiren and the purported strangers whom the applicant purports to introduce as children of the deceased are new issues which were never introduced in the said succession cause No. 23 of 1988.

29. The respondent averred that the property described as LR 8709 belonged to the Estate of Kite Tiren and was bequeathed vide the last Will and Testament dated 12th May 1981 to Rose Cherono Tiren. She subsequently had the whole of the said parcel transferred to her in the year 1996 while the succession petition of the Estate of Kite Tiren was pending in the court. It is not true that the said property belonged to Rose Cherono Tiren but belonged to the Estate of the Kite Tiren.

30. The respondent urged that the assets of the deceased as listed in paragraph 11 of the supporting affidavit of the Applicant are not a true current reflection of the Estate. Further, that when the Judgment was delivered and a decree issued on 22nd February 1998, then some of the properties were transmitted and transferred to the respective beneficiaries. He laid out the true current status of the Estate of the late Kite and urged that the properties do not form part of the Estate of the deceased and-have never been in the proceedings. Further, that there are properties that have hot been transmitted but are confirmed in the Certificate of Confirmation of Grant to wit; properties due to the Estate of the late Susana Tiren. Since the petition in respect to the Estate of Susana Tiren has been filed then any issue of facts and law and distribution therefore can be dealt with in the said petition. The instant application by Rose Cherono is an attempt to appeal the decree that has been issued by the court. The review can only be made in respect to errors/mistakes in the Grant or Certificate of Confirmation of Grant whereas there are other issues of facts and law introduced by the Applicant.

31. He maintained that since his appointment as an administrator on 3rd March 2022 he has not done much on the Estate and further, he has not been given nor used any funds whereas on the contrary, the Estate needs funds to settle bill including legal and other incidentals thereto needed in the Administration of the Estate. Together with the filling of this Affidavit, he filed a probate Account of the Estate as at 1st January, 2024. He urged the court dismiss the application with costs.

3rd Beneficiary's Replying Affidavit

32. The 3rd beneficiary, Robby Tiren, swore an affidavit in response to the application. He averred that the application is res judicata since the claim pertaining to LR. No. 8709 was dealt with in the ruling fated 28th August 2019. Further, that the court is now functus officio after it issued the certificate of confirmation of grant. Rose Tiren has never filed an appeal and the present application is an appeal in disguise. He urged the court to dismiss the application as it is an abuse of the court process.

RESPONDENT'S SUBMISSIONS

33. The administrator filed submissions in opposition to the application and further to the affidavit he filed in response to the same. He reiterated the contents of the affidavit and urged that the Applicant purports to distribute the shares of Susana Tiren who is deceased. The Applicant does not represent the Estate of Susana Then who is her late mother. If she is pursuing the interest due to her late mother, then she is required to take out letters of administration in order to have authority to lay claim. The Applicant cannot claim to speak or seek distribution of her mother's share in these proceedings, as she does not hold any form of representation to cloth her with authority to stand in the proceedings to claim on behalf of her mother. Technically she is an intermeddler in the estate of her late mother. Further, that a Grant of Probate of Written Will has already be filled at the High Court being Eldoret Succession Cause No. 157 of 2023 and the properties of her mother have already been ascertained through their father's will, which is not disputed. There is need to file another succession petition in respect of the estate of their late mother Susana Tiren, which in this case has already been filed by the Respondent. It is the Respondent's claim that any property bequeathed to their mother Susana Tiren in their in their father's will in respect of the proceeding ought to be dealt with under the already filed Eldoret Succession Cause No. 157 of 2023 in the Estate of Susana Tiren.

34. Counsel submitted that the Certificate of Confirmation of Grant issued on 3rd March 2022 ought not to be cancelled as it was obtained through the right procedure. Revoking the grant will not serve the beneficiaries any good since the mode of distribution will not change. A review in respect to error / mistakes in the Grant or Certificate of Confirmation of Grant can only be made, whereas in the instant case, there are no such mistakes to warrant review. Further, that the submitted issues of distribution of property forming part of the Estate of the late Kite Tiren was made pursuant to the decree issued on 22nd February 1998 pursuant to a Judgment of the court and thereafter a Certificate of Confirmation of Grant thus, the same is therefore binding to all the beneficiaries and therefore no one should be blamed for nondisclosure of the unavailability of the said parcels by the Applicant which are just allegations without proof of their existence.

35. The Applicant is included in the distribution lists as a beneficiary and from the Ruling delivered by Lady Justice P.M Mwilu on 28th July 2010 he learnt that the Estate was further distributed through an application from the other four houses who are beneficiaries. From the said Ruling it settles the issue of distribution in the four houses whose members were Objectors in the proceedings. It is the Respondents contention that the order can then be extracted and the Certificate of Confirmation of Grant may be amended to reflect the same. Thus, the Respondent cannot purport to apply for distribution on behalf of the other houses, which in any case, It has been settled by the Ruling made on 28th July 2010.

36. The respondent urged that the fact that the Applicant did not show evidence that the deceased brother John Tiren had children and wife and were included in the Estate of their father or an Affidavit from the biological mother to confirm their paternity, did not prove her claims that the named children are children of the deceased brother and therefore did not discharge the burden of proof. The absence of the witness evidence should make this court draw the inference that the witnesses would have adduced adverse evidence to the Applicant's claim. There is no evidence or claim by the Applicant that the deceased had assumed parental responsibility to the said children before his death. It is the Respondents submissions that the claimed children have never known nor involved with the deceased and the family members before the deceased's death. He urged that the Estate of John Kimutai Then was transmitted and wound up as demonstrated in the Affidavit of Silas Kipkoech Then. He urged the court to dismiss the application.

Analysis and determination

37. Having walked down the memory lane regarding this cause, I wish to first and foremost answer the question whether the application on review is meritorious, which in my opinion is the substantial order sought by the Applicant herein. What are the salient features as conceived by the applicant? That an order of review do issue removing and excluding land parcel LR 8709 from the assets of the estate, an order of review do issue to assign various individuals to hold in trust the properties meant for the respective homes, that orders of review do issue to assign equal land sizes measuring 150 acres each to the three (3) children of Susana and order of review do issue to have the plots due to the house, Susan Tiren registered jointly in the names of three children. It is the same question this court has been called to determine in various occasions and as far as I am concerned, this court has spoken on this matter in several occasions but the parties have not come to terms with it.

38. First and foremost, before I address the issues raised in this application by the Applicant I cannot resist the temptation of restating the law that this is an intestate succession in a polygamous African family setting. It is a fact that the deceased who died intestate during his life's time he was in a polygamous union and that remains to be an acknowledged fact from the evidence presented from the very beginning of this petition. There are very specific factors that needs to be addressed by any court exercising jurisdiction in the administration of the estate with such diverse family groupings comprising of what is commonly referred as household each defined within the tenets of a spouse who happened to have been married by the deceased.

39. The second factor to be looked at is the number of children and property acquired by the deceased individually or jointly with his spouse. The specific law that applies to the intestacy succession in a polygamous family like in the instant cause is Section 40 of the *Law of Succession Act* which provides as follows: "Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall in the first instance be divided among the houses according to number of children in each house but also adding any wife serving him as an additional unit to the number of children.

40. The Act further defines a house as a family unit comprising of a wife, whether alive or dead at the date of the husband and the children of that wife. Although the section speaks of the distribution based on the number of persons per house it is trite that the court has to also take into account other factors when making an order for such a distribution so that justice is not only done but also be deemed to be done giving effect to the unique characteristics which may be presented by way of evidence before the probate court.

41. I am of the considered view that the dicta in Mary Rono v Jane Rono (2005) eKLR had some of these factors in mind when the court of appeal made the following observations. "the possibility that girls in any particular family may be married is only one factor among others that may be considered in exercising the court's discretion. It is not a determining factor. Courts have also held that applying the strict meaning of Section 40 of the Act may cause injustice in certain instances, therefore the court must rise up to an higher call of duty on matters of distribution so as not occasion prejudice or injustice to the other members within the consanguinity and affinity. The court in the case of Scholastic Ndululu Sura vs Agness Nthenya Sura (2019) Eklr pronounced itself as follows: "That although Section 40 of the *Law of Succession Act* provides a general provision for the distribution of the estate of a polygamous deceased person, the court has the discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.

42. Some of the key factors are as laid down in the case of the Estate of the late George Cheriru Chepkosion (2017) eKLR " In those cases, courts held the position that the contribution made by the 1st wife should be taken into account to avoid the injustice of having a wife who had spent the better part of her life contributing towards acquisition of assets with the deceased having to get equal share with a young wife who comes into the picture later on after assets have been acquired. The courts were of the opinion that before subjecting the net estate into equal distribution, evidence of the contribution of the 1st wife should be taken into account so that she is given her due share."

The natural limb distribution of an estate of the deceased to the heirs is on the doctrine on the doctrine of equality and freedom from discrimination.

a. Everyone is equal before the law and has the right to equal protection and benefit of the law

b. Equality includes the full and equal enjoyment of all right and freedom to promote the achievement of equality legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken

c. The state may not unfairly discriminate directly or indirectly against anyone or one or more grounds including race, gender, sex pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age disability religion, conscience, belief, culture language and birth.

43. Equality has proven difficult and a deeply controversial social ideal when it comes to distribution of the deceased estate either as an intestate or testate estate. At its most basic and abstract the idea of equality in the distribution of an estate is a moral idea the beneficiaries who are similarly situated in relevant ways by birth or affinity be treated similarly when it comes to distribution of the estate survived by the deceased. It's logical correlative is the idea that beneficiaries or claimants to an estate who are not similarly situated should not be treated a like with those within the scope of consanguinity and affinity. *The constitution* of the Republic of Kenya requires probate courts to grapple with this difficult issues.

44. It commits the courts in interpreting the law on distribution to the goal of achieving equality. The same constitution tells us in Article 20 (4) that in interpreting the Bill of Rights, a court, tribunal, or other authority shall promote the values that underlie an open and democratic society based on human dignity, equality, equity, and freedom and the spirit, and purport and objects of the Bills of rights. To this end, special measures have to be taken to ensure the protection or advancement of daughters and widow's rights who have been disadvantaged by discrimination on heirship in the past from benefiting from the estate survived by the deceased.

45. The structure of inquiry as set out above remains the yardstick for the executor or the administrator whose role is to construe and interpret the spirits of the dead on whose behalf they take the throne of the deceased in the administration of the estate. It is also a matter of common knowledge that nearly or inhabitants of the world including those who believe in science accept and profess some form of religion. It is also a matter of common knowledge and judicial notice that all religions teach the doctrine of survival, creation and death. That means they teach that in every individual human being there exist a soul which become separated from the body and the death and continues to live on in some form of existence hence the maxim may his or her soul rest in eternal peace while the body is dust into dust.

PARA4 6.

It may seem puzzling that the possibility of the souls of the deceased continuing to exist when separated from the human bodies is not in the realm of unknown and when the reflection by administrators to the estate of the deceased is apparently drowned in a sea of conflicts it may well therefore a call for them to commune with the spirit of the deceased to re-establish if he or she could have been alive, what would be the best win-win situation of the matter.

47. As can be seen from the protracted distribution of this estate even with the best interpretation of the *Law of Succession Act* the guarantees therein as a matter of policy has not conveyed or transmitted the movable and the immovable assets to the identified beneficiaries under Section 39 of the *Law of Succession Act*. The litigation exists in perpetuity from one generation to another. From the procedural standpoint over eight judges have applied their mind in accordance with the premise of the law as established but yet no answers so provided have placed the properties of the deceased in the hands of the beneficiaries. So as I advert to the merits of this application filed by the Applicant the cardinal question I vest in the shoulders of the administrator by the convent of the law is to determine and apply the basis structures of instruments of administration as so declared and have the distribution of the estate commenced and concluded within a reasonable time.

48. In deciding whether to grant such an application, the court considers a number of issues, some which have been highlighted in this ruling. The court is alive to the fact that different cases require the emphasis on one or more of the issues that must be considered. This case requires more stress to be placed on considering whether the applicant's proposal to review the certificate of confirmation of grant is something which has a prospective success in review of the historical litigation of this matter and the many orders on the same estate by various session judges, which have been disobeyed with impunity by the administrators. Before considering the usual issues of review however, it may be held as a backdrop to identify the reason and effect of non-transmission of this estate to the beneficiaries.

49. Having said that, the present matter has been a subject of continuous litigation majorly on the issue of review of the orders issued by the court. What is the law on review?

50. The dictionary meaning of the word review is the act of looking, offer something again with a view to correction or improvement. A judgment or decision is open to review inter alia, there is a mistake apparent on the face of the record.

51. Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules provides as follows: -

Section 80. Review

"Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

[Order 45, rule 1.] Application for review of decree or order.

"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.

(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"

52. This court in Republic v Medical Practitioners & Dentists Board & Another & another; MIO1 on behalf of MIO2 (a Minor) & another (Interested Party) ; Kingángá (Exparte) (Miscellaneous Civil Application 59 & 63 of 2019 (Consolidated)) [2021]cited the decision in National Bank of Kenya Ltd vs Ndungu Njau, (1996) KLR 469 (CAK) at page 381while discussing review. The court stated thus:

> There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error, where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.
>
> 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 a 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 proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."

53. As the supreme of court in the case of Aribam Tuleshwar Sharma v Aribam Pishak Sharnal (SCC p. 390, para 3)1 (1979) 4 SCC 389 stated, it has to be kept in view that an error apparent on the face of record must be such an error, which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions. The rationale behind this reasoning is that there is a distinction between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'.

54. Similarly, the court in Thungabhadra Industries Ltd v Govt. of A.P.1 stated as follows:

> " A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out."

55. Review of decisions of a probate court is governed by Rule 63 of the Probate and Administration Rules, which provides as follows: -

> "63. Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules
>
> (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.
>
> (2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules."

56. In John Mundia Njoroge & 9 Others vs. Cecilia Muthoni Njoroge & Another [2016] eKLR, the court cited Rule 63 of the Probate and Administration Rules, and then stated as follows:

> "As stated above, the only provisions of the Civil Procedure Rules imported to the *Law of Succession Act* are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time. Clearly, Order 45 relating to review is one of the Civil Procedure Rules imported into succession practice by rule 63 of the Probate and Administration Rules. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in Order 45 of the Civil Procedure Rules."

57. Evidently, a party seeking review of orders, in a probate and succession matter, is bound by the provisions of Order 45 of the Civil Procedure Rules.

The substantive provisions of Order 45, state 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.

(2) ..."

58. Having perused through the record and the present application, the applicant has not established the discovery or existence of new and important evidence to warrant a review of this court's order. She has not demonstrated an error apparent on the face of the record, neither has she given sufficient reason to warrant the court exercising its discretion. The record bears me witness that in instances the applications for review have been raised, they did not meet the threshold set in Order 45. The present application is not any different. I have not seen a mistake that is so glaring as to warrant a review. For once, let the beneficiaries herein agree to implement the decisions of this court. This court cannot continue to issue decisions in vain.

59. A clear reading of the application reveals that the applicant seeks to alter the distribution of the estate that was already determined and a grant issued and confirmed. The application, in my considered view, is an appeal disguised as an application for review. The applicant has gone a step further and provided an alternative mode of distribution in the supporting affidavit despite the issue of distribution having been settled vide the judgement delivered on 22nd February 1998 and decree issued on 20th April 1999. There was an amended grant issued to the petitioner on 3rd March 2022 and the judgement and decree issued by the court are yet to be appealed against. I reiterate that the application is in every way, shape and form an attempt to appeal the distribution issued by the court disguised as a review. It is trite law that a review can only issue where the following ingredients are proved to exist to the satisfaction of the court;

a. 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

b. A mistake or error apparent on the face of the record

60. The Application seeks a plethora of reliefs the crux of which is to alter the distribution of the estate as per the will, confirmed grant and the judgment and decree of the court. Evidently, the issue of distribution was determined by the court, with reference to the will of the deceased. If there were any errors on the confirmed grant, the correct mode of approaching the court would be to seek rectification of the grant. Rectification of grant is provided for in Section 74 of the *Law of Succession Act*, Cap 160 Laws of Kenya and Rule 43(1) of the Probate & Administration Rules. Section 74 provides as follows:-

> " Errors in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly."
>
> Rule 43(1) provides: -
>
> " Where the holder of the grant seeks pursuant to the provisions of section 74 of the Act rectification of an error in the grant as to the names or descriptions of any person or thing or as to the time and place of death of the deceased or, in the case of a limited grant, the purpose for which the grant was made, he shall apply by summons in Form 110 for such rectification through the registry and in the cause in which the grant was made."

60. The law on rectification of grant was discussed in the Matter of the Estate of Geoffrey Kinuthia Nyamwinga (Deceased) [2013] eKLR as follows: -

> " The law on rectification or alteration of grants is Section 74 of the *Law of Succession Act* and Rule 43 of the Probate and Administration Rules....What these provisions mean is that errors may be rectified by the court where they relate to names or descriptions, or setting out the time or place of the deceased's death. The effect is that the power to order rectification is limited to those situations, and therefore the power given to the court by these provisions is not general...."
>
> Where a proposed amendment of a grant cannot be dealt with under the provisions of Section 74 of the *Law of Succession Act*, the applicant ought to approach the court under order 44 of the Civil Procedure Rules. A review under Order 44 of the Civil Procedure Rules may be sought upon discovery of new and important matter or on account of some mistake or error apparent on the face of the record, or for any sufficient reason. The applicant in this case should have moved the court under this provision-Order 44 of the Civil Procedure Rules on account of some mistake or error apparent on the face of the record and on the ground that there exists a sufficient reason for review of the certificate of the confirmation of the grant."

61. I still hold the position that Jurisdiction in respect of causes of action in Succession matters is time bound. The parties to a litigation petition for letters of grant of administration which sequentially follow gazettement of the probate cause by the government printer. The appointed legal representative will have 30 days to receive objections to the making of the grant. In the event no objection is admitted by the court the official appointment of the administrators under Section 66 of the Act takes effect. Once the administrator/s determine the type of estate and action arising out of the entire scheme on movable or immovable properties and any such liabilities the law mandates proceedings for confirmation of grant be instituted. The effect is that the probate court issues a final decree on the subject matter for the administrator or administrators to transmit the estate as per the certificate of confirmed grant. Section 83(g) & (h) of the Act obligates the administrators to submit a probate account to the court within 6 months from confirmation of grant. If an administrator fails to comply with any of the prescribed provisions the court is entitled to provide leadership within the stipulated period. In accordance with Section 83 the probate court ought to move in that legal process to discharge the administrators from exercising administration over the estate of the deceased. The foregoing timelines protocols on both procedural and substantive justice relating to Succession Petitions highlights the doctrinal barriers and practical difficulties that those who seek to challenge the certificate of confirmation of grant must surmount before exercising Locus Standi to revoke or a null the grant under the ambit of section 76 of the Act.

62. The errors pointed out by the applicant are not errors per se as they question the mode of distribution and the beneficiaries entitled to the estate, thereby falling short of the threshold set in Order 45 of the Civil Procedure Rules. To buttress the position I have taken on this application, I am inspired by the guidelines given by the court in Independent Medico Legal Unit vs Attorney General of the Republic of Kenya, EACJ Application No. 2 of 2012 in which it was observed:

> " As the expression 'error apparent on the record has not been definitively defined by statute, etc, must it be determined by the court's sparingly and with great caution.
>
> The 'error apparent' must be self-evident; not one that has to be detected by a process of reasoning.

No error can be said to be an error apparent where one has to travel beyond the record' to see the correctness of the judgment – see paragraph 2 of the Document on 'Review of Jurisdiction of the Supreme Court of India' (supra).

It must be an error which strikes one on mere looking at the record, and would not require any long-drawn process of reasoning on points where there may conceivably be two opinion – see Smti Meera Bhanja v Smti Nirmala Kumari (Choudry) 1995 SC 455.

A clear case of 'error apparent on the face of the record' is made out where, without elaborate argument, one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be not two opinions entertained about it – see Thugabhadra industries Ltd. V. The Government of Andra Pradesh 1964 AIR 1372; 1164 SCR (5) 174; also quoted in Haridas Das v Smt. Usha Rani Banik & Ors, Appeal (civil) 7948 of 2004.

In summary, it must be a patent manifest and self-evident error which does not require elaborate discussion of evidence or argument to establish – (see; Sarala Mudgal vs. Union of India M. P. Jain, page 382, vol. I.)

Review of judgment will not be considered except where a glaring omission or a patent mistake or like grave error has crept into that judgment through judicial fallibility – see Document: 'Review Jurisdiction of Supreme Court of India" (supra)

The review jurisdiction of the court cannot be exercised on the ground that the decision of the court was erroneous on merit. That would be in the province of a Court Appeal.

A review cannot be sought merely for fresh hearing or arguments or correction of an erroneous view taken earlier.

A review proceeding cannot be equated with the original hearing of the case.

The purpose of the review jurisdiction is not to provide a back door by which unsuccessful litigants can seek to re-argue their cases.

The parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case or new versions which they present as to what should be a proper apprehension by the court of the legal result. If this was permitted, litigation would have no end, except when legal ingenuity is exhausted – see Hoystead v. Commissioner of Taxation (LR 1926 AC 155 at 165)

A power to review is not to be confused with appellate power which may enable an appellate court to correct all manner of error committed by a subordinate court."

63. In so far as the reliefs sought by the applicant under review jurisdiction and having evaluated, weighed and scrutinized the evidential material in the four corners of it, it lacks substance capable to amount to the guidelines in the above case law. These claims challenging the grant can be addressed as an administrative action taken by the administrator with concurrence by the beneficiaries. Incidentally, from the outset since the delivery of the judgment on 22nd February, 1998 by Nambuye J. as further enhanced in the ruling dated 28th July, 2010 by P.M. Mwilu J, the critical question on compliance with *the Constitution* and the *Law of Succession Act* was properly articulated on conferring rights of inheritance to the beneficiaries under Section 29 of the *Law of Succession Act*. The court's decisions have one thing in common; the procedural protection of the rights of the beneficiaries and subsequent substantive justice guaranteeing the rights as defined in the Law. The hallmark of any factual differences are within the essential scheme of administration by the administrators bearing in mind the family

genealogy dependent upon how the five matrimonial homes had been established by the deceased. Whatever the reason that may arise, the matrimonial properties basics are to be preserved for the benefit of the surviving spouses when delineating the life interest. The insider's guide on the metrics of distribution, the administrator can heavily borrow from the certificate of confirmation of grant issued by this court on 11th May, 2022 and the qualitative content analysis on the key aspects of the primary decision by Nambuye J and subsequently as modified by Mwilu J. and the basic structure on distribution by this court. There should be no controversy on the concept of inheritance to be litigated by this court by way of review jurisdiction.

64. A careful reading of the application at bar creates a very strong impression that the same is res judicata.

65. Section 7 of the *Civil Procedure Act* provides that:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

66. Our courts have been clear in numerous decisions that there are times when litigation ought to come to an end. In the case of William Koross (legal personal representative of Elijah C.A. Koross) v Hezekiah Kiptoo Komen & 4 others [2015] eKLR, the Court of Appeal stated:

> " The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go."

67. I have stated elsewhere that in Succession cases a rational argument can be mounted that the most significant event is an order by the probate court for a certificate of confirmation of grant to pave way for the transmission of the estate to the beneficiaries. The essential underpinnings of our system are twofold. Firstly, constitutionally entrenched rights and freedoms be enforced by the courts to enhance the rule of law. And secondly, all together the trial process as a such for the thought shall not be litigated ad inifinitum. These three questions still trouble my heart as a judge. When does the cause of action arise? When does the time expire to limit a cause of action in probate? What then is the position on the principle of res judicata as set out in Section 7 of the *Civil Procedure Act*. How do the principles in Henderson vs Henderson(1843-60) ALL E.R 378 observed as follows apply to the cause of Action in Succession matters. Thus:

> " .....where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as art of the subject in context, but which was not brought forward only because they have, from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies, except in special case, not only to point upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time"

68. There are three conditions which have to be satisfied for the court to apply the doctrine. These are: -

i)There is a former suit or proceeding in which the same parties in the subsequent suit had litigated.

ii)The issue in dispute was directly or substantially in issue in the former suit.

iii)That a court with competent jurisdiction had heard the matter and finally determined it.

69. The doctrine applies in disputes of civil nature where the circumstances of the case would allow a party to raise it. The application of the doctrine to succession matters would depend on the circumstances of the matter in issue. It is my humble view that considering the role the doctrine of res judicata serves, it is applicable in all disputes of civil nature including succession matters, where the conditions for the application of the doctrine exists, the doctrine can be successfully argued in succession disputes notwithstanding the ambiguity in section 76 of the succession Act which seems to provide that Succession matters belong to an exclusive jurisdiction that its litigation is in perpetuity or ad-infinitum. That any party who files a succession matter is at liberty to litigate, to re-litigate and litigate without the cause of action being concluded within a reasonable time as provided for in Art 50(2)(e) of *the Constitution*. This constitutional dictate on the face of it lays emphasis on the realm of criminal law but in construing it with Art 159(2)(b) justice shall not be delayed, it brings that clause in the administration of civil law. As if that is not enough, some provisions under the *Civil Procedure Act* apply mutatis mutandis in adjudication of Succession matters. I have in mind Section 1(a) of the *Civil Procedure Act*, which provides as herein

> "(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act."

70. In section 7 of the *Civil procedure Act*, if the court is satisfied that a particular party to a litigation has habitually and persistently and without any reasonable cause instituted applications one after another without a justiciable cause, it is plausible to rule that such proceedings are vexatious legal proceedings. The law governing probate and administration litigation is well settled under the Succession Act. The Act provides for a timetable for conduct of litigation from the moment of a petition being filed followed with gazettement in the Kenya Gazette, subsequently, a window of thirty days for any objector to object to the making of the intestate or probate grant of administration. Thereafter, if no objection is forthcoming, grant of letters of administration are issued to the petitioners now administrators with powers to administer the intestate estate or in the case of testamentary estate duly appointed by the testator. It is worth noting that this estate was initially one governed by a testamentary will of the testator. However, an application was filed challenging certain aspects of the testamentary will and this court's wisdom being presided over by the session judge Hon. Nambuye, varied the distribution matrix provided in the Will without interfering with the executors who were duly appointed by the testator. As stated earlier, the administrators had a duty to use reasonable skill, care and competence in carrying out the testator's intention with the variations made by this court. This obligation is of fundamental importance in transmitting the assets of the testator to the known and identified beneficiaries. As already noted, for one reason or another the executors/administrators never set in motion the process of distribution of this estate as founded in the certificate of confirmation carefully discussed and decreed by Justice Nambuye and as later decreed on 11th May, 2022. It is clear that litigation has never stopped as the current application is a testimony to that fact. This is an estate of affliction as the evidence supports that no heir, dependant or beneficiaries has ever had access to the defined shares in the entire estate survived by the deceased. There has been non-compliance with the timetable the Succession Act sets

as also propounded by the court itself. Unfortunately, neither the administrator nor the beneficiaries has ever sought leave of the court to extend time. What timelines are we talking about? The threshold set by the act that upon the initial of grant of letters of administration, the administrators or the executors as the case may be, shall have six months to correlate the movable and immovable assets of the deceased/testator for purposes of seeking an order of the court of a final decree on matters of succession commonly referred to as certificate of confirmation of grant. In Succession law, this is the final instrument which authenticates legally so the distribution of the estate to the beneficiaries. Likewise, under Section 83 (g) of the Succession Act, the administrators or conversely the executors shall file a probate account demonstrating enforced instruments of disposal of the estate and to seek a discharge order on administration. From my recollection of the historical factual matrix of this case, there has been a degree of prejudice to the right holders for non-distribution of this estate. A glance of all the application filed, there is prima facie evidence of inordinate delay but no sufficient cause has ever been given by any of the litigants who have shown the appetite to invoke the jurisdiction of this court even when there is no substantial cause of action. The parties litigating in this matter for close to thirty years come to the various forums of this court to demonstrate that there is something germane or relevant which must be adjudicated by the court and give a remedy against some rights which have been infringed. However, it is settled that if the issue raised in the earlier matter and which through inadvertence or otherwise was not raised cannot now be invoked to re-litigate the same issues. The evidence from the record is clear. Based on the pleadings and documentary evidence, there is no indication from the particulars of the claim in the current application that there is a new and important matter to occasion an amendment to the certificate of confirmation of grant. It is unfortunate in our legal system that review jurisdiction has not timeline whereas the appeal process has very strict timelines. I am of the considered view that the rules committee needs to look at this issue that review jurisdiction should not be a carte blanche for litigants to vex the court under the umbrella of the right to access justice in art 48 of *the Constitution*. I look forward to the time when litigants/parties involving review jurisdiction on an already decided matter have to surpass the hurdle of limitation. In addition to this present application. I wonder as to the various structural variations of the distribution model in the certificate of grant are not basically administrative which the administrators or as the case may be executors can faithfully deal with because there is no error of law apparent on the certificate of confirmation of grant. There is sufficient basis for the court to conclude that the court is being put into disrepute and endangering the finality of the administration of the estate by the very many frivolous application emanating at very late stages of the proceedings which are unjustified and which one can say is unreasonable use of legal proceedings to vindicate certain rights but in the end it amounts to an abuse of the process. The attempt by the applicant to rehash the very substance of the decision on the distribution of the estate is a collateral attack on an earlier decision of a court of competent jurisdiction. It will be manifestly unfair, unjust, improper, illegal for a party who at all times has knowledge of the initial suit, petition, cause of action but fails to litigate those issues in the earlier proceedings but elects to re-litigate the same issues, time has come for the courts to apply the doctrine of estoppel so as not to bring the administration of justice into disrepute. My reading in and reading out of the statement of the case by the applicant is a reformulation of the distribution model, trying to circumvent the fundamental issues that the court has determined. Some of the key parameters being stated in the affidavit by the applicant are to realign, dismember, sever the certificate of confirmation of grant issued on 11th of May, 2022. It is significant to note that the position as it relates to this estate, the key members of eligible to benefit from the assets survived of the deceased have also had their years numbered a right and left the scene without enjoying the fruits of the estate which they tirelessly worked for and contributed to its existence. On the other hand, the first degree of consanguinity and affinity are the ones weapon -zing against each other on who gets what while there is already a basic structure in the

form of a certificate of confirmation of grant dated 11th May, 2022. The court is not even being told that the impugned instrument is fatally defective even to redress the partial distribution.

71. Another aspect of the moral and legal duty standard in so far as this estate is concerned touches on the question of trust. As a matter of statutory interpretation, Justice Musyoka in Re Estate of Atibu Oronje Asioma (deceased) 2022 KEHC 11046 (KLR) expounded the provisions as follows;

> " Section 82 of the *Law of Succession Act* did not talk about trusts in general but a continuing trust. The concept of a continued trust was not interpreted in section 3 of the *Law of Succession Act*. In the context of the *law of succession Act* it arose in two situations.
>
> d. With regard to the life interest enjoyed by surviving spouses, under part v of the *law of Succession Act* as stated in Sections 35(1)(b)(2), 36(1)(c) and (3) and 37. A continued trust arose where a spouse survived the deceased, and at distribution in intestacy, the property should devolve to the surviving spouse in the first instance and upon the determination of the life interest, to the children or other persons beneficiaries entitled in intestacy. Such surviving spouses held such property during their lifetime, in trust for the eventual beneficiaries, be they children or others. It was a trust that continued during the lifetime of the surviving spouse.
>
> e. With regard to the interests of minor survivors or beneficiaries, that was to say the interests of those beneficiaries or survivors who are below the age of majority, Section 41 of the *Law of Succession Act* provided that the interests of such minors was held in trust during their minority until they attained the age of maturity, when it should be conveyed or transmitted or transferred to them. The trust in such a case will be continuing during their minority. The term continuing trust was used expressly in Section 75(a), 83(g) and (i) and 84 of the *Law of Succession Act* but it was the provision in section 84 which brought out what continuing trust meant in the context of the *Law of Succession Act*, that was to say the life interest enjoyed by a surviving spouse and the trust held on behalf of a minor. Trust as used in the *law of Succession Act* particularly in part vii was limited to continuing trust and other trusts in favour of beneficiaries or creditors. In that decision, Justice Musyoka pronounced himself as follows which is relevant to the same issues raised by the applicant in this matter:
>
> It was not used in the context that the applicants were using it in their application. The applicants had not established any trust and the administrators therein could not be deemed to be a trustee on their behalf. They had to establish that the trust against him, in proceedings commenced elsewhere but not in those succession proceedings, the court did not have jurisdiction in relation to declaration of a trust."

72. Pursuant to the above provisions, principal beneficiaries to the estate cannot be trustees in proper charge of such a person's estate regardless of whether there is a court order to that effect unless there are compelling and exceptional circumstances of the mental incapacity of that beneficiary to deal with the benefits which accrue from that asset. In the case of a minor named in the distribution model under the Succession Act, it is understandable to have an administrator be retained with the custodial arrangement continuing until the beneficiary reaches 18 years of age. These powers could be exercised only with necessity of obtaining approval of any court to facilitate on emergency situation to have any such payment from movable assets made in good faith which shall be deemed as proper and complete

release to the minor's benefit. Specifically, if it is to support the tuition or tutoring programmes before the minor reaches the age of 18 years.

73. In my judgment, what the court has to do is to ensure that the distribution of the estate in a polygamous setup complies with Section 40 of the *Law of Succession Act* which states as follows:

> "Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall in the first instance be divided among the houses according to the number o children in each house but also adding any wife surviving him as an additional unit to the number of children. The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in Section 35-38 of the *Law of Succession Act*.
>
> In section 35, the Act provides that subject to the provisions of section 40 where an intestate has left one surviving spouse and a child or children the surviving spouse shall be entitled to the personal and household effects of the deceased estate absolutely and a life interest in the whole residue of the net intestate estate. A surviving spouse shall during the continuation of the life interest provided by (1) have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children but that power shall not be exercised by will nor in such manner to take effect at any future date.....
>
> Section 36, where the intestate has left one surviving spouse but no child or children the surviving spouse shall be entitled out of the net intestate estate to the personal and household effects of the deceased absolutely. The first ten thousand shillings out of the net intestate estate or twenty per centum thereof whichever is the greater and a life interest in the whole of the remainder provided that if the surviving spouse is a widow, that life interest shall be determined a remarriage to any person.
>
> Section 38, where an intestate has left a surviving child or children but no spouse the net intestate estate shall be subject upon the provisions of section 41 and 42 devolve upon the surviving child if there be only one or be equally divided among the surviving children of the estate.
>
> I am of the considered view that given this legal perspective, the affidavit evidence presented by the applicant on the issue of trust would produce an unreasonable result in the circumstances of the distribution model of this estate. That proposition is in contrast with the letter and the spirit of the provisions of Section 75(a), 83(g) and (i) and 84 of the *Law of Succession Act*. Despite the clarity of language in the law, the applicant nonetheless seems to import ambiguity to the provisions for this court to declare a trust to the distribution of this estate. It is impossible for this court to misconstrue the law in favour of the applicant who is also a primary beneficiary who is at war path with other beneficiaries on the distribution of the estate as set out in the impugned certificate of confirmation of grant. This discussion will be incomplete without delving into the definition of what constitutes a trust. Fabunmi J. O. 206 in his treatise on equity and trust in Nigeria described a trust in the following manner:
>
> "All that can be said of a trust therefore, is that it is the relationship which arises whenever a person called the trustee is compelled in equity to hold property whether real of personal and whether by legal or equitable title, for the benefit of some persons of whom he may be one and who are termed as ces tui que trust or for some object permuted by law in such a way that the real benefit of the property accrues not to the trustee but to the beneficiaries

or other objects of the trust. See also Keeton, The Law Trusts Eight Edition p. 3 cited in Jegede, M.I (1999). Law of trusts, Bankruptcy and Administration of Estate. Lagos."

74. The learned author proceeds to make the following observations:

> " That a trust is created by an individual when he executes a written Declaration of Trust directing one person or more persons sometimes this can be a corporate Trust company called a Trustee(s) to hold property or assets in accordance with the terms and conditions contained in the Trust instrument for the benefit of one or more persons or a section of the general public called the beneficiaries who are the equitable owners of the property or assets while the legal interest is vested in the trustee. The person creating the Trust is referred as to a grantor, settlor or donor.

75. What these principles illustrate is that the concept of Trust under the Succession Act is not the same as in the Law of Trusts. Thus, the kind of Trust created under the Act is specific and defined as a continuing Trust on account of the provisions of Sections 75(a), 83(g) and (i) and 84 of the *Law of Succession Act*. Consequently, it is trite under the Law of Succession that any person of 18 years of age and above is regarded as of full age and has the capacity to hold legal interest in real property. It follows from the above that what this court is being asked to do by the applicant is repugnant and ultra vires of the legislature's intention in enacting the aforesaid provision of the Act. The applicant is neither the grantor nor the donor to vest or create any trust capable of administering the classification of the property identified in the affidavit evidence in support of the application.

76. The long and short of it is that the court on review jurisdiction looks at the error of law apparent on the face of the record. It should not be taken back and forth on the question of distribution just because the parties are not satisfied with the decisions rendered.

77. Whereas the issues canvassed in this ruling arise out of the application by the applicant on review and there is no controversy in the manner in which this court has distilled the various typologies as premised or as pleaded by the applicant. However, on observation though not pleaded, as a statement of argument in the instant application the role of this court in the Kenyan Judicial system is to operate as a court of general, inherent, residual jurisdiction that ensures that there are no gaps in the administration of justice. Thus, from the constitutional dictates, the high court has general subject matter jurisdiction over all civil, criminal, succession and constitutional matters.

78. In section 3(a) of the *civil Procedure Act* and with specific reference to Rule 73(1) of the Probate and administration Rules, the court has vested inherent jurisdiction to ensure that it can function as a court of law to fulfil its mandate to administer justice. The seminal question on inherent jurisdiction of the court is a matter which has been delved into in numerous decisions by the superior courts.

79. First and foremost, learned author I.H. Jacob in his article namely the inherent jurisdiction of the court 1970 23 current legal problems at page 23-27 observed as follows:

> " the term inherent jurisdiction of the court does not mean the same thing as Jurisdiction of the court used without qualification or description, the two terms are not interchangeable, for the inherent jurisdiction of the court is only a part or an aspect of its general jurisdiction. The general jurisdiction of the high court as a superior court of record is broadly speaking unrestricted and unlimited in all matters of substantive law both civil and criminal except in so far as that has been taken away in unequivocal terms by statutory enactment. The high court is not subject to supervisory control by any other court except by due process of appeal and it exercises the full plenitude of judicial power in all matters concerning the general

administration of justice within its area. This general jurisdiction thus includes the exercise of an inherent. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law.

80. Commenting on this jurisdiction, the court in R v Caroun (2011) 1SCR at 78 the court stated that the superior court's inherent powers are derived not from any statute or rule of law, but from the very nature of the court as a superior court of law to enable the judiciary to uphold, to protect and to fulfil the judicial function administering justice according to law in a regular, orderly and effective manner. In other words, inherent jurisdiction is the power over persons, process and inferior courts that inheres in the superior court because it is necessary in order for the court to fulfil its mandate as a court of general jurisdiction. It is what enables a superior court to function as a court of law without the requirement of a specific statured grant of all the necessary powers. Because the superior courts are taxed with administering justice, they are imbued with the powers they need to do so.

81. Thus, inherent jurisdiction can be understood as the reserve or fund of powers, a residual source of powers which the court may draw upon as necessary whenever it is just or equitable to do so. Those enumerations of the powers which are exercised under inherent jurisdiction, are meant to fulfil four main functions without the list being considered exhaustive.

    a. Ensuring convenience and fairness in legal proceedings

    b. Preventing steps being taken that will render judicial inefficacious.

    c. Preventing abuse of process

    d. Acting in aid of superior courts and in aid or control of inferior courts and tribunals

    As in the case of Macmillan v Simpson 1995 4 SCR the court also entrenched the position on inherent jurisdiction by articulating the concepts as follows

> "While inherent jurisdiction may be difficult to define, it is of paramount importance to the existence of a superior court. The full range of powers which comprise the inherent jurisdiction of a superior court are tother, its essential character or Immanent attribute. To remove any party of this core emasculates the court making it something other than a superior court. The core jurisdiction of the superior courts comprises those powers which are essential to the administration of justice and maintenance of the rule of law. It is unnecessary in this case to enumerate precise powers which comprises inherent jurisdiction as the power to punish for contempt exfacie is obviously within that jurisdiction. The power to punish for all forms of contempt is one of the defending features of the superior courts."

82. I take judicial notice of the record that overtime, there have been multi-jurisdictional issues and undeniably which have been litigated before the various judges of concurrent jurisdiction of this court. Unfortunately, some of those decisions provided the driving force behind the deceased's estate, identification of the beneficiary and some clear judicial directions on distribution of the estate. In my view, the initial session judge to deal with the interpretation of the will and subsequent adjudication on the subject matter based on the freedom of testation was Nambuye J. thereafter, in the forum of the high court presided over by Hon. P.M. Mwilu as she then was. As part of her jurisdiction, made reference to the rights of surviving beneficiaries and spouses of the deceased and the free estate survived of the deceased. The approach in Hon. Mwilu's decision mirrors some differential minimum from the decision by Hon. Nambuye J. on inheritance and solo rights to property to be conferred upon the beneficiaries. There is a real and substantial connection between the subject matter of the action before

Hon. Nambuye J and subsequently the order by Mwilu J as both of them at that time did exercise jurisdiction.

89. In obiter, the preliminary issue raised in these proceedings which the administrator has to contend with is whether the orders issued by Hon Mwilu J. dated 28th July, 2010 finally received endorsement in the form of a certificate of confirmation of grant by the court. The other issue is whether the order represents the interests of the beneficiaries to the estate. It is surely not in doubt that a court of law in Kenya cannot conduct a trial inquisitorially rather than by means of an adversarial process or order hearing without being moved by the parties and suo moto attempt to grant reliefs which are not part of any motion, summons, petition or plaint. To put the same point in a different way, the court must exercise the power to regulate its procedure in a way which respects two important principles of natural justice and open justice.

90. Having reviewed the evidence and other material before me, I am satisfied that the weight of the authorities which I have cited supports the view the court cannot and must not interfere with the structural distribution matrix of the certificate of confirmed grant for failure of the applicant not surmounting the provisions of Section 80 of the *Civil procedure Act*, Order 45 Rule 1 of the Civil Procedure Rules and Rule 73(1) of the Probate and Administration Rules. The inroads upon which an applicant satisfies the relevant test on review jurisdiction has not been met by the Applicant.

91. Secondly, as has been mentioned above even given that a distinction can be drawn between the primary facts and the inferences from the instant application, it can be properly construed that the question on review is one of law as epitomised in the cases of National Bank of Kenya Ltd vs Ndungu, Aribam Tuleshwar Sharma v Aribam Pishak Sharnal and Thungabhadra Industries Ltd v Govt. of A.P.1 (Supra).

92. There is no unfair trial from all the nine courts which have presided over the probate issues involving the estate of Kite Tiren. In short, this must be an estate which must have caused emotional stress for the parties when added to the aspect of time lost, irrecoverable costs incurred up to date and the consequences of not yet been a beneficiary of the rights of inheritance which accrue from the estate. Indeed 1994 is not yesterday, the outcome of it all of non-distribution of the estate is a tragedy for the whole family. The tangible benefits which the deceased looked forward to for the children to succeed and advance the course of wealth creation through the estate survived of him on his demise may have been seriously depleted by this lengthy litigation. Sadly, from the record it has not proved possible for the family to arrive at a consensual resolution of their differences on the distribution of the estate. The administrators appointed to administer the estate under Section 66 of the *Law of Succession Act* are just first among equals of the rest of the family members. For avoidance of doubt, they earn no salary, or income or receive any bigger share of the estate by virtue of being administrators.

93. In this particular case on totality of the relevant evidence, time has come for the parties to drown their differences and rise up to the occasion to rally behind the administrator as a team to shift the roadmap on this estate from the court corridors to the locus in quo and to complete the transmission and conveyance of the estate of the beneficiaries. I would therefore strongly urge the beneficiaries to these proceedings though belatedly to do everything possible to reach a consensual settlement of their differences using the legal instrument issued by this court to distribute the estate rather than fight legal battles in and out the court system. For those who have had the legitimate expectations, of testamentary or intestate benefit from what was survived of the deceased in the form of an estate must be feeling emotionally broken down, hurtful, sense of unfairness and disappointment. Fortunately, this can be markedly brought to an end forthwith if each of the beneficiaries draws from the fountain of their resilience, affinity, consanguinity, the DNA ancestry and the spirit of family to accommodate each other by burying their differences in so far as this estate is concerned.

94. It therefore follows that the criteria of the orders desirable on account of the evidence, the law and the jurisprudential decisions reproduced in part above persuades this court to exercise discretion and accordingly make the following order:

a. That the applicant's application dated 4th December, 2023 on review jurisdiction under Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules is lost for want of merit.

b. That there can be no doubt whatever the sufficiency of the grounds adverted to by the applicant, I am unable to accept that this is a new cause of action being litigated by the applicant to logically vindicate her rights over the estate of the deceased. This is a typical case where the doctrine of res judicata must be invoked for the protection and benefit of other beneficiaries desirous of having completeness in the administration of this estate.

c. That speaking broadly, this is an estate in which the administrators and the beneficiaries alike have wilfully failed, refused or neglected a court order in so far as the pre-requisites set out in the decisions by Nambuye J, Mwilu J, Olga Sewe and the latest decision of this court underpinning the distribution of the estate. The law relating to disobedience in part is on breach of the timelines requirement construed in more than one way and imposed for compliance by the administrator.

d. That the primary issue of concern in the context of creating a trust under the codification of the Act is untenable for it is a matter that involves a clear challenge to the provisions in Sections 75(a), 82, 83(g) and (i) and 84 of the *Law of Succession Act*.

e. That considering all the relevant evidence available, I consider this estate almost being threatened to be revoked under Section 76(d) of the *Law of Succession Act* which provides that a grant of letters of administration issued to the administrator(s) can be revoked if the person(s) to whom the grant was made has or have failed after due notice and without reasonable cause has not completed transfer/ transmission of the estate within six months from the date thereof of confirmation of grant or such longer period as the court may order or allows or has been incapable to proceed diligently with the administration of the estate. That crucial steps be taken by the administrator(s) to distribute the estate for purposes of validating the certificate of confirmation of grant and the exact object of it as founded in the negotiated instruments which may have arisen during the pendency of these proceedings.

f. That prima-facie though Kenya's legal system is adversarial in nature a time has come to re-think whether it is a proper protocol in delivering substantive justice in Succession/family disputes. This kind of context as in this estate between two equally situated contestants and each of them striving to prevail seems not to have delivered substantive justice at their door step.

g. That Article 159(2) (c) window of *the constitution* remains alive for the administrators to invoke and oxygenate to bridge the gap between the structured certificate of grant of confirmation and the unique characterization of the estate occasioning re-litigation on the same subject matter.

h. That given the history of this probate cause a freezing order be and is hereby issued in terms of section 1(a), 1(b), 3(a) of the *civil procedure Act* and Rule 73(1) of the Probate and Administration Rules against any interlocutory applications filed without leave of this court to give the already decrees of the court be complied with and implemented to the letter.

    i. That a declaration be and is hereby made that any party aggrieved with the decisions of this court at various sessions exercise his or her right of Appeal to the court of Appeal for redress.

j. That the pending administration of the intestate estate be assessed by the administrator(s) with a view to have it distributed within 6 months from today's ruling. In default of compliance by the administrator, the pending probate/administration of the deceased estate be vested in the Public

Trustee working in conjunction with the Deputy Registrar of the high court to take over the instruments with respect to the estate and have it administered in accordance with the provisions of the Succession Act placing reliance on the certificate of confirmation issued on 11th May, 2022 as conjunctively read with the hallowed objectives in the ruling delivered by this court on 28th July, 2010 within 90 days from the date of default by the administrator.

k. That the Registrar of the High Court clothed with ministerial powers be and is hereby directed to convene a conference with the Public Trustee on account of this order to plan and design an implementation matrix with specific timelines and distribution of the estate to completion, as an alternative entity in the event the powers vested in the administrators is by any reason abdicated without any compelling reasons.

l. That this being a family matter, the costs of this litigation be in the cause.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 13TH DAY OF JUNE 2024

In the Presence of

Mr. Songok Advocate

M/s Waweru of Katwa Kigen.

.....

R. NYAKUNDI

JUDGE

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SUCCESSION CAUSE NO. 52 OF 1994	0