Lelei & another v Cheptalam (Succession Cause 64 of 2010)
[2024] KEHC 7200 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7200 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 64 OF 2010

RN NYAKUNDI, J

JUNE 13, 2024

BETWEEN

HELLEN CHERUIYOT LELEI ..... 1ST PETITIONER

RAEL JEPKOECH SANGA ..... 2ND PETITIONER

AND

MARGARET CHELAGAT CHEPTALAM ..... RESPONDENT

RULING

1. Before me is a Notice of Motion dated 8/2/2024 and filed on 21/2/2024 by the Applicant seeking the following orders;

    1. That this Honourable Court be pleased to review the Certificate of Confirmation of Grant dated 23/7/2013 to include land parcel Moi's Bridge/ Ziwa Block11 Kipsigak/ 201 measuring 1.638 hectares.

    2. That upon grant of prayer (1) in the instant application, this Honourable Court be pleased to allocate the said parcel to the Applicant herein.

    3. That this Honourable Court be pleased to order that the excess of 2.43 Hectares in Soy/ Kipsang/ Block5 (Ziwa)/ 201 previously Soy/ Kipsang/ Block5 (Ziwa)/ 3 be carved out from the said Soy/ Kipsang/ Block 5 (Ziwa)/ 201 and the same be allocated to the Applicant.

    4. That this Honourable Court be pleased to order that the excess of 3 acres in property land registration number Moi's Bridge/ Ziwa Block 11 Kipsigak/ 205 measuring approximately 6.47 Hectares be allocated to the Applicant.

    5. That this Honourable court be pleased to order the Respondents to pay half of the costs incurred in distribution exercise.

2. The application is premised on the grounds therein and is further supported by the Affidavit sworn on 8/2/2024.

3. She deposed that by an Order issued by this Court on 22/4/2021 by the Honourable Justice Githinji, the Deputy Registrar executed completion documents on behalf of the Petitioners to facilitate the distribution exercise in respect of the Estate of the deceased, that the distribution exercise has proceeded and a large part of the Estate has since been distributed, that the Respondents have through acts of violence and intimidation, made it difficult to distribute the remaining part of the Estate including but not limited to property land registration number Moi's Bridge/ Ziwa Block 11 Kipsigak/ 205, that the Respondents have declined to meet the costs for the distribution process and she has been forced to bear all the costs of the distribution exercise and that during the distribution exercise, they realised that some properties belonging to the Estate of the deceased were not included in the succession proceedings, and in the Certificate of Confirmation of Grant, they also noted that there were properties whose ground area measurements exceeded the registered area and the excesses were not captured in the Certificate of Confirmation of Grant and therefore requiring changes in the Certificate of Confirmation of to capture the excesses, for instance, and by the Certificate of Confirmation of Grant issued on 23/7/2023, she was allocated a share (33.72 acres) of Property Land Registration Number Soy/Kipsang/ Block5 (Ziwa)/ 3 while the Respondent Hellen Cheruto Lelei was allocated a share of 60 acres of the said Property Land Registration Number Soy/Kipsang/ Block5 (Ziwa)/3. She contended that however, upon survey and subdivision of the said parcel of land being Property Land Registration Number Soy/ Kipsang/ Block5 (ZIWA)/ 3 it was realized that there was an excess acreage of 2.43 Hectares, that the said property being Soy/ Kipsang/ Block5 (Ziwa)/3 was subdivided into two portions being Soy/ Kipsang/ Block5 (Ziwa)/ 201 and Soy/Kipsang/ Block 5 (Ziwa)/ 202. The excess of 2.43 Hectares mentioned in (7) above, lies in SOY/ Kipsang/Block5(Ziwa)/20, and further, and in the Certificate of Confirmation of Grant, she was allocated 5 acres in Property Land Registration Number Moi's Bridge/ Ziwa Block 11 Kipsigak/205 measuring approximately 6.47 Hectares and Hellen Cheruto Lelei was allocated 7acres and the said property measures 6.47 Hectares which is an equivalent of 15.98 acres, and therefore there is an excess of 3 acres which has not been distributed. She further deposed that property land registration number Moi's Bridge/ Ziwa Block11 (Kipsigak)/201 measuring approximately 1.638 Hectares, which property belongs to the deceased was erroneously not included in the grant and was therefore not distributed.

4. She contended that she has been allocated less than 20 percent of the Estate of the deceased and she therefore pray, in the interests of justice, that this Court finds it fit to order that; property land registration number Moi's Bridge/ Ziwa Block11(Kipsigak)/ 201 measuring 1.638 Hectares which was erroneously not included in the grant, be so included and the same be allocated to her, the excess of 2.43 Hectares in Soy/ Kipsang/ Block5 (Ziwa)/ 201previously Soy/ Kipsang/ Block5 (Ziwa)/3 be carved out from the said Soy/Kipsang/Block5(Ziwa)/201 and the same be allocated to her, the excess of 3 acres in Property Land Registration Number Moi's Bridge/Ziwa Block11 Kipsigak/ 205 measuring approximately 6.47 Hectares be allocated to her and that Respondents be ordered to pay half of the costs incurred in the distribution exercise, or the Court does find it fit to Order that part of the property not allocated in the Certificate of Confirmation of Grant be sold to recover the costs of distribution.

The Response

5. The application is opposed by the 1st Petitioner/Respondent vide her Replying Affidavit filed on 15/4/2024.

6. She deposed that this application is one of the many applications mischievously brought by the said Applicant some dating way back to the genesis of the petition herein, that the Applicant has all along

played herself into the property of her deceased husband persistently with the malicious intentions of wrestling any available property of the estate for her selfish benefit and she has committed all these evils despite our generosity and kindness demonstrated at the time of the distribution of the estate, she continues to provoke emotions unnecessarily and despite the deep rift that she has consequently created in the family.

7. She further deposed that the application dated 8/2/2024 purports to seek a review of the certificate of confirmation dated 23/7/2013 to purportedly introduce a parcel namely Moi's Bridge/ Ziwa Block11 (KIPSIGAK) 201 but which has already been addressed previously in these proceedings and duly distributed, the prayer that the said parcel and another purported excess of 2.43ha. be apportioned to her clearly demonstrates a manifestation of an evil, mischievous and a malicious person. According to the 1st Petitioner, it is laughable that the Applicant wants for herself the purported 1.638ha, 2.4ha. and 6.47ha in Moi's Bridge/ Ziwa Block 11(Kipsigak) 205 as well as a cost share of the cost of distribution.

8. With regard to property known as Moi's Bridge/ Ziwa Block11(Kipsigak) 201, the 1st Petitioner highlighted the following; that this parcel is the same asset appearing in the certificate of confirmation of grant dated 23/7/2023 at schedule (3) though erroneously named as Moi's Bridge/Ziwa Block 11(Kipsigak) 205 approximately1.85ha, instead of Moi's Bridge/ Ziwa Block 11 (Kipsigak) 201, that the parcel number Moi's Bridge/ Ziwa Block 11 (Kipsigak) 201 is approximately 1.85ha.As Shown in the title deed and was rightly distributed to her, that the parcel is 1.85ha as correctly indicated at schedule at 3, there was however a typographical error at the drawing of the certificate of confirmation where the title no "205" was entered instead of "201", that she knows that all of them including the Applicant herein that this parcel was intended for and duly distributed to her because prior to the said agreements on the mode of distribution, there were several correspondences and meetings during which this parcel was agreed on among others that the same be distributed to her, that the same was well known to the Applicant and is the reason she didn't raise any issue over 13 years, that indeed in the correspondences between their counsels and the subsequent draft certificates for the then Hon Judges signatures, the citation of the parcel No Moi's Bridge/Ziwa Block 11 (Kipsigak) 201, was correctly communicated but the typographical error only came up at the drawing of the certificate of confirmation of grant, that parcel number Moi's Bridge/Ziwa Block 11(Kipsigak)205 approximately6.47ha.was already distributed at schedule No 1 & 2 of the same certificate of confirmation as follows; 5 acres to the Applicant to hold in trust for her 3 children and 7acres thereof to herself in trust for my 5 children, that the parcel no 205 in Mois'Bridge/Ziwa Block 11(Kipsigak) 205 could not be the same as the same one at schedule 3 with different measurements, that it is not true that the said land measures 1.638ha as alleged by the Applicant unless she meant any other parcel and that clearly the No. 205 at schedule 3 is an error caused at typing instead of 201 and I request the Court to allow an amendment of the same to read 201accordingly.

9. With regard to property known as Soy /KipsangBlock5(Ziwa)/ 3 the 1st Petition highlighted the following; that the parcel is 93.72 acres as shown in the title deed, that this parcel is distributed at schedule 6 and 7 of the certificate of confirmation dated 23/7/2013 duly signed by the Judge as follows: 60 acres thereof to herself to hold in trust for her 5 children namely; Vibian Cheptoo Cheruiyot, Philovian Chebet Kiprop, Alfayo Kirwa Cheruiyot, Susan Chepkosgei Cheruiyot and Elisha Kiprop Cheruiyot and 33.72 acres to Margret Chelangat Cheptalam to hold trust for her three children namely. Kevin Kipchirchir, Daniel Kiptoo and Ruth Jepchumba, that indeed the format of sharing the said property was after lengthy discussions and meetings out of which a consent was duly recorded in terms of the agreed mode of distribution, that she believes that the size of the land is derived from the title deed and that is what was indicated in the said title and therefore the purported excess of 2.34ha.is an afterthought and a bad game by the Applicant and that in any event, it is the Applicant who maliciously instigated the surveyors and forcefully entered the land and caused the subdivision

without her presence or any of my house representatives and whatever games she wanted to play she must have fully achieved it and she cannot now be heard to cry foul.

10. She maintained that parcel of land known as MOI'S BRIDGE/ZIWA BLOCK 11 (KIPSIGAK) 205 (approximately6.47ha.) was discussed between both parties and was agreed that she take 7 acres while the Applicants children take 5 acres, that they were all aware that the approximately 3 acres therefore had been bequeathed by the deceased to his sister brother and former employee namely Anthony Kipkemoi Nyango, Naum Yego and Haron, respectively and in all honesty they could not touch them and that indeed she didn't even take it for myself and neither can the Applicant purport to lay a claim over the same, that they however inadvertently did not include their names in these proceedings for the same to be recorded and procedurally be distributed to them along those shared out them and the same portion is available for the said people and can be included in the list of distribution.

11. She further maintained that the Applicant knows too well that she has no capacity whatsoever to participate or any claim anything whatsoever out of her late husband estate and it is no wonder that she had to withdraw the objection proceeding that she had purported to present after she demonstrated that she was very transparent in her petition and she had included all the 3 children sired by my late husband and herself as well as all the assets. Further, she contended that the allegation that she had misrepresented facts and left out some of the deceased's properties were mere allegation by the Applicant intended to malign my name and that of her sister in law who is also my co-administrator.

12. She further deposed that the marriage as celebrated between herself and her late husband was demonstrated through my certificate of marriage which she presented during the proceedings and that the same was not open for any another union, that despite the same, and upon obtaining legal advice, the children of Margret could not be locked out of their fathers inheritance and because they were of a tender age then, she had to hold their shares in trust for them, that the Applicant therefore has no moral authority to make any Complaint whatsoever in these proceedings, the Applicant withdrew the objection she had filed and is therefore a stranger to the subsequent proceedings and the applications.

13. She contended that the allegation that she took more shares than herself are totally unfolded and misleading, she maintained that the assets that she is now enjoying are out of the hard earned sweat of her late husband and herself, that their proposal of sharing was very fair and just and even if the same was to happen again she would still do the same.

14. The 1st Petitioner further deposed that she is aware that the Applicant indeed disposed of by selling almost everything that was shared out of her children thinking that was shared out of her children because she feels nothing whatsoever for those of us who had to sweat for it, that when they suspected that she was planning to dispose of half share of ELD Municipality BLK 9/2379.We requested her relinquish the same back to us for a consideration but she refused and that she later on maliciously and unfairly subdivided if inequitable by taking the more valuable portion and leaving to her the inaccessible and worthless portion to hence their application dated 30/6/2021 now pending in Court. She maintained that with the same evil motives, speed and her ill- intentions to frustrate her and her children the Applicant moved the Court and sought for orders that the Deputy Registrar executes instruments of transfer of the parcels and for the surveyor to subdivide the parcels as per the certificate of confirmation of grant, that the surveyor visited the land and without bothering to consult them, entered the land and proceeded to subdivide the same and more particularly to create parcel No. Soy/kapsang BLK 5(Ziwa)/201 and No. Soy/Kapsang BLK 5(Ziwa)/ 202, that the said orders from Court and the execution exercise has not been set aside nor has the status of the said parcels reverted for this application to be considered.

15. The 1st Petitioner maintained that the allegation by the Applicant in both the application and the affidavit in support are totally untrue and should be dismissed with the contempt it deserves, that it is totally untrue and abusive for the Applicant to claim that they have been violent and made it difficult for them to conclude the exercise when on the other hand they entered into, surveyed and subdivided all parcels of land.

16. The 1st Petitioner denied the allegations that they interfered with the Applicant nor the survey process otherwise they would not have finished the exercise of survey as they did.

17. She contended that indeed she and her children, the supposed legitimate hers of the deceased estate were pushed off, harassed and intimidated from concluding a very fair honest transparent and just process that they had begun. According to the 1st Petitioner, any sober thinking individual would not get an answer for the questions why if she readily included the children of the Applicant in the petition without any hesitation and further agreed to give them their rightful share in the distribution as appeared in the certificate of confirmation and distribution why would she fail to conclude the final certificate of confirmation and distribution why would she fail to conclude the final part of executing the transfers to warrant the Applicant make the moves that she did in Court. She further deposed that it may be true that they were slow in concluding the process of transfer but this delay was caused partly by her naturally slow nature but most importantly because they were trying to get funds for the same exercise without necessarily disposing of their hard acquired property, that as one who painfully understand the pain they went through in acquiring the assets of this estate, she believed that the same would be preserved for the benefit of and improvement by the deceased's children and never ever imagined that they could just be thrown away like clothes in the market as has been done herein by the Applicant.

18. The 1st Petitioner denied allegations that she refused to pay for the cost of distribution as alleged, she maintained that she is aware that payment of the cost of the distribution of the estate is the duty of the legal administrator out of the estate, and the Applicant being stranger has no business purporting to make the same payment except for her malicious intentions, she is willingly as she has always been to pay for the reasonable legitimate costs as legally provided and or as may be assessed by the Court, that the alleged payments by the Applicant and the receipt purportedly issued are a creation of the Applicant and is not a legitimate payment for the exercise related hereto.

19. She maintained that the contents at paragraph *13,14* 15 and 16 are totally untrue and misleading, she honestly believe that the size of a parcel of land is described in the title deed and that any extra or less is the approximate nature of such measurements. the Applicant may need to seek an amendment of the registration and acreage of the mother title and to establish the extra if at all, that paragraph *17* is totally untrue for the reasons that I have above stated.

20. In response to paragraph *18*, she contended that it is not true that parcel number Moi's Bridge/ Ziwa Block 11(Kipsigak)201 is 1.628 ha as claimed but is 1.85ha. as shown in the certificate of search annexed, the same was legally rightfully and legitimately distributed to me as shown at scheduled but save for the typing No"205" instead of "201"as explained above, that paragraph *19* is a wrong and is a malicious perception as the Applicant is not entitled to the prayers sought and the same should be dismissed.

21. The 1st Petitioner prayed that the typographical error at scheduled 3 of the certificate of confirmation be rectified to read 201 instead of 205 and further deposed that indeed an amendment ought to be made in the certificate of confirmation is for parcel number Moi's Bridge Sirikwa Block 3 (Ziwa)333 at schedule 4b and 12(c) respectively be distributed to herself as sought in my application dated 28/1/2022 and allowed by this Court in its ruling delivered on 1/3/2023 and further for the inclusion of the

beneficiaries of the approximately 3acres of the parcel No. Moi's Bridge/Ziwa Block 11 (Kipsigak) 205 (approximately6.47ha.)

22. In the end, the 1st Petitioner deposed that it shall also be fair for the Court to give directions on the equitable subdivision and sharing of parcel No. Eld Municipality Block 9/2379 for each party to get a valuable portion and for the preservation of the same until then.

Analysis and Determination

23. Having appreciated the parties pleadings on record, I find the only issue for determination is whether the orders sought can be granted.

24. With regard to the issue of review of the certificate of confirmation grant, so that the same can include the parcel of land known as Moi's Bridge/Ziwa Block11 (Kipsigak) 201, for onset I must that the law does not provide for review of Certificate of Confirmation of grant but rather it provides for the amendment of the grant.

25. The Court in In Re Estate of Charles Kibe Karanja (Deceased) [2015] eKLR, held that:

> "It goes without saying that the provisions in Section 74 are on alteration of grants of representation, not certificates of confirmation of grant. A certificate of confirmation of grant is not a grant of representation. In probate practice, the term "confirmed grant" has gained currency and it is understood by some to mean the certificate of confirmation of grant. It is a misconception. The certificate issued upon a grant being confirmed does alter the grant of representation made in the matter. It does not replace the grant of representation, and it is not the confirmed grant. It is an instrument to certify that the grant made in the matter has been confirmed. In short it is the evidence of the confirmation of the grant. From the wording of Section 74, it is plain that the same was not tailored to for amendment of such documents as certificates of confirmation of grant, but rather of grants of representation themselves, be they full or limited, confirmed or not. A party wishing to have rectified or altered or amended a certificates of confirmation of grant, need not approach the court through Section 74 of the *Law of Succession Act*, for the reasons that I have given above; rather they ought to apply for review of the orders made upon the application for confirmation of grant, where the alterations sought are fundamental; or for amendment of the certificate under Rule 73 of the Probate and Administration Rules to address minor errors or mistakes in the body of the certificate.
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> A certificate of confirmation of grant is by its nature a formal order extracted from the orders made by the court on the application for confirmation of grant. If a party wishes to have the assets of the estate redistributed or there is discovery of new assets that were not available or had not been discovered at the time of distribution, among others; it would be imprudent to seek rectification or alteration or amendment of the certificate of confirmation of grant. Such changes are fundamental, not superficial. They go to the core of the distribution. They cannot be effected without touching the orders made by the court at the distribution of the estate. Consequently, such changes cannot and should be effected through a mere amendment of the certificate of confirmation of grant.
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> The proper approach ought to be an application for review of the orders made at the confirmation of the grant. The remedy of review of court orders is not directly provided for in the *Law of Succession Act* and the Probate and Administration Rules, but it is imported into probate practice by Rule 63 of Probate and Administration Rules, which has adopted a number of procedures from the Civil Procedure rules. Among the imported procedures is

the device of review under the Civil Procedure Rules. In the relevant rules on review under the Civil Procedure Rules, an order of the court can be revised on the grounds of an error on the face or the record or discovery of new and important evidence that was not available at the time of the making of the order sought to be reviewed or for any other sufficient reason.

Where known assets are omitted from the schedule of the property to be distributed or the name of a known beneficiary or heir is inadvertently left out of the confirmation application, an application ought to be made for review of the confirmation orders to accommodate the said assets or beneficiaries on the basis that the said assets or heirs were left out by mistake or error. Where assets are discovered after the court has confirmed the grant or a heir or survivor of the deceased who had previously been previously unheard of materializes after distribution, the court may review its orders made at the point of confirming the grant on the ground of discovery of new and important evidence that was not available at the time the grant was being confirmed.

26. In In Re Estate of John Mwaka Koka (Deceased) [2019] eKLR, the Court stated that:

> " 19. ... it is clear from the orders sought in this application that what is sought by the applicant herein is strictly speaking not an order for rectification but one for review. Section 74 of the *Law of Succession Act* which deals with rectification states as follows:-
>
> > "Errors in names and descriptions, or in setting out the time and place of the deceased's death, or the purpose of in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered or amended accordingly."
>
> 20. The reliefs sought are not restricted to rectification of errors in names and descriptions, or in setting out the time and place of the deceased's death, or the purpose of, in a limited grant. They are in fact prayers which substantially seek to alter the judgement delivered by this court on distribution of the estate. They therefore ought to be treated for what they seek, review of the judgement."

27. Once a grant is issued and confirmed the person representative has the legal authority to distribute the estate to the beneficiaries. There is no evidence the certificate of confirmation of grant was obtained fraudulently or through concealment of material facts on the estate. The grant in question was issued first by . Azangalala J as he then was detailing the mode of distribution for the benefit of the spouses and the children of the deceased. The administrators never transmitted that estate and a further application was filed before Justice Ngenye on 23.7.2013 in which she also revisited the entire spectrum of the estate and reconfirmed of what I can state to be better particulars on this proceeding anchored in the distribution of the estate of the deceased. The administrators and the beneficiaries sat again on their rights without transmitting the estate as required by law. For reasons which are not very clear from the record, in the same estate in a session presided over by Ochieng J as he then was under the endorsement of his hand and signature another instrument of the same calibre was also apparently issued for the benefit of transmitting the estate of the deceased to the beneficiaries. Surprisingly again Magaret Chelagat

Cheptalam moved the court presided over by Githinji J as he then was seeking the following reliefs:

a. That this Honourbale court through the Deputy Registrar executes the completion/transfer documents on behalf of the petition who have declined to do so.

b. That upon execution by the Deputy Registrar of this Honorable court in order (1) above the same be deemed as sufficient instrument for completion/transfer documents.

c. That this Honourable court be pleased to give orders as to the compliance of the certificate of confirmation of grant dated 23.7.2021

27. At the end of it all his Lordship pronounced himself on the justiciable issues confronting the parties as heroin appreciated:

a. However, this court being a succession court has ample powers donated to it by section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules to resort to, in order to meet the ends of justice. The task of administering the estate is still on the shoulders of the respondent (administrator). As I have already noted, despite the grant having been confirmed in the year 2007 and even after the subsequent amendment by Muchemi J (which including the Wanguru plot in the certificate) the respondent has nonetheless failed to administer the estate. I believe that court orders ought not to be issued in vain but must be complied with. Further, the office of administrator of estate of a deceased person is an office which is built on the foundation of trust and goodwill. Where such is seen to be lacking, then the court ought to invoke its power to ensure tht justice is done to the beneficiaries more so where the administrator puts the beneficiaries in an unenviable position.

b. In the instant case, the administrator having failed to distribute the estate and without any valid reason, the Deputy Registrar of this court ought to be ordered to sign all the relevant documents to effect the transfer of the properties to the beneficiaries. As such I allow prayers 5 of the application

c. In the instant case, and from the documents annexed to the application, it is clear that the administrators in this case have refused to sign transfer documents in order to bequeath the beneficiaries there share of entitlement to the deceased's estate as per the certificate of confirmation of grant issued on 23.7.2013. Guided by the court's holding in the above cited authorities, I will proceed to allow the application and orders as follows;The deputy Registrar of this Honourable court is hereby directed to execute the completion/transfer documents on behalf of the petitioners who have since declined to honour the certificate of confirmation of grant issued on 23.7.2013.

d. Upon executing by the Deputy Registrar of this Honourable court of the completion documents, the same be deemed as sufficient instrument for completion/transfer documents

e. The administrators are directed to render full and final accounts in respect of the estate in compliance with section 83(f) and (g) of the Laws of Succession Act and the same to be filed in court within 60 days from the date of issuance of titles deeds as per the confirmed grant.

28. Given this background, the approach being taken by the Applicant to review the structured certificate of confirmation of grants spills over into other areas of decision making and final pronouncements

issued by Azangalala J, Muchemi J, Ngenye J, Ochieng J Githinji J and yours truly Nyakundi J. The so called rules of natural and access to justice which are engraved in our Articles 47, 48, & 50 of *the constitution* were followed readily by the courts with additional safeguards to ensure attainment of justice. In my judgment it is important to note that since the issuance of the primary certificate of confirmation of grant, the law has been thrown into a state of some confusion by the subsequent court decisions addressing the same parties and same subject matter.

29. This court is being told that there is a fresh matter demanding invocation of Section 1(A), 1(A) 3(A) of the *civil procedure Act*, order 45 Rule 1 of the Civil Procedure Rules and Rule 73(1) of the Probate and Administration Rules to review and change the character of the certificate of confirmation of grant. I dare say that as regards fresh material forming the basis for review, it must be of such a nature that is irrelevant and it undermines the impugned verdict. This is apart from the requirements that it could not be produced despite due diligence during the earlier proceedings. With certainty I have taken the liberty to peruse, conceive, and appreciate the entire scope of this litigation involving this intestate estate and same beneficiaries or heirs. The instant application fails the threshold test of new and compelling evidence which has become available to the Applicant to seek leave of this court to review the legal instrument carefully and judiciously thought through by the various session Judges who have exercised their respective jurisdiction from a point of view of expertise, knowledge, and experience in adjudicating disputes under Article 50 (1) of *the constitution*.

30. It is also crystal clear that the Applicant's application and affidavit provides no iota of discovery made of new and important matter of evidence which after the exercise of due diligence was not within her knowledge or could not be produced by her at the time when the various decrees in the form of certificates of confirmation of grant or that the orders made by these courts are tainted with mistake, error apparent on the face of the record or existence of some sufficient reasons. (See Order 45 Rule 1 of the Civil Procedure Rules). This court is also privy by virtue of exercising jurisdiction over this matter that the reading in and the reading out of the impugned ruling there is no evidence of material error which is manifest on the face of the ruling likely to result in a miscarriage of justice or undermine its soundness of transmitting the estate of the deceased. Once more again, as a cautionary statement to the parties who are engaged in a litigation of this estate ad infinitum a review of a decree of the court or judgement is not a routine procedure. It is a serious step and a recourse of last resort unless and until an applicant demonstrates glaring omissions or patent mistakes or grave errors of the law and if left to stand the parties will suffer prejudice and injustice. In the comparative dictum from India in Lily Thomas Vs Union of India, 2000 (6) SCC 224 the court emphatic that " It follows therefore that the power of review can be exercised for correction of a mistake but not substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power of review. Review cannot be treated like an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. Once a review petition is dismissed no further petition of review can be entertained. It is settled law that the power of review cannot be confused with Appellate power which enables a superior court to correct all errors committed by a subordinate court. It is not a re-hearing of an origin matter. A repetition of old and overruled arguments is not enough to reopen concluded adjudications. The power of review ought to be exercised with extreme care, caution and circumspection and only in exceptional cases.

31. Rather curiously, the circumstances of this Succession cause indeed borders on an abuse of the court process. The petitioners and the objector have been on this litigation and even the road maps provided for distribution by various courts, never makes sense to them. In the earlier proceedings, in which there was a certificate of grant of confirmation, and the validity of it, determined by this superior court presided over by other Judges of concurrent jurisdiction there has been no agreement to move on with distribution of the estate. When one subjects this application and the previous ones decided by this

court none of the parties to this cause of action can escape the wrath of the doctrine of res-judicata. Many centuries ago before even Kenya adopted the common law as the driving force behind its legal system, the court in Henderson v Henderson (1843) 3 Hare 114-115 James Wigram V-C stated " "In trying this question, I believe I state the rule of the court correctly, when I say, that 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 matter which might have been brought forward as part of the subject in contest, 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 cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, 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."

32. Likewise in Blair v Curran(1939-40) 62 CLR 464 the court set with clarity the doctrine of re-judicata as herein under stated: " A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgement, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is tht a money sum be recovered or that the doing of an act be commanded or be restrained or tht rights be declared. The distinction between res judicata and issue estoppel is that in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgement, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgement, decree or order. Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded. In matters of fact the issue estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is the title to the right established. Where the conclusion is against the existence of a right or claim which in point of law depends upon a number of ingredients or ultimate facts the absence of any one of which would be enough to defeat the claim the estoppel covers only the actual ground upon which the existence of a right established. Where the conclusion is against the existence of a right or claim which in point of law depends upon a number of ingredients or ultimate facts the absence of any one of which would be enough to defeat the claim, the estoppel covers only the actual ground upon which the existence of the right was negative. But in neither case is the estoppel confined to the final legal conclusion expressed in judgement, degree or order. In the phraseology of Coleridge J in R. V inhabitants of the Township of Hartington Middle Quarter, the judicial determination concludes not merely as to the point actually decided, but as to a matter which it was necessary to decide and which as actually decided as the groundwork of the decision itself, though not then directly the point at issue. Matters cardinal to the latter claim or contention cannot be raised if to raise them is necessarily to assert that the former decision was erroneous.

> In the phraseology of Lord Shaw, a fact fundamental to the decision arrived at in the former proceedings and the legal quality of the fact must be taken as finally and conclusively established (Hoystead v Commissioner of Taxation). But matters of law or fact which a re subsidiary or collateral are not covered by the estoppel. Findings, however deliberate and formal, which concern only evidentiary facts and not ultimate facts forming the very little to right give rise to no preclusion. Decisions upon matters of law which amounts to no more than steps in a process of reasoning tending to establish or support the proposition upon which the rights depend do not estop the parties if the same matters of law arise in subsequent litigation.

> The difficulty in the actual application of these conceptions is to distinguish the matter fundamental or cardinal to the prior decision or judgement, degree or order or necessarily involve in it as its legal justification or foundation from matters which even though actually raised and decided as being in the circumstances of the case the determining considerations, yet are not in point of law the essential foundation or groundwork of the judgement, degree or order.

33. The distinction represented by the above principles relates to the nature and cause of action which deals with rights and legalities of the matter to be adjudicated by the judicial body. A judicial decision is one which has been reached in the application of the law to a given situation in the determination of the rights of the parties. But the quality of the discretion and the grounds for a challenge of it may not coincide. In this case we are here concerned with a judicial discretion exercised over time by the various session Judges in determining the issues on dependency and the residual estate survived of the deceased. It is of essence of such a discretion that the evidence was on the same subject matter and though two different minds might have reached different decisions without either being appealable might not necessarily be the ambit within which to invoke the review jurisdiction.

34. It seems to me therefore, that I have no materials and no jurisdiction to review what the previous Judges and what I determined in the exercise of the statutory duty which is largely judicial on distribution of the deceased's estate.

35. The Kenyan courts have flirted with this classification on res-judicata for a while, indeed as it can be seen in the following cases it has been adopted as a valid criterion for determining the competency of the applications or suits to estop further litigation on a matter which has been heard on the merits and final judgement pronounced by a competent court. In Murugami Gichembe v Gunda Gichembe, Nairobi, High Court Civil Case Number 1916 of 2000. (Gacheche, C.A on 29 January 2000). " A party can only successfully file a second application if it is based on facts not known to him at the time he made the first application. If the facts were known to him, his second application will be dismissed as res-judicata. The position would otherwise be intolerable. A decree-holder wold be deprived of the benefits of his judgement by a succession of application to set aside the judgement and judges would in effect be asked to sit on appeal over their previous decisions or those of other judges. See Mburu Kinyua v Gachuhi Tuti (1978)KLR 69.

    Samuel Kiiru Gitau v John Kamau Gitau, Nairobi High Court Civil case number 1249 of 1998 (Visram, J on 27 March 2001)

    a. For a matter to be res judicata it must be one on which the court has previously exercised its judicial mind and has, after argument and consideration, come to a conclusion on the contested matter and for this reason a matter is said to have been heard and finally decided notwithstanding that the former suit was disposed of by a decree on an award.

    b. Whether a matter was directly and substantially in issue in a former suit is to be determined by reference to the plaint, the written statement, the issue and the judgement and the test of re judicata is the identity of the issue and not the identity of the property involved in the former suit

    c. To determine the question whether a matter is or is not re judicata the court must look at the cause of action and the relief claimed

    d. The cause of action and the relief claimed must have been in issue directly and substantially to maintain a plea of res judicata. However, a matter cannot be said to be "directly and

substantially " in issue is a suit unless it was alleged by one party and denied or admitted expressly or impliedly by the other and it is sufficient if the matter was in issue in substance

e. A matter is in issue if he court considers the adjudication of the issue to be material and essential to its decision and a matter is also "directly and substantially" in issue if it is one which might or ought to have been made a ground of attack by the plaintiff to substantiate the relief claimed or made a ground of defence by the defendant against the claim against him. A party cannot in a subsequent proceeding raise a ground of claim or defence, which upon the pleadings or the form of issue was open to him in the former case. See Halshbury's Laws of England.

f. A plaintiff is barred from litigation in instalments and it is in the interest of everybody that there must be an end to litigation

36. It is impossible to really come to terms to the nature of the application filed by the Applicant which is traceable to the historical litigation of this estate. It is becoming abundantly clear that there is no legal system which has no legal safeguards however small, however big of ensuring that the subject matter of litigation must at one time or another come to an end. One should not be allowed to revisit the question in the dispute, claim, suit or interlocutory applications because he or she at the very beginning he or she was negligent or by accident or inadvertently omitted to plead and present all facts and points of law required at the primary court before pronouncement of the final judgement. It is clear therefore, from the perspective of res-judicata the applicant has no case before this court.

37. On the other hand, the evidence has convincingly demonstrated that Section 80, of the *Civil Procedure Act* and Order 45 rule 1 on review jurisdiction cannot come to the aid of the Applicant. This is just a misuse of the court process. The proceedings of this kind are abusive up to the extent where the point at issue and the evidence deployed in support of it not only could have been raised in the earlier proceedings but should it be in the formulation of it now, something which the law would expect is some reasonable justiciable issue for the court to exercise discretion in the interests of justice.

38. My considered view is that the position is the same as reached by Justice Azangalala, Justice Muchemi, Justice Ngenye, Justice Githinji, and the one taken specifically by this court. It is hard to see how this certificate of confirmed grant of representation to this estate taken at his highest, it cannot even partially transmit part of the deceased estate to the beneficiaries.

39. Having examined all the material referred in the particulars of this application I am satisfied there is no reasonable basis to impugn the decision of this court and even the basic structures laid in the previous certificates of confirmation of grant.

40. With regard to the other orders being sought by the Applicant, it is clear that the same go to the core of the distribution, and completely mutates or alters the distribution of the estate ordered by the court, and the same cannot, therefore, be effected through a review of the certificate of confirmation of grant. That is far from the stipulates of the law.

41. With regard to the issue of costs incurred during the distribution exercise, it is evident from the record that the Applicant in this matter is not a beneficiary and or an administrator for that matter and as such the said order cannot issue. The Applicant is only a trustee in the estate herein as thus has no locus standi to seek such orders. It must be noted payment of any costs incurred by the estate part of the duties of the administrator and until and unless it has been proved that an administrator has negated in performing the said function such an order cannot issue.

42. In the upshot, I find that the application is neither well founded nor properly conceived in law and fact, and I hereby proceed to dismiss the same, with no orders as to costs and subsequent covenanted orders shall abide.

a. That the administrator to this estate are steering at Section 76 of the Succession Act which provides for grounds under which the appointment of administrators can jointly or severally be revoked for reason of not acting with due diligence to proceed and administer the estate of the deceased, In the same breadth the revocation of the administrators can be carried out by this court for reason that has persona representative have failed to produce to the court within the time prescribed under Section 83 (g) the probate account of administration on material particulars of the estate within six months after issuance of certificate of confirmation of grant.

b. That by implication an order be and is hereby made that the administrators or personal representatives duly appointed by this court are hereby commanded to comply with the law and the various orders issued by this court at various levels and the administration of the estate to do so within ninety (90) days from today's date by first convening an all-inclusive implementation status conference of all the beneficiaries with the legal counsels seized of this matter to design a strategic plan to meet the set timelines.

c. That the Deputy Registrar of the High Court in exercise of her ministerial powers be part of the convenor of the initial conference to ensure compliance with clause (b) of this order.

d. That in default of compliance by the administrators /personal representatives to the orders of transmitting and conveyance of the entire estate to the defined beneficiaries and located shares a revocation order of the administrators so appointed shall take effect and in their place the Public Trustee under the supervisory jurisdiction of the Deputy Registrar of the High Court shall commence, to lay out a plan of execution to transmit and implement the decree of this court on the model of distribution of this estate.

e. That both the administrators or as the case may be the ordained Public trustee and Deputy Registrar shall draw their inspiration from the provisions of Article 159 (2) (C) of *the constitution* of closing in on any administrative gaps which may arise during implementation of the designed plan on distribution of the estate of the beneficiaries. The purpose of this is to assist the administrators and the Public Trustee /Deputy Registrar at an opportune time to effectively oversight and manage the distribution expeditiously and safeguards the rights of the beneficiaries.

f. That in view of the lengthy and inordinate delay occasioned in complying with the court orders whenever they have been issued with the constitutional pens of the various courts properly constituted under Article 50 (1) of *the constitution* interim freezing orders are hereby granted 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 and as read with constitutional scheme in article 50 (2) (E) on the rights to have a trial begin and concluded without unreasonable delay, Article 47 on fair administrative action that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair and Article 159 (2) (b) that justice shall not be delayed.

g. That generally speaking in full measure of this proceedings the courts have complied and rested their vested jurisdiction within the constitutional mandate.

h. That the doctrine of res-judicata defined properly so under section 7 of the *Civil Procedure Act* protects this court from having to adjudicate any more issues in this estate arising from the same cause of action and same parties /beneficiaries. The weight of this judicial authority readily lends this court to exercise inherent jurisdiction that any such interlocutory applications impeaching the final decree of this court be solely with leave properly applied for and granted.

43. It so ordered.

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

.....

R. NYAKUNDI

JUDGE

ledyseii@yahoo.com