In re Estate of the Late Samwel Maritim Chumek alias Maritim Arap Chumek (Deceased) (Succession Cause 14 of 2014) [2024] KEHC 9479 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9479 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

SUCCESSION CAUSE 14 OF 2014

JK SERGON, J

JULY 25, 2024

BETWEEN

ERASTUS MARITIM ..... APPLICANT

AND

STEPHEN KIPRONO MARITIM ..... 1ST RESPONDENT

STANLEY SANG ..... 2ND RESPONDENT

ONESMUS KIPKIRUI ARAP MARITIM ..... 3RD RESPONDENT

RULING

1. The application coming up for determination is a notice of motion dated 19th June, 2023
   (i) That this honourable court be pleased to review the judgement entered on 16th April, 2021.
   (ii) That the costs of this application be provided for
2. The application is supported by grounds on the face of it and the supporting affidavit of Erastus Maritim the applicant herein.
3. The applicant avers that the applicant through his deceased mother Rael Cherotich Chumek filed a protest dated 17th September, 2015 against the summons for confirmation of grant dated 23rd March, 2015.
4. The applicant avers that this Court allowed the protest. The applicant avers that the respondent had proposed equal distribution of the estate among all the beneficiaries, this mode of distribution was successfully challenged.
5. The applicant avers that the protestor indicated that the deceased shared his properties in accordance with the Kipsigis customary laws and each household settled in their distinct and separate parcel of land.

6. The applicant avers that this Court entered a ruling on 20th May, 2020 allowing the protest dated 17th September 2015, to the effect that the respondents proposed mode of distribution was rejected.

7. The applicant avers that this Court further entered a judgement on 16th April, 2021 in which the court found that the deceased had distributed his property and settled his family prior to his demise.

8. The applicant avers that there is an apparent error in the judgement dated 16th April, 2021 since it is not definite and conclusive, in that it did not specify the mode of distribution to be applied to the deceased's estate given that the respondents proposed equal distribution among the three households whereas the applicants proposed that each household should take up the respective parcels as had been allocated by the deceased prior to his death. Therefore the judgement is vague and ambiguous and therefore not enforceable and/or actionable.

9. The applicant avers that in the circumstances , it is only fair and just that this Court reviews the said judgement to give more definite and clear orders and/or directions as there was an apparent error on the face of the Court record.

10. The respondents filed a replying affidavit in response to the application, the replying affidavit was sworn by Onesmus Kipkirui an administrator of the estate and on behalf of the co-administrators and respondents herein.

11. The respondent avers that the averments by the applicants were merely argumentative and interposed in a bid to re-litigate this matter which was duly closed vide the judgement of this Court dated 16th April, 2021, which judgement was informed by witness statements and submissions by the parties.

12. The respondent avers that the judgement clearly indicated that the petitioners' and protestors respective proposed modes of distribution were rejected and this Court directed that the estate herein be distributed in accordance with Kipsigis Customary Law.

13. The respondent further avers that the instant application in so far as it seeks a review of the said judgement, it is not merited as it neither discloses any apparent error on the face of the record and/or judgement or premised on discovery of new evidence.

14. The respondent avers that the fact that the fact that this court had contemporaneously held that the deceased had settled the beneficiaries and upheld the protest challenging equal distribution of the estate of the deceased among beneficiaries and at the same time directed that the estate be distributed in accordance with Kipsigis Customary Law could only be raised as a ground of appeal and cannot by any means be construed to constitute an apparent error on the face of the record or judgement warranting an application for review.

15. The respondent urged this Court to dismiss the application to pave way for distribution of the estate as directed by this Court in the said judgement.

16. The court directed the parties to canvas the application by means of written submissions. At the time of writing this ruling, the applicant had not filed their submissions nor uploaded them on the case tracking system.

17. The respondents complied with the orders of this Court and filed written submissions, which I have considered.

18. The respondent contended that the application for review ought to be construed with the provisions of order 45 (I) (b) of the *Civil Procedure Rules*, 2010 and further that the application did not disclose an apparent error on the face of record or the discovery of new evidence that could not have been

procured after exercise of due diligence during the trial. The respondent cited the findings of the Court of Appeal in *National Bank of Kenya Ltd v Ndungu Njau* [1997] Eklr as follows:- "A review may be granted wherever 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..."

19. The respondent reiterated that the grounds proffered by the applicant in support of the application are akin to grounds of appeal that ought to be canvassed before the Court of Appeal and the applicant was seeking to re-open litigation on their protest and distribution of the estate which was conclusively determined by this Court vide the judgement dated 16th April, 2021.

20. Having considered pleadings, the sole issue for determination by this court is whether review of the judgement of this Court dated 16th April, 2021. The answer is in the negative. I find that the applicant has not disclosed grounds of review as set out in order 45 of the Civil Procedure Rules, thereby warranting this Court to review the said judgement.

21. The application is anchored on section 80 of the *Civil Procedure Act* together with the enactment on the Court's overriding objectives vide Section 3A, 1A & B of the *Civil Procedure Act*. Section 80 of the *Civil Procedure Act* provides as follows; "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 judgement to the Court, which passed the decree or made the order, and the Court may make such order thereon as it thinks fit. "

22. The grounds of review are provided for under Order 45 of the *Civil Procedure Rules* as follows; "(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

    (c) on account of some mistake or error apparent on the face of the record, or

    (d) for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgement to the Court which passed the decree or made the order without unreasonable delay."

23. I wish to highlight the findings of the High Court in *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR where Justice Mativo as he then was held that; "...Review is impermissible without a glaring omission, evident mistake or similar ominous error. An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review."

24. Consequently, the notice of motion dated 19th June, 2023 seeking review of the judgement of this Court dated 16th April, 2021 is hereby dismissed with no orders as to costs.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 25TH DAY OF JULY, 2024.

…….

J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Rutoh

Miss Kitur holding brief for Chelimo for the applicant

Miss Sang for the Petitioner