



In re Estate of the Late Simon Kiprop Cheruiyot (Deceased) (Succession Cause 64 of 2010) [2023] KEHC 1556 (KLR) (1 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1556 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 64 OF 2010
RN NYAKUNDI, J
MARCH 1, 2023
IN THE MATTER OF THE ESTATE OF THE LATE
SIMON KIPROP CHERUIYOT (DECEASED)**

BETWEEN

HELLEN CHERUTO LELEI 1ST PETITIONER

RAEL JEPKOECH SANGA 2ND PETITIONER

AND

MARGARET CHELAGAT CHEPTALAM OBJECTOR

RULING

1. The facts relevant to the proceedings are captured in the Affidavit in support of summons dated January 28, 2022 by one Hellen Jeruto Lelei. In the stated summons the Applicant is seeking the following orders:-
 1. This court be pleased to review and set aside the orders made herein on April 22, 2021 and to give the applicant a hearing on the issue of distribution of the deceased estate herein more especially that:
 - a. The certificate of confirmation be amended to assign
 - i. Parcel No Moisbridge/Sirikwa Block 3(Ziwa) 333 measuring approx.0.04 ha to Hellen Cheruto Lelei instead of Margret Chelagat Cheptalam.
 - ii. For parcel no Moisbridge/Sirikwa Block 3(Ziwa)331tobe given to Vibian Cheptoo Cheruiyot the daughter to Hellen Jeruto Lelei instead of Margaret Chelagat Cheptalam



- b) The certificate of confirmation of grant be amended to include parcels of land known as Soy /Kipsang Block 4 (Ziwa) 240 and plot no 55 at Ziwa Machine and the same be distributed in favour of Margaret Chelagat Cheptalam.
 - c) The plot at Kapsoya Eld/ Mun/Block 9/2379 be equally share in 2 equal parts between Hellen Cheruto Lelei and Margaret Chelagat Cheptalam.
2. Costs of this application be borne by both parties.
2. In the opposition to the summons is a replying affidavit sworn by Margret Cheptalam dated January 8, 2022. There after both counsels filed brief submissions as to the substratum of their summons. The effect of which it will be captured in the determination of this summons

Determination

3. The governing provisions on review are entrenched in Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*. It is important that we delve into the principles which guide the court in exercising discretion pursuant to review jurisdiction. In Republic vs Public Procurement Administrative Review Board & 2 Others (2018) eKLR was held

Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

- 4 In Republic vs Advocates Disciplinary Tribunal *ex Parte* Apollow Mboya (2019) eKLR High Court of Kenya Nairobi Judicial Review Division Misc Application No 317 John M Mativo Judge called out the following principles from a number of authorities:-
- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
 - ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
 - iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
 - iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
 - v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/ judgment of a coordinate or larger Bench of the tribunal or of a superior court.
 - vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/ decision as vitiated by an error apparent.



- vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
 - viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is *prima-facie* visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
 - ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
 - x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.
5. From the reading of my affidavit it does appear that the Applicant has produced evidence of circumstances sufficient to establish review of the Certificate of Grant in terms of paragraph 3(a) (b) and c) of the summons dated January 28, 2022. The plain and simple inference is that the applicant has given every reasonable consideration for this court to invoke the power of review jurisdiction for the sole purpose of not rendering the certificate of grant un implementable. The objection raised by the respondent does not outweigh the competency of the sufficient cause by the Applicant that there is a substantial basis to review the initial terms of the grant issued by this court. It is also trite that a consent order can be varied or reviewed depending on the unique circumstances which have arisen post endorsement of the order by the court. This what the court clearly stated in *Brook Bond Liebig vs Mallya* (1975) EA 266 where Mustafa Ag. VP stated that: “The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.” Also in the case of *Flora N Wasike vs Jestimo Wamboko* [1988]eKLR Hancox JA cited Setton on Judgments and orders (7th edition) vol 1 page 124, and reiterated that;

Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement.”

6. On the facts before the court the present application to vary or to set aside certain substantive orders has merit in view of the averments in the Affidavit in support. To put the matter in the corrective perspective, it is necessary the impugned consent be varied on ground mistake or error apparent in the grant as deposed by the Applicant. I do not find any sufficient reasons raised by the objector given the anomalies in the proceedings leading up to and including the consent judgement in issue. I need to



point out that the objector has not addressed the critical issues pleaded by the Applicant rendering the consent order untenable.

7. It follows that the summons dated January 28, 2022 is meritorious and is allowed as prayed with no orders to cost.

DELIVERED, DATED AND SINGED THIS 1ST DAY OF MARCH 2023

R NYAKUNDI

JUDGE

Coram: Before Hon Justice R Nyakundi

M/s Oyaro & Associates Advocates

M/s Ledisha J.K Kittony & Co Advocates

