



REPUBLIC OF KENYA



**In re Estate of Alexander Machii Kebenei (Deceased) (Succession Cause  
125 of 2019) [2023] KEHC 3292 (KLR) (19 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3292 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 125 OF 2019  
RN NYAKUNDI, J  
APRIL 19, 2023**

**IN THE MATTER OF THE ESTATE OF ALEXANDER MACHII KEBENEI (DECEASED)**

**BETWEEN**

**JOSEPHINE KIBITOK KEBENEI ..... 1<sup>ST</sup> PETITIONER  
SAMMY KIPRONO KEBENEI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**MARY CHEPCHIRCHIR ..... 1<sup>ST</sup> OBJECTOR  
IRENE CHEPKOECH KEBENEI ..... 2<sup>ND</sup> OBJECTOR  
MARGARET JERUTO KEBENEI ..... 3<sup>RD</sup> OBJECTOR  
MAURINE JEPKORIR KEBENEI ..... 4<sup>TH</sup> OBJECTOR**

**RULING**

1. The manner and form of the Review Jurisdiction is based on two applications on dated February 23, 2023 seeking the following orders:
  1. That pending the hearing and determination of this application, there be temporary stay of enforcement/execution of the judgement delivered on February 6, 2023.
  2. That this Honourable Court do review the said judgement taking into account the 1<sup>st</sup> Objector Affidavit dated December 16, 2022 and filed on the January 31, 2023.
  3. That this Honourable Court do review the said judgement taking into account the 1<sup>st</sup> Objector Affidavit dated the January 31, 2023 and filed on the December 17, 2022.
  4. That the costs of this application be in the cause.



2. In support of the application is an Affidavit sworn by Mary Chepchirchir sworn on the same day. Correspondingly a further summons dated 8<sup>th</sup> of March 2023 was filed by one Irene Chepkoech also seeking the reliefs herein under:
  1. That there be temporary stay of enforcement/execution of the judgement delivered on February 6, 2023 pending the hearing and determination of this Application inter-parties.
  2. That this Honourable Court do review the said judgement on the mode of distribution of the Estate of the deceased as per the 2<sup>nd</sup> and 3<sup>rd</sup> and 4<sup>th</sup> objectors Affidavit of protest dated January 30, 2023
  3. That the costs of this Application be in the cause.
3. The tenor of the two applications is to review the final judgement of the court on distribution of the intestate estate of the late Alexander Machi Kebenei. In their latest grievance the Applicant Irene Chepkoech in her Affidavit points to the fact inequitable distribution of the estate to herself and siblings identified as objectors to the model of confirmation of grant. On the other hand, the Applicant Mary Chepkoech urged this court to revisit the issue on the identified shares of the estate and the manner in which the final orders were made with in implicit violation of Equity and Equality. It was therefore an averment that all the beneficiaries deserved to be treated equally.

#### **The Law**

4. It is trite that review jurisdiction by this court is exercisable as expressly provided for in Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*. Similarly Rule 73(1) of the *Probate and Administration Rules* powers the court to invoke inherent jurisdiction to do justice to any issues arising out of the grant of representation or certificate of confirmation of grant. The sum of the peculiar jurisdiction of the court is summarised in the case of the *Republic v Advocates Disciplinary Tribunal Ex Parte Apollo Mboya* (2019) eKLR High Court of Kenya Nairobi Judiciary Review Division Misc Application No 317 of 2018 John M Mativo Judge called out the No 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 Rule1.” (See also the *Suleiman Murungu vs Nilester Holding Limited & Another* (2015) eKLR)

5. The question of what constitutes review trial issues content and scope is traceable to persuasive case law. In the *Application of Review of Judgement No 158 of the United Nations Administrative Tribunal* (ICJ) Report 1973 P 166 (hereinafter “Fasla Opinion “) the court declared that :

“ the task of the court is not to retry the case but to give its opinion on the questions submitted to it concerning the objections lodged against the judgement. The court is not therefore entitled to substitute its own opinion for that of the Tribunal on the merits of the case adjudicated by the Tribunal. Its role is to determine if the circumstances of the case, whether they relate to merits or procedure, show tht any objection made to the judgement on one of the grounds mentioned in Order 45 rule 1 of the CPR underlined emphasis added. The court cited with approval the principle in Application for Review of Judgement No 273 of the United Nation Administrative Tribunal (ICJ Reports 1982, P 325 at Page 356 para 58) (hereinafter the “Morished Opinion”) Furthermore the Court gave, in its Fasla Opinion, detailed guidance in evaluation a challenge that the Tribunal failed to exercise jurisdiction vested in it:

“ In The Court’s view, therefore, this ground of challenge covers situations where the Tribunal has either consciously or inadvertently omitted to exercise jurisdictional power vested in it and relevant for its decision of the case or of a particular material issue in the case. Clearly in appreciating whether or not the Tribunal has failed to exercise relevant jurisdictional powers, the court must have regard to the substance of the matter and not merely to the form. Consequently, the mere fact that the Tribunal has purported to exercise its power with respect to any particular material issue will not be enough: it must in fact have applied them to the determination of the issue. No doubt, there may be borderline cases where it may be difficult to assess whether the tribunal has in any true sense considered and determined the exercise of relevant jurisdictional power. But that does not alter the duty of the court to appreciate in each assistance. In the light of all pertinent elements, whether the Tribunal did or did not in fact exercise with respect to the case the powers vested in it and relevant to its decision (ICJ Reports 1973 PP 189-190 PARA 51) the test of whether there has been a failure to exercise jurisdiction with respect to a certain submission cannot be purely formal one of verifying if a particular plea is mentioned eo nomine in the substantive part of a judgment. The test must be the real one of whether the Tribunal addressed its mind to the matters on which a plea was based and drew its own conclusions therefrom as to the obligations violated by the respondent and as to the compensation to be awarded therefore”.

6. Germane to the discussion central to the review application is Article 27 of the *Constitution of Kenya*. The Article as crafted provides inter earlier as follows:

“1. Every person is equal before the law and has the right to equal protection and equal benefit of the law. Subsection (4) outlaws discrimination on grounds of sex, marital status, culture, or birth.”

7. The non-discrimination and equality before the law on inheritance and heirship is incorporated Under Section 38 of the Act to give force to Article 27 of the *Constitution*.



8. Article 1 of *CEDAW (Discrimination Against Women)* Defines discrimination against women as follows: “ Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”
9. The Constitutional court of South Africa delved into the issue in the case of *President of the Republic of South Africa -vs-Hugo* 1997 (4) SA I (CC) para 41 observed as follows: “ that we need .. to develop concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal. We cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case therefore will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different contest.”
10. Basically this intestate estate means the court to enter into an inquiry on the model of distribution within the scope and spirit of the law in Section 40 of the *Law of Succession* which makes provision for distribution of the net estate to the houses according to the No of children in each house but also having any wife surviving the deceased as an additional unit to the No of children. The structure of Section 3 of the Act defines a family unit as comprising a wife and the children of that wife. In case at bar, it is clear from the Chief’s letter that this was a polygamous family drawing their expected rationale on distribution under Section 40 of the *Succession Act*. It is the test for justifiability of the law that there should be no differentia which connotes discrimination. The proviso to Section 71 (2) as read with Rule 40 (4) of the *Probate and Administration Rules* prescribes that where “Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all person entitled to the estate have been ascertained and determined”. Undoubtedly, the beneficiaries and assets of the estate have been fully disclosed in the various instruments and information filed before this court. There is no evidence of any lifetime gifts passed on to the sons or daughters of the deceased.
11. I have considered the application and taken into account the 1<sup>st</sup> Objector’s affidavit dated December 16, 2022 and filed on December 17, 2022 with regard to the mode of distribution. Upon considering the mode of distribution dated December 9, 2022, the affidavit in response to the summons for confirmation of grant dated December 16, 2022 and the mode of distribution dated January 30, 2023, I hereby review the judgement delivered on February 6, 2023 to the extent that the estate shall be distributed as follows;
  1. Moi’s Bridge Sirikwa/Block 3/248 - Peter Kiplimo
  2. Moi’s Bridge Sirikwa/Block 3/249- Caroly Kibiwot
  3. Moi’s Bridge Sirikwa/Block 3/250- Julius Kirwa Kosgey
  4. Moi’s Bridge Sirikwa/Block 3/251- Richard Kipchumba Kebenei
  5. Moi’s Bridge Sirikwa/Block 3/252- John Kipkemboi Maiss
  6. Moi’s Bridge Sirikwa/Block 3/253- Henry Kiproop Kebeney
  7. Moi’s Bridge Sirikwa/Block 3/254- Matthew Kimutai Kebenei
  8. Moi’s Bridge Sirikwa/Block 3/255- Josphinejebhok Kebenei



9. Moi's Bridge Sirikwa/Block 3/121 (approximately 15 acres)

To be shared among:-

- 1) Sammy Kiprono Kebenei 2.5 Acres
- 2) Pracily Kiplagat Kebenei 2.5 Acres
- 3) Simon Kibet Kebenei 2.5 Acres
- 4) Irene Jepkoech Kebenei 2.5 Acres
- 5) Margaret Jeruto Kebenei 2.5 Acres
- 6) Maurine Jepkorir Kebenei 2.5 Acres

10. Moi's Bridge Sirikwa/Block 3/266 (Approximately 1.800 Hectares)

- 1) Peter Kiplimo 150 x 100 FT
- 2) Caroly Kibiwot 150 x 100 FT
- 3) Julius Kirwa Kosgey 150 x 100 FT
- 4) Richard Kipchumba Kebenei 150x100 FT
- 5) Henry Kiprop Kebenei 100 x 100 FT
- 6) John Kipkemboi Maiss 150 x 100 FT
- 7) Matthew Kimutai Kebenei 150 x 100 FT
- 8) Pracily Kiplagat Kebenei 150 x 100 FT
- 9) Simon Kibet Kebenei 100 x 100 FT
- 10) Sammy Kiprono Kebenei 150 x 100 FT
- 11) Paul Kipngetch Kebenei 150 x 100 FT
- 12) Irene Chepkoech Kebenei 150 X 100 FT
- 13) Margaret Jeruto Kebenei 150 X 100 FT
- 14) Maurine Jepkorir Kebenei 150 X 100 FT

11. Moi's Bridge Sirikwa/Block 3/267 (Approximately 6 Acres)

1. Peter Kiplimo 150 x 100 FT
2. Caroly Kibiwot 150 x 100 FT
- 3) Julius Kirwa Kosgey 150 x 100 FT
- 4) Richard Kipchumba Kebenei 150 x 100 FT
- 5) Henry Kiprop Kebeney 150 x 100 FT
- 6) John Kipkemboi Maiss 150x100 FT
- 7) Irene Chepkoech 150 x 100 FT



- 8) Matthew Kimutai Kebenei 150 x 100 FT
  - 9) Pracily Kiplagat Kebenei 150 x 100 FT
  - 10) Simon Kibet Kebenei 150 x 100 FT
  - 11) Sammy Kiprono Kebenei 150 x 100 FT
  12. Paul Kipngetich Kebenei 150 x 100 FT
  - 13) Lucy Cherotich 150 x 100 FT
  - 14) Mary Chepchirchir 150 x 100 FT
  - 15) Margaret Jeruto Kebenei 150 x 100 FT
  - 16) Maurine Jepkorir 150 x 100 FT
  - 17) Grace Jepkemboi Kebenei 100 x100FT
12. Moi's Bridge Sirikwa/Block 3/240
- 1) Grace Jepkemboi Kebenei 40 x129ft
  - 2) Lucy Cherotich 40 x129 ft
  - 3) Henry Kiprop Kebeney 40 x129ft
  - 4) Grace Jepkemboi Kebenei &
  - 5) Mary Chepchirchir 40 x129ft
  - 6) Portions sold to purchasers to be transmitted to the administrators who will thereafter transfer to the purchasers. The remainder shall be distributed to the beneficiaries in equal shares.
13. Moi's Bridge Sirikwa/Block 3/256
- 1) Peter Kiplimo 0.7 of an Acre
  - 2) Paul Kipngetich Kebenei 0.7 of an Acre
  - 3) Sammy Kiprono Kebenei 0.7 of an Acre
  - 4) Caroly Kibiwot 0.7 of an Acre
  - 5) Margaret Jeruto Kebenei 0.7 of an Acre
  - 6) Irene Chepkoech 0.7 of an Acre
  - 7) Maurine Jepkorir 0.7 of an Acre
14. Ziwa Sirikwa LR No 11701/45  
Josphine Jebitok Kebenei Whole
15. Ziwa Sirikwa LR No. 11701/46  
Simion Kibet Kebenei Whole
16. Moiben/Moiben Block 2 (Segero) 518



- Paul Kipngetich Kebenei whole
17. Moiben/Moiben Block 2 (Segero) 515
    - 1) Paul Kipngetich Kebenei 1 Acre
    - 2) Grace Jepkemboi Kebenei 2.3 Acres
  18. Moiben Township Plot 21  
To be shared equally by:-
    - 1) Peter Kiplimo
    - 2) Paul Kipngetich Kebenei
    - 3) Sammy Kiprono Kebenei
    - 4) Caroly Kibiwot
    - 5) Margaret Jeruto Kebenei
    - 6) Irene Chepkoech
    - 7) Maurine Jepkorir
  19. Moiben/Moiben Block 1/18
    - 1) Mary Chepchirchir 2.5 Acres
    - 2) Catholic Church 0.5 of an Acre
    - 3) To be sold and proceeds used to offset estate fees & duties 1 acre
  20. Moi's Bridge 858/17  
To be shared equally among;
    - 1) Simon Kibet Kebenei
    - 2) Margaret Jeruto Kebenei
    - 3) Irene Chepkoech
    - 4) Maurine Jepkorir
  21. Eldoret Municipality/Block 14/1374 – Hill School  
To be shared equally by the following beneficiaries:-
    - 1) Sammy Kiprono Kebenei
    - 2) Pracily Kiplagat Kebenei
  22. Uasin Gishu/Kimumu/1251  
To be shared equally by the following beneficiaries:-
    - 1) Matthew Kimutai Kebenei
    - 2) Richard Kipchumba Kebenei
  23. Eldoret Municipality block 14/285



To be shared equally by the following beneficiaries:-

- 1) John Kipkemboi Maiss
- 2) Henry Kiprop Kebenei
- 3) Julius Kirwa Kosgei
- 4) Margaret Jeruto Kebenei
- 5) Irene Chepkoech Kebenei
- 6) Maurine Jepkorir Kebenei

24. A portion in Langas Farm LR No 8500 measuring a quarter of an acre

To be shared equally by the following beneficiaries:-

- 1) Caroly Kibiwot
- 2) Paul Kipngetich Kebenei

25. Eldoret Municipality/Block 15/1001

To be shared equally among;

- 5) Margaret Jeruto Kebenei
- 6) Irene Chepkoech
- 7) Maurine Jepkorir
- 8) Pracily Kiplagat Kebenei

26. Shares in Kenya Commercial bank, DTB, ABSA, NCBA bank

Josphine Jebitok Kebenei Whole

27. Ziwa Machine Plot No. 15

To be shared equally by the following beneficiaries:-

- 1) Peter Kiplimo
- 2) Paul Kipngetich Kebenei
- 3) Sammy Kiprono Kebenei
- 4) Caroly Kibiwot
- 5) Margaret Jeruto Kebenei
- 6) Irene Chepkoech Kebenei
- 7) Maurine Jepkorir Kebenei

28. Moiben/Moiben Block 2 (Segero) 513

Grace Jepkemboi Kebenei – Whole

Apart from the above assets, the intestate estate is also pleaded in the instruments dated December 9, 2019 to have owned the following movables:



- 1) Traller Registration no ZA 7565
- 2) Tractor Jembe
- 3) Posho Mill Ndume & Lister Engine and red in colour
- 4) Tiller Yellow in colour
- 5) Wheat Planter
- 6) Movable Water Tank
- 7) Generator
- 8) Welding Machine
- 9) Two bicycles
- 10) Metallic Water Through
- 11) Farm Harrow
- 12) CP3 Spray pump
- 13) Old Water Pumb
- 14) Lorry Registration No KTU
- 15) Three Milk churns
- 16) Gear Box and Ford Block
- 17) Forty-Two Cows
- 18) Thirty Sheep

12. It is also necessary to mention at this point that the identifiable movable Assets value and level of depreciation remains in the realm of unknown save may be for the livestock comprising of cows and sheep. The same applies to the Safaricom lease that forms part of the estate of the deceased.
13. It is therefore sufficient for the purposes of this judgement to order that a fresh inventory be undertaken by the County veterinary officer as it relates to the livestock in question. On the other hand the itemized machineries and accessories be valued taking into account the level of depreciation by a qualified mechanical engineer outsourced from the county government. This also applies to the safaricom lease which I hereby direct the administrators to file a copy of the terms of the lease agreement for the court to determine its value in so far as distribution to the beneficiaries is concerned.
14. Broadly formulated all the valuation reports shall then form the basis of the specific mode of distribution under section 40 of the *Law of Succession Act*. Given these declarations the experts reports are intimated to be filed in court within 45 days from today's date. In order to facilitate this activity the administrators under Section 83 of the Act are mandated to allow access to the necessary instruments/ logbooks on ownership of the movable assets to the experts. The qualified nature of immovable Assets as fairly contemplated in this ruling without any further delay be transmitted with the beneficiaries pending the valuation of the movable properties. As a consequence of the above findings this court shall issue a partial decree commonly known as a certificate of confirmation of grant for the immovable estate to the beneficiaries pending final decree on the matter upon perusal of the text of the valuation reports as aforementioned above.



It is so ordered.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 19<sup>TH</sup> DAY OF APRIL 2023**

**In the presence of Chemoiyai & Co. Advocates**

**Tum & Co. Advocates**

**Birech, Ruto & Co. Advocates**

**Omboto & Co. Advocates**

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**R. NYAKUNDI**

**JUDGE**

