



REPUBLIC OF KENYA



**In re Estate of Kipkosgei Kiplagat Kamar (Deceased) (Succession Cause  
59 of 1997) [2023] KEHC 23091 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23091 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 59 OF 1997  
JRA WANANDA, J  
OCTOBER 6, 2023**

**BETWEEN**

**JOHN KIBET KAMAR ..... 1<sup>ST</sup> ADMINISTRATOR  
TAPYOTIN KIMOI KAMAR ..... 2<sup>ND</sup> ADMINISTRATOR  
JOSEPH KIPKOSGEI KAMAR ..... 3<sup>RD</sup> ADMINISTRATOR  
CHARLES KIBIWOTT KAMAR ..... 4<sup>TH</sup> ADMINISTRATOR**

**AND**

**RUTH JEMUTAI KAMAR ..... 1<sup>ST</sup> OBJECTOR  
MARGARET JEPKOECH KAMAR ..... 2<sup>ND</sup> OBJECTOR  
EVERLYN JERUIYOT KIPKOSGEY ..... 3<sup>RD</sup> OBJECTOR  
JANE JESANAI NAKADONY ..... 4<sup>TH</sup> OBJECTOR  
ELIZABETH JEPYEGO KAMAR ..... 5<sup>TH</sup> OBJECTOR  
HELLEN JESIRE KIPKEMOI ..... 6<sup>TH</sup> OBJECTOR**

**AND**

**CHRISTOPHER KAMAR ..... BENEFICIARY  
MARY JEPKEMEI KIBOSS ..... BENEFICIARY  
LILIAN SERONEY ..... BENEFICIARY  
ESTHER ROTICH ..... BENEFICIARY  
SUSAN MIBEI ..... BENEFICIARY  
NERISA KAMAR ..... BENEFICIARY**



## RULING

1. The Application before the Court is the Notice of Motion dated 5/10/2022 filed by the 1<sup>st</sup> - 6<sup>th</sup> Beneficiaries on the same date. The same seeks the following orders:
  - i. [Spent]
  - ii. [Spent]
  - iii. That the Honourable Court be pleased to review paragraph 12 of the Judgment of the Court delivered on 22<sup>nd</sup> December 2015 and consequently direct that the properties listed therein; Mosop Chepkorio/21, Chepkorio/Cheroget/236, Uasin Gishu/Munyenwet (Kabao) and Chepkorio Plot 11 be shared equally amongst all the beneficiaries of the deceased estate.
  - iv. That this Honourable Court be pleased to set aside and/or review the consent order given on 3<sup>rd</sup> May 2021 and issued on 6<sup>th</sup> May 2021.
  - v. Costs be in the Cause.
2. The Application is filed through Messrs Nabasenge & Co. Advocates, is based on the grounds set out on the face thereof and is supported by the Affidavit of the 1<sup>st</sup> Applicant, Christopher Kamar. The Application is brought under various provisions of the law but the more relevant are Section 47 of the Law of Succession Act, Cap. 160 and Rule 63 (inherent powers) of the Probate & Administration Rules.
3. In the Affidavit, the 1<sup>st</sup> Beneficiary depones that he swears the Affidavit also on behalf of the 2<sup>nd</sup> - 6<sup>th</sup> Beneficiaries, that the consent order dated 6/05/2021 is due for enforcement and yet the same was entered into without the knowledge of the Applicants, the said consent is as a result of the Judgment/Ruling of this Court and yet it excludes some of the deceased's properties that are due for subdivision and distribution, this matter was heard by way of written Submissions and as such many issues in respect of the mode of distribution of the estate were not satisfactorily addressed by the Court, the Judgment distributing the estate delivered on 22/12/2015 left a number of pertinent issues in abeyance and hence it had to be reviewed and/or clarified vide the Ruling delivered on 14/11/2016, both the Judgment and Ruling failed to address some crucial issues regarding distribution of the estate and that is the reason some of the beneficiaries have endeavoured every now and then to reach various consents in respect of distribution of the estate although without the involvement of all beneficiaries, the 1<sup>st</sup> consent was entered into on 14/11/2016, the 2<sup>nd</sup> consent was endorsed on 3/05/2021, it is in the interest of justice that all estate properties should be included in the impugned 2<sup>nd</sup> consent.
4. The 1<sup>st</sup> Applicant deponed further that in as much as the firm of Birech Ruto & Co. purports to represent the 1<sup>st</sup> house, they only represent John Kibet Kamar and as such the Applicants have been left in the dark and are not privy to the consents purported to be executed by the said law firm, initially the said law firm used to represent the deceased and after his demise they took over the succession of the estate but to a larger extent they have kept the Applicants in the dark insofar as the distribution of the estate is concerned, the said law firm was instructed by John Kibet and the late Dr. Kimitei Kipkosgei Kamar to handle the Succession Cause but have always represented their interests to the Applicants' detriment, inasmuch as the said John Kibet Kamar is a member of the 1<sup>st</sup> house where the Applicants also belong, he has never represented the Applicants' interests but his own interests and those of the late Dr. Kimitei Kipkosgei Kamar, the Applicants were surprised to learn that at paragraph 12 of the Judgment delivered on 22/12/2015 the Court stated that all beneficiaries had agreed on the mode of distribution by consent and yet there was no such consent ever reached,



5. It was further deponed that the best way to distribute the properties is for every beneficiary to get an equal share which is not the case on the ground since some of the beneficiaries have grabbed larger portions, the consent given on 3/05/2022 ought to be set aside for the reasons that although it intends to settle this matter once and for all, it does not address all the concerns affecting distribution of the estate, it has failed to address the rent proceeds collected from the commercial property Eldoret Municipality Block 7/26 which proceeds only benefits John Kibet and Dr. Kimitei Kamar's family, it has failed to address the 40 acres forming part of the larger land parcel L.R. No. 7439(Sigowo) measuring 846 acres and which the Court vide the Ruling delivered on 14/11/2016 ordered be distributed amongst all beneficiaries in equal share, unless the consent order given on 3/05/2021 is set aside and/or reviewed the Applicants shall suffer prejudice and loss of their entitled shares in the estate, unless paragraph 12 of the Judgment delivered on 22/12/2015 is reviewed the Applicants shall suffer similar prejudice and loss.

### **1<sup>st</sup> Administrator's Response**

6. The Application is opposed vide the Grounds of Opposition filed on 12/10/2022 through Messrs F. Omondi & Co. Advocates who describe themselves as acting for the 2<sup>nd</sup> House. The same is then stated to have been filed on behalf of the 1<sup>st</sup> and 4<sup>th</sup> Administrators.
7. In the Grounds of Opposition, it is argued that the Application is frivolous, vexatious and an abuse of the process, is fettered by laches and brought in bad faith, is misconceived and bereft of merit and that the Court lacks jurisdiction to entertain the Application insofar as it seeks a review.
8. Also filed is the Replying Affidavit sworn by the 1<sup>st</sup> Administrator John Kibet Kamar and filed through Messrs Tum & Associates on 07/12/2022. It is therefore not very clear to me which Advocate between the two abovenamed is representing the 1<sup>st</sup> Administrator.
9. While addressing me, Ms Tum Advocate also stated that she took over the firm of Birech Ruto & Advocates as its Administrator following the demise of Mr. Birech Advocate. She also stated that she represents the 1<sup>st</sup> House and the 2<sup>nd</sup> Administrator.
10. Be that as it may, the 1<sup>st</sup> Administrator deponed that the deceased died partially intestate on 20/10/1993, the Petition herein filed on 21/03/1997 and Judgment delivered on 22/12/2015, all beneficiaries have been aware of the proceedings and the Judgment and cannot therefore purport to "have been in the dark for the last 25 years". The deceased had two wives, initially the beneficiaries instructed Birech Ruto & Co. Advocates to pursue Letters of Administration, later in the course of the proceedings, the beneficiaries in the 2<sup>nd</sup> House deemed it fit to instruct a different Counsel to represent them and instructed Messrs Omboto & Co. Advocates to represent them, Messrs Birech Ruto & Co. was left acting for the beneficiaries from the 1<sup>st</sup> House, one of the beneficiaries Charles Kibiwot Kamar became an Objector and instructed Messrs Miyenda & Co. Advocates to represent him.
11. After the Letters of Administration were granted the beneficiaries did not fully agree on distribution and the Court directed the parties to file Submissions together with proposed modes of distribution, both parties complied, the Court then rendered its Judgment on 22/12/2015, any party aggrieved by the reasons given in a Judgment can only appeal, not seek a review as review is only available to correct clerical mistakes apparent on the record, the Applicants have not met the threshold for review, the Consent of 3/05/2021 was entered into for the sole purpose of executing the Judgment and the subsequent consent entered into on 14/11/2016, the consent of 3/05/2021 is only to provide modalities of demarcating the parcel L.R. No. 7439 as per the Judgment and does not affect the distribution of the estate as per the Judgment, the Consent was entered into in the presence of all



Advocates on record, the Applicants have not pleaded any fraud, collusion or any agreement contrary to public policy to justify setting aside of the orders, no misapprehension, ignorance of material facts or any sufficient reason has been presented to justify the setting aside of the consent order, a similar Application was made on similar grounds of representation and the Court made its Ruling on 30/04/2020 thus the issues raised are Res Judicata.

#### **4<sup>th</sup> Administrator's Affidavit In Support Of Application**

12. In his Replying Affidavit filed on 15/05/2023 through Messrs Nabasenge & Co. Advocates, the 4<sup>th</sup> Administrator, Charles Kibiwot Kamar deponed that he is not fully agreeable to the consent order given on 3/05/2021 for the reason that the deceased had deposited his Will at Kenya Commercial Bank (KCB) Eldoret Branch, Joseph Kosgei Kamar has declined to surrender the deposit slips since 1993, he has also confiscated an envelope that had been deposited at the Standard Chartered Bank Eldoret Branch which had crucial and important information regarding the estate, the consent is not conclusive since some properties have been left out, a Nairobi house that is under the management of the 2<sup>nd</sup> House was left out, the rent from Eldoret Municipality Block 7/26 is being collected by Dr. Kimitei Kamari's family and John Kibet Kamar at the detriment of other beneficiaries and that Joseph Kipkosgei Kamar's share is to be used to compensate the loan in question and not the family land.
13. He deponed that John Kibet Kamar and Joseph Kipkosgei Kamar have since 1993 been leasing the property Uasin Gishu/Munyewet (Kabao) measuring approximately 80 acres and have since possessed the title deed in their names, their late mother Toiyoi Kamar contributed towards purchase of the property Chepkorio/Chrorget/236, Dr. Kimitei Kamari's family sold and benefited from the proceeds of 27 cows, the timber was to be shared equally amongst all the beneficiaries but the said mode of sharing has not been captured in the consent, Ketraco proceeds of about Kshs 5,000,000/- were only shared between Joseph Kipkosgei Kamar and John Kibet Kamar, in view of the above, it is in the interest of justice that the consent of 3/05/2021 be set aside and parties be given an opportunity to enter into a conclusive consent that will capture all issues at hand.

#### **Hearing Of The Application**

14. On 2/02/2023, Messrs Kutto & Kaira Nabasenge Advocates took over representation of the said Charles Kibiwott Kamar, the 4<sup>th</sup> Administrator thereby replacing the firm of Miyenda & Co. Advocates.
15. It was then directed and agreed that the Application be canvassed by way of Written Submissions. Pursuant thereto, Messrs Nabasenge & Co. Advocates filed Submissions on 31/05/2023 stated to be filed on behalf of the 1<sup>st</sup> – 6<sup>th</sup> Beneficiaries and the 4<sup>th</sup> Administrator. Messrs F. Omondi & Co. Advocates filed Submissions on 6/06/2023 stated to be filed on behalf of the 2<sup>nd</sup> House. Finally, Messrs Birech Ruto & Co. Advocates filed on 2/02/2023 stated to be filed on behalf of 2<sup>nd</sup> Administrator.

#### **Applicants' Submissions**

16. Mr. Nabasenge submitted that the consent of 3/05/2021 was entered into without the Applicants' knowledge and participation, the consent has failed to incorporate all issues, the proposed sub-division is adverse to the Applicants' interests, the Applicants have denied having been represented by the firm of Birech Ruto & Co. Advocates which purported to enter into the consent on their behalf, the said firm has been on record for John Kibet Kamar and Dr. Kimitei Kipkosgei Kamar (deceased), there is no evidence that the firm represented all the beneficiaries from the 1<sup>st</sup> House, the minutes of the family meeting alleged to have given rise to the consent only shows a proposed mode of distribution, there



is no evidence that the Applicants consented to it and that there is also nothing to demonstrate that the Applicants were present.

17. Counsel added that the Judgment delivered on 22/12/2015 failed to settle all the issues in question, as a result the Court reviewed the Judgment through the Ruling delivered on 30/04/2020, once again the Ruling failed to address the distribution of the estate with finality, this is the reason why the impugned consent was entered into to settle outstanding issues, however the consent also failed to address all issues, the consent should be set aside and all beneficiaries be given an opportunity to participate and reach a conclusive solution that is final. He cited the case of *In re Estate of Njagi Maguta (Deceased)* [2017] eKLR, H.C. at Embu Succession Cause No. 114 of 2015.

### **Submissions Filed By Messrs F. Omondi & Co. Advocates**

18. As aforesaid, the said law firm described itself as representing the 2<sup>nd</sup> House. In opposing the Application, F. Omondi Esquire reiterated the matters set out in his Grounds of Opposition. He then added that the matter was filed 26 years ago, the Petitioners were 4, these were Toiyoi Tabarno Kamar, Kimitei Kipkosgei Kamar, Tapyotion Kimoi Kamar and Joseph Kipkosgei Kamar, the 1<sup>st</sup> and 3<sup>rd</sup> individuals were widows to the deceased while the 2<sup>nd</sup> and 4<sup>th</sup> individuals were sons to the deceased from either house, later, members of the 2<sup>nd</sup> House represented by Tapyotin and Joseph appointed the firm of Rioba Omboto & Co. Advocates to represent them, F. Omondi & Co. Advocates then took over from the said firm, effectively Birech Ruto & Co. Advocates remained on record representing the 1<sup>st</sup> House (Toiyoi and Kimitei), an Objector by the name Charles Kibiwot Kamar, himself a member of the 1<sup>st</sup> House emerged and is represented by Miyenda & Co. Advocates, Toiyoi and Kimitei are now deceased, on 31/01/2018 John Kibet Kamar and Patrick Kipkemoi Kamar filed an Application dated 30/01/2018 seeking to substitute the deceased duo, in that Application it is clear that they wanted to come into the matter to represent the interests of the 1<sup>st</sup> House, on 24/10/2018 Birech Ruto & Co. and Miyenda & Co. Advocates filed a consent by which the said Application dated 30/01/2018 was settled by appointing John Kibet Kamar and Charles Kibiwott Kamar as new Administrators in place of the deceased duo.
19. Counsel submitted further that on 13/11/2018 when the matter came up in Court (Sewe J) they raised an Objection on the suitability of John Kibet Kamar to be appointed an Administrator, the proceedings show Mr. Miyenda for the Objector (now a co-Administrator) informing the Court that the 1<sup>st</sup> House had agreed on John and Charles to represent them, it cannot be said with any justification that for 25 years the Applicants were not aware of the goings on in this matter, the 1<sup>st</sup> House to which the Applicants belong has been and still is represented by Birech Ruto & Co. Advocates, an intriguing aspect of this instant Application is that it is supported by Charles Kibiwott Kamar a co-Administrator represented by Mr. Miyenda, he has been party to these proceedings for many years initially as an Objector, it is not clear why he would support an Application which seeks to nullify consent orders he is party to and that it is also curious that his Affidavit is drawn by Counsel for the Applicants and not his own Counsel.
20. Counsel contended further that the Application seeks to review paragraph 12 of the Judgment, by that paragraph the Court merely endorsed the Agreement on distribution and sharing in respect of Mosop Chepkorio 21, Chekorio/Cheroget/236, Uasin Gishu/Munyenwet (Kabao) and Chepkorio Plot 11, the aforesaid Judgment and paragraph have already been subject of an Application for Review. Counsel referred to the Objector's Application dated 5/10/2016 and the proceedings of 14/11/2016 and added that essentially therefore the Application seeks to review a review, this offends Order 45 Rule 6 of the Civil Procedure Rules, paragraph 12 of the Judgment was re-affirmed by consent of the parties on 14/11/2016, the Applicants were represented, to succeed in the Application, the Applicants



must satisfy the prerequisites for setting aside a consent. He then referred to paragraphs 22 to 24 of the Ruling of Sewe J dated 30/04/2020.

21. Counsel submitted further that the regarding the consent adopted on 6/05/2021, the same was restricted to one property L.R. No. 7439 (Sigowo), the rest of the properties are to be shared out in terms of the Judgment as already reviewed, the consent recognizes the entitlement of Charles Kibiwott Kamar to a portion of the land, this is not contested in the Application, the only irony is that the said beneficiary seeks to take away the demised portion, the ratio in which the property is shared out is in consonance with the Court's holding in its Judgment that all beneficiaries share the land equally, no beneficiary is prejudiced, indeed the Application seeks to achieve the same end. He cited the case of Civil Appeal No. 211 of 1996: National Bank of Kenya Limited vs Ndungu Njau.
22. Lastly, Counsel referred to their own Application dated 4/12/2016 which sought the setting aside of the consent recorded on 14/11/2016 and submitted that the same was based on the same grounds as the instant Application, it was dismissed on 30/04/2020, that Ruling renders the present Application Res Judicata as the Court has already pronounced itself on the matters raised.

### **Submissions Filed On Behalf Of John Kibet Kamar By Birech Ruto & Co.**

23. Counsel for John Kibet Kamar submitted that his client, as co-Administrator, is a representative of the 1<sup>st</sup> House, that the family had instructed the firm of Birech Ruto & Co. Advocates to pursue the Letters of Administration, all the beneficiaries have been aware of the proceedings, after the Letters of Administration was granted the Court directed the beneficiaries to file Submissions together with their proposed mode of distribution, the 1<sup>st</sup> House gave the firm of Birech Ruto & Co. Advocates their proposed mode of distribution and Counsel presented the same to the Court, any party aggrieved by the reasons given in the Judgment that emanated from the consent can only appeal, not seek a review, the Court has powers to set aside or review a consent decree but only upon proof of fraud, collusion or any other agreement and initial lack of ignorance of material facts, that all the beneficiaries have been gathered and the estate has been distributed equally to the beneficiaries. He cited the case of Kenya Commercial Bank Limited vs Specialized Engineering Co. Ltd (1982) KLR 485 and stated that the Applicants have not pleaded any fraud, collusion or any agreement contrary to the public policy or any sufficient reason to justify the setting aside.

### **Analysis and Determination**

24. Upon carefully considering the Record including the Affidavits and Submissions presented, in my view, the broad issue that arises for determination is the following:

“Whether the Applicant has made out a case warranting the review of paragraph 12 of the Judgment delivered herein on 22/12/2015 and also setting aside and/or review of the consent order adopted on 3/05/2021.”
25. From my reading of the record, I gather that the deceased died intestate on 20/10/1993 and left behind two widows and 16 children. In terms of the law of Succession, it is said that he left 2 Houses.
26. The Petition for Letters of Administration was then filed on March 1997 through the firm of Birech & Co. Advocates. The Petitioners were Toiyoi Tabarno Kamar (widow from 1<sup>st</sup> House), Kimitei Kipkosgei Kamar (son from 1<sup>st</sup> House), Tapyotin Kimoi Kamar (widow from 2<sup>nd</sup> House) and Joseph Kipkosgei Kamar (son from 2<sup>nd</sup> House). The Grant of Letters of Administration was then granted on 21/10/1997 to the 4 Petitioners as co-Administrators
27. I also gather that the survivors of the deceased were as follows:



1 <sup>st</sup> House	2 <sup>nd</sup> House
Toiyoi Tabarno Kamar - Widow	Tapyotin Kimoi Kamar – Widow
Mary Jepkemoi Kiboi	Joseph Kipkosgei Kamar
Dr. Kimitei Kipkosgei Kamar Kamar	Ruth Jemutai Kamar
Lilian Kigen Seroney	Prof. Margaret Jepkoech Kamar
Esther Toroitich Rotich	Evelyn Jeruiyot Kipkosgei
John Kibet Kamar	Jane Jesanai Nakedony
Susan Jepkeikei Mibei	Elizabeth Jepyego Kibor
Charles Kibiwot Kamar	Hellen Jesire Kimaiyo
Nerisa Jepkorir Kamar	
Christopher Kimutai Kamar	

28. Thereafter on 2/12/2014, 3 of the 4 Administrators - Joseph Kipkosgei Kamar, Toiyoi Tabarno and Tapyotion Kimoi Kamar - through Rioba Omboto & Co. Advocates filed the Summons for Confirmation of Grant dated 30/07/2014.
29. By filing the said Summons on behalf of the 3 Administrators, it is not clear from the record whether Rioba Omboto & Co. had now formally taken over representation of the Administrators from Birech Ruto & Co. Be that as it may, Birech & Ruto Advocates were among the law firms that filed Written Submissions presenting proposed modes of distribution in respect to the Summons. It filed Submissions on behalf of Dr. Kimitei Kipkosgei Kamar and John Kibet Kamar.
30. By the Notice of Appointment filed on 13/02/2015, Miyenda & Co. Advocates came on record for Charles Kibiwot Kamar who described himself as an Objector. He protested against the mode of distribution proposed by the Administrators and presented his own.
31. By the Judgment delivered on 22/12/2015 by Hon. Lady Justice C.W. Githua, upon considering the Objection filed, determined the Summons for Confirmation. She found that some of the properties comprising the estate, namely, Mosop Chepkorio/21, Mosop/Choroget/326, Uasin Gishu/Munyewet (Kabao), Chepkorio Plot 11 and Eldoret Municipality Block 7/26 had no dispute over their mode of their distribution. She accordingly upheld the mode of distributions proposed by the parties except for the last property, Eldoret Municipality Block 7/26 which she directed be sold and the proceeds thereof be shared amongst the beneficiaries.
32. The 2 properties that the Judge found had disputes were L.R. 7439/Sigowo and Chepkorio/14. She then ruled thereon and distributed the properties amongst the survivors.
33. Being dissatisfied with the Judgment, by the Notice of Motion dated 5/10/2016 and filed on the same date, Charles Kibiwott Kamar, through Messrs Miyenda & Co. Advocates, sought a Review of the Judgment.



34. By the consent order adopted on 14/11/2016, the Advocates on record - Mr. Birech - who described himself as acting for the 1<sup>st</sup> House, Mr. Omboto who described himself as acting for the 2<sup>nd</sup> House and Mr. Miyenda for the Objector - compromised the Objector's said Application dated 5/10/2016 by slightly reviewing the distribution of the estate made earlier in the Judgment of 22/12/2015.
35. By the Notice of Appointment filed on 11/12/2017, Messrs F. Omondi & Co. Advocates came on record for 5 members of the 2<sup>nd</sup> House, namely, Ruth Jemutai Kamar, Evelyn Jeruiyot Kipkosgei, Jane Jesanai Nakodony and Elizabeth Jepyego Kamar. Together with the Notice, they filed the Notice of Motion dated 4/12/2017 seeking the setting aside of clauses 3 and 4 of the said consent order of 14/11/2016. Among the grounds listed in support of the Application was that they were not consulted before the consent was recorded and that their Advocate Mr. David Rioba Omboto who purportedly recorded the consent on their behalf never informed them of the intention to enter into the same. It was also alleged that the Consent had the effect of altering the manner of distribution and sizes of shares distributed by the Court vide the Judgment delivered on 22/12/2015.
36. In the intervening period, by the further Consent recorded on 24/10/2018 through Birech Ruto & Co. and Miyenda & Co. Advocates on behalf of their respective clients, John Kibet Kamar and Charles Kibiwott Kamar were appointed as Administrators in place of Dr. Kimitei Kipkosgei Kamar and Toiyoi Tabarno Kamar who had both now died.
37. By her Ruling delivered on 30/04/2020 in respect of the said Notice of Motion dated 4/12/2017, Hon. Lady Justice Olga Sewe found that the Application lacked merits insofar as it did not allege fraud or collusion or contravention of public policy or want of sufficient material facts in the process leading to recording of the consent. On the issue lack of consultation, the Judge found that all the Advocates for the parties were present in Court and endorsed the consent. The Judge also found that Mr. Omboto was properly on record and therefore possessed full instructions to record the consent as he did. The Judge also held that since each of the two families had nominated respective representatives to take care of their interests, there was no further obligation for Counsel to separately consult each and every other individual member of the respective families before recording the consent. In light of the said findings, the Judge dismissed the Application.
38. A further consent was filed on 3/05/2021 having been executed by Omondi & Co. Advocates acting for the beneficiaries in the 2<sup>nd</sup> House, Miyenda & Co. Advocates acting for the 3<sup>rd</sup> Administrator, Rioba Omboto & Co. Advocates acting for the 1<sup>st</sup> and 4<sup>th</sup> Administrators and Birech, Ruto & Co. Advocates acting for the 2<sup>nd</sup> Administrator. By the consent, the distribution of the property L.R. No. 7439 (Sigowo) amongst the beneficiaries was further slightly altered.
39. It is under the above background therefore that the present Application has been filed challenging this latter consent.
40. The Application has been filed by 6 members of the 1<sup>st</sup> House. It seeks review of a portion of the Judgment delivered on 22/12/2015 and also review and setting aside of the said Consent Order recorded subsequently on 3/05/2021. The ground put forward is basically that the Applicants were never consulted by their own Advocates, Rioba Omboto & Co. and that therefore, they had no knowledge of the recording of the consent.
41. As already narrated above, the Petitioners were 4, namely, Toiyoi Tabarno Kamar (widow from 1<sup>st</sup> House), Kimitei Kipkosgei Kamar (son from 1<sup>st</sup> House), Tapyotin Kimoi Kamar (widow from 2<sup>nd</sup> House) and Joseph Kipkosgei Kamar (son from 2<sup>nd</sup> House) and were all represented by Birech Ruto & Co. Advocates. However, subsequently, Charles Kibiwot Kamar, a member of the 1<sup>st</sup> House disengaged himself by appointing his own Advocate, namely, Miyenda & Co. Advocates.



- 42. Upon the deaths of the representatives of the 1<sup>st</sup> House, Toiyoi Tabarno Kamar and Kimitei Kipkosgei Kamar, two members thereof, John Kibet Kamar and Patrick Kipkemoi Kamar were by consent appointed to substitute the deceased Administrators to oversee the interests of the 1<sup>st</sup> House. It is not disputed that during all this time, the firm of Birech Ruto & Co. Advocates was continuously on record for the 1<sup>st</sup> House. Even the said Consent was recorded pursuant to the Application dated 17/09/1997 filed by the same Birech Ruto & Co. Advocates on behalf of the same 1<sup>st</sup> House.
- 43. I therefore gather that the Applicants are not challenging the fact that Birech Ruto & Co. have always been properly on record for the 1<sup>st</sup> House to which the Applicants belong. Their bone of contention is that their said Advocates did not consult them before recording the consent.
- 44. Coincidentally and as aforesaid, 5 members of the 2<sup>nd</sup> House had earlier filed the Notice of Motion dated 4/12/2017 seeking the setting aside of clauses 3 and 4 of the consent recorded on 14/11/2016. As also already recounted above, among the grounds relied on in support of this earlier Application was that they were not consulted before the consent was recorded and that their Advocate Mr. David Rioba Omboto who recorded it on their behalf never informed them of the intention to enter into the consent. It is therefore apparent that the grounds raised by the said 5 members of the 2<sup>nd</sup> House in the earlier Application are strikingly similar to the grounds now listed by the 6 members of the 1<sup>st</sup> House in the present Application.
- 45. In dismissing the earlier Application, by her Ruling delivered on 30/04/2020, O. Sewe J held as follows:

“(26) There is no controversy that the protagonists were all represented by Counsel in the proceedings culminating in the Consent Order of 14 November 2016. The 1<sup>st</sup> House was represented by Mr. Paul Birech of Birech Ruto & Company Advocates. The 2<sup>nd</sup> House was represented by Mr. David Rioba Omboto of Omboto & Company Advocates; while the Objector was represented by Mr. Miyienda of Miyienda & Company Advocates. All these Advocates were present when the impugned Consent Order was made and they duly signed the court record in acknowledgement of their involvement and participation in the negotiation, crafting and endorsement of the Consent Order. The record also shows that Mr. Miyienda also had instructions at the time to hold brief for Joseph Cheron as an Interested Party.

(27) .....

(28) Under those circumstances, it cannot be said that the Consent Order was made without authority or sufficient instructions, .....

(29) I note that, whereas the Applicants acknowledged that they were duly represented as a house, their cause for complaint was that they were not contacted as individuals, or their views sought as to the proposed changes before the Consent Order was made. They posited that, since each of the beneficiaries had acquired their respective shares upon confirmation of Grant on 22 December 2015 on the basis of the Judgment of the Court, any subsequent application whose import would interfere with an individual’s share in the estate had to be brought to the attention of every individual beneficiary and not just a representative of their house.  
.....

(30) In my careful consideration, there was no obligation on the part of Mr. Omboto to contact each member of the 2<sup>nd</sup> House for purposes of the Consent Order. This is because he had ostensible authority to do what he deemed was in the best interests of the 2<sup>nd</sup> House, having obtained instructions and authority from the two Administrators representing that house, as well as Prof. Margaret Kamar and Everline Kamar, in their capacity as representatives of the 2<sup>nd</sup> House. Indeed, in *Kenya Commercial Bank Ltd vs. Specialized Engineering Co. Ltd* (supra), which was followed in *Samuel Mbugua Ikumbu vs. Barclays Bank of Kenya Ltd* (supra) it was held that:

“An advocate has general authority to compromise on behalf of his client as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding.” (see also *Samuel Wambugu Mwangi vs. Othaya Boys High School* (supra))

(31) Thus, the Applicants were under obligation to demonstrate either that the Consent Order was made in disregard of express negative direction from the beneficiaries or any of them, or that there existed bad faith on the part of Counsel. There is absolutely no proof on both fronts and that being the case, lack of consultation or authority cannot be a justifiable ground for impugning the Consent Order.

46. Although the said holding related to the earlier Application filed by members of the 2<sup>nd</sup> House challenging the consent recorded on 14/11/2016 and which is a separate Application from the present one, I find that the grounds raised being similar, the ratio decidendi and logic thereof applies in equal force to the present Application filed by members of the 1<sup>st</sup> House relating to the consent recorded on 3/05/2021. The holding is even more relevant because it was made in this very case, relates to the same parties herein and touched on consents recorded in this very case.
47. It is also now settled law that a consent Judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out (See Judgment of Hancox JA in the case of *Flora Wasike Vs. Destimo Wamboko* (1988) 1 KAR 625 at page 626).
48. Applying the above principles to the facts of this case, I find that the consent order of 3/05/2021, like the earlier consent order of 14/11/2016, was similarly recorded in the presence and with the consent of all Counsel in the matter, including Counsel for the Applicants. I therefore find that the consent is binding on all parties to the proceedings and on those claiming under them. The consent cannot be varied or discharged since the Applicants have not established or demonstrated the existence of any fraud or collusion or that the same was in any way contrary to the policy of the Court or that the consent was given without sufficient material facts or in mis-apprehension or in ignorance of material fact, or in general for any reason which would enable the Court to set aside an agreement. (See the Court of Appeal case of *Brook Bond Liebig (T) Limited Vs. Mallya* [1975] EA 266).
49. In view thereof and in line with the holding of the Court of Appeal in *Samuel Mbugua Ikumbu v. Barclays Bank of Kenya Limited* [2015] eKLR, I find that the Applicants' Advocate Mr. Birech had general authority to compromise on behalf of his clients as long as he was acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, I decline to interfere with the consent order.



50. I also note that the consent was recorded on 3/05/2021 and the present Application was filed on 5/10/2022, about 17 months later. I find this to be inordinate delay since it has not been explained and neither have the Applicants even disclosed when they learnt of the recording or existence of the consent.
51. If the 17 months delay in applying for review or setting aside of the consent recorded on 3/05/2021 was inordinate then the prayer to set aside paragraph 12 of the Judgment delivered on 22/12/2015 is even worse. That prayer is being made 8 years after the Judgment yet no explanation whatsoever has been offered for the delay.
52. I also take cognisance of the fact that this matter was filed about 26 years ago and ought to have been long concluded by now. It is a sound principle of law that litigation cannot be endless, it must at some point come to an end.
53. Further, the Judgment was already reviewed by consent of the parties recorded on 14/11/2016. Counsel Mr. Paul Birech for the 1<sup>st</sup> House which comprises the present Applicants was part and parcel of that consent and endorsed it. The Applicants therefore had the opportunity, at that stage, to push for inclusion of whatever portions of the Judgment they wished to be reviewed. Having failed to do so, they cannot now come back 8 years later to seek review of the Judgment.
54. The above findings sufficiently dispose of the Application. In the circumstances, I see no reason to venture into the second limb of the Application, namely, that allegedly the consent of 3/05/2021 excludes some of the deceased properties.
55. Nevertheless, in any event, in her said Ruling of 30/04/2020, Sewe J quite exhaustively and intensively analyzed the Judgment of Githua J and agreed that the parties possessed sufficient grounds to enter into the consent of 14/11/2016 to correct the portions of the Judgment that, according to them, were unsatisfactory. The consent was then adopted as an Order of the Court. Seeking to again Review the already Reviewed Judgment offends the Res Judicate rule.
56. Further, I find that the matters raised in the second limb are matters that do not at all fall within the ambit of Review and can only be canvassed on Appeal. For this finding, I refer to the Court of Appeal case of National Bank of Kenya Limited v Ndungu Njau [1997] eKLR where the following was stated:

“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.

In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise, we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.”



57. In view of the above, having carefully considered the facts and the circumstances of this case, I am satisfied that the Application does not meet the criteria and guidelines applicable in Applications of this nature.

**Final Orders**

58. The upshot of my findings above is that the Application is devoid of merits. Accordingly, I issue the following orders:

- i. The Notice of Motion dated 5/10/2022 is hereby dismissed with costs to the 1<sup>st</sup> Respondent.
- ii. In the circumstances, the Administrators are at liberty to finalize implementation of the distribution of the estate.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 6<sup>TH</sup> DAY OF OCTOBER 2023**

**WANANDA J.R. ANURO**

**JUDGE**

