



In re Estate of the Late Kipsang Rochi (Deceased) (Succession Cause 37 of 2000) [2024] KEHC 13875 (KLR) (7 November 2024) (Ruling)

Neutral citation: [2024] KEHC 13875 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
SUCCESSION CAUSE 37 OF 2000
JK SERGON, J
NOVEMBER 7, 2024**

IN THE MATTER OF THE ESTATE OF THE LATE KIPSANG ROCHI (DECEASED)

BETWEEN

EZEKIEL TOWETT ARAP SANG PETITIONER

AND

RICHARD KIPKORIR KOSGEY 1ST PROTESTOR

JOEL KIPKEMOI CHEPKWONY 2ND PROTESTOR

RULING

1. The application coming up for determination is a notice of motion dated 7th June, 2024 seeking the following orders;
 - (i) Spent
 - (ii) Spent
 - (iii) That the honourable court be pleased to review its judgement and/or orders issued on 31st July, 2023 with a view of setting it aside and accommodate the applicant's new evidence in arriving at an appropriate mode of distribution of the deceased's estate.
 - (iv) That upon granting prayer (iii) above, this honourable court be pleased to cancel any titles that might have been issued with respect to the parcel of land registered as kericho/ Kipwastuiyo/399 as a result of the judgement entered on 31st July, 2023.
 - (v) That this honourable court issue orders that it may deem fit and just to grant in the circumstances.
 - (vi) That costs be provided for.



2. The application is supported by grounds on the face of it and the supporting affidavit of Richard Kipkorir Kosgey the applicant herein.
3. The applicant avers that the deceased died intestate and that during his lifetime he had three wives.
4. The applicant avers that he is a son of the 1st house of the deceased and therefore a beneficiary of the estate of the deceased.
5. The applicant avers that this court *vide* a judgement delivered on 31st July, 2023 directed that the estate of the deceased be distributed as per the affidavit of protest signed by himself and Joel Kipkemoi Chepkwony, the 1st protestor herein.
6. The applicant avers that as per the affidavit of protest he and Joel Kipkemoi Chepkwony filed a succession cause in Kericho Chief Magistrate Courts' being no. E156 of 2021 and the same confirmed on 10th August, 2022 and after confirmation of grant they severally requested the petitioner to sign but he refused and/or failed to sign.
7. The applicant avers that the averments in the affidavit of protest are not true. As he has never been a party to any succession proceeding before this court or chief magistrate's court in Kericho succession cause no E156 of 2021.
8. The applicant avers that in the instant proceedings, pursuant to the judgement delivered by this court on 31st July, 2023 and the mode of distribution therein, he is apprehensive that the protestor concealed material facts and misrepresented facts alleging that he signed the said affidavit of protest, which he vehemently denies and hence the said judgement was procured unlawfully.
9. The applicant avers that their deceased father has settled all houses prior to his demise as follows;
 - (i) The 1st house was allocated land no Narok/Transmara/ Ololmasani/380 measuring 2.8 Ha and a portion of Kericho/Kipwastuiyo/399
 - (ii) The 2nd house was settled in Transmara in a property known as Narok/Transmara/ Ololmasani/435
 - (iii) The 3rd house was settled in the subject parcel of the instant proceedings to wit Kericho/ Kipwastuiyo/399 and the remainder of the parcel excised for the 1st house.
10. The applicant avers that it is in the interest of justice that the judgement delivered on 31st July, 2023 be reviewed and /or set aside to enable the distribution of the estate to reflect the wishes of the deceased who had settled the families prior to his demise.
11. The applicant avers that he discovered about these proceedings when he was asked to sign the transmission documents by the 1st protestor.
12. Joel Kipkemoi Chepkwony the 1st protestor/respondent filed a replying affidavit in response to the instant application.
13. The respondent avers that the application is frivolous, vexatious and abuse of court process aimed at delaying the fair and just conclusion of the distribution of the estate of the deceased.
14. The respondent avers that this court in its judgement dated 31st July, 2023 conclusively determined the mode of the distribution of the deceased's estate and that the applicants allegation that he did not sign the affidavit of protest or unaware of the proceedings is untrue and a deliberate falsehood. The applicant was aware of the succession proceedings and actively participated in the deliberations that culminated in the filing of the affidavit of protest.



15. The respondent avers that this court is now *functus officio* and lacks the jurisdiction to entertain any further applications seeking to relitigate issues already resolved.
16. The respondent avers that the applicant has not presented any new or compelling evidence that would warrant the review or setting aside of the judgement.
17. The respondent avers that the applicants assertion of fraud or misrepresentation are unfounded and no substantial proof has been provided to support these claims.
18. The respondent avers that the mode of distribution ordered by the court was fair, just and in line with the wishes of the deceased as understood by all the parties involved.
19. The respondent avers that the applicant failed to meet the legal threshold for review under order 45 rule 1 of the [Civil Procedure Rules](#).
20. The respondent avers that the claims advanced by the applicant were ventilated during the trial and that the judgement of this court dated 31st July, 2023 was a fair and just determination of the issues in dispute and the appropriate remedy for the applicant if aggrieved with the judgement lies in filing a appeal not a review.
21. Joel Kipkemoi Chepkwony the 1st protestor/respondent and Ezekiel Towett Arap Sang the 1st petitioner/respondent filed a preliminary objection in response to the application based on the following grounds;
 - (i) That this honourable court delivered a final and conclusive judgement on 31st July, 2023 regarding the distribution of the estate of the deceased. The court is therefore *functus officio* having exhausted its jurisdiction on the matter. As such this court lacks jurisdiction to reopen the matter or to review its earlier judgement.
 - (ii) That the application does not meet the mandatory requirements for review as stipulated under order 45 rule of the [Civil Procedure Rules](#).
 - (iii) That the judgement dated on 31st July, 2023 directed the distribution of the estate pursuant to an affidavit of protest, therefore the applicants contention that they did not sign the affidavit or were unaware of the proceedings does not invalidate the finality of the judgement in the appropriate recourse, if at all lies in an appeal not review.
 - (iv) That the application for review is an attempt to relitigate issues that have already been conclusively determined by this honourable court.
 - (v) That it is in the interest of justice and finality in litigation that the distribution of the estate of the deceased proceeds as directed in the judgement dated 31st July, 2023 under the guise of review, undermines the principle of finality in succession matters.
22. The parties were directed to file written submissions, at the time of writing this ruling the 1st protestor/ respondent had complied and filed their submissions on the Case Tracking System.
23. The 1st protestor/respondent filed submissions in support of the preliminary objection and reiterated that this court had exhausted its jurisdiction by delivering a final judgement on 31st July, 2023 thereby rendering it *functus officio* regarding the distribution of the estate of the deceased and therefore the applicant's request for review contravenes the principle of finality in the succession process and cited the case of the [Estate of M'Ngarithi M'Miriti \(Deceased\)](#) (2017) eKLR, the court reiterated that finality in succession matter prevents ongoing disputes over estates, thus upholding, the efficiency and



solemnity required in distribution the deceased's person's estates. Permitting further challenges post-judgment disrupts the orderly administration of justice in succession matters.

24. The 1st protestor/respondent reiterated that the application for review does not meet the threshold for review under order 45 rule 1 of the Civil Procedure Rules.
25. The 1st protestor/respondent contended that the applicant's attempt to reopen the matter which was determined and concluded under the guise of a review constitutes an abuse of court process. He cited the case of *Kariuki v Kariuki* (1983) KLR 225, where it was held that issues that can be raised on appeal should not be disguised as grounds for review.
26. I have considered the pleadings, responses and submissions on record and find that the following issue is ripe for determination; First, whether this court should set aside/ review its judgement and/or orders issued on 31st July, 2023 and secondly, accommodate the applicant's new evidence in arriving at an appropriate mode of distribution of the deceased's estate.
27. On the issue as to whether to set aside or review the judgement of this court delivered on 31st July, 2023, the answer is in the negative, this court having extensively looked at the application for review finds that the application does not meet the threshold for review as prescribed under Order 45, Rule 1 of the *Civil Procedure Rules*, the said provision stipulates that;
 - “ 1. Any person considering himself aggrieved—
 - (1) (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 on account of some mistake or error apparent on the face of the record, or 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.
 - (2) ...”
28. This court, having carefully considered the application, finds that the applicant did not and has not proved the existence of or discovery of any new and important matter or evidence to warrant review of the court's orders.
29. The applicant did not demonstrate any mistake or error on the face of the record. He neither showed nor demonstrated there is any sufficient reason to warrant the court exercising its discretion and allowing the review as prayed.
30. This court having considered this case on its merits and delivered the judgement dated 31st July, 2023 is rendered *functus officio* regarding the distribution of the estate of the deceased and therefore the applicant's request for review contravenes the principle of finality in the succession process.
31. In light of the foregoing, this court therefore finds that the preliminary objection filed by the respondents has merit.



32. Consequently, the summons dated 7th June, 2024 is found to be without merit. The same is dismissed with each party bearing their own costs.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 7TH DAY OF NOVEMBER, 2024.

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J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Rutoh

Oduor holding brief for Dr. Mutai for 2nd Protestor

No Appearance for Jausiku for Objector

