In re Estate of Kipsitet arap Suter (Deceased) (Succession Cause 266 of 2010) [2024] KEHC 13493 (KLR) (6 November 2024) (Ruling)

Neutral citation: [2024] KEHC 13493 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 266 OF 2010

JRA WANANDA, J

NOVEMBER 6, 2024

BETWEEN

FRANCIS KIPTARUS SUTER ..... 1ST PETITIONER

ANNA TARIKI KIPSITET ..... 2ND PETITIONER

ALFONCE KIPTANUI KIPSITET ..... 3RD PETITIONER

AND

RAEL JEPKOSGEI MUTAI ..... OBJECTOR

RULING

1. I summarized the background of this Cause in my earlier Ruling delivered herein on 17/11/2023 in which I dismissed a Preliminary Objection that had raised a claim of Res Judicata. I captured the same as follows:

    2. The background of this matter is that the deceased, Kipsitet arap Suter died intestate on 26/02/20007 at the age of 94 years. On 17/11/2010, in their capacity as sons and a daughter of the deceased, the Petitioners applied for Grant of Letters of Administration. The same was granted by the Court 4/07/2011 and was subsequently confirmed on 30/07/2018.

    3. However, upon a challenge filed by the Objector, vide the Judgment of H. Omondi J (as she then was), the Grant was subsequently revoked on 23/10/2019, a new one issued and confirmed on 28/09/2019. Aggrieved by this decision, the Petitioners filed a Notice of Appeal and followed it up with the Application dated 8/03/2021 seeking two substantive prayers. The first one was that one William Kosgei Chemjor be substituted into this matter in place of the 2nd Petitioner, Anna Teriki Kipsitet who had died on 11/04/2020. The second one was that, pending hearing and determination of the intended Appeal, the Elgeyo Marakwet County Land Registrar be restrained from registering any subdivision, transfer, charge or such

other interests over the property known as Irong/Iten/248 whose distribution the Judge had redistributed.

4. The Application was dismissed vide the Ruling of Omondi J dated 28/12/2021 and delivered on her behalf by Nyakundi J on 14/02/2022.

5. Undeterred, the Petitioners have now come back with the Summons dated 10/05/2022 urging the Court to review, set aside and/or vary the said Ruling of Omondi J, dated 28/12/2021 and delivered on 14/02/2022. It is this Application that the present Preliminary Objection has been filed against."

2. Having dismissed the Objector's Preliminary Objection therefore, the stage is now set for determination of the substantive Application, namely, the Petitioners' Summons dated 10/5/2022. The same is filed through Messrs Magut Kirigo & Co. Advocates and seeks the following orders:

i. [.....] spent.

ii. [.....] spent.

iii. The Honourable Court be pleased to review, set aside and or vary the Ruling and orders made by Hon. Lady Justice H.A Omondi, J. on 28/12/2021 and delivered on 14/2/2022 and in its place there be an order allowing the Summons dated 8/3/2021 in its entirety.

3. The Application is expressed to be brought under Section 45 & 47 of the *Law of Succession Act*, Rules 49 and 73 of the Probate and Administration Rules, Section 80 & 99 of the *Civil Procedure Act*, and "all other enabling legal provisions". It is premised on the grounds stated on the face thereof and is supported by the Affidavit sworn by the 1st Petitioner, Francis Kiptarus Suter.

4. In the Affidavit, the 1st Petitioner stated that he has the authority of the 3rd Petitioner to swear the Affidavit. He then deponed that the 3rd Petitioner (Alfonce Kiptanui Kipsitet), the late Cosmas Sisei and himself are the sons of the deceased, alongside Paul Kipkoech Kipsitet and the late John Kimutai. He added that the 2nd Petitioner (Anna Teriki Kipsitet) was the widow of their said late brother (Cosmas Sisei Kipsitet) who had been appointed a joint Administrator with them as well as Paul Kipkoech Kipsitet, that upon the death of their father (deceased), they held a family meeting whereupon they agreed on the mode of distribution which was based on wives/houses as follows:

1st Widow (Tamining Kimoi) - 1st House	
Cosmas Suter	15 acres
Paul Kipsitet	20 acres
2nd Widow (Tabutmoi Sote Kipsitet) - 2nd House	
Francis Suter	8 acres
Alfonce Kipsitet	10 acres
John Kipsitet	13 acres

5. He deponed that the matter proceeded in Court until the Grant was confirmed on 30/7/2018, that however, Rael Jepkosgei Mutai (widow of the late John Kimutai) filed an Objection and after

a protracted hearing, the Court delivered a Judgment on 23/10/2019 allowing the Objection and distributing the land parcel Irong/Iten/248 between the said Rael Jepkosgei Mutai (Objector) and the said Paul Kipkoech Kipsitet. He deponed further that they immediately filed a Notice of Appeal and applied for typed proceedings, that the 2nd Petitioner (Anna Teriki Kipsitet) died on 11/4/2020 and a Grant of Letters of Administration Ad Litem was subsequently obtained by one of her sons (William Kosgei Chemjor), that they then filed the Summons dated 8/3/2021 seeking the appointment of the said William Kosgei Chemjor in substitution for the deceased (his mother) to enable them proceed with the matter to its logical conclusion on behalf of the 2nd Petitioner's estate and that of his deceased father, Cosmas Sisei Suter.

6. The 1st Petitioner deponed further that the Objector has commenced the process of sub-division of the estate property pursuant to the said Judgment but which is the subject of the intended appeal and may dispose of or otherwise deal with it to the Petitioners' detriment unless restrained by this Court. He also urged that they had similarly moved the Court to intervene by issuing orders to preserve the property so as to avoid the same being sub-divided and new titles being issued or transferred to innocent third parties and thereby rendering the intended appeal before the Court of Appeal nugatory, that when the Court finally delivered its Ruling on 14/2/2022, there was a material error apparent on the face of the record in that the Court did not address the prayer for substitution which was at the core of the Summons. According to him, the Judge dwelt on the prayer for injunction which was subsidiary to the one of substitution despite her having listed all the prayers at the beginning of the Ruling, that the Court was also in error by making a determination on the premise that they had sought for stay of execution yet the correct position is that they were seeking orders of injunction barring the Land Registrar from dealing with the property, pending the appeal. He contended that the principles applicable in dealing with Applications for injunction are different from those of stay of execution hence it amounts to material error apparent on the face of the record. In conclusion, he deponed that there are thus sufficient grounds to warrant the Court setting aside and/reviewing its earlier orders.

Replying Affidavit

7. The Application is opposed by the Objector vide her Replying Affidavit sworn on 27/05/2022 and filed through Messrs W. Kigen & Co. Advocates. In the Affidavit, she deponed that the Petitioners filed a similar Application on 10/3/2021 which was dismissed on 28/12/2021 and that the Application is therefore res-judicata. She added that she filed Summons for Revocation/Annulment of Grant on 26/10/2016 and Judgment was delivered on 23/10/2019 and a Certificate of Confirmation issued in her favour and Paul Kipkoech Kipsitet on 28/11/2019, and that on 31/10/2019 the Petitioners filed a Notice of Appeal but have not taken steps to file the substantive Appeal at the Court of Appeal. She deponed further that in the Certificate of Delay issued, it is clear that by 5/3/2020, the certified copies of proceedings and Judgment were ready for collection and the Petitioners had all the time to lodge their Appeal and that it is over 1 year since the Petitioners collected the Certificate of delay on 10/3/2020.

8. She deponed further that the orders sought cannot be issued since there is no Appeal pending in respect of which a stay order can issue pending its disposal since a draft Memorandum of Appeal has not been annexed to show the merits or arguability of the intended Appeal, and that the Application is an afterthought. She contended further that the Petitioners were granted 30 days stay after the delivery of the Judgment but never took any steps to lodge the Appeal, that the instant Application was filed with intent to delay the fruits of the Judgment and that she will be greatly prejudiced if the prayers sought are granted.

Hearing of the Application

9. The Application was then canvassed by way of written Submissions. Pursuant thereto, the Petitioners filed their Submissions 31/1/2024 while the Objector filed hers on 5/3/2024.

Petitioners-Applicants' Submissions

10. Counsel for the Petitioners cited Section 80 of the *Civil Procedure Act* which confers upon the Court the power to review its decree or order and also Order 45 of the Civil Procedure Rules which, he submitted, sets out the rules for setting aside a Judgment or Court. He cited the case of Republic vs. Public Procurement Administrative Review Board & 2 Others [2018] eKLR, the case of Pancras T Swai Vs. Kenya Breweries Limited [2014] eKLR and also the case of Ajit Kumar Rath Vs. State of Orisa & Others, 9 Supreme Court Cases 596. He submitted that an omission by the Court led to the failure to take into consideration the main prayer in the Application which had sought for substitution of the deceased Petitioner. He cited the case of Nyamogo & Nyamogo Vs. Kogo [2001] EA 170.

11. Counsel appreciated that the Courts have established what would constitute "sufficient reasons" for review of a decision, namely, that it is only for correction of patent errors of law or fact which stare in the face without any elaborate argument and cannot be claimed for a fresh hearing or correction of an erroneous view that was taken. He urged that failure by the Court to pronounce itself on the prayer for substitution is an apparent error or omission which is self-evident and requires no elaborate argument, that therefore, the Application meets the threshold for review.

Objector-Respondent's Submissions

12. On his part, Counsel for the Objector observed that the review sought is on the prayer for substitution but that in seeking the order, the Petitioners have also indirectly couched their prayer to include the Court allowing the Summons dated 8/3/2021 in its entirety. According to Counsel, what has been placed before the Court is, in fact, an appeal against the Ruling, and not an Application for review. He urged that for this Court to determine whether there was "an error on the face of the record", the Court would have to examine the prayers made in Application dated 8/3/2021, including whether it was merited in the first place. According to him, the error alleged requires a detailed examination on whether the prayer for substitution of a deceased personal representative of an estate could be issued in law. He urged further that it is trite that for a reason to suffice as "error on the face of the record", the error should not require any such detailed examination. Counsel submitted further that Courts have held that an error which can only be resolved by a long process of reasoning cannot be treated as "an error apparent on the face of the record". He cited the case of *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR High Court of Kenya, Nairobi Judicial Review Division Misc. Application No. 317 of 2018*.

13. According to Counsel, the Petitioners are seeking to review the Ruling in order to achieve the substitution of the 2nd Petitioner, that the law is clear on the procedure to be followed when any of the personal representatives of the estate has died, and that in such a case, the Grant becomes inoperative and the only recourse is to revoke it, not to review it. He cited the case of In the Estate of Simon Ngugi Nganga (2013) eKLR. He contended that the Application is an afterthought, and that the Petitioners filed notice of intention to appeal but the statutory period to appeal has since lapsed.

14. In regard to the prayer for injunction, Counsel submitted that a temporary injunction can only be issued pending an existing cause of action, and only where the same is not statute-barred, that the Petitioners are seeking injunction barring the Respondent from enjoying fruits of her judgment yet that they have no cause of action challenging the decision having filed a Notice of Appeal on

31/10/2019 but, to date, they have never preferred any substantive Appeal. He urged that it will be unfair and unjust to issue injunction orders against execution when there will never be any appeal to reverse the decision injuncted against since the intended appeal is already statute-barred under Rule 83 of the Court of Appeal Rules 2010. Further, Counsel submitted that the Application is a replica of what was sought in the earlier Application dated 8/3/2021, which Application was heard and determined on merit. He reiterated that the prayer for an injunction is therefore res judicata, and is barred under Section 7 of the *Civil Procedure Act*.

Determination

15. The issue herein is "whether the Court should review the Ruling of by H. Omondi J (as she then was) dated 28/12/2021 and delivered on her behalf by Nyakundi J on 14/02/2022".

16. Review of orders in a Succession Cause is governed by Rule 63(1) of the Probate and Administration Rules, which provides as follows:

> " 63. Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules
>
> 1. Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules."

17. It is therefore clear from the foregoing that the only provisions of the Civil Procedure Rules imported to the *Law of Succession Act* are those listed above and which includes Order 45 of the Civil Procedure Rules which relates to Review (see John Mundia Njoroge & 9 Others vs. Cecilia Muthoni Njoroge & Another [2016] eKLR).

18. In the circumstances, any party seeking review of orders in a probate or Succession matter must meet the requirements set under Order 45(1). The same provides 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 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 judgment to the court which passed the decree or made the order without unreasonable delay."

19. Order 45 therefore provides for 3 circumstances under which an order for review can be made. The first one is where there has been "discovery of new and important matter or evidence", the second is where there has been "a mistake or error apparent on the face of the record" and the third is "for any other sufficient reason". The Petitioners have come under the ground "mistake or error apparent on the face of the record". The question therefore is whether the Petitioners have successfully brought themselves within that ground?

20. Regarding "an error apparent on the face of the record", the Court of Appeal, in the case of Muyodi -v- Industrial and Commercial Development Corporation & Another (2006) 1 EA 243, described the phrase in the following terms:

> "....in Nyamogo & Nyamogo -v- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal..."

21. Similarly, "an error apparent on the face of the record", was described in the Tanzanian case of Chandrakhant Joshibhai Patel -v- R [2004] TLR, 218 as one that:

> "...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions.'

22. There is also the case of National Bank of Kenya Limited v Ndungu Njau [1997] eKLR, where the Court of Appeal had the following to say:

> "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."

23. It is therefore clear that "an error apparent on the face of record" must be one that is obvious to the eye, and self-evident. It must be one which when considered, would not yield two results and does not require elaborate arguments to be established.

24. In this case, the Petitioners want the Court to review the Ruling dated 28/12/2021 on the ground that there is a material "error on the face of the record" in that the Court did not address the prayer for substitution which was the core of the Summons and secondly, that the Court erroneously dealt with the prayer for temporary injunction as one for stay of execution pending Appeal.

25. I have keenly perused the Petitioners' earlier Summons dated 8/3/2021 vis a vis the impugned Ruling rendered on 14/2/2022. It is clear that in the said Summons, the Petitioners primarily sought for an order of temporary injunction restraining the County Land Registrar, Elgeyo Marakwet from registering any sub-division, transfer, charge or in any other such manner, dealing with the land parcel Irong/Iten/248, pending the hearing and determination of the intended Appeal challenging the Judgment delivered herein on 23/10/2019. They also sought for an order that one William Kosgei Chemjor be substituted in place of his mother, the 2nd Petitioner, who had since passed on. The Court, in the said Ruling, rendered a determination which was in terms of a determination of a prayer for stay of execution pending Appeal, rather than as an Application for temporary injunction as had been prayed. However, clearly, the Court did not address the second prayer, the one for substitution of the deceased Petitioner-Administrator. However, the Court then dismissed the entire Summons.

26. With regard to the prayer seeking a temporary injunction restraining the County Land Registrar from acting on the said Judgment pending the intended appeal, I find it to be mischievous and amounting to mere tautology to argue that the fact that Omondi J (as she then was) treated it as a prayer for stay pending Appeal caused any injustice. First, there is no provision for issuance by the High Court of a temporary order of injunction pending Appeal in a concluded matter already determined by itself, where, as herein, it has already rendered its final Judgement. Once the High Court has rendered its final Judgment as herein, and a dissatisfied party wishes to move to the Court of Appeal, the only recourse available to that party to preserve the subject matter pending Appeal is to apply for an order of stay of execution pending Appeal, not a temporary injunction. The power to grant a temporary injunction pending Appeal is only available at the Court of Appeal before which such party would be intending to prefer an Appeal. In that regard, Rule 5(2) of the Court of Appeal Rules provides as follows:

> 2. Subject to sub rule (1) the institution of an appeal shall not operate to suspend any sentence or to stay execution but the Court may -
>
> .....
>
> b. in any civil proceedings where or notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just"

27. There is no provision in the High Court for issuance of a temporary injunction pending Appeal against its own final Judgment. H. Omondi J could therefore have dismissed or even struck out that prayer on the above ground alone. The Petitioner should therefore even be grateful that the Judge opted to treat the prayer as one for stay pending Appeal. This Court having therefore rendered its Judgment on 23/10/2019, the only preservatory orders that it could have granted to the Petitioners was an order of stay of execution, not an injunction. The argument that the prayer for injunction was purportedly treated as one for stay of execution cannot therefore form the basis for the quest for review on the ground of there being a "mistake or error apparent on the face of the record".

28. I also note that the Petitioners' Notice of Appeal was filed way back on 31/10/2019, about 5 years ago. There is however no evidence that the substantive Appeal has been filed to date yet the Certificate of Delay issued indicates that the typed proceedings have been available for collection since 5/03/2020 for the purposes of enabling the Petitioners to compile, prepare and file their Record of Appeal at the Court of Appeal. In respect thereto, I cite Rules 84(1) and 85(1) of the Court of Appeal Rules which provide as follows:

> 84(1) Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged— .....

> 85(1) If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, that party shall be deemed to have withdrawn the notice of appeal and the Court may, on its own motion or on application by any other party, make such order.

29. Considering the express timelines prescribed above, unless the Petitioners obtain an extension of time from the Court of Appeal (which, in my view, is quite unlikely), the intention to Appeal is for all intents and purposes now repudiated as the window for doing so has long closed. In the circumstances, neither the prayer for stay nor for injunction seems viable. In the circumstances, even if "a mistake or error apparent on the face of the record" would have been demonstrated, still, it would be pointless and useless to review the order of H. Omondi J (as she then was) for the purpose of determining the prayer for injunction.

30. The second ground for seeking review is that there was "a mistake or error" insofar as the Ruling of Omondi J (as she then was) dated 28/12/2021 and delivered on her behalf by Nyakundi J on 14/02/2022, did not deal with the prayer for substitution of the deceased Administrator (2nd Petitioner). There is no doubt that the issue in respect to which the Petitioners are seeking a review is the prayer that one William Kosgei Chemjor be substituted in this matter as a co-Administrator in place of her now late mother, the 2nd Petitioner, Anna Teriki Kipsitet who died on 11/04/2020. I have perused the Ruling and note that truly, the Ruling did not address this prayer for substitution. For this reason, I agree that indeed, this omission amounted to "a mistake or error apparent on the face of the record". Accordingly, I review that portion of the Ruling and proceed to determine the prayer for substitution on its merits.

31. In challenging the prayer, the Objector's Counsel has taken the position that the same cannot be granted since, according to him, when any of the personal representatives of an estate dies, the Grant becomes inoperative and the only recourse is to revoke it, not to substitute such dead legal representative. He cited the decision of W. Musyoka J made in the case of In the Estate of Simon Ngugi Nganga (2013) eKLR which I am aware of in any case. This issue is governed by Section 81 of the *Law of Succession Act* which provides as follows"

> " Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executor or administrators shall become vested in the survivors or survivor of them"

32. In accordance with the above provision, my own view is that where there are more than one Administrator appointed and only one dies leaving the other or others, there would be no need to revoke the Grant. All that needs to be done to maintain the validity of the Grant is to either formally remove the name of the dead Administrator from the Grant and leave the remaining to continue as Administrator(s), or in the alternative, appoint one new Administrator in replacement of the dead Administrator. This is even more necessary in polygamous families where Administrators are usually appointed from each of the "houses". Only where the dead Administrator had been appointed as a single Administrator would there be need to revoke the entire Grant and begin afresh. In the circumstances, since in this case there are other surviving Administrators lawfully appointed, I find no difficulty with the prayer to appoint a replacement Administrator and accordingly, I grant the prayer.

33. However, even as I appoint the replacement Administrator, it is not clear of what use such appointment shall be to the Petitioners since by its said Judgment delivered on 23/10/2019, the Court long concluded its role of distributing the estate and the purported Appeal earlier said to be intended also appears to have fallen by the wayside. Be that as it may, I leave it to the Petitioners to chart their way forward, if any.

Final orders

34. The upshot of my findings is that I order as follows:

    i. The Petitioners' Summons dated 10/05/2022 partially succeeds with the consequence that the Ruling dated 28/12/2021 and delivered herein on 14/02/2022, is partially reviewed but only to the extent that prayer 3 of the Petitioner's earlier Summons dated 8/03/2021 is allowed.

    ii. Consequently, and for avoidance of doubt therefore, the only effect of the order (i) above is that William Kosgei Chemjor is hereby appointed as an additional co-Administrator in replacement of the now deceased 2nd Administrator, Anna Teriki Kipsitet.

    iii. Each party shall bear its own costs of the instant Application.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 6TH DAY OF NOVEMBER 2024

.....

WANANDA J. ANURO

JUDGE

Delivered in the presence of:

Rurii for Kamau Lagat for Petitioners

Kigen for Objector

Court Assistant: Brian Kimathi