



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**PROBATE AND ADMINISTRATION CAUSE NO.63 OF 2002**

**IN THE MATTER OF THE ESTATE OF THE LATE DAUDI CHEPTUM SAWE DECEASED**

**RAEL TARKOK SAWE.....1<sup>ST</sup> PETITIONER**

**PHILIP KIPROP SAWE.....2<sup>ND</sup> PETITIONER**

**FRANCIS KIPKEBOI SAWE.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**PATRICIA SAWE.....1<sup>ST</sup> OBJECTOR**

**JANE JEPKEMBOI SAWE.....2<sup>ND</sup> OBJECTOR**

**EUNICE JELIMO SAWE.....3<sup>RD</sup> OBJECTOR**

**ROY KIPRONO SAWE.....4<sup>TH</sup> OBJECTOR**

**RUTH CHEMUTAI SAWE.....5<sup>TH</sup> OBJECTOR**

**LEAH JELAGAT SAWE.....1<sup>ST</sup> APPLICANT**

**EMMY JEBET SAWE.....2<sup>ND</sup> APPLICANT**

**RULING**

By an application dated 28<sup>th</sup> October, 2020 the Applicants seek orders that;

1. Spent
2. Spent
3. Spent
4. Spent
5. The applicants be admitted as objectors in the succession proceedings.
6. This Honourable Court be pleased to set aside the mediation settlement made on 9<sup>th</sup> May 2019 and adopted as judgment of this court on 25<sup>th</sup> November, 2019 and any subsequent orders thereto and the applicants be allowed to participate in any legal proceedings over the estate of the late DAUDI CHEPTUM SAWE.
7. The costs be borne by the respondents.

The application is supported by the annexed affidavit of Leah Jelagat Sawe sworn on 28<sup>th</sup> October, 2020 and is premised on grounds that;

1. The applicants are daughters of the late DAUDI CHEPTUM SAWE who died intestate in 2002.
2. Despite being from the first house through their mother (deceased)- Lina Tinko Sawe, the applicants have been excluded from the succession proceedings involving their late father.
3. The petitioners obtained grant of Letters of Administration on 10<sup>th</sup> May, 2002.
4. The petitioners are guilty of material non-disclosure as they did not include all the beneficiaries of the deceased and expressly omitted the entire first house.
5. The entire family had not consented to the letters of administration being issued to the petitioners as is required by law nor to the mediation settlement.
6. The interests of the 1<sup>st</sup> house will not be catered for unless they are included in the list of beneficiaries and participate in succession proceedings.
7. The petitioners did not comply with the provisions of law which are conditions precedent to the making of the said grant.
8. The applicants only learnt of the existence of the succession proceedings after their half siblings and step-mother (respondents), through their advocates, started the process of surveying the parcel of land known as LR No. 10520, situate at Plateau-Uasin Gishu.
9. The Honourable Court is seized with unfettered discretion to grant the orders sought.

The application is opposed by the 4<sup>th</sup> objector who relies on a replying affidavit sworn on 4<sup>th</sup> December, 2020 by Roy Kiprono Sawe. The 1<sup>st</sup> objector equally opposes the said application and relies on the affidavit sworn on 7<sup>th</sup> December, 2020 by Patricia Sawe. The application is also opposed by the 1<sup>st</sup> petitioner who relies on the affidavit sworn on 8<sup>th</sup> December, 2020 by Rael Tarkok Sawe.

The applicants claim that the petitioners failed to disclose all the beneficiaries of the deceased when they petitioned and obtained the Grant of Letters of Administration Intestate on 10<sup>th</sup> May, 2002. It is their case that the deceased had two wives and that they belong to the 1<sup>st</sup> house which was never included in these instant proceedings. It was also their case that they never consented to the Grant of Letters of Administration Intestate being issued to the petitioners as per the requirements of the law.

The 1<sup>st</sup> and 4<sup>th</sup> objectors in response to the said application conceded that the deceased had other issues arising out of another relationship. They however, contended that the deceased person was never married to one Lina Tinko Sawe (deceased) as alleged by the applicants. It was also their contention that from the said relationship the deceased had three daughters and the entire list of persons listed as beneficiaries/children of the deceased in this instant application. It was the objectors' contention that the interest of the three known daughters of the deceased had already been catered for by their allocation of all that parcel of land known

as **MOSOP/CHEPKORIO/235** which they were to share equally amongst themselves. It was their case that the applicants' interests having been fully catered under parcel of land known as **MOSOP/CHEPKORIO/235** and therefore they have no reason of being enjoined in these proceedings.

Parties agreed to canvass this application by way of written submissions. The applicants filed their written submissions on 25<sup>th</sup> February, 2021 and the 1<sup>st</sup> petitioner filed her written submissions on 2<sup>nd</sup> June, 2021.

#### **ANALYSIS AND DETERMINATION**

From the evidence and submissions on record, it is clear that what is being sought by the applicants herein is a review of this court's adoption of the mediation agreement as a judgment of the court.

The law on review applicable to this case is **Order 45 Rule 1** of the **Civil Procedure Rules, 2010** which provides as follows;

**“1 (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 review of judgement to the court which passed the decree or made the order without unreasonable delay.”**

In ***Kenya Commercial Bank Ltd Versus Specialized Engineering Co. Ltd [1982] KIR 485***, it was held that an order entered into by consent

is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud, or collusion, or by an agreement contrary to the policy of the Court, or where the consent was given without sufficient material facts, or in representation or ignorance of such facts in general for a reason which would enable the court to set aside an agreement. Justice Harris at page 493 opined:

***“The making by a court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates, and when made, such an order is not lightly to be set aside or varied save by consent or one or other of the recognized grounds.”***

It is evident, and even conceded by the respondents herein that the deceased had other children that were not included by the petitioners in arriving at the mediation settlement agreement dated 9<sup>th</sup> May, 2019 which was subsequently adopted as the judgement of this court on 25<sup>th</sup> November, 2019. A perusal of the said mediation settlement agreement will show that the applicants were never listed as part of the rightful heirs/beneficiaries of the estate of the deceased. It is without doubt that some of the beneficiaries never participated in arriving at the said mediation settlement agreement. It follows therefore that the orders that I gave on 25<sup>th</sup> November, 2019 adopting the mediation settlement agreement, were in error. The error has to be corrected by review to avoid an injustice.

The result is that the application dated 28<sup>th</sup> October 2020 is allowed. The proceedings of 25<sup>th</sup> November, 2019 and the order adopting the mediation agreement dated 9<sup>th</sup> May, 2019 as the judgment of this court are hereby reviewed and set aside. Costs be in the cause.

The matter be subjected to fresh mediation where all the beneficiaries should participate. Mediation Deputy Registrar to kick start the process.

**S.M GITHINJI**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 16TH DAY OF JUNE, 2021.**

In the presence of:-

Mr. Kipnyekewei for the Objectors/applicants

Mr. Mathai for the Petitioners/Respondents

Mr. Aseso for the two additional parties.

Ms Gladys – Court assistant