



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**SUCCESSION CAUSE NO.13 OF 2014**

**IN THE MATTER OF THE ESTATE OF CHEBONGOI ARAP CHEPKOSIOM**

**alias KIPCHEBONGOI CHEPKOSIOM (DECEASED)**

**BENARD SANG**

**MICHAEL CHEBONGOI.....PETITIONERS/RESPONDENTS**

**AND**

**JULIUS KIPKOECH CHEPKWONY.....OBJECTOR/APPLICANT**

**RULING**

1. Before me is an application by way of a Notice of Motion dated 4<sup>th</sup> June 2018 filed by Julius Kipkoech Chepkwony, the objector through counsel Ms. Onesmus Langat & Company.

2. The application was filed under section 80 and 3A of the Civil Procedure Act (Cap.21), and Order 45 rules 1, 2 and 3 of the Civil Procedure Rules and seeks the following orders-

**1) (spent)**

**2) (Spent)**

**3) That the Honourable Court be pleased to review and/or set aside the ruling delivered on 15<sup>th</sup> November 2017 and all consequential orders and grant leave to the objector/applicant herein to adduce *viva voce* evidence to prove or disapprove that all that property referred to as Kericho/Kipchimchim/957 was indeed a gift *mortis causa* made by the deceased to 1<sup>st</sup> and 2<sup>nd</sup> houses notwithstanding that there has been no complete transfer of legal title.**

**4) That the court be pleased to give directions with regard to who to undertake surveys of the subdivisions and how to deal with the permanent developments are affected by the orders for subdivision of the estate of the deceased.**

**5) That costs of this application be provided for.**

3. The application has grounds on the face of the Notice of Motion, that the estate remained un-administered for over 36 years and it could thus be right to dispose of if by *viva voce* evidence as opposed to written submissions to make the court get full facts; that *viva voce* evidence could have made the facts clearer, as the objector and other members of the 1<sup>st</sup> and 2<sup>nd</sup> houses had lived at Kericho/Kipchimchim/957 for close to 40 years without interruption, that once the ruling was delivered the petitioners proceeded to undertake biased survey without involving the objector and other members of the 1<sup>st</sup> and 2<sup>nd</sup> houses and had uprooted 50 years old tea bushes and demolished permanent buildings; that there was an error on the face of the court's ruling as it never gave directions on how the survey on Kericho/Kipchimchim/957 would be conducted and how the 50 year old tea bushes and permanent buildings erected by the objector/applicant and other members of 1<sup>st</sup> and 2<sup>nd</sup> houses would be dealt with; and lastly that the ruling brought about a lot of tension and disharmony in the extended family.

4. The application was filed with a supporting affidavit sworn by the applicant on 4<sup>th</sup> June 2018, which amplifies the grounds on the face of the application.

5. The application was opposed through a replying affidavit sworn by Bernard Sang the 1<sup>st</sup> petitioner/respondent on 21<sup>st</sup> September 2018, in which it was deponed that the application was fundamentally defective and founded on wrong provisions of law as stipulated under Rule 63 of the Probate and Administration Rules; that there was nothing to show discovery of any new important matter or evidence not within knowledge of the applicant at the time the court orders were made; that the court ruling was made in compliance with the applicable law; that it was not true that biased survey was conducted which interfered with permanent structures and developments undertaken by the objector; and that no photographs were filed on the said developments; that there was no requirement for Land Control Board consent to subdivide an estate of a deceased person; and that the Grant was confirmed and certificate of confirmed grant issued in September 2017.

6. The application proceeded by way of filing written submissions. The objector/applicant's counsel Onesmus Langat & Co. Advocates filed written submissions on 13<sup>th</sup> June 2019, while the petitioners/respondents' counsel M/s J. K. Kirui & Co. Advocates filed submissions on 18<sup>th</sup> June 2019. Mr. Mwita for the applicant and Ms Kitur for the respondent, who appeared in court, relied on the written submissions filed.

7. This is an application for review of the court's ruling delivered by Justice Mumbi Ngugi, on 15<sup>th</sup> November 2017. It does not deal with the Certificate of Confirmed Grant of Letters of Administration which was signed by the Judge on the same date distributing the estate of the deceased to the beneficiaries, including the objector/applicant herein. The objector/applicant comes from the 2<sup>nd</sup> house, in this Succession Cause. I note that the two land assets that is Kericho/Kipchimchim/957 and Kericho/Kipchimchim/954 were distributed to the three houses taking into account the spouses and number of children in each of the three (3) houses.

8. I note also that the objector has come to this court alone, and has not enjoined any of the other beneficiaries. He has also come to this court using the Civil Procedure Act and Rules.

9. The application will not succeed, firstly because the applicant has come to this court under the wrong law, the Civil Procedure Act and Rules, not through the Provisions of the Law of Succession Act (Cap.160) and Rules made thereunder. Section 97 of the Law of Succession Act is clear that the Rules applicable are those made under the Act and in my view there cannot be importation of Rules from another Act, unless the Rules under the Act says so. Rule 63 of the Probate and Administration Rules only apply Order 5, 10, 11, 15, 18, 25, 44 and 49 of the Civil Procedure rules. The application is thus incompetent and defective *ab-initio* and has to be dismissed.

10. The second reason why the application has to be dismissed is that once this court made its ruling, it became *functus officio*, and any complaint therefrom has to be determined by the Court of Appeal, not this court. Errors on the face of the record in my view can be corrected by this court and there are procedures in the Probate and Administration Rules for rectification of grant of Letters of Administration under the Act. However, those have to be clear errors on the face of the record such as where the Judge wrote 11, instead of 1.1. Any substantive mistake in the determination by the court cannot be an error on the face of the record, and can only be dealt by the higher court, the Court of Appeal. The applicant has not demonstrated any error that requires correction by this court and the application has to fail on that account also, and is thus for dismissal.

11. I wish to mention here that, in succession proceedings, any errors on the face of the record to a Grant, can only be corrected through a consent signed and filed by all beneficiaries.

12. To conclude, the application of the objector Julius Kipkoech Chepkwony dated 4<sup>th</sup> June 2018 is hereby dismissed, with costs to the petitioners/respondents.

Dated and delivered at Kericho this 8<sup>th</sup> day of October 2019.

**GEORGE DULU**

**JUDGE**