REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

SUCCESSION CAUSE NO. 91 OF 2008

IN THE MATTER OF THE ESTATE OF THE LATE MAKERER ARAP BIRIR (DECEASED)

JANE CHEPTOO BIRIR.....PETITIONER

VERSUS

LUDIAH CHEROP BIRIR.....OBJECTOR

WILSON KIPROTICH KOECH.....APPLICANT

RULING

1. In its judgment dated 28th October 2016, this court distributed the estate of the deceased in this matter as proposed by the 2nd petitioner, Jane Cheptoo Birir, in her application dated 26th April 2011.

2. The decision was based on the pleadings before the court and the oral evidence that was taken before Hon. Ong'udi J on diverse dates in 2015. The court had directed that the parties file written submissions, and when the matter came up before me on 6th June 2016, Learned Counsel for the parties, Mr. Orina for 1st petitioner and Mr. Koko for 2nd petitioner, agreed that the court could render judgment on the material on record, which included the written submissions of the parties.

3. It appears that the beneficiaries of the estate were not satisfied with the said judgment and the mode of distribution arrived at by the court. As a result, two applications have been filed before this court. One is dated 19th December 2016 while the other is dated 11th January 2017.

4. The application dated 19th December 2016, with Phillip Kipketer Koech and Wilson K. Koech as applicants, has been brought by way of Chamber Summons under Order 45 Rule 1,2 and 3 of the Civil Procedure Rules and Rule 73 of the Probate and Administration Rules in the Law of Succession Act, Cap 160 Laws of Kenya. In the said application, the applicant, Philp Kipketer Koech, seeks the following orders:

> ***(a)*** That ***the judgment delivered and orders issued by this court on 28th October 2016 be reviewed and the Applicants herein be given an opportunity to be heard.***
>
> ***(b) That pending the hearing and determination of this application, the status quo as at 28/10/2016 be maintained.***
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> ***(c) That costs of this application be provided for.***

5. The application is premised on the following grounds:

> ***(a) That the Applicants are children and dependants of the deceased.***
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> ***(b) That the Applicants never indicated to the 2nd Petitioner that they are not interested in being included in the distribution of their father's estate.***
>
> ***(c) That parcel numbers Kericho/Gelegele/105 & 119 do not form part of the estate of the deceased.***
>
> ***(d) That the Applicants were not given the opportunity to be heard before the judgment was delivered.***

6. The application was supported by the affidavits of Philp Kipketer Koech and Wilson K. Koech which are undated but were filed on 9th January 2017. The applicants depose that the averments by the 2nd Petitioner that they are not interested in being included in the distribution of the deceased's estate are false. Mr. Phillip Kipketer Koech further deposes that he is the registered proprietor of

Kericho/Gelegele/105 and annexes a copy of the land certificate in respect of the same. He deposes further that he purchased the said parcel of land from one Wesley Arap Langat in 1975 and annexes a copy of the agreement for sale of the said parcel. He was not able to participate in the proceedings when the matter was going on as he was serving a sentence in **Sotik Criminal Case No. 20 of 2013** at Kericho G.K prison. He was subsequently acquitted on appeal on 23rd July 2015.

7. Mr. Keter avers further that he and his brothers are entitled to shares in Kericho/Gelegele/168. It is also his contention that land parcel No. Kericho/Gelegele/107 was faudulently registered in the name of John Koech and is the subject of a court case.

8. Wilson K. Koech makes similar averments in his affidavit in respect of Kericho/Koiyet/119.

9. The second application dated 11th January 2017, also filed by Philip Kipketer Koech and supported by his affidavit of the same date seeks the following orders:

(a) That this application be certified urgent and be heard ex-parte in the first place.

(b) That pending the hearing and determination of this application inter partes an order do issue to restrain Paul Koech and Julius Koech from in any way alienating, mortgaging land parcel No. Kericho/Koiyet/168 or its resultant portions from subdivision.

(c) That pending hearing and determination of this application Paul Koech and Julius Koech be restrained from in any way alienating, mortgaging land parcel No. Kericho/Koiyet/168 or its resultant portions from subdivisions.

(d) That the costs of this application be provided for.

10. The application, is based on the grounds that the following grounds that Philip Koech and Wilson Koech have applied for a review of the judgment of this court delivered on 28th October 2016, and the subdivisions of land parcel Number Kericho/Gelegele/168 was done irregularly as neither the applicants nor other beneficiaries were consulted.

11. Jane Cheptoo Birir filed a replying ffidavit sworn on 3rd February 2017 in response to the application dated 11th January 2017. She deposes that the property in the application formed part of the estate of the deceased. Thar the court issued a judgment dated 28th October 2016 when parties had failed to agree and the matter proceeded to full trial. It is her averment that land known as property title No. Kericho/Koiyet/168 is not existent and the orders sought cannot issue. Further, that the affidavit sworn by Philip Koech is false as everything was done according to the law and after following the right process and procedures.

12. A third application was filed by one Wilson K. Koech on 8th December 2017. Mr. Wilson Koech deposes in his affidavit in support of this application sworn on 8th December 2017 that despite parties being aware of the pendency of the matter, property tile No. L.R No. Kericho/Koiyet SS/168 has been subdivided and the resultant titles being Kericho/Koiyet SS/359 and Kericho/Koiyet S.S/358 issued. Further, that one Julius Kipyegon Koech has moved to the ELC court and obtained injunctive orders against Paul Kipngetich Koech under ELC No. 74/2017. He deposes further that Julius Kipyegon Koech has instructed the District Land Surveyor to move to the groundd to subdivide land parcel No. L.R Kericho/Koiyet SS/168 in accordance with the titles already issued, namely Kericho/Koiyet S.S/359 and Kericho/Koiyet SS/358.

13. In a supplementary affidavit sworn on 7th June 2018, Wilson Koech deposes that the properties known as L.R No. Kericho/Gelegele SS/105 and L.R No. Kericho/Koiyet SS/119 respectively were acquired by his brother Philip Kipketer Koech, who was now deceased, and himself of their own sole efforts and were registered in their respective names. He states that he acquired property L.R No Kericho/Koiyet SS/119 from one Kiprono Arap Korir (deceased) vide an agreement dated 1st January 1977. He deposes further that at the time the property was registered in the name of the Settlement Fund Trustees which had registered a charge over it in its favour to secure payment of money for its acquisition by the said Kiprono Arap Korir (deceased). He had taken over payment of the loan advanced pursuant to the charge re-executed in 1984 when he cleared it and secured its discharge and subsequent registration in his name.

14. His brother, Philip Kipketer Koech (deceased) on his part acquired property title No. Kericho/Gelegele SS/105 of his sole efforts from one Wesley Arap Langat subject to a charge placed in favour of the Settlement Fund Trustees to fund its acquisition. In the circumstances, it is his averment that the two properties namely Kericho/Gelegele SS/105 and L.R. No. Kericho/Gelegele SS/119 ought not to have been treated as part of the deceased's estate.

15. According to Wilson Koech, the 2nd petitioner deliberately misled the court on the status of the properties in order to enhance the share of her household. He avers that she also misled the court to believe that he and his brothers renounced their rights to receiving property from the estate of the deceased. As a result, owing to the deliberate acts and omissions of the petitioner, he and his brothers were condemned unheard and denied their respective shares from the estate of their deceased father. He therefore urges the court to review its judgment dated 28th October 2016 and grant injunctive orders to stop the subdivision of Kericho/Koiyet SS/168. No order for setting aside of the judgment has been sought.

16. In opposing the applications, Learned Counsel for the 2nd petitoner, Mr. Koko, submitted that the applicants had an opportunity to attend court during the hearing of the protest and adduce evidence, but did not.

17. He submits, further, that no evidence has been produced to show that the properties did not belong to the deceased and that he had not, prior to his demise, given them to the applicants, who are his children.

18. Counsel further submits that there is no good reason why the court should review its decision. He asks the court to dismiss the applications with costs, noting that the only avenue available to the applicants is an appeal, not review.

Determination

19. From the pleadings and submissions of the parties, two issues arise for determination. The first is whether the applicants have made out a case for review of the decision of the court made on 28th October 2016. The second issue, which is dependent on the first, is whether the applicants are entitled to the injunctive orders sought with respect to title number Kericho/Koiyet SS/168, which is, I believe, the property at the core of the present revival of this cause.

20. The first question to consider is whether the Civil Procedure Act and Rules are applicable in succession matters. Rule 63 of the Probate and Admnistration Rules provides as follows:-

> ***63. Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules***
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> ***(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.***
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> ***(2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.***

21. In considering whether Order 45 applies to succession matters, the court in **John Mundia Njoroge & 9 Others vs Cecilia Muthoni Njoroge & Another [2016] eKLR** quoted rule 63 of the Probate and Administration Rules then stated as follows:

> ***"As stated above, the only provisions of the Civil Procedure Rules imported to the Law of Succession Act are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time. Clearly, Order 45 relating to review is one of the Civil Procedure Rules imported into succession practice by rule 63 of the Probate and Administration Rules. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in Order 45 of the Civil Procedure Rules."***

22. It is my finding, therefore, that the application dated 19th December 2016, which is expressed to be brought under Order 45 Rules 1,2 and 3 of the Civil Procedure Rules as well as Rule 73 of the Probate and Administration Rules, is properly before the court.

23. The next question to consider is whether the applicant has met the substantive requirements of Order 45, which provides as follows:

> ***1. (1) Any person considering himself aggrieved—***
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> ***(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.***
>
> ***(2)…***

24. Order 45 thus provides three circumstances under which an order for review can be made. To be successful, the applicant must demonstrate to the court that there has been 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. A party may successfully apply for review, secondly, if he can demonstrate to the court that there has been some mistake or error apparent on the face of the record. The third ground for review is worded broadly: an application for review can be made for any other sufficient reason.

25. The question is whether, in this case, the applicants have met any of the conditions set out in order 45.

26. Mr. Koech, Learned Counsel for the applicant, argued that the application is premised on the fact that some of the properties distributed by the court namely Kericho/Gelegele/105 and Kericho/Koiyet/119 did not form part of the estate of the deceased but were acquired by the applicants through their sole efforts. He also alleges that the 2nd petitioner misled the court that the applicants were not interested in inheriting any part of the deceased's estate.

27. Are these ***'new and important matter or evidence'*** that were not within the knowledge of the applicants, and which could not be discovered at the time of the hearing through the exercise of due diligence?

28. In **Dubai Bank Kenya Limited vs Kwanza Estates Limited [2015] eKLR,** the court stated that the only way to discover whether a party had exercised all diligence is to consider the conduct of the party.

> ***" The only way to tell if a party has exercised due diligence from one who is merely out to re-litigate the matter is by their conduct. In this case, the appellant's conduct and pursuit of the purported new evidence does not appear to have been zealous; bearing in mind when it learnt of the forged documents. If anything, the purported new material appears to have been a calculated move to keep the respondent from enjoying the fruits of its success in litigation. The burden of proof lay with the appellant to show that it had moved with due diligence and expediency in having the alleged fraud and/or forgery investigated. The appellant made a complaint to the police in regard to the alleged fraud/forgery of the signature on the Memorandum through a letter dated 1st October 2013. However, at the time of filing its Replying Affidavit on 4th June 2013, the appellant had knowledge of the purported forgery. No explanation was ever given as to why there was a delay of over three months before investigations could be pursued."***

29. The Court of Appeal in **Stephen Wanyoike Kinuthia (Suing on behalf of John Kinuthia Marega (deceased) vs Kariuki Marega & Another [2018] eKLR** stated categorically that where an applicant in an application for review sought to rely on the ground that there was discovery of new and important evidence, they had to strictly prove the same. The court stataed as follows:-

> ***"We emphasize that an application based on the ground of discovery of new and important matter or evidence will not be granted without strict proof of such allegation."***

30. The matters that the applicants now seek to raise are not "new and important evidence". The proceedings in this cause lasted for a very long time, from 2008 till the decision sought to be reviewed was delievered on 28th of October 2016. Throughout that time, the applicant, Wilson Koech as well as his brother were aware that the petitoner had argued that the property now in contention formed part of the deceased's estate. They did not argue against this contention at any stage. They also must have been aware that in her affidavit sworn on 26th April 2011, the 2nd petitioner had stated that they were not interested in the estate of the deceased.

31. I say this for two reasons. First, the applicants are the children of the 1st petitioner, who had protested against the mode of distribution proposed by the 2nd petitoner. They cannot purport to be unaware of the succession dispute pitting their mother against their step-mother. More importantly, it was the applicant, Wilson Kiprotich Koech, who was in contact with the Advocate on record for their mother. This was evident during the hearing of the protest by their mother before Ong'udi, J. On 2nd July 2015, when the protestor had not appeared in court, Mr. Orina, her Counsel then on record, informed the court as follows:

> ***"There is a son of the 1st petitioner (Wilson Koech) who is present in court. We sent him a letter about today. Three days ago I met Wilson and informed him to ask him to be present today. He told me he (sic) was unwell. He undertook to inform her, to attend today. He is here and tells me, he had said she will try her best. It is now 11.30 a.m and she has not shown up. I am constrained to seek for an adjournment. She is not absent deliberately. We pray for another date. We undertake to pay costs for today. The 1st petitioner is 80 years old. That is what the son is telling me."***

32. It appears to me, therefore, that Mr. Wilson Koech is being less than truthful when he applies for review of the decision in this matter. He was present in the proceedings from the outset, and at times appeared in court for his mother, the 1st petitioner, who had filed the protest. To then argue that the matter proceeded in their absence and that they did not get an opportunity to be heard is therefore to be less than truthful.

33. I note that the initial applicant, Philip Kipketer Koech, alleged that he was serving a jail term at the GK prison pursuant to a conviction in **Sotik Criminal Case No. 20 of 2013**. First, it appears that the proceedings against him commenced in 2013, five years after the filing of this cause. Secondly, he deposed in his affidavit in support of the application for review that he was subsequently acquitted on appeal on 23rd July 2015. He was therefore free and able to raise any concerns with regard to this matter at least a year and three months before the judgment on 28th October 2016. I am not satisfied therefore that his allegations have any basis or can meet the requirements of Order 45.

34. The other ground for review under Order 45 is error apparent on the face of the record. In **Muyodi vs Industrial and Commercial Development Corporation & Another (2006) 1 EA 243** the Court of Appeal considered what constitutes a mistake or error apparent on the face of the record and stated as follows:

> ***"In Nyamogo & Nyamogo vs 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."***
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> ***The Court accorded no particular definition for an error apparent on the face of the record, stating that it would vary with each particular case. But in an earlier Tanzanian decision in the case of Chandrakhant Joshibhai Patel V R (2004) TLR, 218, it was held that an error stated to be apparent on the face of the record:***
>
> ***'...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".***

35. In the application now before me, no error or mistake apparent on the face of the record has been pointed out by the applicants to warrant an order for review. In the judgment dated 28th October 2016, this court considered all the facts that had been placed before it by the parties, who had been represented by Counsel in a full hearing, and came to a conclusion that in its view, was fair and just in the circumstances.

36. In concluding on this point, I ask whether there is any other sufficient cause that would allow the court to exercise powers of review under Order 45. The only two reasons advanced for the application for review is that the applicants were not heard, and that Philip Kipketer Koech was in prison. Given my findings above with respect to these two arguments, I find that no sufficient cause has been presented to justify a review of the judgment of this court dated 28th October 2016.

37. I observed earlier in this ruling that the second issue in this matter, whether the applicants are entitled to the injunctive orders sought, will depend on the outcome on the first issue. Put differently, if the court finds that there is reason to review its decision (and set it aside, though the applicants had not sought such an order) then it would be justified in granting an order to restrain sub-division of title number Kericho/Koiyet SS/168.

38. Having found that no basis has been laid for reviewing its judgment, then it follows that the sub-division of the subject property, which is in line with the said decision, should go on as there is no reason to issue injunctive orders as prayed.

39. In the premises, and without labouring the matter any further, I find that the two applications before me dated 19th December 2016 and 11th January 2017, as well as the application filed by Wilson Kiprotich Koech dated 8th December 2017, are without merit. They are hereby dismissed, but with no order as to costs in light of the fact that this is a matter involving siblings and their mothers.

Dated Delivered and Signed at Kericho this 1st day of November 2018

MUMBI NGUGI

JUDGE