



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**SUCCESSION CAUSE NO.126 OF 2005**

**IN THE MATTER OF THE ESTATE OF REBECCA CHEPKURUI TURGAT - (DECEASED)**

**LEAH CHEROTICH SOI.....PETITIONER**

**VERSUS**

**TECLA CHESANG REBECCA.....OBJECTOR**

**RULING**

**Introduction**

1. The present proceedings relate to the estate of Rebecca Chepkurui Turgat, who died intestate on 13<sup>th</sup> June 1993. An application for letters of administration intestate was made on 26<sup>th</sup> July 2003 by Leah Cherotich Soi, who claimed to be the widow of the deceased as a result of a woman to woman marriage recognized under Kipsigis customary law.

2. Letters of administration intestate were issued to her on 4<sup>th</sup> October 2005. However, by an application dated 14<sup>th</sup> December 2005, one Tecla Chesang Rebecca, the objector, filed an application for revocation of grant, claiming that she, too, was a widow of the deceased pursuant to a woman to woman marriage, and that the petitioner had failed to acknowledge her interest in the estate of the deceased. The application was heard by way of oral evidence before Serгон J.

3. In his judgment dated 30<sup>th</sup> May 2014, Serгон J found that a woman to woman marriage existed between the deceased and the objector, Tecla Chesang Rebecca, which marriage was within the knowledge of the petitioner. He further found that the failure of the petitioner to acknowledge that the objector had an interest in the estate of the deceased amounted to material non-disclosure which may lead to the revocation of a grant, and he proceeded to revoke the grant issued to the petitioner. He further proceeded to direct that a fresh grant be issued in the joint names of the petitioner, Leah Cherotich Soi, and the objector, Tecla Chesang Rebecca.

**The Application**

4. Dissatisfied with the decision of the court, the petitioner filed the application dated 4<sup>th</sup> August 2014 in which she sought the following orders:

***a) That the application herein be certified urgent and service thereof be dispensed with in the first instance.***

***b) That pending the hearing and determination of the present application there be a stay of the***

***execution of the judgment of the court delivered on 30th May 2014 and all consequential orders.***

***c) That this Honourable Court be pleased to review the orders contained in the judgment dated 30th May 2014 and all consequential orders.***

***d) That the costs of the application be provided for.***

5. The application, which was expressed to be brought under the provisions of “*section 1A, 1B, 3A & 63 C 22(1) of the Civil Procedure Rules and all other enabling provisions of the law*” was based on the following grounds:

***i) That there is an error apparent on the face of record in that the court proceeds on the wrong premise of customary law when the same was inconsistent with the written law.***

***ii) That the objector has proceeded and executed the judgment and a confirmed grant is about to issue.***

***iii) That the Honourable Court erroneously found that the objector was married to the deceased in a “woman to woman marriage”.***

***iv) That the Honourable Court on 31/7/2014 proceeded to confirm the grant notwithstanding the fact that the mode of distribution was inequitable and unfavourable to the petitioner.***

***v) That the counsel who held brief on 31/7/2014 had no express instructions to hold brief for the counsel on record.***

***vi) That unless the orders herein are granted the petitioner/applicant is likely to be prejudiced hence suffer loss and damages.***

6. The application is supported by an affidavit sworn by the petitioner/ applicant. In her affidavit, the petitioner avers that she is a widow of the deceased. She filed the present succession cause in respect of the estate but the objector filed objection proceedings in which judgment was delivered on 30<sup>th</sup> May 2014.

7. The petitioner avers that the objector has executed the judgment and a confirmed grant is about to issue. She contends that the court had erroneously found that the objector was married to the deceased in a woman to woman marriage.

8. The petitioner deposes, on the basis of advice from her advocates on record, that there is an error apparent on the face of the record in that the court proceeded to pronounce judgment on what was not pleaded. She prays that the court should stay the execution of the judgment pending the hearing and determination of the application to review the judgment.

9. The petitioner further avers that should the court not grant the orders that she seeks, she stands to suffer irreparable loss and damage as the objector has proceeded to have the impugned grant confirmed notwithstanding the fact that the mode of distribution was inequitable and unfavourable to the petitioner. She further avers that the grant emanated from proceedings in which the counsel who held brief for her advocates had no express instructions from the counsel on record.

10. According to the petitioner, the objector is likely to benefit from the estate of the deceased notwithstanding the fact that she is not a dependent within the meaning of section 29 of the Law of Succession Act. She also contends that the court’s findings are at variance with the law pertaining to “*intestate succession and or the customary law which is inconsistent with the express provisions of the constitution and the Law of Succession Act which ranks higher than the customary law.*”

## **The Response**

11. The objector opposed the application. She filed an affidavit in opposition which she swore on 26<sup>th</sup> August 2014. In her affidavit, the objector avers that she took out summons for revocation of grant dated 14<sup>th</sup> December 2005 against the grant made to the petitioner and a judgment was rendered in her favour on 30<sup>th</sup> May 2014 and directed that a fresh grant be issued jointly in her name and the name of the petitioner. The court also ordered that the two parties could jointly or severally as administrators apply for the confirmation of grant notwithstanding that six (6) months had not lapsed.

12. With respect to the present application, the objector notes that the application is premised on the grounds that there is an error apparent on the face of the record in that the court proceeded on the wrong premise of customary law which was inconsistent with the written law. She avers, again on the basis of advice from her counsel, that the court rightly made a pronouncement on an established and recognized custom, being the woman to woman customary marriages among the Kipsigis, which custom the courts have found to be valid and consistent with the laws of Kenya. She further observes that the petitioner's allegation is also self-defeating as her own claim to the estate of the deceased is based on the existence of the same customary woman to woman marriage between her and the deceased.

13. The objector further avers that the application is without merit as an application for orders of review is required to be made without unreasonable delay and the grounds on which it is made clearly pleaded, both of which the petitioner has failed to do.

14. To the argument that the court dealt with matters not pleaded, the response from the objector is that no particulars of such matters have been given. She therefore prays that the application be dismissed with costs.

15. The parties agreed to file written submissions in support of their respective cases which they both chose not to highlight.

## **Determination**

16. I have considered the pleadings of the parties as set out in brief above, and their respective written submissions. The core of the application before me is an application for review of the judgment of the court dated 30<sup>th</sup> May 2014. In her written submissions, the petitioner sets out, correctly, the provisions of law with respect to review. She notes that under rule 63(1) of the Probate and Administration Rules, this court has jurisdiction to apply the Civil Procedure Rules for review of judgments and rulings to succession matters.

17. Order 45 Rule 1 (a) and (b) of the Civil Procedure Rules provides that

***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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.***

18. In the submissions filed on her behalf, the petitioner seems to have combined an application for review of the judgment of 30<sup>th</sup> May 2014 and the confirmation of grant made on 31<sup>st</sup> July 2014. She submits, in a paragraph that is somewhat incoherent and incomprehensible, that her application is premised on the grounds that *“the judgment was made on the premise that the Objector was married to*

*the deceased and that the parties had consented to the mode of distribution by the reason that the counsel holding our brief on 31<sup>st</sup> day of July 2014 consented to the mode of distribution which is not only prejudicial to the Petitioner as the Objector was never married to the deceased but also inconsistent with the written provision of the law as to the distribution of estate in polygamous union is concerned in which the property is to be distributed as the units in each house.”*

19. She then relies on the decision in **National Bank of Kenya Limited versus Ndungu Njau [1997] eKLR** in which the court stated:

***“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 establish.”***

20. In their submissions filed on behalf of the objector, her Counsel agree in substance with the statement of the law by the petitioner’s advocates. They, too, rely on the **National Bank** case with respect to the circumstances under which an order for review can be made. The point of departure in their view is that there is no basis, in this case, for the court to exercise its jurisdiction under Order 45: there is no error apparent on the face of the record, nor is there any new evidence on the basis of which the court could grant an order of review.

21. The objector further relies on the decision in **Nyamogo & Nyamogo vs Kogo 2001 EA 170** cited in the case of **Veleo Limited vs Barclays Bank Kenya Limited Civil Case No. 1483 of 2000**. I shall revert to this judgment later in this ruling.

22. Having considered the matters before me and the judgment of the court sought to be reviewed, as well as the decisions of the court relied on by the parties, I am constrained to agree with the objector that the petitioner has not made out a case for review. What the petitioner seeks is, in effect, an order reversing the finding of the court that the objector is a widow of the deceased, having been married to the deceased, like the petitioner, in a woman to woman marriage under Kipsigis customary law. The court which rendered the decision of 30<sup>th</sup> May 2014 did so after hearing oral evidence from the parties, five witnesses for the objector and three in support of the petitioner. Having carefully read the judgment of the court, I am unable to find an error in the judgment, and more importantly, none has been pointed out to me by the petitioner. As was held in the case of **Nyamogo vs Nyamogo (supra)** relied on by the objector:

***“We have carefully considered the submissions made to us by the advocates of the parties to this appeal. 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 a 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 apparent on the face of the record would be made out. An error which has to be established by a 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 apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for appeal.”*** (Emphasis added)

23. Further, the court that made the decision sought to be reviewed is a court of concurrent jurisdiction: it is the High Court, only differently constituted. What the petitioner is asking this court to do is to sit on appeal on a decision made by a court of concurrent jurisdiction, which this court cannot do. As Lesiit J observed in her decision dated 31<sup>st</sup> October 2008 on a similar application for review from a decision of a brother judge of the High Court in the case of **Veleo (K) Limited vs**

**Barclays Bank Kenya Limited (supra):**

***“The Applicant has demonstrated that the learned judge misconstrued the provisions of Order X rule 20 and purported to exercise a jurisdiction he did not have or exceeded in the exercise of his discretion and made an order that the Court could not do under those provisions of the law. It is very clear in my mind that what the Applicant has demonstrated is that in its view the learned Judge misapprehended the provisions of Order X rule 20, and struck out the set-off and the counterclaim, which he did not under that provision have the power to do. It is my view that what the learned judge did as alleged by the Applicant can only be corrected by the Court of Appeal. The proper way to correct a judge’s misapprehension of the law is to appeal to the Court of Appeal and is not to invoke the provisions of Order XLIV rule 1 of the Civil Procedure Rules.”*** (Emphasis added)

24. In this case, there has been no demonstration that the Learned Judge misapprehended the law in reaching his decision in the matter. However, even had that been demonstrated, this court would have had no jurisdiction to grant an order of review. The issues that the petitioner raises are matters of appeal, to be determined by the Court of Appeal. They are not matters of review by this court. They are not “*errors on the face of the record*” as contemplated under Order 45 of the Civil Procedure Rules.

25. In the circumstances, the application dated 4<sup>th</sup> August 2014 must fail in so far as it relates to a review of the judgment of the High Court dated 30<sup>th</sup> May 2014.

26. However, I have some disquiet with respect to the application for confirmation of grant which was presented to the court on 31<sup>st</sup> July 2014. The applicant contends that the Counsel who appeared for her, holding brief for her counsel on record, did not have instructions from her counsel. I note that the Counsel informed the court that “there is no objection”, presumably to the application for confirmation of grant and the mode of distribution proposed therein.

27. It is not clear from the record whether the Counsel did have instructions as the affidavit from the petitioner’s counsel, which she avers that she annexed to her application, is not on record. However, the court notes that the estate of the deceased was distributed between the houses, which appears to be in accordance with customary law, rather than statute. The petitioner views this as having resulted in an inequitable distribution.

28. It is evident from the record and the judgment of Serгон J dated 30<sup>th</sup> May 2014 that the deceased was in a “*polygamous*” woman to woman marriage. That being the case, her estate ought to have been distributed in accordance with the provisions of section 40 of the Law of Succession Act, which governs the distribution of the estate of a polygamous person who dies intestate, taking into account the number of children in each house.

29. The affidavit in support of the application for confirmation of grant sworn by the objector on 3<sup>rd</sup> July 2014 indicates that the petitioner has nine (9) children, while the objector has four (4). A distribution of the estate of the deceased on the basis of houses clearly results in unfairness.

30. Under section 76 of the Law of Succession Act, the court has the jurisdiction to revoke a grant, either on the application of a party or on its own motion. Rule 73 of the Probate and Administration Rules gives the court wide discretion to make such orders as are necessary for the ends of justice to be met.

31. Accordingly, I hereby revoke the grant issued on 31<sup>st</sup> July 2014. I direct that the estate of the deceased be distributed in accordance with section 40 of the Law of Succession Act. The parties may individually or jointly file an appropriate application in this regard.

32. With regard to costs, let each party bear its own costs.

33. It is so ordered.

**Dated, Delivered and Signed at Kericho this 25<sup>th</sup> day of January 2017.**

**MUMBI NGUGI**

**JUDGE**