



**In re Estate of Cheres Soit (Deceased) (Succession Cause
27 of 2017) [2023] KEHC 17944 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 17944 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
SUCCESSION CAUSE 27 OF 2017**

**RL KORIR, J
APRIL 20, 2023**

BETWEEN

WILLIAM CHERES PETITIONER

AND

SIMON CHERES OBJECTOR

RULING

1. The Applicant/Objector filed the present Application dated 18th December 2020. The Application is premised on Order 51, Rules 1, 3 and 10, Order 45, Rule 1 of the Civil Procedure Rules 2010 and section 3A of the Civil Procedure Act, Cap 21. The prayers are:
 - a. That this matter be certified urgent and service be dispensed with in the first instance. (Spent)
 - b. That this honorable court be pleased to stay and/or set aside its Order delivered on the 5th August 2020, pending the hearing and determination of this Application.
 - c. That this honorable court do review and/or set aside the Order dated 6th August 2020.
 - d. That the court do make any other or further Orders as it may deem fit and just.
 - e. That the cost of this Application be provided for.
2. This Application is premised on the following grounds: -
 1. That there is an error apparent on the face of the record.
 2. That some factors brought out by the witnesses during the hearing were not put into consideration which evidence is fundamental to this case.
 3. That this honorable Court erred in concluding that the land parcels Kericho/Tegat/60 and Kericho/Tegat/925 are ancestral lands as claimed by the Petitioner whereas they were acquired



by the Applicant's mother Taputany Cheres and there was sufficient evidence to that effect which if it was considered by the court it would come to a different conclusion.

4. That the parcels of land Kericho/Tegat/60 and Kericho/Tegat/925 belonged to the Applicant's mother Taputany Soit despite being registered in the name of their father Cheres Soit and there is new evidence to that regard hence it is necessary that the Court considers the same.
 5. That the honorable Court did not consider crucial evidence that was not available at the time of hearing this matter and which evidence would have made this honorable Court consider the same.
 6. That the grant issued was on properties not part of the deceased's Estate.
 7. That the honorable Court did not consider the fact that the Petitioner's mother left her matrimonial home after the death of the late Cheres Soit, got married and settled in another matrimonial home where she had 5 other children who are not beneficiaries of the Estate of Cheres Soit but have been included by the Petitioner herein as beneficiaries of the said Estate.
 8. That the honorable Court made its decision to exclude the Applicant from being an administrator based on unsubstantiated allegations of falsehoods made by the Petitioner that the Applicant disposed of land parcel L.R. Kericho/Kongotik/7 without the consent of other beneficiaries, which allegations are not true and were never proved by the Petitioner.
 9. That this honorable Court disregarded the fact that the Applicant was a son to the late Cheres Soit and is a beneficiary to the said Estate and should be granted an opportunity to be a co-administrator.
 10. That the Petitioner in his affidavit admitted that he did not seek any consent from the Applicant together with beneficiaries of the first house as it was a waste of time.
 11. That the Petitioner's misadvised actions of filing for grant without the consent of the Applicant and while keeping the Applicant in the dark reeks of malice, outright contempt and is clear proof of the Petitioner's intention to illegally and unlawfully deprive the Applicant and other beneficiaries of what rightfully belongs to them.
 12. That the Orders dated 5th August 2020 if implemented will have adverse and irreparable effects on the beneficiaries of the Estate of Cheres (deceased) including the Applicant.
 13. That the Orders granted on 5th August 2020 are extremely prejudicial to the Applicant herein and the beneficiaries of the Estate of the deceased.
 14. That there is no appeal that has been filed against the judgment.
 15. That the Application herein had been brought timeously.
 16. That there are thus sufficient reasons and grounds for the Court to review its orders as prayed.
 17. That it is only just and expedient that the Application at hand is allowed.
3. The Application is supported by the sworn Affidavit of Simon Cheres, the Applicant herein. On 7th July 2021, the Respondent/Petitioner filed a Replying Affidavit dated 6th July 2021 opposing the said Application. It was his prayer that the Court dismisses the present Application for lack of merit.



Background of the Application

4. The late Cheres Soit died on 14th August 1965. He left behind two wives and 8 children (4 children from the 1st house and 3 children from the 2nd house). After his death, the 2nd wife remarried and had 5 other children. The Petitioner herein, William Cheres is the firstborn and only son of the deceased from the 2nd house. He has two sisters Mary Chepkemoi and Christine Chepkoros. The Applicant/Objector is the 2nd born of the 1st household. The Petitioner was issued with Grant of Letters of Administration sealed and dated 27th July 2017. On 19th February 2018, he filed Summons for Confirmation of Grant dated 12th February 2018 together with an Affidavit of Mode of Distribution and Consent executed by the children in the 2nd house.
5. By an Application dated 3rd May 2018 and filed on 7th May 2018, the Applicant moved the Court for the revocation of the said Grant on the basis of material non-disclosure. He also sought appointment as co-administrator of the Estate and Conservatory Orders restraining the Petitioner from proceeding to execute the Grant in any manner.
6. In its Ruling dated 5th August 2020, the Court dismissed the above Application and ordered the Petitioner to list the matter for hearing of confirmation of Grant.
7. Being aggrieved by this Ruling, the Applicant/Objector filed the present Application for review. This Court issued directions on 7th July 2021 for parties to canvass the Application through written submissions.

The Applicant's Submissions

8. The Applicant/Objector's submissions are dated 30th November 2021 and filed on 1st December 2021. Learned Counsel for the Applicant submitted on whether the Application met the threshold for granting Review orders and relied on Rule 63 of the *Probate and Administration Rules* together with Order 45, Rule 1(a) of the *Civil Procedure Rules*. He submitted that the Court was vested with authority under section 80 of the *Civil Procedure Act*. They listed the three requirements for which a party may apply for review: Firstly, that there must be a discovery of new and important matters or evidence. On this, Counsel submitted that the Applicant discovered that the Petitioner's mother had left her matrimonial home and remarried elsewhere where she had 5 other children who were never meant to be beneficiaries of the Estate of the deceased. That these children were never proven to be dependants under the meaning of Section 29 of the *Law of Succession Act* and that they were born after the death of the deceased even as evidenced by their age.
9. The second requirement for granting review was whether there was a mistake or error apparent on the face of the Record. On this, Counsel submitted that the Court failed to consider that the deceased Cheres Soit died in 1965 when the Law of Succession was not in operation and that his Estate was subject to the written customs and laws at the time. To this, he cited the case of Kericho High Court, Succession Cause No. 14 of 2014, In the Matter of the Estate of the Late Samwel Maritim Chumen alias Maritima Arap Chumek.
10. Further, Counsel outlined and submitted on four issues which the Court in his view failed to consider: -
 - i. That there was a mistake apparent on face of the Record when the Court failed to consider that no consent had been obtained from the 1st house to commence the succession proceedings and to appoint the Petitioner as the sole administrator of the Estate. That the Petitioner did not seek the consent of beneficiaries who were of a higher ranking in priority as per section 66 of the *Law of Succession Act* and Rule 26(2) of the *Probate and Administration Rules*. That



since the Petition for the Grant was brought by means of untrue allegations of facts essential in points of law, the subsequent Grant was defective. To this end, he relied on the decision in *In the Matter of the Estate of Marioko Njeru Migwi (deceased)*, Meru High Court, Succession Cause No. 663 of 2017.

- ii. That the second mistake apparent on the Record was the omission of the Court to note that the affidavit on mode of distribution was not consented to by the beneficiaries and cited the case of Nairobi High Court Succession Cause 1064 of 1994, *In the Matter of the Estate of Isaac Kireru Njuguna (deceased)*.
 - iii. That the Court failed to note that the Petitioner included property (Kericho/Tegat/60, Kericho/Tegat/925 and Kericho/ Kong’otik/7) not belonging to the late Cheres Soit as they belonged to the Applicant’s mother since they were acquired after the death of the deceased which would render it impossible for the deceased to have bought and registered property under his name. That there were three witnesses who confirmed this under oath and it would therefore be unfair to vilify the Objector and other beneficiaries solely for lack of ownership documents.
 - iv. Lastly, that the Court excluded the Applicant from being a co-administrator of the Estate representing the 1st house based on unsubstantiated grounds.
11. In conclusion, Counsel submitted that the Application met the threshold for review of orders of the Court and prayed that the Application be allowed with costs to the Applicant.

The Respondent’s Case

12. The Respondent filed a Replying Affidavit on 7th July 2021. In his sworn affidavit dated 6th July 2021, the Respondent stated that the Application had no merit and ought to be dismissed because no new evidence had been tendered to show that the parcels L.R. No. Kericho/Tegat/60 and LR. No. Kericho/Tegat/925 belonged to the Objector’s mother.
13. The Respondent further averred that the Objector’s intention was to delay the confirmation of Grant and that the Application had not met the threshold for review. He finally stated that the Application was ill-motivated, mischievous and an abuse of the court process.

Respondent’s Submissions

14. The Petitioner/Respondent’s submissions are dated 13th October 2021 and filed on 14th October 2021. Learned Counsel for the Respondent submitted on two issues being: whether the Application satisfied the grounds to warrant an order of review and whether the Applicant is entitled to the Orders sought in the Application.
15. Firstly, Counsel outlined the scope for review as stated by the Supreme Court of India case *Ajit Kumar Rath v State of Orisa & Others* 9 Supreme Court Cases 596 at page 608. He submitted that the grounds for which the Applicant applied for review were not sufficient to demonstrate that indeed he had come upon new information that was material enough to warrant a review. It was his submission that the Applicant had been given an opportunity to prove his claims and had failed to demonstrate the same to the Court. Further, that the Applicant knew that the Petitioner’s mother had left her matrimonial home but never adduced the same in evidence during the hearing for the Court to consider it.
16. Secondly, Counsel submitted that there was no mistake on the face of the Record and the Court made its determination based on the evidence before it. On this, he cited the case of *Nyamongo & Nyamongo v Kogo* [2001] EA, 170 and *Attorney General & O’rs v Boniface Byayima*, HCMA No. 1789 of 2000. It



was their conclusion that the Application did not meet the scope for review under Order 45 Rule 1 of the Civil Procedure Rules and that the Applicant's interest and rights had not been adversely affected by the Court's decree. He cited the Court of Appeal case of Kamau James Gitutho & 3 Others v Multiple ICD (K) Limited & Another [2019] eKLR in which the court referred to the case of Daniel Lago Okomo v Safari Park Hotel Limited & Another [2018] eKLR.

Issues for Determination

17. I have considered the Application, the rival affidavits on Record, and the respective submissions of the parties. I have further perused the Record. The first issue for my determination is whether the Application meets the threshold for Review. The second is whether the issues raised have merit.

Whether the Application meets the required threshold for Review and whether the issues raised have merit.

18. The law on Review is premised under section 80 of the Civil Procedure Act, Cap 21 as follows:-

Review

Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

19. Further, Order 45, Rule 1 provides that:-

Application for review of decree or order.

- (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.

- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

20. Rule 63 of the Probate and Administration Rules 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 Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (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.

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. Rule 63 of the Probate and Administration Rules imports the application of Order 45 Rule 1 of the Civil Procedure Rules when proceeding under the Law of Succession. I am persuaded by Mativo J. in the case of John Mundia Njoroge & 9 Others v Cecilia Muthoni Njoroge & Another [2016] eKLR, where it was stated thus: -

“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 follows then that Order 45 Rule 1 is the appropriate legal reference for this Application. Sub-section (2) sets out the parameters for Review as follows: -
- i. The Application must have been made without undue delay; and.
 - ii. That there must be a discovery of new and important information which after the exercise of due diligence, was not within the knowledge of the Applicant at the time the decree or order was made; or
 - iii. That there was a mistake or error apparent on the face of the Record; or
 - iv. That there were other sufficient reasons.
23. It is evident that the Application for Revocation of Grant and the current Application for review were premised on the two parcels of land which the Applicant/Objector claims were his mother’s properties and ought not to have been included in the list of properties for distribution; and that the succession proceedings were instituted without the necessary consent of members of the 1st household. I will therefore consider the above grounds on the basis of the parameters outlined under Order 45 Rule 1.

i. The Application must have been made without undue delay.

24. I will consider whether the Application was brought without undue delay. From my perusal of the Record, the Ruling was delivered on 5th August 2020 and the Application was dated 18th December 2020 and filed on 20th January 2021. At the same time, the Petitioner prepared Summons for confirmation of grant dated 7th December 2020 and filed the same on 18th January 2020. This was two



days prior to the filing of the present Application. There is no explanation provided by the Objector/Applicant in the present Application for the lengthy period he took to file for the review orders.

25. I would, however, considering the circumstances of this case, exercise discretion and determine the Application on merit despite the delay. I am guided by the principle of the overriding objective in litigation as aptly enunciated by the Court of Appeal in the case of *Abdirahman Abdi* also known as *Abdirahman Mubamed Abdi v Safi Petroleum Products Ltd. and 6 Others*, Civil Application No. 173 of 2010. In that case, the Court of Appeal addressed the question of striking out a notice of appeal that was allegedly served out of time without leave of the Court and held thus: -

“The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice...

In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the *Appellate Jurisdiction Act*, Cap 9 Laws of Kenya, and later, Article 159(2)(d) of *the Constitution* of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of *the Constitution* makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion.” (Emphasis mine)

26. The principles set out in the above case are relevant to this case. I hold the view that the present Succession Cause affects not just the two parties (Petitioners and Objector) but a host of other beneficiaries. There is evidence on Record to demonstrate that the deceased was survived by other children from the 1st and the 2nd household who would be greatly prejudiced if the present Application is not considered. It is therefore in the interests of justice that this Court considers the Review Application.

ii. Discovery of New and Important information

27. It was the Applicant’s case that he had come upon new information that the Petitioner’s mother remarried and had other 5 children from her second marriage. That these children were listed by the Petitioner as beneficiaries of the Estate from the 2nd household yet they were not to be considered children under Section 29 of the *Law of Succession Act*.
28. This Court received viva voce evidence and one of the Petitioner/Respondent’s - 3rd witness (David Cheres) - testified that the deceased died in 1965 while he was born in 1975.
29. From my perusal of the Record, it is clear that the persons listed as children of the deceased from the 2nd Household were not the children of the deceased but the children of his wife from her second marriage after his demise. Section 3 (2) of *Law of Succession Act* Cap 160 defines who a child is:-

References in this Act to “child” or “children” shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any



child born of her out of wedlock and in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.

30. After considering the evidence on Record, it is obvious that the children of the 2nd household were not dependants of the deceased because they were born years after his demise. They would therefore not be legitimate heirs. The High Court in explaining who illegitimate children are stated as follows *in Re Carey Kibagi Muriuki* [2000] eKLR:-

“Children of a void or voidable marriage are illegitimate but by Section 3 (5), if their mother went through a customary marriage, the children would be deemed legitimate and would be dependants under section 29 (a) *LSA*.

But there are other classes of illegitimate children as distinct from illegitimate children born out of an invalid marriage. They could be issues of a relationship of a man and woman who do not eventually marry. Those children would not qualify as dependants unless the father had recognized or accepted them as children of his own or he had voluntarily assumed permanent responsibility over them.”

31. In the present case, the children listed as beneficiaries from the 2nd household were not the biological children of the deceased save for the Petitioner/Respondent and his two younger sisters – Mary Chepkemoi and Christine Chepkoros. Evidence demonstrates that these 5 children were born after the death of the deceased and were issues of another marriage between the Petitioner/ Respondent’s mother and her second husband. It is also evident, based on their ages, that they were born after 1965 when the deceased died. There is also no evidence adduced to demonstrate that these 5 children were maintained by the deceased for the very fact that they were born after his death. Thus, they cannot be dependants within the meaning of section 29 of the *Law of Succession Act*.

32. Section 29 states as follows: -

Meaning of dependant

For the purposes of this Part, "dependant" means-

- a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
 - b. such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
 - c. where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.
33. It is the view of this Court that, the fact that the 5 children were neither the biological children of the deceased nor his dependants, could not have been new information to the Objector/Applicant in this case. Indeed, his own witnesses Benson Rono and Richard Tanguis gave evidence through their witness statements indicating that the Petitioner/Respondent William Cheres’ mother, Elizabeth Soit, left her matrimonial home after the deceased died and remarried. Thus, any children that were born by her after the deceased’s death were children from the second marriage and not children of the deceased.



34. In the case of *Tokesi Mambili and others v Simion Litsanga* [2004] eKLR, the court held as follows:-

“i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason” (emphasis mine)

35. It was all along known to the Applicant/Objector that the 5 children listed as dependants in the 2nd household were children born out of his step-mother’s second marriage and therefore neither the biological children of his father the deceased nor beneficiaries of the Estate. This information was within his knowledge and was in fact contained in the witness statements of Richard Tangus, Alfred Chebusit and Benson Rono.

36. The Applicant/Objector failed to demonstrate that it was not within his knowledge that his step-mother remarried and had other children. Consequently, I find that it is unlikely that this information was just newly discovered and so the first parameter fails.

iii. Mistake apparent on the face of the Record

37. The second parameter is that there must be a mistake or error apparent on the face of the record. In the case of *Tokesi Mambili and others v Simion Litsanga* (*supra*), the court held as follows: -

“i.An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason”

38. In this case, the Applicant in his submissions on pages 4-6 outlined what he perceived to be the errors on the face of the Record. It was the Applicant’s case that the error apparent on the face of the Record was that the Court proceeded to issue Grant of Letters of Administration to the Petitioner/Respondent based on a consent that had not been executed by beneficiaries from the 1st household. The second error was that the affidavit of the mode of distribution was also not consented to by the beneficiaries from the 1st household and lastly that the Petitioner listed property not belonging to the Estate of the deceased.

39. An error apparent on the face of the record was defined by the Supreme Court of India in the case of *Aribam Tuleshwar Sharm v Aribam Pishok Sharmal* [SCC P.390, para 31] 1 [1979] 4SCC, 389: AIR 1979 SC 1047 where Chinnappa Reddy J. stated thus:-

“It has to be kept in view that an error apparent on the face of the record must be such an error, which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions.”

40. Similarly, in the Indian case of *Batuk v Vyas Surat Municipality*, AIR [1953] Bom 133, the court took the view that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination of argument to establish it.

41. The Record clearly demonstrates that when the Petitioner/Respondent instituted the Succession proceedings in respect of the Estate of his deceased father, he listed as beneficiaries, all his step-siblings from the 1st household and also included his step-siblings from his mother’s second marriage as the children of the 2nd household. A cursory glance at the Record also indicates that the Petitioner is the sole



- administrator of the deceased's Estate and the Consent filed alongside the Petition was only executed by the children listed under the 2nd household and no other beneficiary from the 1st household.
42. As already established, the 5 children listed under the 2nd household were not children of the deceased and therefore could not be beneficiaries of the Estate. Further, there was no evidence on Record to demonstrate that these 5 children were maintained by the deceased prior to his death. In any case, they could not have been maintained by the deceased because they were born after the death of the deceased, out of the Petitioner's mother's second marriage. It follows then that they cannot be included in the Succession Cause as dependants or beneficiaries of the Estate and they lack the legal status to grant consent for purposes of Succession.
43. Kimondo J. in *ETR v JKR* [2015] eKLR stated at paragraph 14 that:-
- “It follows that under sections 51 and 76 of the *Law of Succession Act* as read with Rules 26, 40(8) and 41(8) of the *Probate and Administration Rules*, all beneficiaries must consent to the confirmation of grant and to the distribution of the Estate. See *Re Estate of Evaristus Njagi Mugo* High Court, Embu, Succession Cause No. 324 of 2005 [2008] eKLR. In the end, I find that the proceedings to obtain the grant were defective in substance....”
44. Rule 26 of the *Probate and Administration Rules* also states as follows:-
- “(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.
- (2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”
45. I therefore find that, there was an error on the face of the Record when the Court failed to consider that not all the beneficiaries had consented to the appointment of the Petitioner as Administrator and the subsequent Mode of Distribution filed alongside the Summons for confirmation of Grant.
46. Further and as already established, the people who consented to the Mode of Distribution were not beneficiaries under the *Law of Succession Act*. As earlier noted, it was only the 5 children from the 2nd household who signed the consent adopted by the Court, yet they were neither the children of the deceased nor dependants, a fact well-known to the Petitioner/Respondent. This Court observes that none of the children from the 1st house who had priority to be listed as beneficiaries of the Estate, consented to the Application for grant of letters of administration and the subsequent mode of distribution. On the same note, there is also no representative from the 1st house as a co-administrator. This could only imply that the beneficiaries from the 1st household were either not in agreement with the succession proceedings with respect to their father's Estate or in the alternative, had been excluded from it.
47. It is the finding of this Court that there was an error apparent on the face of the Record by virtue of the issuance of a Grant without appropriate consent. It follows then that the Grant on Record was defective ab initio and ought to be revoked.



iv. Other Sufficient Reasons

48. With respect to whether the two land parcels Kericho/Tegat/60 and Kericho/Tegat/925 formed part of the deceased's Estate, this Court in its Ruling of 5th August 2020 adjudicated upon the same and arrived at the finding that the Applicant/Objector failed to adduce evidence to demonstrate that his late mother had purchased the two parcels L.R. No. Kericho/Tegat/60 and LR. No. Kericho/Tegat/925. This Court based its decision on the fact that the title deeds were registered in the name of the deceased and considered this sufficient evidence to prove that the deceased owned the said parcels and formed part of the deceased's Estate free for distribution among his dependants during succession.
49. Upon review, it is apparent to the Court now is that the contested parcels were registered in the name of the deceased long after his death which raises the possibility of some trust. As I have already found the Grant defective, the parties will have a chance to ventilate this issue of the contested properties through a separate Application in the Succession Court as stipulated by Order 37 of the [Civil Procedure Rules](#) or in the Land and Environment Court for the ownership of the parcels to be determined.
50. The second issue was that this Court dismissed the Applicant/Objector's prayer to be included as co-administrator of the Estate. It found that the Applicant/Objector was unfit to be appointed as a co-administrator because there was evidence that he had already sold off one of the parcels of land thus was an intermeddler under the [Law Of Succession Act](#). In his defense, the Objector/Applicant testified that the said parcel was sold off for purposes of paying dowry by their late grandmother and not himself.
51. Upon review, I consider it just that a representative from the 1st household be appointed as a co-administrator.
52. Having made the above findings, I take note that Order 45 Rule 1 is drafted in a disjunctive manner by employing the word 'or'. This means that any of the conditions outlined under subrule 1 (b) is sufficient to allow for a review. This application meets the parameters set out in Order 45 Rule 1 as it has demonstrated that the decision of this Court was founded on an error apparent on the face of the Record being the lack of a properly executed consent and the inclusion of the names of persons who were not the children of the deceased and thus, not beneficiaries of the Estate.
53. In the upshot, I find that the Application has merit. It is allowed to the extent of the review already undertaken.
54. I make the following specific orders: -
 - i. That the orders from the Ruling of this Court dated 5th August 2020 are hereby vacated to the extent of the review.
 - ii. The Grant issued on July 27, 2017 is defective and is hereby revoked under section 76 of the [Law of Succession Act](#).
 - iii. The parties are directed to elect a representative from each household to be appointed by the Court as co-administrators of the Estate of the deceased within 21 days.
 - iv. The co-administrators appointed as above shall identify the uncontested properties forming the Estate of the late Cheres Soit for distribution as prescribed by the [Law of Succession Act](#) and the Probate and Administration Rules.
 - v. Any contested properties shall be adjudicated upon in line with Order 37 of the [Civil Procedure Rules](#) or in the Environment and Land Court.
 - vi. This being a family matter, there shall be no order as to costs.



55. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 20TH DAY OF APRIL, 2023

.....

R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of Mr. Mugumya for the Applicant, No appearance for the Respondent and Siele (Court Assistant).

