In re Kiprotich arap Tirop alias Kiprotich Tirop Philip Nyongesa (Deceased) (Succession Cause 232 of 2011) [2025] KEHC 11849 (KLR) (11 August 2025) (Ruling)

Neutral citation: [2025] KEHC 11849 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 232 OF 2011

RN NYAKUNDI, J

AUGUST 11, 2025

IN THE MATTER OF KIPROTICH ARAP TIROP ALIAS KIPROTICH TIROP

BETWEEN

PHILIP NYONGESA ..... OBJECTOR

AND

WILLIAN KIPKEMBOI ..... 1ST PETITIONER

STEPHEN SINGOEI ..... 2ND PETITIONER

RULING

1. By Summons dated 2/12/2024, the Objector/Applicant sought the following orders:
    a. Spent.
    b. Spent.
    c. Spent.
    d. Spent.
    e. That this Court be pleased to review and/or rectify the Mediation Settlement Agreement dated 26/08/2024 and adopted on 19/11/2024 to reflect the Applicant's acreage as 3.2 acres in place of 0.2 acres erroneously awarded by the Mediator.
    f. That upon rectification of the decree and order made on 19/11/2024, Title deed be issued to the Objector/Applicant by the Registrar of land Uasin Gishu in final settlement of this matter.
    g. That costs be provided for.
2. The Application is premised on the grounds therein and it is further supported by the Affidavit sworn by the Objector/Applicant on the same date.

3. In the Affidavit in support of the summons, the Applicant deposed that he is aggrieved by the orders of this Court made on 19/11/2024 adopting the Mediation settlement dated 26/08/2024, that he is aggrieved for reasons that the Mediation Settlement awarded him 0.2 acres of land instead of 3.2 acres which he is entitled to him from the estate of the deceased in land parcel number Uasin Gishu/ Chepsaita Scheme/294, that he has been in occupation and use of the said 3.2 acres from the year 2008, that he purchased 2.7 acres from William Kemboi son of the deceased in 2008 and that he subsequently purchased an additional 0.5 acres from one of the beneficiaries/ purchaser Alfayo Mango in 2010, that the said Alfayo Mango purchased the said share from William Kemboi and he was subsequently awarded the said 3.2 acres by a panel of elders in LDT No. 20 of 2011.

4. The Applicant further deposed that as at the time when the mediation was being conducted, he did not capture all the details as the same was being conducted in Kalenjin language, that he was asked to sign on the attendance form by the mediator only to learn that the was a Settlement Agreement allocating him 0.2 acres. The Applicant further alleges that he was asked to step out by the Mediator during the mediation proceedings a fact which he did not understand since he was not represented by his Advocates. The Applicant contends that losing 3 acres from the estate is very high following the erroneous Mediation Settlement which was adopted by the Court, that he is being threatened with eviction by the Administrators more particularly William Kemboi and Stephen Singoei who are the Administrators of the estate herein. The Applicant wants this Court to review and/or set aside the Mediation Settlement which awarded him 0.2 acres instead of 3.2 acres from the estate.

5. The Applicant also filed a Further Affidavit on 22/01/2025 wherein he basically reiterated the contents of his Supporting Affidavit save for adding that before he purchased the said portion of land he did due diligence by confirming from the Chief that indeed the 1st Petitioner was the son of the registered proprietor and that the portion he purchased was indeed his share of the estate, that he subsequently carried out a search which confirmed that land parcel number Uasin Gishu/Chepsaita Scheme/294 belonged to Priscilla Jesang Rop (Deceased), the mother of the 1st Petitioner, that initially the aforementioned parcel was registered in the names of Kiprotich Tirop (Deceased) and that it clear from the record that the 1st Respondent is a Co-petitioner alongside Priscilla Jesang Rop (Deceased). The Applicant then annexed copies of the Certificate of the Official Search in respect of Uasin Gishu/ Chepsaita Scheme/294, confirming ownership of the parcel of land and Mutation Form from the initial parcel of land. The Applicant maintained that he is a bona fide beneficiary of 3.2 acres to be excised from Uasin Gishu/Chepsaita Scheme/294 which portion was allocated to the 1st Petitioner/ Respondent herein and not 0.2 acres as indicated in the Mediation proceedings.

6. The Application is unopposed.

7. None of the parties filed their respective submissions.

Determination

8. The Applicant, Mr. Philip Nyongesa, comes before this Court seeking to have his portion increased from 0.2 acres to 3.2 acres in the distribution of the estate of the late Kiprotich Arap Tirop. His claim is anchored in alleged purchases made in 2008 and 2010 from William Kemboi, son of the deceased, and one Alfayo Mango, respectively. The narrative woven by the Applicant speaks of due diligence conducted, of confirmations sought from local authorities, of years of occupation, and of a purported miscarriage of justice during the mediation process.

9. Yet, before delving into the merits of these claims, this Court must first determine whether the present application meets the stringent threshold for review. The power of judicial review is not to be invoked lightly; it is not a second appeal, nor is it a mechanism to reargue a case already decided. Rather, it is

a limited remedy available only in specific circumstances where justice demands intervention. As this Court embarks on this determination, it bears in mind the delicate balance between finality in litigation and the paramount duty to correct manifest errors.

10. From the onset let me point out that the power of review is only available in cases when an error is evident from the record itself. To be clear, the review process is not an appeal. Re-evaluating all of the evidence or the judge's application or interpretation of the law would amount to the exercise of appellate jurisdiction, which is not permissible. The review must be limited to errors that are evident from the record.

11. Section 80 of the *Civil Procedure Act* Cap 21 provides as follows: -

> " 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."

12. Order 45 Rule 1 of the Civil Procedure Rules, 2010 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 a review of judgment to the court which passed the decree or made the order without unreasonable delay."

13. In Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR it was held: -

> " Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds;
>
> (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;

(b) on account of some mistake or error apparent on the face of the record, or

(c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay."

14. It is in Sarder Mohamed v. Charan Singh Nand Sing and Another (1959) EA 793 where the High Court held that Section 80 of the *Civil Procedure Act* conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate.

15. Discussing the scope of review, the Supreme Court of India in the case of Ajit Kumar Rath vs State of Orisa & Others, 9 Supreme Court Cases 596 at Page 608, had this to say:-

> " The power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" ..... means a reason sufficiently analogous to those specified in the rule"

16. In Tokesi Mambili and others Vs Simion Litsanga 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.

ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.

17. In Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018 John M. Mativo Judge culled out the following principles from a number of authorities: -

i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.

ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/ judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/ decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/ tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.

18. In the present case, the Applicant wants the Court to review its order dated 19/11/2024 in which the Court herein adopted the Mediation Settlement Agreement dated 26/08/2024 and directed the estate of the deceased herein comprising of all that parcel of land known as Uasin Gishu/Chepsaita Scheme/294 to be distributed as follows:

No.	Name	Shares Of Heirs
Paulina Senge Sitienei	0.5 Acres	
Stephen Kibwot Singoei	0.2 Acres	
Rose Jerubet Rop	0.5 Acres	
William Kipkemboi Chepsiror	0.4 Acres	
Yusuf Kirui Rutto	0.3 Acres	
Juma Sindani Kadam (purchaser)	2.8 Acres	
Joseph Imanya Muhati (purchaser)	0.2 Acres	
Philip Nyongesa (purchaser)	0.2 ACRES	

19. The Applicant wants the Court to review and or rectify the said Mediation Settlement Agreement to reflect his acreage as 3.2 acres in place of 0.2 acres erroneously awarded by the Mediator. The maintained that he legally and procedurally purchased the 3.2 acres of land from the 1st Respondent herein in the year 2008 and 2010 and has been in occupation of the same since 2008 to date. According to the Applicant, he is a bona fide purchaser and thus entitled to he 3.2 acres in the estate of the deceased.

20. From outset, it is worth noting that parcel of land known as Uasin Gishu/Chepsaita Scheme/294 belonged to the late Kiprotich Arap Tirop alias Kiprotich Tirop who died intestate on 06/08/2000. The Applicant's basis for claiming 3.2 acres from the estate herein is primarily anchored on an alleged Sale Agreement that was entered into by him and one William Kemboi Chepsiror, the 1st Respondent herein in the year 2008. The Applicant maintains that he bought 2.7 acres from the 1st Respondent being a son to the deceased and that he subsequently purchased an additional 0.5 acres from one Alfayo Mango, being a purchaser in the estate herein. As it can be appreciated from the Court record, the alleged sell transaction all took place after the demise of the deceased herein and before the grant in respect of his estate could be issued by the Court. The 1st Respondent therefore did not have the legal capacity and or requisite instruments to transfer any land whatsoever belonging to the deceased. As such any transaction arising therefrom could only amount to intermeddling with the estate of the deceased. Although the Applicant claims that he indeed conducted due diligence by confirming with the Chief that the 1st Respondent was he son to registered proprietor and that the portion he purchased was indeed the 1st Respondent share of the estate. He has not tendered any evidence to show that indeed the share that he allegedly purchased belong to the 1st Respondent. Without going into too much detail, it is important to note that the Environment and Land Court, not this Court, should hear any claims the Objector/Applicant may have against the aforementioned William Kemboi Chepsiror with regard to the purchase of land.

21. Be as it may, the Applicant has however failed to categorically state whether there has been discovery of new and important matter or evidence which was not within her knowledge or could not be produced at the time when the order to be reviewed was made. Further, the Applicant has not shown that there was a mistake or error apparent on the face of the record or for any other sufficient reason to warrant the review being sought. From a cursory perusal of the order of 19/11/2024 it is evident that the Applicant herein was in fact part of the people present when the Mediation Settlement Agreement.

22. The pleadings on file make it clear that the Objector/Applicant disagrees with the decision made by this Court; therefore, he should have filed an appeal instead of requesting a review.

23. In the end, the Objector/Applicant has failed to demonstrate that there was mistake or error apparent on the face of the record and/or any sufficient reason to enable this Court review/or set aside its orders issued on 19/11/2024.

24. Accordingly, the Applicant's application dated 22/1/2024 is without merit and is hereby dismissed with no orders as to costs. However, the Court notes that the Objector/Applicant's claims essentially relate to a land purchase transaction that occurred prior to the issuance of a grant of letters of administration. As indicated elsewhere in this judgment, this Court observes that the appropriate forum for adjudicating disputes regarding the alleged land purchase agreement between the Objector/Applicant and William Kemboi Chepsiror (1st Respondent) is the Environment and Land Court, which has the requisite jurisdiction to determine such matters.

25. In Kenya, the *Law of Succession Act* mandates that no immovable property from an interstate estate (where the deceased died without a will) can be sold before the certificate of confirmation of grant is issued. The certificate legally authorized the administrator to manage and distribute the deceased's

assets. Sales of such property before confirmation are generally deemed invalid and can be challenged in court. This sale between the alleged purchaser and one of the beneficiaries by the name William Kipkemboi was in violation of the law. The purchaser purportedly was buying land from William Kipkemboi who had no capacity in law to distribute, to convey, to transmit or to pass any rights to a third party involving the intestate estate of the deceased. The protocols on land transaction in Kenya is well laid down in the various statutes for example; The *Land Registration Act* 2012, The *Land Control Act* e.t.c. The purchaser never complied with the provisions of these two predominant legislations. The core issue here is that the transaction between the purchaser Nyongesa and the beneficiary to the estate by the name William Kipkemboi was void for lack of consent from the Land Control Board as provide for under Section 6 of the *Land Control Act*. The same statute is very clear under Section 7 of the *Land Control Act*. Any monies paid for a transaction for a purported sale of land which in law is void ab initio is only recoverable as a debt subject to Section 22 of the Act. It is also expressly stated that an application for consent must be made under Section 8(1) of the same Act which requires that the purchaser applies for consent which should be made within six (6) months of making of the sale agreement. That was never done by the Objector/Purchaser. When this Court was undertaking distribution, there was no more land to be excised from either William Kipkemboi and other heirs so that the Objector/Purchaser herein named as Philip Nyongesa to meet the terms of a void or illegal transaction. If this Court was to do so, it would have been an unjust enrichment on the part of William Kipkemboi. A voidable contract to me is a sick contract that may be cured or killed depending upon the option that may be exercised by the victim of the defective agreement. That is why it is said annullable acts live in a way under menace of death. That indeed was the case here in which the Court was asked during the hearing of this Succession Cause to give effect to a fatally defective land transaction which could have occasioned prejudice or injustice to the other beneficiaries legitimately entitled to the rights of the estate of the deceased. This was purely intermeddling with the estate of the deceased on the part of William Kipkemboi in which the law sets itself as follows;

> " That intermeddling with an intestate's land refers to unauthorized actions that affect the deceased's property before a legal representative is appointed. This can include selling, transferring, or otherwise disposing of the land without proper authority. Several court cases in Kenya have addressed this issue, emphasizing the importance of adhering to the *Law of Succession Act* and obtaining a grant of representation before dealing with a deceased person's property".

26. Be that as it may, if the Objector/Purchaser thinks am wrong in this finding he is at liberty to invoke the jurisdiction of the Environment and Land Court for an appropriate remedy. A void contract is an act that the law holds to be no contract at all a nullity from the very beginning although void contracts does not change the position of the contractants. This sale apparently was entered into by one of the beneficiaries William Kipkemboi without the knowledge of his siblings. The effect of which during the mediation agreement there was no extra land capable of settling the terms of the contract with the Purchaser/Objector in this case.

27. In my considered view, if the Objector/Applicant is strongly aggrieved with my findings maybe a second opinion from Environment and Land Court might find a remedy which I am not able to see and grant using the lens of a Probate Court. To that extent the application is lost with no orders as to costs.

28. It is so ordered.

DATED SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF AUGUST 2025.

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R. NYAKUNDI

JUDGE