In re Estate of Kengu arap Chepkwony (Deceased) (Succession Cause 343 of 2009) [2024] KEHC 12891 (KLR) (25 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12891 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 343 OF 2009

RN NYAKUNDI, J

OCTOBER 25, 2024

BETWEEN

JEPTARUS CHEPKWONY ..... 1ST PETITIONER

ANCHALINA SENGE CHEPKWONY ..... 2ND PETITIONER

AND

KIMELI ARAP MASAN ..... 1ST RESPONDENT

KIPKOSGEI ARAP MOROGO ..... 2ND RESPONDENT

PHILIP CARLOS KEMBOI ..... 3RD RESPONDENT

RULING

1. I am called to determine summons dated 19th January, 2024 in which the Objector/Applicant seeks orders that:

    a. Spent

    b. This Honorable court be pleased to issue leave to the applicant herein to file an appeal against the ruling delivered on 20th December, 2023 by the trial court in Eldoret High Court Succession Cause No. 343 of 2009, In the matter of the estate of Kengu Arap Chepkwony.

    c. This Honorable court be pleased to order that there be a stay of execution and/or implementation/distribution of the estate of Kengu Arap Chepkwony as per the Certificate of Confirmation of a grant dated 21st February, 2011 pending the hearing and determination of the intended appeal.

    d. Costs of this application to abide in the appeal.

2. The application is supported by an affidavit sworn by Philip Carlos Kemboi together with grounds thereof being; that the applicant has an arguable appeal; that the applicant and his family members

stand to be evicted from the suit parcel they currently occupy in execution of the certificate of Confirmation of A Grant dated 21st February, 2011; that the applicant and his family has been living on the suit parcel since 1968 and they have known the suit parcel to be their only home/place of aboard.

3. In response to the application, the Respondents made the following significant averments:

   a. That the applicant through his mother one Leah Chelimo Chepkwony, filed summons dated 7th March, 2012 for revocation of the grant issued to us on 1st December, 2009.

   b. That during the pendency of the aforesaid summons, the applicant, his mother and other beneficiaries of the 2nd house forcefully took possession of the lions' share of the parcels constituting the estate of the deceased and planted sugarcane thereon.

   c. That having taken possession as above, the beneficiaries of house 2 intentionally and conveniently decided not to prosecute the objection proceedings for a period of over ten (10) years at our expense.

   d. That the 3rd house and I have been greatly prejudiced by the delay in determining the objection proceedings as we hardly have sufficient land to plough for our benefit.

   e. That we were pleased when this court finally pronounced itself on the objection proceedings almost twelve years after the same were instituted.

   f. That in the foregoing, my Co-Administratrix and I believe that the instant summons has only been filed to enable the 2nd house continue utilizing the lion's share of our late husband's estate at our expense and that of our children.

   g. That we have already been greatly prejudiced by the twelve years' delay in determining this matter as justice delayed is indeed justice denied.

   h. That as much as the applicant has a legal right to lodge an appeal to the superior court, the same should not take precedence over our right to enjoy the fruits of a justly obtained judgment.

   i. That it is not in dispute that my Co-Administratrix and I were indeed legally appointed by this court as administratrixes of the estate of our late husband vide the order issued on 1st December, 2009.

   j. That the allegation that we will administer the estate herein should the orders sought not issue is a fallacy as it is trite law that an estate of a deceased person cannot remain unadministered after summons for revocation of grant have been dismissed as applies in the instant case.

   k. That the allegations that the applicant and his other relatives stand to be evicted are not only untrue but made with the intention to conjure the unwarranted sympathy of this honorable court.

   l. That further to the above, the 2nd house was indeed provided for by the will of the deceased.

   m. That contrary to the illusion created by the applicant, it is evident that the estate of our late husband indeed stands as distributed as per the Certificate of confirmation of grant in force having been retained by this court by the dismissal of the objection proceedings.

   n. That contrary to the insinuation created by the applicant, this court is not mandated to grant the orders as sought since the Applicant has a right to appeal against denial of leave.

   o. That the applicant in this case has not demonstrated why the direction should be exercised in his favour.

p. That the allegation that the applicant will expeditiously prosecute the intended before the superior court if granted leave is a far cry from the truth as he does not have the control of the diary of the said court.

q. That the applicant has not satisfied the irreparable loss he stands to suffer should the orders he seeks not issue.

r. That the allegations that the applicant and his family have been living on the suit parcel of land since 1968 is not a ground for him to be granted the orders he seeks since we too are beneficiaries of the deceased herein hence entitled to enjoy the shares awarded to us by both the will and subsequent certificate of confirmation of grant which remains fully in force.

s. That should this honorable court deem it prudent to allow the applicant pursue his right of appeal, my co-administratrix and I propose as follows in the best interest of justice:

   i. The 1st and 3rd houses be allowed to take possession of their respective shares on the ground for utilization pending the hearing and determination of the intended appeal.

   ii. The status quo in the register of the parcels constituting the assets of the estate be maintained until the intended appeal is heard and determined.

t. That the orders as sought affect my entitlement of thirty (30) acres comprised in L.R No. Nandi/Kipkaren/Salient/228 as awarded to me vide Kapsabet Land Dispute Tribunal Case No. 53 of 2007 which decision the deceased never appealed against during his lifetime.

4. Learned Counsel Ms. Isiaho filed written submissions dated 2nd April, 2024 in agitating for the Respondents. Learned Counsel argued that the beneficiaries of the 2nd house (from which the applicant belongs) intentionally and conveniently decided not to prosecute the objection proceedings for a period for over ten (10) years at their expense. She submitted that as a consequence, the 1st and 3rd houses have been greatly prejudiced by the delay in determining the objection proceedings as they hardly have sufficient land to plough for their benefit.

5. The respondents further opined that as much as the applicant has a legal right to lodge an appeal to the superior court, the same should not take precedence over their right to enjoy the fruits of a justly obtained judgment. They further faulted the applicant's allegation that they will administer the estate herein should he orders sought not issue as a fallacy as it is trite law that an estate of a deceased person cannot remain unadministered after summons for revocation of grant have been dismissed as applies in the instant case.

6. It is the Respondent's case that contrary to the illusion created by th e applicant, it is indeed evident that the estate of the deceased herein stands as distributed as per the certificate of confirmation of grant in force the same having been retained by this court vide the dismissal of the objection proceedings.

7. Learned Counsel submitted that it is the Respondent's undisputed evidence that portions they currently occupy have been adequate to sustain their families hence the reason they have been relying on relatives for subsistence. In the premises, the Respondent averred that this application does not have the best interest of justice at heart hence the same ought to be dismissed with costs. Counsel cited the provisions of Section 1A, Order 46 Rule 6(2) of the Civil Procedure Rules and the decision in Siegfried Busch versus MCSK (2013) eKLR and submitted that the applicant has not met the prerequisite conditions to merit the application.

Analysis and Determination.

8. I have considered the application, the response and submissions and the only issues that stand out are whether the applicant can be granted leave to file an appeal at the court of appeal and whether stay of execution can be granted.

9. Section 50 of the *Law of Succession Act* Cap 160 Laws of Kenya provides for the finality of proceedings in succession matters from the magistrate's court to the High Court on appeal. It states as follows: -

> "(1) An appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court shall be final.
>
> (2) An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi's court in respect of the estate of a deceased Muslim and with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal."

10. The provisions were well elucidated in the case of Hafswa Omar Abdalla Taib & 2 Others v Swaleh Abdalla Taib [2015] eKLR, where it was held as follows:

> "In this case, the appellate jurisdiction in respect of succession causes has been donated by Section 50 (1) of the Laws of Succession Act. From this provision, it is clear that decisions from the magistrate's courts in succession causes are appealable to the High Court; whose decision on such an appeal is final. However, the decision of the Kadhi's court are appealable to the High Court; and a party dissatisfied with the decision of the High Court on appeal can appeal further to this court (Court of Appeal) but only with leave of the High Court and in respect only on points of Muslim Law. However, there is no mention of an appeal to this court from the decision of the High Court made in exercise of its original jurisdiction. Indeed, even Section 47 of the same Act makes no mention of an appeal to the Court of Appeal from the decision of the High Court made in the exercise of its original jurisdiction."

11. Similarly, in John Mwita Murimi & 2 Others v Mwikabe Chacha Mwita & Another [2019] eKLR, the Court of Appeal stated as follows:-

> "It is not in dispute that the impugned ruling in this matter arises from a succession cause and the respondents did not obtain leave to appeal. The decision in Makhangu v Kibwana [1996] EA cited by the respondent was succinctly considered by this Court in Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another [2014] eKLR. In analyzing the Makhangu decision (supra), this Court held that under the *Law of Succession Act*, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this Court. (See also in Re Estate of Mbiyu Koinange (Deceased) [2015] eKLR; HCC Succession Cause No. 527 of 1981)."

12. On the one hand the applicant argued that he has an arguable case and that he intends to speedily prosecute the intended appeal in a timely manner so as not to prejudice the beneficiaries of the estate of Kengu Arap Chepkwony. He further averred that his family stands to be evicted from the suit parcel they currently occupy in execution of the Certificate of Confirmation of a Grant dated 21st February, 2011. The Respondents on the other hand are apprehensive that their right to enjoy the fruits of the

judgment shall be prejudiced and that the applicant has not met the conditions set out under Order 42 Rule 6 of the Civil Procedure Rules.

13. The conditions that this court should consider in granting or refusing the leave prayed for was laid out in the case of Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another [2014] eKLR where the Court of Appeal held that:

> "In view of these and given the adversarial nature of litigation in our system of justice, it would be unconscionable to allow as final the decision of a single judge, and limit the right of appeal to the High Court, especially now when the court hierarchy has been opened by the creation of the Supreme Court as an apex court.
>
> We think we have said enough to demonstrate that under the *Law of Succession Act*, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this Court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration."

14. Having considered the instant case and the above cited decision, it follows that leave to appeal is only granted where from the onset it appears that there are significant grounds which need the judicial consideration of the Court of Appeal. I am conscious of the fact that the provisions of Art. 48 of *the Constitution* require the court to uphold a party's right to access justice. However, I hold the view that the right is pursued at the Court of Appeal when it is necessary to do so at the said forum. Therefore, the exercise of the discretion in granting leave to appeal in succession causes, should be underpinned by the right of appeal provided in *the Constitution*, but not where a party sleeps on his rights infringing other statutory provisions which expressly provide timelines in which to approach a superior court to vindicate his or her rights.

15. The impugned certificate of confirmation of grant was issued way back in 2011, in computation of time that is precisely 14 years down the line and no sufficient cause has been shown for the delay which occasions substantial risk to fair trial rights and prejudice to other beneficiaries. The delay in this case is an abuse of the court process. The facts of this case frowned at by the court if the principles in Ivita v Kyumbu (1984) KLR 441, is anything to go by as this test demonstrates "When the delay is prolonged an inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the actions straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing, justice to all the parties. The plaintiff, the Defendant and any other third or interested party in the suit, lest justice should be placed too far away from the parties. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues (1) whether the delay has been intentional and contumelious (2) Whether the delay or the conduct of the plaintiff amounts to an abuse of the court (3) Whether the delay is inordinate and inexcusable (4) Whether the delay is that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or cause or likely to cause serious prejudice to the Defendant, and (5) what prejudice will the dismissal cause to the plaintiff, By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.

16. The powers donated to the court in order 42 Rule 6 of the CPR must be exercised judicially and it is dependent on specifics and guiding principles that execution of a judgement and final decree of the court would only be suspended where real and substantial justice requires hence calling for sufficient cause. The litigants for cause of action should not be allowed to hide under the umbrella of

the constitution to relitigate on issues over and over again even they are in breach of statutory law which provides the tenets of procedural law to give rise to substantive justice.

17. After considering the papers filed, to anchor the notice of motion for leave to appeal and the arguments presented the parties legal counsel I am of the view that the threshold outlined in the law relating to stay of execution has not been met for the reasons advanced elsewhere in this ruling. The provisions does not avail a litigant to sit on his rights and after long period of time he or she comes to court to make attempts to persuade the court to exercise discretion when in the first place one is guilty of laches and the criteria of irreparable harm invariably will not result given the underlying causa of the subject matter.

18. The court is satisfied that it not ought to exercise its discretion to allow the intended appellant leave to appeal to the next superior court in as much it is not a matter involving a point of law of general importance.

19. To put the Applicants matter in context both leave to appeal and stay of execution are unmerited and I make no orders as to costs

20. Orders accordingly.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 25TH DAY OF OCTOBER 2024

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R. NYAKUNDI

JUDGE