



**In re Estate of Kimson Njoroge Kagunyo (Deceased) (Succession Cause 3 of 2017) [2024] KEHC 14687 (KLR) (25 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14687 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
SUCCESSION CAUSE 3 OF 2017  
F GIKONYO, J  
NOVEMBER 25, 2024**

**IN THE MATTER OF THE ESTATE OF KIMSON NJOROGE KAGUNYO(DECEASED)**

**BETWEEN**

**JACINTA MURINGA KAHIHIA ..... APPLICANT**

**AND**

**SARAH NJERI KIMSON KIMSON ..... 1<sup>ST</sup> RESPONDENT**

**JAMES NGUGI KIMSON ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Much Careless Pleadings**

1. The significant order sought in the Notice of Motion dated 14/02/2024 seems to be stay of execution of the judgment dated 18/12/2018 pending the hearing and determination of the application.
2. The application is premised on Order 51 Rules 1 and 3 of the Civil Procedure Rules and sections 1A, and 3A of the *Civil Procedure Act*.
3. The application is based on the grounds set out in the application and supporting affidavit of Sarah Njeri Kimson sworn on 14/02/2024.
4. The applicant averred that judgment was delivered in the absence of the applicant.
5. The applicant came to know about the matter when the mother was deceased on 12/08/2017 and a certificate of death was issued on 22/08/2017 yet judgment was delivered on 18/12/2018 by Bwonwong'a J. who was not aware of the demise of the applicant.
6. That she filed memorandum of appeal late of which she is seeking leave. See paragraph 5 of the supporting affidavit. And, she annexed a plaint thereto.



### **The response.**

7. In response, the applicant herein filed a notice of preliminary objection dated 08/03/2024. The applicant herein has raised a preliminary objection on the following grounds;
  - i. The applicant herein has been named in the application as the applicant yet she is not the applicant in the said application.
  - ii. The respondents were not parties to the matter that gave rise to the ruling delivered by Bwonwong'a J. on 18/12/2018.
  - iii. The 1<sup>st</sup> respondent purports to seek leave to file an appeal out of time and instead of a memorandum of appeal she has filed a plaint (fast track).
  - iv. The notice of motion seeks stay of execution under civil procedure rules which is not applicable in succession matters.
  - v. The notice of motion seeks stay of execution pending hearing and determination of the application but does not have any other substantive prayer.
  - vi. There is no pending appeal or intended appeal or a memorandum of appeal this court has no powers to grant the orders sought.
8. The respondents filed a response to notice of preliminary objection dated 23/04/2024.
9. The respondents contend that the applicant herein is the applicant in Succession Cause No. 3 of 2017.
10. The respondents contend that the respondents were not parties to the Succession Cause No. 3 of 2017 but are related to parcel number Githunguri/Githiga/1950 to which the respondents have an interest.
11. The respondents averred that the preliminary objection does not state in particular which laws under civil procedure rules bar seeking stay of execution hence the averments are ambiguous.
12. The respondents contend that the notice of motion dated 14/02/2024 has a substantive prayer sought hence the averment is an attempt to mislead this court.

### **Directions of the court**

13. The application and preliminary objection were canvassed by way of written submissions.

### **The applicant's submissions.**

14. The applicant submitted that the reliefs sought by the respondent herein are not tenable since this is a succession matter and the *law of succession act* and/ or probate and administration rules do not provide a provision for stay of execution. The applicant contends that this being a succession matter which has unique and special procedures which are provided for in the *law of succession act* and/ or probate and administration rules. The applicant relied on In Re Estate of The Late Kabarachi Peter (Deceased) [2021] eKLR.
15. The applicant submitted that the application filed is not proper since the application is brought in the form of a notice of motion instead of summons as provided for in the *law of succession act* and/ or probate and administration rules. The applicant relied on rule 49 of the Probate and Administration Rules 1980.



16. The applicant submitted that the respondent seeks leave to file an appeal out of time yet they were not parties in the suit they seek to appeal against. Therefore, they have no right to appeal.
17. The applicant submitted that the respondents instead of filing a memorandum of appeal have filed a plaint.

### **Analysis And Determination**

18. This court has considered the application dated 14/02/2024, the notice of preliminary objection, the response thereto, and the applicant's submissions.
19. Is the preliminary objection merited?

### **The meaning of a preliminary objection.**

20. It should be in the form of a demurrer which should settle all issues leaving nothing else for determination. The definition of a preliminary objection was well set out as: '...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.' Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696.
21. Whereas there are elements in the preliminary objection which are merely on form, the essence of the objection is that; a) the court has no jurisdiction; and b) the application is incurably defective and untenable in law; for it cites persons who are not parties in the proceedings and lacks in legal substance and tenor. These are points of law potent enough to dispose of the application.

### **Applying the test**

22. This court has carefully perused the application dated 14/02/2024 as well as the preliminary objection.

### **Of parties**

23. The applicant admitted that the respondents are not parties in the Succession Cause No. 3 of 2017. Except, that they are related to parcel number Githunguri/Githiga/1950 to which the respondents have an interest. The kind of relationship which would cloth the persons named with standing-either as remedy-seekers or obligation-bearers- in these proceedings in which they are not parties, was not established. For a court to have jurisdiction, proper parties must be before the court. Therefore, jurisdiction of the court over such persons who are not parties in the suit has not been established.
24. On that score, the application fails. Nonetheless, shall consider the other matters raised in the preliminary objection.

### **Relief sought: nature and grounding**

25. The application sought orders for stay of execution of the judgment delivered on 18/12/2018.
26. The application is expressed to be brought under Sections 1A, 3A 63 (e) of the [Civil Procedure Act](#) and Order 51 rule 1 and 3) of the Civil Procedure Rules. But, the applicant did not show the relevance of these provisions to the application and the relief sought. This Court is also unable to decipher relief sought, the law under which the relief is premised and the basis for seeking relief.
27. Much careless pleadings result from failure to understand the purport of citing relevant provisions of the law and the relief sought in the application. Which may not always be venial or amusing



blunder curable under article 159(2)(d) of *the Constitution*; especially where the legal grounding of the application and the exact reliefs sought cannot be deciphered.

28. Citing irrelevant provisions of the law, especially from the Civil Procedure Rules, is a classic example of poor drafting of pleadings and lack of attention to detail. Parties should be conscious and deliberate in specifying the relief sought in, and the legal context of the application; and where a legal counsel is employed, the responsibility is higher; to uphold professional astuteness in drafting pleadings as to bring out their client's cause of action and relief sought precisely and concisely.
29. This court is at pains to understand the kind of relief the applicant is seeking.
30. A myriad of other shortcomings. The supposed applicants have referred to themselves as respondents in their own application. Their prayer is, pending hearing and determination of the application; there is no substantive prayer and the event for which the stay should be granted. The applicant only stated in paragraph 5 of the supporting affidavit: -

‘that I have learnt that I was late to file a memorandum of appeal of which I am seeking leave to be granted the same’.
31. The purported memorandum of appeal was not annexed to the application. Instead, she annexed a plaint.
32. The muddle completely obscures the purport, the basis of, and the relief sought in the application, making it incurably defective and unmeritorious. It cannot be saved even by the generous grace of article 159(2)(d) of *the Constitution* for it lacks in factual and legal substance.
33. The application is, but a perfect candidate for dismissal. In the upshot, the application dated 14/02/2024 is dismissed with costs to the respondents.
34. Nevertheless, the learned legal counsel for the applicant may consider filing a competent application.
35. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**F. GIKONYO M**

**JUDGE**

In the presence of: -

Ms. Kanini h/b for Charagu for respondent

Kiptoo for applicant absent

Otolo C/A

