



REPUBLIC OF KENYA



**In re John Kiptum Bartilol (Succession Cause 17 of 2001)
[2023] KEHC 3246 (KLR) (27 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3246 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 17 OF 2001
RN NYAKUNDI, J
MARCH 27, 2023
IN THE MATTER OF THE LATE JOHN KIPTUM BARTILOL (DECEASED)**

BETWEEN

DINAH JEPKEMBOI BARTILOL 1ST PETITIONER

JAPETH KIPROTICH BARTILOL 2ND PETITIONER

AND

WINNIE CHEBET BARTILOL 1ST APPLICANT

JOYCE CHEMUTAI BARTILOL 2ND APPLICANT

ALICE CHERONO BARTILOL 3RD APPLICANT

HILLARY KIPRUTO BARTILOL 4TH APPLICANT

AND

SILAS KIPTOO TISIA RESPONDENT

RULING

1. By a notice of motion dated November 11, 2022 the applicants seek orders that: -
 1. Spent.
 2. This honourable court be pleased to order that, the petitioners having failed to file a proposed mode of distribution as directed in the ruling dated January 21, 2019 and having failed to prosecute their appeal within (60) days as ordered, this honourable court do adopt the proposed mode of distribution by the Applicants/Beneficiaries and or give directions on the same.
 3. Spent.



4. This honourable court be pleased to order that the Petitioners Dinah Jepkemboi Bartilol and Japhet Kiprotich Bartilol be summoned to court jointly and severally with their agents and or third parties be barred from trespassing, leasing out, selling, ploughing and or dealing with 50 acres within parcel of land known as Illula Plot No 4 being used by the applicants/beneficiaries for their subsistence and livelihood pending the distribution of the estate.
 5. The honourable court be pleased to issue an order to one Silas Kiptoo Tisia to remit to the applicants Kshs.2,400,000/= failure to which he be committed to civil jail for a period of not less than one for intermeddling with the said parcel of land known as Illula Plot No 4 being used by the applicants/beneficiaries for their subsistence and livelihood pending the distribution of the estate.
 6. The honourable court be pleased to issue summons to the proprietor Geowinphel Limited Town and Country Surveys Tel: 071xxxxx97 and village Elder Kapmalakwen village Illula Timothy Kemei of Tel No: 072xxxxx04 to attend court during the interparties hearing for illegally surveying parcel of land known as Illula Plot No 4 without a Court order and if found culpable be committed to Civil jail for not less than one year.
 7. Costs of this application be paid by the petitioners.
2. The application is premised on the grounds therein and it is further supported by the affidavit sworn by Hillary Kipruto Bartilol, on November 11, 2022.

The Applicant's Case

3. The applicants deposed that that this instant application is premised on the ruling of January 21, 2019 in which the applicants were recognized as bonafide beneficiaries of the objector and the deceased herein. The applicants further deposed that the succession herein was commenced in 1997 but the same is yet to be determined despite of the aforementioned court ruling.
4. The applicants maintain that during the pendency of this cause, the court directed the objector to utilize 40 acres and the 2nd petitioner to utilize 10 acres of parcel of land known as Illula Plot No 4 which was he status quo prior to the demise of the deceased.
5. The applicants maintain that they have lived on parcel of land known as Illula Plot No 4 since birth and that they solely rely on 40 acres on the said parcel for their upkeep. The applicants contends that the Petitioners herein have always trespassed into their portion, leased out to third parties and committed criminal offences against them and their mother which have been reported to the Chief and Kapsoya Police Station and Illula Police Station.
6. The applicants further deposed that after hearing the objection, the court on January 21, 2019 rule that the applicants were bonafide beneficiaries and directed parties to file their respective modes of distribution. Consequently, the petitioners herein appealed and that stay pending appeal was granted on April 26, 2021 on condition that the appeal be prosecuted within (60) days. The applicants contend it now over one and seven months since they said orders were granted and the petitioners have not done so. According to the applicants the stay order and the appeal now stand abated and the cause herein should proceed to distribution as decided.
7. The applicants contend that the petitioners herein in 2021 and 2022 purported to lease out 10 acres of the Illula Plot No 4 to the respondent hereon one Silas Kiptoo Tisia yet he is a stranger to the estate of the late John Kiptum Bartilol and has since trespassed into the subject land without any color of right and has engaged in unlawful farming activities therein despite being warned through a demand letter



and also verbally. That the said Silas Kiptoo Tisia has illegally benefited by illegally planting maize in the said 10 acres as depicted hereinunder:

8. The applicant urged the court to commit the said Silas Kiptoo Tisia to Civil jail.
9. The applicants contend that in 2001 the objector herein obtained injunctive orders against the Petitioners for interfering and trespassing on parcel of land known as Illula Plot No 4 which the applicants maintain has always been in use by the objector her children.
10. The applicants contend that in the ruling rendered on January 21, 2019, the court noted that the petitioner were not able to account for over Ksh 20,000,000/= for the sole use of Ndalala Farm in Kitale and Soy Plot and the same should be factored in during distribution.
11. The applicants contend that sometimes around April 2021, surveyors from Geowinphel Limited and County Surveys in the company of a village elder Kapmalakwen village, Illula illegally trespassed and purported to survey and carve out 20 acres of Illula Plot No 4.
12. Lastly, the 1st applicant, Hillary Kipruto Bartilol seeks to be appointed as administrator in the deceased's estate so as to protect his interests and those of his siblings and the interest of the entire estate.

The Petitioners' Case

13. The application is opposed vide the affidavit sworn by Dinah Jepkemboi Bartilol, on January 11, 2023.
14. The Petitioners case is that there is a pending appeal being Eldoret Civil Appeal No E141 of 2021. That the appeal is in respect of the ruling of this honourable court that was delivered on January 21, 2020.
15. The petitioners maintain that the appeal is yet to be concluded and that they are in process of preparing submissions on the appeal.
16. The petitioner maintain that the said appeal is properly before the court of appeal and that this court vide its ruling delivered on April 26, 2021 granted the petitioners stay of execution. Further that the stay was granted pending the institution of the appeal within sixty days and pending the hearing and determination of the appeal. The petitioners maintain that the said timelines as stipulated by the court were duly complied with.
17. The petitioners maintain that during the pendency of this court, the objector Edna Kangogo was allowed to use 20 acres of the parcel of land known as Illula Plot No 4. The petitioners contend that the objector herein never appealed against the court's ruling and is in fact no longer a beneficiary or a party to these instant proceedings.
18. The 1st petitioner maintains that the objector's children were the only one recognized as being the beneficiaries to her late husband's estate. The 1st petitioner further deposed that although the objector herein was excluded from these instant proceeding, she has continued to allow her children to use the 20 acres during the pendency of this cause.
19. The 1st petitioner contends that it actually the applicants who have dispossessed her from her portion and have leased the same to one Pius Kipkemboi Tum which action has prompted her to move the Environment and Land Court at Eldoret.
20. The petitioners contend that the Silas Kiptoo Tisia is not a party to these proceedings and has been enjoined without leave of court.
21. The 1st petitioner maintains that she is entitled to use Illula Plot No 4 having acquired the same with her late husband.



22. The petitioner further deposed that they have not interfered with the 20 acres being utilized by the applicants mother.
23. The 1st petitioner contends that this application is full of falsehoods as the court allowed the objector to plough 20 acres of the subject land whereas the 2nd petitioner was allowed to plough 10 acres. The 1st petitioner maintains that the rest of the land was in her possession during the pendency of the cause in court.
24. The 1st petitioner reiterated that the objector herein has since been excluded from the estate and the Court has not reviewed the orders that were issued on March 15, 2001.
25. The 1st petitioner contends that the applicants herein have continued to use the said 20 acres contrary to what is alleged in their application.
26. The petitioner maintain that this instant application is a waste of judicial time because there is a pending appeal and no proceedings shall be taken out until the appeal is heard and determined.
27. The petitioners contend that the applicants herein have also enjoined other parties without leave of court
28. Both parties did not file any written submissions.

Determination

29. I have carefully considered the application and response thereto. The only issue that arises for determination in my view is whether the orders sought can issue.
30. From onset I must mention that I take judicial notice that this is a very old matter wherein parties have continued to file interim applications with no intent of dealing with the substantive issues herein.
31. The crux of the application herein is the ruling by Hon Lady Justice, H A Omondi, that was delivered on January 21, 2020 that directed parties to each file their respective modes of distribution which shall exclude the applicant therein being Ednah Kangogo. The court further directed that a valuation report on each asset be filed simultaneously so that in the event of there being no harmony in the mode of distribution, this court shall have the final say on distribution.
32. Aggrieved by the said directive the 1st petitioner herein consequently filed an application dated March 5, 2020 in which she sought for stay of proceedings in this matter pending the hearing and determination of the appeal arising from the ruling delivered on January 21, 2020. She also sought that the estate of the deceased herein be preserved pending the hearing and determination of the intended appeal.
33. To navigate and understand some of the issues in this instant application I will have to revisit the findings by the court in the said ruling.
34. Having heard the respective parties Hon Justice SM Githinji, allowed the 1st petitioner's application as prayed and directed that the 1st petitioner herein is granted (60) days to pursue the intended appeal, failure to which the stay orders shall stand vacated.
35. This court on January 16, 2023 having heard the parties herein issued a raft of orders amongst which was that one Hillary Kipruto Bartilol be made a co-administrator forthwith.
36. The applicants herein contend that the petitioners have failed to prosecute their appeal as directed by this court and thus want parties to file their respective modes of distribution in this matter. There is no doubt that there is a pending appeal being Eldoret Civil Appeal No E141 of 2021 filed by the



petitioners herein. From the draft memorandum of appeal on record it is also evident that one of the grounds forming the substratum of the appeal is on the mode of distribution which is the core in dispute in this cause. The applicants allege that the petitioners have failed to pursue the intended appeal and thus the stay orders stand vacated. The applicants however have not tendered any evidence to show that the petitioners herein have failed to pursue the said appeal. To my mind the appeal is still in force and thus cannot be wished away as the same touches on crucial issues in the proceedings herein. It is trite law that he who alleges must prove what was sought herein was stay of proceedings and thus the proceedings herein cannot concurrently proceed with the proceedings at the Court of Appeal as one would be an exercise in futility. There is in fact nothing on record to indicate that the applicants herein have sought to have the said appeal dismissed for want of prosecution.

37. In present application there are allegations and counter allegations by the respective parties. The applicants want the petitioners herein to be barred from trespassing, leasing out selling or dealing with 50 acres of all that parcel known as Illula Plot No 4 which is the main bone contention in the matter. The Petitioners have also accused the petitioners for interfering with their respective portion of the subject land.

38. I must remind parties herein that intermeddling is a serious offence under section 45 of the Law of Succession Act. Section 45 of the said Act provides as follows:

- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
- (2) Any person who contravenes the provisions of this section shall—
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

39. In Re Estate of M'Ngarithi M'Miriti [2017] eKLR it was held that:

Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”



40. The parties herein are therefore warned against any acts of intermeddling and are advise to maintain status quo until and as when the estate of the deceased herein will be distributed with finality.
41. The applicants have also urged the court to order that one Silas Kiptoo Tisia to remit the applicants Kshs 2,4000,000/= failure to which he be committed to civil jail for a period of not less than one year. Similarly, the applicants want this court to issues summons to the proprietor of Geowinphel Limited and County Surveys in the company of a village elder Kapmalakwen village, Illula one Timothy Kemei for illegally surveying parcel of land known as Illula Plot No 4.
42. At this juncture I must remind parties that court orders must be capable of enforcement. The aforementioned parties are in fact not parties to the cause herein. The allegations levelled against them cannot be substantiated at this interim stage and therefore the court cannot issue orders in vacuum.
43. With the foregoing analysis and findings, the conclusion becomes irresistible that the applicants' application dated November 11, 2022 is not meritorious. Accordingly, I hereby dismiss the applicant's application dated November 11, 2022 with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 27TH DAY OF MARCH 2023

In the Presence of

Mr. Songok & Co. Advocate

Mr. Murgor & Co. Advocates

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R. NYAKUNDI

JUDGE

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