



**In re Estate of Joel Kiprotich Mutai (Deceased) (Civil Appeal
E021 of 2023) [2023] KEHC 21446 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21446 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL E021 OF 2023**

JK SERGON, J

JULY 31, 2023

IN THE MATTER OF THE ESTATE OF JOEL KIPROTICH MUTAI (DECEASED)

BETWEEN

CATHERINE CHEBET APPLICANT

AND

DKR 1ST RESPONDENT

MC 2ND RESPONDENT

RULING

1. The instant application is a notice of motion dated 13th June, 2023 seeking the following orders;
 - i. That this Honourable Court do set aside the order made on the 12th June, 2023 by Chief Magistrates' Court at Kericho.
 - ii. That this Honourable Court do order a stay of execution of the ruling and order made by the said Chief Magistrates' Court on the 12th June, 2023 pending the hearing and final determination of the applicant's appeal.
 - iii. That the costs of this application be provided for.
2. The Application is supported by grounds on the face of it and the supporting affidavit of Catherine Chebet the Applicant herein, she stated that she is the second wife of the deceased whereas the Respondents are the children of the 1st wife who is deceased.
3. The Applicant avers that she got married to Joel Kiprotich Mutai (deceased) in December 2019 under Kipsigis customary law and lived with the deceased until his demise through a road accident on 6th January, 2022 and further that upon the burial of the deceased the Respondents herein became violent and chased her from the deceased's home in Kebeneti Village in Kericho, that the verbal abuse escalated



and the clan was involved and various meetings were held to reconcile her and her step children, the feuds over the estate of the deceased ended up with the provincial administrators.

4. The Applicant avers that the Respondents filed a succession petition in the Chief Magistrates' Court at in the lower court in the estate of the deceased and she only learnt that the successions proceedings were complete and confirmed grant had issue on 9th January, 2023 when an employee at Kipsigis Highlands Cooperative society Limited called her to notify her of a funds transfer from the deceased's account.
5. The Applicant avers that she moved the court vide a summons for revocation of grant on 16th January, 2023 which following a sequence of events which she documented and set out in the instant affidavit, was dismissed on 12th June, 2023 primarily because she had failed to adduce evidence of her customary marriage to the deceased.
6. The Applicant contended that the court directed that the summons for revocation be canvassed by way of oral submissions, however, under the counsel of her advocates on record, she had filed sworn affidavits and witness statements to prove the customary marriage, she further avers that after having read the impugned ruling she deduced that the court failed and/or neglected to consider her evidence of the customary marriage.
7. The Applicant argues that the findings of the court in the succession cause were fraudulent, given that the succession proceedings were shrouded in secrecy and that the court had ignored her sworn averment to wit the chief's letter which is mandatory for succession proceedings.
8. The Applicant faulted the trial court for failing to refer the instant suit being a family matter for court annexed mediation.
9. The Applicant maintains that given the aforementioned reasons she has a good case with high chances of success.
10. The Applicant avers that the ruling dated 12th June, 2023 was punitive, inequitable and unjust. She further maintains that she has an arguable appeal with overwhelming prospects of success based on the grounds set out in her memorandum of appeal.
11. The Respondent filed a replying affidavit in opposition to the application dated 4th July, 2023, the affidavit was sworn by Davis Kiplangat Rotich one of the dependents and a co-administrator of the estate of the deceased.
12. The Respondent stated that the instant application was a delay tactic aimed at denying the legally recognized beneficiaries/ dependents of the estate an opportunity to administer, preserve and enjoy the benefits accruing from the estate of the deceased.
13. The Respondent avers that the facts and grounds adduced in the supporting affidavit were aimed at remedying the applicant's case in the trial court and that the applicant was seeking to reopen the summons for revocation grant under the guise of an application for stay pending appeal.
14. The Respondent avers that facts deponed in paragraph 4 and 5 of the supporting affidavit were misplaced, the applicant ought to have presented them in the trial court to support her case but failed to do so, despite bearing the burden of proof in the case and further that none of the witnesses named in the statements attached was called to give evidence in support of her case in the trial court.
15. The Respondents conceded to fact that they had legally petitioned the court for letters of administration intestate as the lawful dependents of the estate to administer and preserve the estate which was on the verge of being wasted by intruders and third parties.



16. The Respondents argued that the directions as to the disposal of the summons for revocation of grant were taken in the presence of all parties and neither the applicant nor her advocate sought alternative directions for disposal of the summons, both parties were given an opportunity to prove their case and the applicant failed to prove that she was a legally recognized beneficiary of the estate of the deceased.
17. The Respondent argued that as per the directions taken for disposal of the summons for revocation of grant, the trial court did not have any obligation of perusing witness statements whose makers were not called to testify and be cross examined on the credibility and veracity of the same.
18. The Respondent was adamant that the applicant did not request to have the matter referred for court annexed mediation, despite the opportunity to do so and at this point could not fault the trial court for obligations she and her advocate failed to discharge despite being presented with an opportunity to do so.
19. The Respondent maintained that the instant application was frivolous and devoid of merit, the applicant had not demonstrated that she would suffer prejudice if the orders sought were not granted and in any event granting the orders sought would prejudice the respondents who were still minors in dire need of school fees and other basic needs.
20. The Respondent argued that the applicant had not demonstrated that she is likely to suffer substantial loss unless the stay orders sought are granted and further faulted the applicant for failing to deposit in court suitable security hence maintained that she was undeserving of the orders sought.
21. I have considered the instant application, supporting affidavit and replying affidavit filed in opposing the application and I find that the sole issue for this court's determination is whether this court can entertain the application for stay in the circumstances. I find that the this court is empowered to consider the same under section 47 of the Law of Succession Act and rule 73 of the Probate and Administration Rules, in this regard, the court can entertain any application of whatever nature under section 47 aforesaid and invoke its inherent power under Rule 73 and make orders for the sake of justice. It is therefore in the interest of justice to grant the for stay sought for the preservation of the estate herein in order to have the instant appeal heard and determined on its merits.
22. Accordingly, I find that the application dated 13th June, 2023 has merit and I allow it with the following consequential orders;
 - (i) I hereby vacate the orders made on the 12th June, 2023 by Chief Magistrates' Court at Kericho in Succession Cause 101 of 2022 is set aside.
 - (ii) An order for stay of execution of the ruling and order made by the said Chief Magistrates' Court on the 12th June, 2023 pending the hearing and final determination of the applicant's appeal;
 - (ii) Each party to bear its own costs.

DATED, SIGNED AND DELIVERED THIS 31ST DAY OF JULY, 2023

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J.K. SERGON

JUDGE

In the presence of:

C/Assistant - Rutoh



Amaya for the Applicant

Mburu for the Respondent

