REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 190 OF 1998

IN THE MATTER OF THE ESTATE OF KIPCHUMBA TOROITICH KIPTENGWA (DECEASED)

AND

IN THE MATTER OF AN APPLICATIONS FOR EXECUTION AND STAY OF EXECUTION PENDING APPEAL

BETWEEN

SELINA TINGO KIPCHUMBA.....PETITIONER

AND

CHARLES KIMURGOR KIPCHUMBA.....OBJECTOR

RULING

[1] Following the ruling of the Court dated **4 March 2020** by which the estate of the deceased, **Kipchumba Toroitich Kiptengwa**, was distributed amongst his beneficiaries, the Objector herein, **Charles Kimurgor Kipchumba,** filed his application dated **10 March 2020** seeking stay of execution of the decision of the Court dated **4 March 2020** pending the hearing and determination of his intended appeal. That application was filed under a Certificate of Urgency and one of the prayers, which was granted *ex parte* on **11 March 2020** was stay of execution pending the *inter partes* hearing and determination of the said application.

[2] Being aggrieved by the aforementioned turn of events, the Petitioner filed her application dated **19 March 2020** seeking that the *ex parte* orders made on **11 March 2020** be vacated. In the alternative, she prayed that the Court be pleased to review or vary its orders issued on **11 March 2020;** and that in lieu thereof, the Objector be restrained from ploughing, cultivating and/or planting crops on that parcel of land known as **SERGOIT/ELGEYO BORDER BLOCK 1(BELIOMO)/19 (hereinafter, the suit property)** pending the *inter partes* hearing of the application. The Petitioner also prayed that the Officer Commanding Police Division, Eldoret West and/or the OCS, Kapsoya Police Post, be ordered to put her into possession of the suit property.

[3] The Petitioner also filed a Replying Affidavit to the Objector's application dated **10 March 2020**, contending that the Objector is seeking to re-litigate issues that have already been determined by the Court; thereby inviting the Court to sit as an appellate court over its own decision. She further averred that she is now over 80 years old and ought to be allowed to enjoy the fruits of her judgment during her sunset years. She noted that this suit has been pending before court for more than 20 years and ought therefore to come to an end.

[4] This ruling is therefore in respect of the two applications aforementioned, which were canvassed by way of written submissions pursuant to **Paragraph 6** of the **Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the General Public from the Risks associated with the Global Corona Virus Pandemic, Gazette Notice No. 3137 of 20 March 2020**. The Objector's written submissions were filed herein by **Ms. Kipseii,** Advocate, on **9 June 2020**. In her view, the Objector had fully satisfied the prerequisites for the grant of the prayers sought by him as set out in **Order 42 Rule 6(2)** of the **Civil Procedure Rules, 2010**. Counsel relied on the Objector's Supporting Affidavit and highlighted the fact that the Objector has been in actual occupation of the suit property with his entire family; and that he has already initiated the appeal process.

[5] Counsel also postulated that the Petitioner may decide to dispose of the property if given possession at this point in time, and thereby render any decision on appeal nugatory. According to her, a reversal of such an event would be impossible; and therefore the loss anticipated may not be easily quantified or remedied by an award of damages. Counsel further submitted that the application has been brought without unreasonable delay and within the 30 days' appeal window. Thus, counsel relied on **Re Estate of Nasotokini Ole Sane (Deceased)** [2020] eKLR; **Silverstein vs. Chesoni** [2002] 1 KLR 867; **Mukuma vs. Abuoga** [1988] KLR, to buttress her arguments. The cases of **Kenya Commercial Bank Limited vs. Nicholas Ombija** [2009] eKLR and **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others** [2013]

eKLR were also cited for the proposition that the intended appeal is arguable.

[6] On the issue of security, **Ms. Kipseii** proposed an order that the title deeds for the two parcels of land, namely **SERGOIT/ELGEYO BORDER BLOCK 1(BELIOMO)/19** and **TEMBELIO/ELGEYO BORDER BLOCK 9/(KOMBA EMIT)/76** be surrendered and kept in the custody of the Court until the appeal is heard and determined; or as the Court may order. And, in response to the Petitioner's averments that the appeal is incompetent, **Ms. Kipseii** relied on **Article 159(2)(d)** of the **Constitution, Sections 1A, 1B** and **3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya** and the case of **Githure vs. Kimungu** (citation not provided) and urged the Court to uphold substantive justice by giving consideration to the merits of the Objector's application as opposed to technicalities.

[7] **Mr. Korir**, counsel for the Petitioner conceded that the two applications are indeed interrelated; and that the outcome of the Objector's application would inform the Court's decision on the Petitioner's application. In response to **Ms. Kipseii's** submissions, **Mr. Korir** took the posturing that the application dated **10 March 2020** (hereinafter, the 1st application) is incompetent in so far as it purports to have been brought under **Order 42 Rule 6** of the **Civil Procedure Rules**; yet the applicable procedural law herein is the **Probate and Administration Rules, 1980**. Counsel relied on **Julius Kamau Kithaka vs. Waruguru Kithaka Nyaga & 2 Others** [2013] eKLR and **Re Estate of Sarastiono M'Chabari (Deceased)** [2019] eKLR for the proposition that where any proceedings are governed by a special Act of Parliament then the provisions of that Act must be followed; and therefore that the **Civil Procedure Act** and the rules thereunder have no place in succession proceedings except to the extent recognized by **Rule 63** of the **Probate and Administration Rules.**

[8] **Mr. Korir** also impugned the application on the ground that no leave to appeal was ever sought by the Objector or granted by the Court; and therefore that no useful purpose would be served by granting the orders prayed for; contending that the proposed appeal is a non-starter. He cited the case of **Rhoda Wairimu Kioi & John Kiio vs. Mary Wangui Karanja & Salome Njeri Karanja,** Civil Application No. NAI. 69 of 2004, for the holding that in succession matters, there is no express, automatic right of appeal to the Court of Appeal; and that leave of the High Court is therefore a prerequisite.

[9] On the merits of the application, **Mr. Korir** submitted that the Objector had failed to demonstrate that he stands to suffer substantial loss in the event that the decree of the Court is executed. He relied on **James Wangalwa & Another vs. Agnes Naliaka Cheseto** [2012] eKLR and urged the Court to find that the Objector, having deprived the Petitioner of the use of her share of the estate for over 22 years now, ought not to be allowed to continue in that course indefinitely as has been proposed. Counsel mentioned that the Petitioner is over 80 years of age and had been rendered destitute by the Objector during the pendency of this cause. He accordingly urged for the dismissal of the Objector's application and prayed that the Petitioner's application dated **19 March 2020** be allowed and the orders prayed for therein granted.

[10] In respect of the 1st application, I have considered the grounds set out on the face thereof, the Supporting Affidavit sworn by the Objector as well as the Petitioner's Replying Affidavit filed on **8 June 2020** in opposition thereto. I have likewise given due attention to the written submissions filed by counsel for the parties, including the authorities relied on by them. Needless to say that the **Law of Succession Act, Chapter 160** of the Laws of Kenya is, in the main, a stand-alone piece of legislation; and that, other than those provisions that have been imported under **Rule 63** of the **Probate and Administration Rules,** the rules of procedure as provided for in the **Civil Procedure Rules** are inapplicable. Thus, in **Josephine Wambui Wanyoike vs. Margaret Wanjira Kamau & Another [2013] eKLR,** the Court of Appeal restated this position thus:

> **We hasten to add that the Law of Succession Act is a self-sufficient Act of Parliament with its own substantive law and rules of procedure. In the few instances where need to supplement the same has been identified, some specific rules have been directly imported into the Act through its Rule 63(1).**
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> **There must have been a good reason for that…"**

[11] The foregoing notwithstanding, it cannot be a serious argument for **Mr. Korir** to submit that, simply because the application was expressed to have been brought under **Order 42 Rule 6** of the **Civil Procedure Rules**, it is incompetent and merits no further consideration. I say so because the application is also expressed to have been brought pursuant to **Rule 73** of the **Probate and Administration Rules**; which stipulates that:

> **"Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."**

[12] I would accordingly agree with what **Hon. Ouko, J.** (as he then was) had to say in **Re Estate of George M'Mboroki** Meru HCSC No. 357 of 2004:

> **"The Law of Succession Act, like section 3A of the Civil Procedure Act has a saving provision as to the court's jurisdiction under section 47 which is affirmed by rule 73 of the Probate and Administration Rules. It is therefore accepted that the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them."**

[13] Likewise, in **Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya** Nakuru Hccc No. 262 of 2005 **Hon. Kimaru, J.** took the following similar approach:

> **"The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term "inherent", is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil**

and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

[14] Moreover, **Article 159(2)(d)** of the **Constitution** mandates that justice be administered without undue regard to procedural technicalities. What that means in the present scenario, to my mind, is that the subject application be considered and determined on its merits, as opposed to procedural technicalities, especially where, as in the instant case, such do not go to the substance of the application. Accordingly, in **Raila Odinga and others vs. Independent Electoral and Boundaries Commission and 3 others** [2013] *e*KLR the Supreme Court of Kenya held that:

"The essence of that [Article 159(2)(d)] is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone, and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case and conscientiously determine the best course."

[15] It is therefore my finding that the Objector's application cannot be said to be incompetent simply from the point of view that it was expressed to be brought under **Order 42 Rule 6** of the **Civil Procedure Code**. In the same vein, it would be speculative for this Court to entertain arguments as to the competence or otherwise of the proposed appeal. In my considered view, those, as well as the arguability of the appeal, are matters which fall squarely within the purview of the Court of Appeal. Consequently, the only question that falls for my determination in respect of the 1st application is whether sufficient cause has been shown for stay of execution.

[16] It is not in dispute that, as matters stand, the family of the Objector is on the disputed property and has been there for the past 22 years. The Objector has expressed his dissatisfaction with the decision of the Court and is desirous of filing an appeal. On the other hand, though not in occupation of the suit property, the petitioner holds the title to the property in her name. There is therefore no risk that the piece of land being disposed of by the Objector in the interim. Thus, having weighed the competing interests of the parties, I take the view that it would be in the interest of justice to allow the Objector's application for stay. I would, thus, agree with the position taken in **Re Estate of Nasotokini Ole Sane (Deceased)** [2020] eKLR that:

"…the Court, in considering an application for stay of execution, exercises judicial discretion which it should exercise judiciously. And whether or not to grant stay, the Court must consider the circumstances of the case, the essence being, to do justice to the parties. The Applicants are dissatisfied with the decision of this court and want to exercise their statutory right of appeal. In the impugned judgment, the court ordered that some 16 acres be transferred to the Respondents within 90 days. In default the court ordered the Deputy Registrar of this court to execute documents to facilitate compliance with the decree. The judgment requires the Applicants to give sixteen acres of land to the Respondents which are to be excised from the parcel of land, the subject of these succession proceedings. If execution takes place it means the applicant's appeal will face complications. Should the Court of Appeal overturn this court's decision there would have to be a cancellation of the sub-divisions already carried out and the transfers effected in execution of this court's decree. In the circumstances, I do not find overwhelming hindrance, to dissuade this court from granting stay so that the appeal, if filed may not be rendered nugatory. Rather, I am persuaded that it would be in the interest of justice to grant stay of execution, but on certain conditions…"

[17] Moreover, in **Mugar vs. Kunga** [1988] KLR the Court of Appeal appreciated the emotive nature of land disputes and the need for parties to be given the opportunity to fully ventilate their grievances. It held that:

"The practice of the Court of Appeal in the case of land which is a sensitive issue is that the parties should be allowed to come to court to have the issues involved in their dispute determined by a court of last resort. For the parties to come to this court the court has to consider whether the status quo should be maintained pending the hearing of the appeal failing which the appeal if successful will be rendered nugatory. The court was of the view that the status quo should be maintained until the appeal was heard and determined."

[18] In the premises, the justice of the case would require that the existing *status quo* be maintained pending the hearing and determination of the appeal. As proposed by Counsel for the Objector, it would serve the interests of both parties if the title deeds to the two properties, namely **SERGOIT/ELGEYO BOARDER BLOCK 1(BELIOMO)/19** and **TEMBELIO/ELGEYO BORDER BLOCK 9/(KOMBA EMIT)/76** are deposited in Court in the meantime. Accordingly, the orders that commend themselves to me in respect of the Objector's application dated **10 March 2020** and which I hereby grant are as hereunder:

[a] That pending the hearing and determination of the applicants intended appeal, there be an order of stay of execution of the Order made herein on **4 March 2020.**

[b] That there be an Order of Inhibition against any registration or further dealings in respect of Title No. **SERGOIT/ELGEYO BOARDER BLOCK 1(BELIOMO)/19** pending the hearing and determination of the proposed appeal.

[c] The matter shall be mentioned on **5 August 2020** to confirm the filing of the proposed appeal.

[d] Costs of the application to be in the cause.

[19] In the light of the foregoing, it follows that the Petitioner's application dated **19 March 2020** is untenable. Accordingly, the same is hereby dismissed with an order that the costs thereof be costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET VIA EMAIL THIS 22ND DAY OF JULY 2020

OLGA SEWE

JUDGE