



REPUBLIC OF KENYA



**Lagat & 4 others v Kandie & 2 others (Environment and Land Miscellaneous Application 8 of 2023) [2025] KEELC 3058 (KLR) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3058 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 8 OF 2023**

**CK YANO, J**

**APRIL 3, 2025**

**BETWEEN**

**HANNA JEBIWOT LAGAT ..... 1<sup>ST</sup> APPLICANT  
AMBROSE KIPTAI MASHARA ..... 2<sup>ND</sup> APPLICANT  
REBECCA JEPKOECH OLOIBE ..... 3<sup>RD</sup> APPLICANT  
ESTATE OF MIRIAM JEPKORIR KIPKOROS ..... 4<sup>TH</sup> APPLICANT  
CHRISTINE CHEMUTAI RUTTO ..... 5<sup>TH</sup> APPLICANT**

**AND**

**PHILOMENA KANDIE ..... 1<sup>ST</sup> RESPONDENT  
GILBERT KIPROTICH KANDIE ..... 2<sup>ND</sup> RESPONDENT  
DOVIOUS KIPKORIR KANDIE ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Respondents filed an application dated 26<sup>th</sup> August, 2024 seeking the following orders;
  - a. Spent
  - b. Spent
  - c. The orders/directions given on 24-7-2024 and consequential and/or subsequent proceedings including the mention set for 18-9-2024 and/or other proceedings upto and after 18-9-2024 be and hereby stayed forthwith pending the hearing and final determination of the Respondents'/ Applicants' Court of Appeal Civil Application No. E037 of 2023 between Philomena Kandie (applicant) =versus= Kimoi Kapkoros alias Elizabeth Kimoi Jacob Kapkoros (respondent)
  - d. Costs to the respondents/applicants.



2. The Application is supported by an Affidavit of even date sworn by Philomena Kandie, the 1<sup>st</sup> Respondent on behalf of herself and her two sons, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. She deponed that the Applicants filed Notice of Motion dated 14<sup>th</sup> August, 2023 against the Respondents herein, which was served upon them on 12<sup>th</sup> September, 2023. That they filed their response and on 24<sup>th</sup> July, 2024 the court fixed the matter for mention on 18<sup>th</sup> September, 2024.
3. The 1<sup>st</sup> Respondent deponed that prior to 24<sup>th</sup> July, 2024 the Respondents had filed Eldoret Court of Appeal Civil Application No. E037 of 2024 for extension of time to file an appeal against the judgment given on 17<sup>th</sup> July, 2023 in Eldoret High Court Succession Cause No. 145 of 2000, where she is the Petitioner and one Elizabeth Kimoi Kapkoros is the objector.
4. She averred that their oral application on 24<sup>th</sup> July, 2024 for stay of these proceedings was unsuccessful and she asked that this instant Motion be allowed as prayed. The Respondents annexed a copy of the Notice of Motion Application made in Eldoret Civil Application No. E037 of 2024 and the Supporting Affidavit thereto.
5. The Applicants/Respondents opposed the Application through a Replying Affidavit sworn by the 5<sup>th</sup> Applicant, Christine Chemutai Rutto, dated 9<sup>th</sup> September, 2024. It is the Applicants' case that the instant Motion is brought in bad faith as the Respondents made an oral application for stay of proceedings that was denied, but they still filed the instant Motion which is res judicata. Further, that the prayers herein were made in Civil Application No. E047 of 2023 where the Applicant therein sought a stay of execution and further proceedings arising out of the decision in Eldoret P&A Cause No. 145 of 2023 delivered on 17<sup>th</sup> July, 2023. That the Court of Appeal struck out the said application vide its ruling delivered on 7<sup>th</sup> June, 2024 and currently, there is nothing barring this court from proceeding with this matter.
6. The 5<sup>th</sup> Applicant deponed that thereafter, on 9<sup>th</sup> July, 2024 the Respondents filed Civil Application No. E037 of 2024 under Certificate of Urgency seeking an extension of time within which to file a Notice and Record of Appeal. That no urgency has been inferred on the Application to date, thus it is unfair and unjust to stay these proceedings as it is uncertain whether the said Application shall be determined. Further, that the matter before the Court of Appeal is in no way related to the matter before this court and therefore the proceedings will not affect the Court of Appeal Application.
7. The 5<sup>th</sup> Applicant stated that the Respondents have not demonstrated any loss that shall befall them as required under Order 42 Rule 6(2), which is ground for dismissal of the Application. That in any case, any loss that may befall the Respondents can adequately be compensated by an award of damages.
8. She deponed that the Respondents' right to appeal should not hinder the Applicant's right to enjoy the fruit of their judgment obtained in Eldoret P&A Succession Cause No. 145 of 2000, which they seek this court's aid in executing. She termed the Respondents perennial litigators whose sole aim is to delay the execution of the said judgment and deny them justice, yet the Respondents are also beneficiaries in the said judgment.
9. She averred that not allowing this application shall actually benefit the Respondents and bring to an end a two-decade court battle, ensuring that all the parties get their share of the estate. She asked the court to dismiss the instant Motion with costs. The Applicants annexed a copy of the Notice of Motion Application filed in Eldoret Civil Application No. E047 of 2023.



## Submissions;

10. The Application was heard orally on 6<sup>th</sup> March, 2025. Mr. Cheptarus for the Respondents/Applicants submitted that in Civil Application No. E037 of 2024, the Applicants intend to challenge a decision by Hon. Justice Nyakundi given on 17<sup>th</sup> July, 2023 in Succession Cause No. 145 of 2000. That the said Application is still pending hearing and final disposal before the court of Appeal, hence the instant application for stay of execution of the judgment. Counsel submitted that the court can grant a stay pursuant to Order 42 Rule 6 of the Civil Procedure Rules and all provisions of the law. He submitted that if execution proceeds, the Applicants will suffer substantial loss.
11. Mr. Cheptarus submitted that the application was made without delay, and that the Applicants will suffer no prejudice as all parties will have an opportunity before the Court of Appeal. Counsel added that the Court of Appeal Application will be rendered useless unless stay is granted. Further, that the Applicants in their Replying Affidavit admitted the averments in the Supporting Affidavit.
12. Counsel explained that there had been previous Applications being E047/2023 and E048/2023 which were heard and determined, after which the Respondents moved to the Court of Appeal in Civil Application No. E037 of 2024. He urged the court to grant the orders sought.
13. Opposing the Application, Ms. Aketch for the Applicants/Respondents submitted that there have been two previous Applications in the Court of Appeal being E047 and E048 of 2023. That in Civil Application No. E047/2023, the Respondents sought among other prayers, a stay of execution and further proceedings in Succession Cause No. 145 of 2000, but it was dismissed on 7<sup>th</sup> July, 2024.
14. Counsel argued that the instant Motion raises the same issues as those raised in Civil Application No. E047 of 2023, thus it is res judicata and ought to be dismissed. She also submitted that the Application before the Court of Appeal is for extension of time to file a Notice and Record of Appeal, and has no nexus with the current matter neither will it serve the parties any justice.
15. Ms. Aketch submitted that it is only just that this matter is concluded for the execution to be carried out. She added that the Respondents have a right to enjoy the fruits of their judgment. Further, that execution being a lawful process should not be unnecessarily curtailed. Counsel also submitted that under Order 42 Rule 6, one has to show that they will suffer substantial loss, but the Respondents have not demonstrated what substantial loss they would suffer.
16. Counsel cited Section 1B of the *Civil Procedure Act* that courts ought to hear matters expeditiously. In addition, Counsel argued that all parties will benefit from the execution. Counsel submitted that the matter dates back to the year 2000, and that the same now having been determined, execution should not be stayed any further.
17. Counsel also submitted that Application No. E037 of 2024 does not have a date although it was filed under Certificate of Urgency in July, 2024. Counsel argued that allowing this matter to proceed will not affect the said Application. Counsel relied on the case of Nicholas Mutuku vs Patricia Mweni Kilonzo (2020) eKLR. Counsel asked that the Respondents' Application be dismissed with costs for reason that it is res judicata and has not met the threshold under Order 42 Rule 6 of the Civil Procedure Rules.
18. In reply, Mr. Cheptarus submitted that this matter and the execution process arose from Succession Cause No. 145 of 2000. That the two applications in the Court of Appeal also arose from the same matter, and were dismissed because the Notice and Record of Appeal were not filed on time. Counsel submitted that they are disputing the distribution by Hon. Nyakundi J., and that the age of the succession case is not a dispute before this court. Further, that the issues in Application No. E037 of



2024 are governed by the Court of Appeal Rules. He submitted that this matter is not res judicata as alleged and asked that the Application be allowed with costs.

### **Analysis and Determination;**

19. I have considered the application, the response filed thereto and the oral arguments by Counsel for the parties and I am of the view that the following issues arise for determination:-
- i. Whether the court has jurisdiction to grant the prayers sought.
  - ii. Whether the Application is res judicata.
  - iii. Whether the orders sought in the application should issue as prayed.
  - iv. Who should bear the costs of this Application?

### **Whether the court has jurisdiction to grant the prayers sought;**

20. In the instant application, the Respondents/Applicants seek a stay of proceedings in this matter pending the hearing and determination of Eldoret Court of Appeal Civil Application No. E037 of 2023 which arose from the judgment delivered on 17<sup>th</sup> July, 2023 in Eldoret High Court Succession Cause No. 145 of 2000. The Applicants'/Respondents' Notice of Motion dated 14<sup>th</sup> August 2023 also arose from the said judgment.
21. It is not in dispute that the proceedings herein emanated from a decision made by the High Court in Eldoret High Court Succession Cause No. 145 of 2000. In their application dated 14<sup>th</sup> August 2023, the Applicants/Respondents are basically seeking to execute the decision in Eldoret High Court Succession Cause No. 145 of 2000.
22. Section 47 of the [Law of Succession Act](#) provides as follows:-

47. Jurisdiction of the High Court.

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:

Provided that the High Court may for the purpose of this section be represented by Resident Magistrate's appointed by the Chief Justice.”

23. In addition, section 38 of the [Civil Procedure Act](#) gives powers of court to enforce execution, and provides inter alia as follows: -
38. subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree –
- a) by delivery of any property specifically decreed;
  - b) –
  - c) –
  - d) –
  - e) –



f) In such other manner as the nature of the relief granted may require.

24. In this case, it is admitted by both the applicants and the respondents that the proceedings herein emanates from the judgment delivered on 17<sup>th</sup> July, 2023 in Eldoret High Court Succession Cause No. 145 of 2000, and the Respondents/Applicants filed Civil Application No. E037 of 2023 in the Court of Appeal at Eldoret which is still pending.
25. It is trite law that jurisdiction is donated by the constitution or statute and as such a court cannot exercise its discretionary powers to donate jurisdiction where it does not exist and where it has not been donated by the constitution or statute. Jurisdiction as succinctly stated in the classic case of Owners of Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Limited (1989) KLR 1 is everything. Nyarangi J. A held: -
- “Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs its tool in respect of a matter before it the moment it holds the opinion that it is without jurisdiction.”
26. This position has been eruditely restated with finality by the Supreme Court of Kenya in the case of Samuel Kamau & Another vs Kenya Commercial Bank and 2 others Supreme Court Civil Application No. 2 of 2011 where it opined as follows: -
- “A court’s jurisdiction flows from either the constitution or legislation or both. Thus, a Court of Law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in his submissions that the issue as to whether a court of law had jurisdiction to entertain a matter before it is not one of procedural technicality, it goes to the very heart of the matter for without jurisdiction, the court cannot entertain any proceedings.”
27. The jurisdiction of this court is provided for under Section 13 of the Environment and Land Court Act which states that the court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and the provision of that Act or any other law applicable in Kenya relating to Environment and Land. Subsection 2 of Section 13 of the Environment and Land Court Act lists the disputes the court can hear and determine while Section 14 provides for the enforcement of the court’s orders. My reading and understanding of the said provision of the law is that this court can only make orders for the enforcement of a Judgement, award, order or decree arising from its own decisions.
28. As stated above, the proceedings herein have arisen from the judgment delivered on 17<sup>th</sup> July, 2023 in Eldoret High Court Succession Cause No. 145 of 2000. It is not clear why the proceedings herein which seek to enforce a judgment made in the High Court Succession Cause No. 145 of 2000 were filed before this court (ELC) under a miscellaneous application instead of the said Succession Cause.
29. Section 6 of the Civil Procedure Act provides as follows: -
6. “No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”



30. Further, in Section 2 of the *Civil Procedure Act*, “suit” is defined to mean all civil proceedings commenced in any manner prescribed. Section 19 of the said Act provides that “every suit shall be instituted in such manner as may be prescribed by the rules, while Order 3 rule 1 (1) of the Civil Procedure Rules provides that “every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.”
31. The Applicants application which is seeking to enforce the Judgment in Succession Cause No. 145 of 2000 has been made by way of a miscellaneous application. In my view, the miscellaneous application herein has been made in a vacuum and is not a suit properly so called. Further, it is my considered view that the miscellaneous application herein is subjudice since there is another matter before the High Court between the same parties and over the same subject matter. It is therefore my finding that this court has no jurisdiction over the matter and I down my tools.
32. Accordingly, the Notice of Motion dated 26<sup>th</sup> August 2024 filed by the Respondents herein and the Notice of Motion dated 14<sup>th</sup> August 2023 filed by the Applicants herein are hereby struck out. Parties to bear their own costs.
33. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 3<sup>RD</sup> DAY OF APRIL, 2025 VIDE MICROSOFT TEAMS.**

**HON. C. K. YANO**

**ELC, JUDGE**

In the presence of;

Mr. Kimurgor for the Applicants.

Mr. Cheptarus for the Respondents.

Court Assistant - Laban.

