



REPUBLIC OF KENYA



**Jeptoo & another v Tarus & 2 others (Miscellaneous Application
E001 of 2022) [2022] KEELC 2713 (KLR) (5 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2713 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
MISCELLANEOUS APPLICATION E001 OF 2022**

MN MWANYALE, J

JULY 5, 2022

BETWEEN

ZANURA JEPTOO 1ST APPLICANT

ZAKIA JEPKOSGEI 2ND APPLICANT

AND

MAHAMOUD CHEMWOR TARUS 1ST RESPONDENT

LAND REGISTRAR NANDI COUNTY 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. Before Court for determination is the Notice of Motion dated 14th January, 2022 seeking the substantive orders.
 - i) Spent
 - ii) That, the Honorable Court be pleased to grant an order of temporary stay of execution of the orders/judgement delivered on 18/4/2016 by the Kadhi's Court At Eldoret In Succession Cause No. 24 of 2015 pending the hearing and determination of this application interpartes and thereafter pending hearing and determination of the intended appeal against the judgment.
 - iii) That, the Honorable Court be pleased to allow the Applicants to file a Memorandum of Appeal out time against the orders made on 18/4/2016 by Kadhi's Court In Eldoret Kadhi's Court Succession Cause No. 24 of 2015.
2. The said application is supported on grounds interalia;



- i) That the 2nd Respondent has published in the Kenya Gazette Notice 13747, his intention to issue title deed for L. R. No. Nandi/chepkongony/922 upon expiry of thirty (30) days which period is lapsing on Monday 17th January 2022.
 - ii) That, the Applicants will suffer irreparable loss and damage and yet they were not aware of the proceedings before the Kadhis Court at Eldoret in Eldoret Kadhis Court Succession Cause No. 24 of 2015.
 - iii) That, the intended Appellants/Applicants were condemned unheard as the proceedings before the Kadhis Court were exparte.
 - iv) That, the Kadhis Court has no jurisdiction to issue the order that vested to the suit property in the 1st Respondent.
 - v) That, the failure to institute an appeal within time was occasioned by the absence of the Trial Court File.
 - vi) That the Applicants were not aware of the judgement until they were instructed to surrender the title by the 2nd Respondent.
 - vii) The intended appeal raised triable issues that stands good chances of succeeding
 - viii) It is in the inters tot justice and fairness that the order sought are granted so as allow the Appellants to ventilate their case in Court.
 - ix) The Applicants and other members of the family were born and brought up on the suit land and they do not have any other home.
3. The application was equally supported by the supporting Affidavit if Zanura Jeptoo who reiterated the grounds aforementioned in paragraph 2 above but deponed that the Applicants were daughters of Tuiya Salim and Kiptarus Chemwor.
 4. That the L. R. No Nandi/chepkongony/922 was the property of their late mother Tuiya Salim as a gift from her late husband Kiptarus Chemwor who was the original owner of Nandi/chepkongony 280 which he subdivided into four portions Nandi/chepkongony 922, 923,924 and 925.
 5. That their late father, had 3 wives namely Fatuma, Tuiya Salim and Jebutia.
 - x) That L.r. No. 922 was gifted to Applicants late mother Tuiya Salim, while L.R. NO. 923 to Fatuma, the first wife and L.R. NO. 924 to Jebutia and he remained with 925.
 - xi) That the 1st Respondent instituted succession cause No. 24/2015 before the Kadhis Court and unlawfully included L.R. No. Nandi/chepkongony/922 and yet the property was not part of the Estate of Kiptarus Chemwor.
 - xii) That the Kadhi had no jurisdiction to deal with L.R. No.922 which did not form part of the Estate of Kiptarus Chemwor.
 - xiii) That the Succession Cause was heard exparte and thereafter the file could not be traced for purposes of setting the judgment aside.
 - xiv) That there is danger to transfer the property.
 6. The application is opposed by all the Respondents. The 1st Respondent through Messrs. Melly Cheruiyot and Company Advocates filed a Replying Affidavit after being granted leave to file the same out of time.



7. In his response the 1st Respondents states that he is aware that Nandi/chepkongony/280 belonged to his late father Kiptarus Chemwor.
8. That he challenged ownership of parcel number challenging ownership of L.R. Nandi/chepkongony/922 through case No. 24/2015 before the Kadhis Court.
9. That the Applicant were all aware of the proceedings in the Kadhi's Court, and did not appeal but filed ELC Case No. 20 of 2006.
10. That the issue of the Kadhi's Court file missing is merely meant to mislead this Court.
11. The 1st Respondent thus prayed for the application to be dismissed.
12. On their part the 2nd and 3rd Respondents filed grounds of opposition stating *interlia*.
 - i) The Court's jurisdiction is improperly involved as the dispute is a succession cause at the Kadhis Court whose appeal would live in the High Court of Kenya and not the Environment & Land Court.
 - ii) That the Applicant has not satisfied the conditions and principles for enlarging time to file an appeal out of time as set out in *first American Bank of Kenya Ltd vs Gulab P. Shar & 2 others*.
13. On the strength of the above grounds the 2nd and 3rd Respondent pray that the application be dismissed.
14. The applicant was granted leave to file a further affidavit; and state therein;
 - i) That their late mother was the registered owner of the suit land Nandi/chepkongony/922.
 - ii) That their mother was not privy to the consent entered on 26/8/2004 between the 1st Respondent and their late grandfather Kiptarus Chemwor (alias) Salim entered in cause No. 2 of 2004.
 - iii) The said consent was purportedly entered into the Senior Resident Magistrate Court at Kapsabet Law Court and filed before the Kadhi's Court Eldoret.
 - iv) That the said consent was signed on 26/8/2004 yet subdivision was done in 29/10/2004.
 - v) On jurisdiction, the Applicant responds that this Court has the request jurisdiction to hear and determine the issue in question.
 - vi) That at the time Kadhis Court dealt in L. R. Nandi/chepkogony 922 was registered in the name of Tuiya Salim.
15. On the strength of the further affidavit and supporting affidavit, the Applicant prays for the orders sought in the application.
16. The Applicant herein seeks an extension of time to file an appeal against the decision of the Kadhi in Eldoret Succession Cause No. 24 of 2015, which decision ordered the Land Registrar Nandi County cancel title number Nandi/chepkogony/922, belonging to Tuiya Salim (deceased) mother to the Applicants.
17. It is the Applicant's contention that the property L.R. No. Nandi/chepkogony/922 did not form part of the estate of the late Kiptarus Chemwor.
18. The 2nd and 3rd Defendants have challenged the jurisdiction of this Court and the Court must thus deal with jurisdiction before going to the merits of the application.



19. As noted the application seeks a stay of execution of a judgement of the Kadhi in Succession Cause No. 24/2015, Eldoret, as well as extension of time to file an appeal out of time.
20. The challenge on jurisdiction, is premised on the fact, that the decision sought to be appealed from is a decision in a succession proceeding whose appeal lies in the High Court and not this Court, the 2nd and 3rd Respondent argue.
21. In response, the Applicant submits that the ELC Court is a Court of equal status with the High Court and can therefore hear and determine the appeal hence, the Court should determine the same as it involved parcel of land.
22. The 1st Respondent, has not submitted on the issue of jurisdiction but submitted on the merits of the application for stay of execution and has cited the principles under Order 42 Rule 6 for the Court to follow.
23. On their part the Applicant cite Section 4 (2) of the *Environment and Land Court* as well as Section 13 (1) of the said Act, urging that the Kadhis Court being a subordinate Court, this Court can hear appeals from that Court, and that since the Kadhis Court dealt with land of a person who was not deceased, then the same was not a Succession Cause.
24. On their part the 2nd and 3rd Respondent submit that the jurisdiction under Section 13 of the *Environment* is limited to disputes relating to Environment & Land Court.
25. Considering that the Judgement sought to be appealed from, though touching on ownership of land, was delivered in a succession cause, the proper forum for the Appeal is the High Court Family Division and not the Environment and Land Court.
26. Consequently, the application has been filed in the wrong forum and the application before the High Court in Eldoret.
27. The Application ought to have been filed is hereby dismissed and the interim orders stand vacated.

DATED AND DELIVERED IN KAPSABET THIS 5TH DAY OF JULY, 2022.

M. N. Mwanyale,

JUDGE

In the presence of;

Mr. Melly for the 2nd Respondent

Ms. Jepkemei holding brief for Mr. Letting for the 2nd and 3rd Respondent.

