



REPUBLIC OF KENYA



**In re Estate of the Late Paul Kiplangat Soi (Deceased) (Succession Cause
18 of 2009) [2024] KEHC 1247 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1247 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
SUCCESSION CAUSE 18 OF 2009**

JK SERGON, J

FEBRUARY 8, 2024

IN THE MATTER OF THE ESTATE OF THE LATE PAUL KIPLANGAT SOI (DECEASED)

GLADYS CHELANGAT SOI..... 1ST PETITIONER/APPLICANT

GILBERT KIPNGETICH LANGAT...2ND PETITIONER/APPLICANT

VERSUS

SOPHIA CHEPKOECH SOI.....3RD PETITIONER/RESPONDENT

RULING

1. The applicants herein have filed the notice of motion dated 29th August, 2023 seeking for the following orders;
 - (i) Spent
 - (ii) Spent
 - (iii) That pending the hearing and determination of the appeal, there be a stay of execution of all the consequential orders arising from the rectified certificate of confirmation of grant dated 8th May, 2023 and more particularly any subdivision of land title no. Kericho/Kipsonoi/251.
 - (iv) That the costs of this application be provided for.
2. The application is supported by grounds on the face of it and the affidavit of Gladys Chelangat Soi sworn with the consent of the co-applicant
3. The applicant stated that this court vide a ruling delivered on 12th June, 2020 distributed the estate of the deceased to beneficiaries, in the said distribution, 5 acres constituting Kericho/Kipsonoi/251 were given the first house.
4. The applicant contended that the court did not take into consideration that the deceased had settled the two houses prior to his demise, the first house had been settled in Kericho/Kapsimbiri/179



the paternal ancestral land whereas the second house was settled in Kericho/Kipsonoi/251 in the settlement scheme.

5. The applicant stated that being dissatisfied with the ruling, they filed an application for review dated 1st December, 2021 and the application was dismissed on 16th December, 2022 and they had since lodged an appeal in the Court of Appeal against the decision dismissing their application for review which appeal was yet to be heard and determined.
6. The applicant was adamant that the preferred appeal is arguable and has overwhelming chances of success and unless the same is heard on merit, the applicants were likely to be prejudiced and likely to suffer loss and irreversible damages by being evicted from the subject land parcel where they had constructed their matrimonial homes.
7. The applicant stated that the rectified certificate of confirmation of grant dated 8th May, 2023 was issued to the respondent in their absence and in the absence of their counsel and without their knowledge and the respondent is in the process of executing the same. The applicant contended that they were born, were brought up and have been in occupation of the whole of Kericho/Kipsonoi/251 from which parcel now the respondent wishes to hive out 2.02 hectares as per the rectified certificate of confirmation of grant dated 8th May, 2023.
8. The applicant stated that unless the orders of stay of execution are granted the respondent will proceed to execute the rectified certificate of confirmation of grant dated 8th May, 2023 which will amount to eviction and would therefore render the appeal which has been preferred nugatory.
9. The applicant stated that they were ready and willing to abide by any orders, conditions and/or directions imposed by this court and further that it was only fair and in the interest of justice that the applicants be allowed to ventilate their grievances before the Court of Appeal without the risk of being evicted from the subject parcel of land.
10. Sophia Chepkoech Soi the respondent filed a replying affidavit and stated that the issues raised in the instant application dated 29th August, 2023 are the same ones raised in the applications dated 1st December, 2021 and 30th January, 2023 which were dismissed by this court.
11. The respondent contended that the applicants were in violation of the law and the *Court of Appeal Rules* by not filing the letter seeking certified copies of proceedings and ruling within the prescribed statutory time and not affecting service upon her advocates and further that the intended appeal by the applicants had no chance of success because it was not filed within the prescribed timelines.
12. The applicant filed a further affidavit in response to the respondent's replying affidavit, she stated that in the instant application they were seeking stay of execution of the rectified confirmation of grant dated 8th May, 2023 and more particularly any subdivision of land parcel No Kericho/Kipsonoi/251, the application dated 1st December, 2021 was seeking for review and the one dated 31st January, 2023 was for rectification of grant and therefore it was not true that the present application was raising similar issues.
13. The applicant was adamant that a party aggrieved by a court decision has an option of filing either an appeal or applying for review.
14. The applicant maintained that the issues raised by the respondent are mere procedural technicalities which are cured under article 159 (2) (d) which provides that justice shall be done without undue regard to procedural technicalities and further that the proceedings have been typed and the applicants were in the process of compiling their record of appeal, which appeal would be heard and determined expeditiously and therefore the respondent would not suffer any prejudice.



15. The court directed the parties to file written submissions, both the applicants and the respondent complied and filed written submissions which I duly considered.
16. The applicant reiterated that the principles guiding the court in granting stay of execution pending appeal are espoused under order 42 rule (2) of the Civil Procedure Rules, 2010 and further that the courts are not only limited to the parameters set out in the said section but to give effect to the overriding objectives as set out in sections 1A and 1B of the Civil Procedure Act.
17. The applicant stated that the court was obligated to weigh the likely consequences of granting the stay and in doing so the Court is enjoined to consider the principle of proportionality and equality of arms in placing parties on equal footing on the face of the law. The applicant reiterated that the core function of the courts of law is not to disadvantage parties but to preserve their rights pending the determination of the appeal. The applicant cited the case of Nicholas Mutuku Mwasuna v Patricia Mueni Kilonzo [2022] in which the court stated as follows; “What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice.”
18. The applicant maintained that the grant or refusal of stay of execution is at the discretion of the court, which discretion is to be exercised to ensure that no party suffers prejudice that cannot be compensated in monetary terms. The applicants stated that they were brought up and have been in occupation of the whole of Kericho/Kipsonoi/251 from which the respondent was seeking to hive out 2.02 hectares as per the rectified certificate of confirmation of grant dated 8th May, 2023.
19. The applicants stated that they had made substantial developments on the subject parcel of land and that if the order for stay of execution is not granted the respondent would execute the rectified certificate of confirmation dated 8th May, 2023 which would be tantamount to evicting the applicants, demolishing their houses and development on the subject property thereby rendering the preferred appeal nugatory
20. The applicants maintained that they filed the instant application timeously and without undue delay. The applicants are ready and willing to abide by any orders, conditions and/or directions that this court may impose in terms of security.
21. The applicant reiterated that it was in the interest of justice that the court grants orders sought for stay of execution in order to preserve the substratum of the appeal and avert the applicants from incurring substantial loss, in any event the applicants were not objected to the distribution of other properties of the estate.
22. I have considered the pleadings and the submissions filed by the parties and the sole issue of determination is whether an order for stay of execution of the rectified confirmation of grant dated 8th May, 2023 should be issued. The High Court is the final court of record in succession matters, the right of appeal is not automatic and therefore any party wishing to prefer an appeal from the High Court to the Court of Appeal in succession matters must first seek and obtain leave. This principle has been expounded in various decisions of the superior courts. In the case of John Mwita Murimi & 2 Others v Mwikabe Chacha Mwita & Another [2019] eKLR the Court of Appeal stated inter alia: “... there is no evidence on record that leave of the High Court or this Court was obtained to institute the appeal. We re-affirm the decisions of this Court in Rhoda Wairimu Karanja & Another v Mary Wangui Karanja



Es Another [2014] eKLR and Josephine Wambui Wanyoike v Margaret Wanjari Kamau Es Another [2013] eKLR, where it was clearly stated that in succession matters, there is no automatic right of appeal without leave of court.”

23. I have carefully studied the contents of the file and it is not clear whether the applicant herein sought and obtained leave to file the intended appeal. I note that neither party in both of their rival pleadings and submissions have given any address on this issue.
24. I therefore find no need to analyze the grounds for stay of execution in Order 42 Rule 6 of the Civil Procedure Rules.
25. In the circumstances, I find and hold that the application dated 29th August, 2023 is found to be devoid of any merit and it is hereby ordered dismissed with an order directing the applicant to pay respondent costs of the application.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 8TH DAY OF FEBRUARY 2024.

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J.K. SERGON

JUDGE

In the presence of:

C/Assistant – Rutoh

Kefa for Petitioners/Applicants

No Appearance for the Respondent

