



**Cheruiyot & another v Kilel & another (Civil Appeal  
5B of 2024) [2024] KEHC 7226 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7226 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
CIVIL APPEAL 5B OF 2024**

**JK SERGON, J**

**JUNE 20, 2024**

**IN THE MATTER OF THE ESTATE OF KIPKILEL  
ARAP BOROR ALIAS KIPKILEL BOROR (DECEASED)**

**BETWEEN**

**ERNEST KIPKEMOI CHERUIYOT ..... 1<sup>ST</sup> APPLICANT**

**PHILIP KETER ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JOEL KIPKEMOI KILEL ..... 1<sup>ST</sup> RESPONDENT**

**WILSON KIPTOO KILEL ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal against the Ruling delivered on 15th day of February, 2024 in  
Kericho Chief Magistrate's Court Succession Cause No. 36 of 2019 on application  
dated 3rd October, 2023 by Hon. Johnstone Munguti, Senior Principal Magistrate)*

**RULING**

1. The application coming up for hearing is a notice of motion dated 15th March, 2024 seeking the following orders;
  - (i) Spent
  - (ii) That the applicants herein be granted leave to file their appeal against the ruling delivered on 15th February, 2024 in Kericho CMCC Succession Cause No. 36 of 2019.
  - (iii) That pending the hearing and determination of this Application, this Honourable Court do order a stay of execution of the ruling in Kericho CMCC Succession Cause No. 36 of 2019.



- (iv) That pending the hearing and determination of this Appeal, this Honourable Court do order a stay of execution of the ruling in Kericho CMCC Succession Cause No. 36 of 2019.
  - (v) That necessary directions be given.
  - (vi) That the costs of this application be provided for.
2. The application is based on the grounds on the face of it and supporting affidavit of Ernest Kipkemoi Cheruiyot the 1st Appellant/Applicant on behalf of the 2nd Appellant/Applicant.
  3. The 1st Appellant/Applicant avers that a ruling was delivered in favour of the Respondents herein in Kericho CMCC Succession Cause No. 36 of 2019.
  4. The 1st Appellant/Applicant avers that the Respondents despite having not obtained a decree for execution have commenced revocation of title deeds to their land parcels despite their intention to appeal the said ruling.
  5. The 1st Appellant/Applicant avers that the appeal has merits and attached a copy of the memorandum of appeal. He further reiterates that the intended appeal has high chances of success and that if the orders sought are not granted, they will suffer irreparable loss and damages.
  6. The 1st Appellant/Applicant avers that the application is made in good faith and the Respondents will not be prejudiced if the application is allowed.
  7. The Respondents filed a replying affidavit in opposition to the instant application sworn by Joel Kipkemoi Kilel the 1st Respondent on behalf of the 2nd Respondent.
  8. The 1st Respondent avers that the application does not satisfy the requirement for leave to appeal.
  9. The 1st Respondent avers that the probate court in its ruling dated 15th February, 2024, judiciously exercised its discretion to stay implementation of the certificate of confirmation of grant issued to the Applicants on 12th September, 2023 pending the hearing and determination of their protest. Therefore the ruling dated 15th February, 2024 did not issue any positive orders capable of execution or stay.
  10. The 1st Respondent avers it is clear beyond peradventure that the Applicants who are grandchildren of the deceased are bent on frustrating their efforts to have fair and just distribution of the assets of the deceased to the beneficiaries.
  11. The 1st Respondent avers that contrary to allegation by the Applicants, they had not revoked any titles of the applicants since the title subject to the instant succession cause is still in the name of the deceased, its subdivision having been stayed by the ruling stated 15th February, 2024.
  12. The 1st Respondent avers that the Applicants are mischievously seeking to lift the stay orders of 15th February, 2024 so that they can effect subdivision of the deceased's estate thereby negating their protest.
  13. The 1st Respondent avers the instant application is frivolous, vexatious and an abuse of court process and the same should therefore be dismissed with costs.
  14. The matter came up for inter partes hearing on 16th May, 2024. The advocates on record for the parties made oral submissions which this court has considered. Mr. Bii for the Appellants/Applicants urged this Court to allow the instant application and that he would be relying on the grounds on face of the application and the averments in the supporting affidavit. Mr. Langat for the Respondents stated that he opposed the application and would be relying on the averment in the replying affidavit.



15. I have considered the pleadings and oral submissions by the parties and I find that the issue (s) for determination are as follows; whether to grant leave to file the appeal against the ruling delivered on 15th February, 2024 in Kericho CMCC Succession Cause No. 36 of 2019 and a stay of execution of the said ruling. The answer is in the affirmative. On the issue as to leave to appeal, the proceedings from decisions made the Magistrates' Court to the High Court, are governed by section 50 (1) of the [Law of Succession Act](#) (Cap.160) which provides as follows –
- “An appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court thereon shall be final.”
16. It therefore follows that the High Court has jurisdiction to entertain an appeal from any order or decree of the magistrates' court in succession proceedings.
17. On the issue as to whether to grant a stay of execution, on one part, the applicants allege that respondents despite having not obtained a decree for execution, had commenced revocation of title deeds of the land parcels belonging to the applicants. On the other part, the respondents allege that they had not revoked any titles of the applicants since the title subject to the instant succession cause was still in the name of the deceased, its subdivision having been stayed by the ruling of the court. The respondents reiterated that the court in its ruling dated 15th February, 2024 in Kericho CMCC Succession Cause No. 36 of 2019, did not issue any positive orders capable of execution or stay.
18. It is apparent that the applicant has an automatic right of appeal is indicated hereinabove. Therefore, there is no need for the applicant to seek for leave to appeal to this Court. The applicant has sought for an order for stay of execution. The record show that the trial court gave an order for stay of implementation of the certificate of confirmed grant. It was therefore not necessary for the applicant to seek for a similar order which has already been granted to him.
19. In the end, the application dated 15<sup>th</sup> March, 2024 lacks merit. The same is dismissed with costs being in the cause.

**DELIVERED, SIGNED AND DATED AT KERICHO THIS 20<sup>TH</sup> DAY JUNE, 2024.**

**J.K. SERGON**

**JUDGE**

In the presence of:-

C/Assistant – Rutoh

Bii for the Appellant

No Appearance for B. Langat for Respondent

