



REPUBLIC OF KENYA



**In re Estate of Kiptalam Arap Cherunya (Deceased (Succession Cause
29 of 2014) [2024] KEHC 7498 (KLR) (21 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7498 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 29 OF 2014
JRA WANANDA, J
JUNE 21, 2024**

BETWEEN

**JOHN CHERUNYA KIPTALAM 1ST APPLICANT
SAMMY KIPKORIR CHERUNYA 2ND APPLICANT
JAMES KIPLELE CHERUNYA 3RD APPLICANT
GRACE CHERUNYA 4TH APPLICANT**

AND

MICHAEL KIPYASANG CHERUNYA RESPONDENT

RULING

1. The background of this matter is that the deceased, Kiptalam Arap Cherunya, died intestate on 14/04/2013 at the age of 86 years. From the record, it is indicated that he had 4 wives and at the time of his death, he left behind 2 widows and 25 children. The Petitioners are a daughter and sons of the deceased. The deceased left behind various huge tracts of parcels of land and other assets held in 2 bank accounts.
2. I note that the Petition for Grant of Letters of Administration was filed in this Cause on 5/05/2014 and the Grant was then issued to the 4 Petitioners on 30/08/2017 as joint Administrators. Thereafter, there has been protracted and acrimonious litigation but I have gathered that the parties at some point proceeded to Mediation and came out with a Settlement Agreement dated 20/09/2019. Pursuant thereto, the Petitioners filed the Summons for Confirmation of Grant dated 20/01/2020 which is still pending for hearing.
3. Now before Court for determination is the Application brought by way of the Notice of Motion dated 16/11/2023 and filed by the Petitioners. The same is filed through Messrs Limo R. K. & Co. Advocates and the prayers sought are as follows:



- i. [.....] Spent
 - ii. [.....] Spent
 - iii. That pending the hearing and determination of the main suit, an order of temporary injunction be issued restraining the objector/respondent by himself or through his agents, servants, officers or otherwise from attaching, selling, disposing off, alienating, transferring or interfering with those parcels of lands known as Trans Nzoia Mito Mbili/Scheme/2.
 - iv. That the title of that parcel of lands known as Trans Nzoia Mito Mbili/Scheme/2 held by the objector/respondent be deposited in this Honourable Court for preservation.
 - v. That this Honourable Court be pleased to stay these proceedings pending the hearing and determination of Kitale ELC No. E015 of 2023, Sammy Kipkorir Cherunya vs Michael Kipsayang Cherunya.
4. The Application is premised on the grounds stated on the face thereof and is supported by the Affidavit sworn by the 2nd Petitioner, Sammy Kipkorir Cherunya
 5. In the Affidavit, the 2nd Petitioner has deponed that the deceased was the owner of the parcel of land known as Trans Nzoia Mito Mbili/Scheme/2 having acquired it in 1971 for valuable consideration of Kshs 300,000/- from the original owner, one John Kithinji, that the said original owner died on 20/10/1982 and his estate formed the basis of Nairobi Succession Cause No. 150 of 1983, that there is a dispute as to how the estate of the deceased is to be distributed but during the pendency of these proceedings, the Objector has fraudulently procured the title deed and registration of the said property, that in perpetuation of the said fraud, the Objector has threatened to dispose of the property with a view to defeating the cause of justice and disadvantage the other 25 beneficiaries of the estate of the deceased who are now at the verge of being rendered destitute by the selfish, greed and illegal actions of the Objector.
 6. He deponed further that this matter has been referred to Mediation where partial settlement was made and the 2nd Petitioner is at a loss why the Objector has illegally transferred the same to his name while these proceedings are still pending, that the 2nd Petitioner has since sought for cancellation of the impugned title in the Environment & Land Court (ELC) sitting at Kitale and it is only fair and just that these proceedings are stayed until the ELC resolves the issue of ownership of the property, that the 2nd Petitioner is apprehensive that the Objector's actions are calculated at defeating equal distribution of the estate among the 27 survivors and to render these proceedings a nullity, that the estate has not been confirmed and the beneficiaries shall suffer irreparable and substantial loss if the orders are not granted.

Replying Affidavit

7. The Application is opposed vide the Grounds of Opposition filed on 29/11/2023 through Messrs Mukabane & Kagunza Advocates. In the Grounds of Opposition, it is stated that the Application is dead on arrival given that the orders sought and in particular, orders of injunction have already been overtaken by events following the orders of status quo issued on 21/11/2023 and granting the same will be superfluous, that the Petitioners are guilty of material non-disclosure given that they have not disclosed that the said land parcel Trans Nzoia Mito Mbili/2 does not form part of the estate of the deceased as the same belongs to the Objector who legally acquired it, that given that the Petitioners concern relates to only that one parcel of land, the same can be left out for distribution awaiting ascertainment for now and confirmation regarding the other properties not contested allowed to proceed.



Hearing of the Application

8. It was then agreed, and I directed, that the Application be canvassed by way of written Submissions. Pursuant thereto, the Petitioner's Counsel, Mr. Kibii, filed his Submissions on 15/01/2024. Regarding the Objector, up to the time of concluding this Ruling, I had not come across any Submissions filed by or his behalf by his Counsel, Mr. Kagunza.

Petitioner's Submissions

9. The Petitioners' Counsel submitted that this Court has jurisdiction to entertain the instant Application as provided in Section 47 of the *Law of Succession Act*. On grant of injunction, he cited the usual case of *Giella & Cassman Brown* [1973] EA 358 and also *Nguruman Limited v Jan Bonde Nielsen & 2 Others*, CA No. 77 of 2012 [2014] eKLR. He also cited Section 73 of the Probate and Administration Rules. Counsel then wondered why the Objector would procure registration of the property during the pending of these proceedings and submitted that a look at the impugned title deed indicates that the same was issued on 20/02/2020. He also cited the case of *Succession Cause No. 94 of 1996, in the Estate of Solomon Muchiri Macharia* [2016] eKLR and also the case of *Probate Administration No. 95 of 2009, In the Estate of Kimeto Arap Kili* 2019] eKLR.
10. Regarding the prayer for stay of proceedings pending hearing and determination of Kitale ELC No. E015 of 2023, Counsel cited the case of *Global Tours & Travels Limited: Nairobi HC Winding Up Cause No. 43 of 2020* and also *Re Estate of Henry Wamiti Nganga (deceased) (Succession Cause 1708 of 2005 [2022] KEHC 12860 (KLR) (Family) 5 August 2022) Ruling*. He then submitted that staying these proceedings will enable this Court to fully and equally distribute the estate to all beneficiaries.

Determination

11. The issues that arise for determination in this matter can be summarized as follows:
 - i. Whether the Objector should be restrained by an order of injunction from dealing with the property known as Trans Nzoia Mito Mbili/Scheme/2, pending hearing and determination of this Cause.
 - ii. Whether the proceedings in this Cause should be stayed pending hearing and determination of Kitale Environment & Land Court Case No. E015 of 2023.
12. I now proceed to determine the said issues.

i. Whether the Objector should be restrained by an order of injunction

13. What the Applicant is seeking is basically orders of interlocutory injunction. It is now agreed, as was held in the Court of Appeal case of *Floris Piezzo & Another v Giancarlo Falasconi* [2014] eKLR, that a Probate Court has powers under Section 47 of the *Law of Succession Act* and also Rule 73 of the Probate and Administration Rules to grant temporary injunctions.
14. Section 47 of the *Law of Succession Act* provides as follows:

“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.”



15. On its part, Rule 73 of the Probate and Administration Rules provides as follows:

“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.”

16. The principles guiding the handling of Applications for temporary injunctions are now well settled and are as was set out in the case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 and also in *American Cyanamid Co. v Ethicom Limited* [1975] A AER. Following the said cases, the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR stated as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd v Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.”

17. The question that therefore arises is whether the present Application meets the threshold laid for the granting of orders of temporary injunction.

18. The Court of Appeal, in *Mrao Ltd v First American Bank of Kenya and 2 others*, [2003] KLR 125, which it also cited with approval in its subsequent case of *Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others*, [2014] eKLR, defined a prima facie case as follows:

“A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing



itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

19. Applying the above principles to the facts of this case, I note that the basis of the prayer for injunction is that there is a suit in Court pending for hearing and determination, namely, Kitale ELC Case No. E015 of 2023. It is pleaded and demonstrated by the Pleadings exhibited, that in that suit, the 2nd Petitioner, as an Administrator of the estate herein, has sued the Objector over ownership of the said property known as Trans Nzoia Mito Mbili/Scheme/2. According to the Petitioners, the said property was at all material times owned by the deceased and therefore formed part of the assets comprising the estate herein. The Petitioner’s bone of contention is that despite the said ownership by the deceased, the Objector has somehow irregularly managed to cause the property to be registered in the name of the Objector as the owner thus divesting the property from ownership by the estate. The copy of the Plaint exhibited is incomplete but I presume that the 2nd Petitioner’s prayer before the ELC is for cancellation or nullification of the registration or transfer of the property into the Objector’s name and for the property to revert to the estate of the deceased.
20. Regarding the ELC, Article 162(2) of *the Constitution* of Kenya empowered Parliament to “establish Courts with the status of the High Court to hear and determine disputes relating to:
 - (a) employment and labour relations; and
 - (b) the environment and the use and occupation of, and title to, land.
21. Article 162(3) thereof then authorized Parliament to “determine the jurisdiction and functions of the Courts contemplated in clause (2).” Pursuant to Article 162(3), Parliament enacted the *Environment and Land Court Act*, No. 18 of 2011, Section 13(1) whereof outlines the jurisdiction of the Environment and Land Court (ELC) as follows:
 - “(2) In exercise of its jurisdiction under Article 162(2) (b) of *the Constitution*, the Court [the ELC] shall have power to hear and determine disputes—
 - (a) relating to environmental planning and protection, climate issues, land use, planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.
 - “(3)
22. The dispute on ownership of the property herein is therefore properly before the ELC as it is the Court mandated with the jurisdiction to hear and resolve disputes touching on “use and occupation of, and title to, land” therefore, including ownership thereof. On such matters, it is the ELC that is the primary forum for resolution of disputes. That is why the Petitioners are asking for stay of proceedings of this Cause in favour of the ELC suit, and not the other way round.



23. In the circumstances, I wish to believe that when the 2nd Petitioner filed the suit at the ELC, he also filed an Application to seek interim preservatory orders by way of injunction pending hearing and determination of the suit. Ordinarily, that is the practice and I would be quite surprised if no such Application was made. However, since neither of the parties has said anything about whether such Application was made and if so, what its outcome was, I would say no more about it and cease speculating over the same. However, my view is that since it is the ELC that is handling the substantive dispute relating to ownership of the said property and it is that Court that will finally determine the fate of that property, it is only fair that an order for injunction over the property should be sought before that very Court.
24. The danger of this Succession Court granting the prayer for injunction over the said property is that it is very possible that it may issue parallel orders that may end up conflicting with orders made or to be made by the ELC over the same issue or water down or interfere with that Court's powers and discretion to make interlocutory orders. Although therefore this Court possesses the power to grant the orders of injunction sought and although the Petitioners appear to have a valid case, in light of the matters and circumstances recounted above, I find that it will not be proper for this Court to deal with the prayer for injunction when the substantive suit over the subject property is presently pending before the ELC. Grant of the said orders by this Court is likely to have the unintended effect of complicating the smooth conduct of the existing suit before the ELC. My view is that the prayer for injunction ought to be placed before the ELC which is presently handling the substantive suit, and not before this Succession Court.
25. The above finding also applies mutatis mutandis to the prayer that this Court orders that the title of the said property be deposited in this Court for preservation. That prayer, too, should be or should have been placed before the ELC.

ii. Whether an order of stay of proceedings should be issued

26. Regarding stay of proceedings, it is trite law that when faced with an Application of such nature, the Court is required to exercise its discretion but which discretion must be exercised after due consideration of the merits of the case and the likely effect on the ends of justice. As usual, exercise of discretion must be grounded on judicious principles. On this issue, Hon. Justice Ringera J in the case of Global Tours & Travels Limited, Nairobi HC Winding Up Cause No. 43 of 2000 held as follows:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is so, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”



27. The requirement for the Court to judiciously exercise its discretion when considering an Application to stay proceedings was reiterated by Hon. F. Gikonyo J in the case of Christopher Ndolo Mutuku & Another vs CFC Stanbic Bank Limited (2015) eKLR in which he stated as follows:

“.....what matters in an application for stay of proceedings pending appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice...”

28. Similarly, Halsbury’s Law of England, 4th Edition, Vol. 37 page 330 and 332 gives guidelines on the threshold to be met in Applications for stay of proceedings as follows:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.

It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

29. Further, in the case of Kenya Wildlife Services v Jane Mutembi [2019] eKLR, again, Hon. Justice F. Gikonyo held that:

“stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall right to fair trial. Therefore, the test for stay of proceedings is high and stringent.”

30. In line with the foregoing guidelines, it is generally agreed that in an Application for grant of stay of proceedings, the matters that the Court must satisfy itself on are the following:

- a. That the applicant has established a prima facie arguable case;
- b. That the application was filed expeditiously; and
- c. That the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.

31. Regarding “prima facie arguable case”, it is settled that in Applications of this nature, an “arguable case” need only raise a single bona fide point worthy of consideration and that it need not be one that must necessarily succeed (see Cooperative Bank of Kenya Ltd v Banking Insurance of Finance Union (Kenya) [2015] eKLR. In this case, I have already found that the issues raised by the Petitioners before the ELC are not such that can be termed as frivolous. They are very arguable and capable of success.

32. On whether the Petitioners moved expeditiously, it has not been disclosed at what point in time the Petitioners got to know that the Objector had transferred the land or obtained a title in his name.



There is also no disclosure on how the Petitioners found out. I however note from the exhibited copy of the title deed that the same was issued on 20/02/2020. The present Application was then filed on 16/11/2023, about 3½ years later. It is however very possible that the Petitioners did not immediately learn of the said transfer. In the circumstances, and since the Objector has said nothing about any delay, I am prepared to give the Petitioners the benefit of doubt and presume that they moved to Court as soon as they learnt of the existence of the title deed.

33. The next question is whether the Applicants have “established sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders sought”.
34. Upon careful consideration of the matter and applying the principles of law set out above, I am inclined to rule that full distribution of all properties in this matter should not proceed before determination of the suit pending before the ELC. It is clear that the outcome of the ELC suit will conclusively determine the discourse of the distribution of the estate by this Court. In the circumstances, I would prefer partial distribution. I do not find any prejudice in partially staying distribution of the assets. Staying distribution of the said contentious property will prevent a scenario where if the full grant is confirmed and all properties distributed, including the said Trans Nzoia Mito Mbili/Scheme/2 among the beneficiaries, it may become burdensome, costly and cumbersome to undo the consequences in case the ELC rules that the property was lawfully acquired by the Objector and does not therefore comprise part of the estate yet the property has already been distributed. I am therefore of the view that it is safer to preserve the said one property by suspending its confirmation and distribution to await determination of the ELC suit..
35. I choose partial stay of proceedings because it is my considered opinion that it will not be in the interest of justice to grant a blanket stay of proceedings as doing so will only serve the purpose of delaying this matter further and there is no reason why distribution of the rest of the properties, which are not in contention, should not go ahead.

Final Orders

36. In the premises, the Petitioners’ Notice of Motion dated 16/11/2023 partly succeeds and only to the following extent and terms:
 - i. The parties are at liberty to proceed with the process of confirmation of the Grant issued herein and distribution of assets already identified, amongst the beneficiaries save that the property known as Trans Nzoia Mito Mbili/Scheme/2 shall be excluded, stayed or left out from such confirmation for the time being, pending the hearing and determination of Kitale ELC No. E015 of 2023, Sammy Kipkorir Cherunya vs Michael Kipsayang Cherunya in which the issue of ownership of the said property is still under litigation. The confirmation herein shall therefore be only partial for now.
 - ii. This being a family matter, I make no order on costs

DELIVERED, DATED AND SIGNED AT ELDORET THIS 21ST DAY OF JUNE 2024

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the Presence of:

